INTRODUCTION

This handbook is the third edition of the original handbook that was completed in 2004. We have updated the material with significant cases decided between December 2009 and June 2013.

As in previous editions, our emphasis is on California authority, but we address legal principles that courts have developed when interpreting analogous federal law where it may shed light on state law issues to do so. Our intent is to provide a concise 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.

In *Miklosy v Regents of University of California* (2008) 44 Cal.4th 876, the court held that common law claims against public entities for wrongful termination were barred, and presumably that would include wrongful constructive discharge claims premised on unlawful and intolerable harassment. We have nonetheless kept the section on harassment under the Fair Employment and Housing Act because complaints alleging discriminatory or retaliatory discharge frequently include a cause of action for harassment as well, and the proof of each cause of action may overlap.

The courts continue to develop and fine tune employment law in California. The most significant issue recently resolved in the California Supreme Court pertains to causation under the Fair Employment & Housing Act. In *Harris v. City of Santa Monica* (2013), 56 Cal.4th 203, the court addressed the issue in the context of mixed motive, but the decision has wider application insofar as the court determined what a plaintiff must prove for liability to attach regardless of how the case is characterized—mixed motive or pretext.

We hope this handbook will continue to 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.

August 2013

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.

FEHA prohibits (1) discrimination in employment based on, among other things, race, religion, color, national origin, ancestry, physical or mental disability, medical condition, marital status, sex, gender identity or expression, age, pregnancy, and sexual orientation (Gov. Code, §§ 12940, subd. (a), 12941, 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. (*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 is 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, *Acuña 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/]

[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. section 12101 et seq., for their allegedly discriminatory decisions. (*Le Bourgeois v. Fireplace Manufacturers, Inc.* (1998) 68 Cal.App.4th 1049, 1056.) On different reasoning, the Ninth Circuit reached the same conclusion. (*Walsh v. Nevada Dept. of Human Resources* (9th Cir. 2006) 471 F.3d 1033, 1038.)

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; and

- 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.)

Keep in mind, the *McDonnell Douglas* framework "presupposes that the employer has a single reason for taking an adverse action against the employee and that the reason is either discriminatory or legitimate." (*Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 215.)

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 thirteen 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, 313 [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

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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., *Lyle v. Warner Bros. Television Productions* (2006) 38 Cal.4th 264, 278 ["[W]hile the wording of Title VII and the FEHA differs in some particulars, both statutory schemes regard the prohibition against sexual harassment as part and parcel of the proscription against sexual discrimination, and 'the antidiscriminatory objectives and overriding public policy purposes of the two acts are identical'"], citations omitted; *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.) CAVEAT:

(continued...)

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].) The First District Court of Appeal has 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.)

Physical or Mental Disability. 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 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. (l).) 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," and being regarded as having a mental disability. (Gov. Code, § 12926, subd. (j)(1) and (2).)

Reversing the lower court in *Green v. State of California* (2007) 42 Cal.4th 254, a closely divided California Supreme Court held that the plaintiff employee has the burden of proving that he was qualified to perform the essential duties of his job, with or without reasonable accommodation, as part of his prima facie case. (*Id.* at pp. 258, 260, 264; see also *Brundage v. Hahn* (1997) 57 Cal.App.4th 228, 236.) FEHA and the ADA are similar in this regard. (*Green v. State of California, supra*, 42 Cal.4th at p. 258.)

[2/] (...continued)
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"]; see *Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 57 [parting ways with federal law "in order to advance the legislative goal of providing greater protection to employees than the ADA"].)

In *Lui v. City and County of San Francisco* (2012) 211 Cal.App.4th 962, the court of appeal stated that after *Green* it was clear the plaintiff bore the burden of proving he or she could perform the essential functions of the job, but that it was less clear whether that burden included proving what the essential functions were. (*Id*. at p. 972.) The court felt it unnecessary to decide the issue because the employer in the case before it had offered extensive evidence that the ability to perform physically strenuous duties was an essential function of even administrative position in the police department. (*Ibid*.) Under the ADA the burden of proving what the essential functions of a position are appears to lie with the employer. (See, e.g., *Bates v. United Parcel Service, Inc.* (9th Cir. 2007) 511 F.3d 974, 991.)

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:

- 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. (j)(1)(A) and (l)(1)(B)(i).)

- 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. (j)(1)(B) and (i)(l)(B)(ii).)

In *Colmenares v. Braemar County Club, Inc.* (2003) 29 Cal.4th 1019, the California Supreme Court disapproved of earlier cases which had suggested or asserted that the Legislature intended the federal law's substantial limitation test to apply to claims of physical disability. (*Id*. at p. 1031, fn. 6.)

b. Pretext: Discriminatory Motive And Causation.

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, citation omitted.) "[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.)

"'[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, appellate courts have generally applied 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 *Harris v. City of Santa Monica, supra,* a mixed-motive case, the court construed the phrase, "because of," in Government Code section 12940, subdivision (a). Although *Harris* addressed causation in the mixed-motive context, its analysis of causation was a general one. It stated that "because of" has three plausible meanings: "but for" (meaning solely or predominantly because of), "substantial factor," and "motivating factor." (56 Cal.4th at pp. 216-217.) California Civil Jury Instruction (CACI) No. 2500 required a plaintiff to establish that membership in a protected class was merely a "motivating factor" in an adverse decision. The *Harris* court disapproved of CACI 2500, but did not find that "but for"

causation was required. (*Id*. at p. 232.) Instead, emphasizing the preventative purpose of FEHA, it held that FEHA's prohibition on discrimination is not so limited: "When discrimination has been shown to be a substantial factor motivating an employment action, a declaration of its illegality serves to prevent that discriminatory practice from becoming a 'but for' cause of some other employment action going forward." (*Id.* at p. 230.) Thus, regardless of how a case may be characterized (pretext or mixed motive), liability attaches upon plaintiff's proof that unlawful motive was a substantial factor in the adverse decision. A plaintiff need not prove discriminatory motive was the "but for" cause or determining factor in the adverse decision.

In *University of Texas Southwestern Medical Center v. Nassar* (2013) __ U.S. __ [133 S.Ct. 2517, __ L.Ed.2d __], the United States Supreme Court decided the meaning of the phrase "because of" in the retaliation provision of Title VII and other similarly worded statutes. It held that while the lessened causation standard of "motivating factor" applies to status-based discrimination claims per express statutory language, "but for" causation applies to Title VII retaliation claim. (*Id*. at p. 2533.)

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 certain injunctive relief or declaratory relief, but the court may not award monetary damages or order reinstatement, 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).)

In *Harris v. City of Santa Monica, supra*, the California Supreme Court held that when the plaintiff shows by a preponderance of the evidence that discrimination was a substantial factor motivating termination, the employer is entitled to demonstrate that legitimate reasons standing alone would have led it to make the same decision. (56 Cal.4th at p. 241.) If the employer is successful, the plaintiff may not recover damages or an order of reinstatement. (*Id*. at pp. 232-234, 241.) However, the plaintiff may be able to obtain declaratory and injunctive relief, and reasonable attorney fees and costs. (*Id*. at p. 241.)

The United State Supreme Court has 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].) The *Harris* court agreed for purposes of FEHA claims. (56 Cal.4th at pp. 231-232.)

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." Thus, the *McDonnell Douglas* burden-shifting construct is a useful tool for structuring a summary judgment motion. (See *id*. 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"].) This is so because whether or not a plaintiff has met her prima facie burden or whether a defendant has rebutted her prima facie showing are issues of law for the court. (*Id*. at p. 201.)

- 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. 356-370.) 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.).) Nonetheless, defense counsel would be well advised *not* to "stand mute" as to the employer's legitimate reasons for terminating an employee. Indeed, it is frequently the case that defense counsel focus their summary judgment motions on those legitimate reasons. Under such circumstances, "the employer satisfies its burden as moving party if it presents evidence of such nondiscriminatory reasons that would permit a trier of fact to find, more likely than not, that they were the basis for the termination." (*Kelly v. Stamps.com Inc.* (2005) 135 Cal.App.4th 1088, 1097-1098, citing *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850-851.)

- 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. (*Guz v. Bechtel National, Inc.*, *supra*, 24 Cal.4th at p. 360.) *Guz* is a step forward for employers in their summary judgment motions at this pretext level. 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*, *supra*, 24 Cal.4th at p. 361.) *Kelly v. Stamps.com Inc.*, *supra*, illustrates what that other evidence might be; summary judgment for the employer was reversed because the plaintiff employee could point to evidence from which a trier of fact could conclude she lost her job because of pregnancy rather than because of downsizing, as the employer contended. (*Kelly v. Stamps.com Inc.*, *supra*, 135 Cal.App.4th at p. 1102.)

- *Guz* also suggests that 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." (24 Cal.4th 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.)

In *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, the California Supreme Court rejected the "stray remarks" doctrine which permits a trial court, when ruling on a summary judgment motion, to disregard isolated discriminatory remarks unrelated to the decisionmaking process as insufficient to support an inference of discrimination. The court of appeal had faulted the trial court for weighing the evidence when it found the "stray remarks" were not enough to raise a triable issue of fact. The Supreme Court apparently meant what it said in *Guz* about the insufficiency of weak countervailing evidence of motive, explaining that a stray remark standing alone may not be enough to create a triable issue of fact as to discrimination, but "when combined with other evidence of pretext, an otherwise stray remark may create an 'ensemble . . . sufficient to defeat summary judgment.'" (*Id.* at pp. 541-542.) In *Harris v. City of Santa Monica, supra,* the Supreme Court again commented on "stray remarks," stating that section 12940, subdivision (a) does not purport to outlaw discriminatory thoughts, beliefs, or stray remarks that are unrelated to the decisionmaking process. (56 Cal.4th at p. 231.)

- The *McDonnell Douglas* framework employed in pretext cases "presupposes that the employer has a single reason for taking an adverse action against the employee and that the reason is either discriminatory or legitimate." (*Harris v. City of Santa Monica*, *supra*, 56 Cal.4th at p. 215.) It lends itself to summary judgment. (*Caldwell v. Paramount Unified School Dist., supra,* 41 Cal.App.4th at p. 203.) However, if plaintiff survives summary judgment and the case goes to trial, defense counsel should be prepared with evidence to argue a fall-back position—that the employer would have fired the employee regardless,

for lawful reasons. Because the burden is on the defendant employer to prove it would have made the same decision for legitimate reasons, a defendant should plead in its answer to the complaint "that if it is found that its actions were motivated by both discriminatory and nondiscriminatory reasons, the nondiscriminatory reasons alone would have induced it to make the same decision." (*Harris v. City of Santa Monica*, *supra*, 56 Cal.4th at p. 240.) Note that the *Harris* court saw no inconsistency in an employer's denying a discriminatory motive altogether and contingently arguing that even if a jury were to find mixed motive, the lawful motive would have led to the same decision. (*Ibid*.)

- In *Veronese v. Lucasfilm Ltd.* (2012) 212 Cal.App.4th 1, a pregnancy discrimination case, the appellate court found it was error to refuse to instruct the jury that it could not find the defendant liable for discrimination or retaliation based on its belief that the employer made a wrong or unfair decision or an error in business judgment, but only if its decision was unlawfully motivated. (*Id*. at p. 20.) Moreover, it found, based on a review of the record, that the error was prejudicial, requiring reversal. Defense counsel should request a similar instruction and, if the trial court balks, remind the court that it risks reversal in light of *Veronese*.

- 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*, 121 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"]; see also *DeJung v. Superior Court* (2008) 169 Cal.App.4th 533, 551 [evidence that a "significant participant" in the employment decision was biased is sufficient to raise an inference of discrimination and defeat a summary judgment motion].) 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]; cf. *Lakeside-Scott v. Multnomah County* (9th Cir. 2009) 556 F.3d 797, 805 [final decisionmaker's wholly independent legitimate decision to terminate plaintiff insulates from liability for First Amendment retaliation a lower-level supervisor involved in the process who had retaliatory motive to have employee fired].) 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.

4. Failure To Make Reasonable Accommodation (Disability, Discrimination).[3/]

An employee alleging wrongful termination based on disability discrimination may also allege, as a separate cause of action, 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*, *supra*, 57 Cal.App.4th at pp. 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.

In *Nadaf-Rahrov v. Neiman Marcus Group Inc.* (2008) 166 Cal.App.4th 952, the First District Court of Appeal held that an employee's ability to perform the essential functions of a job is a prerequisite to liability on a failure to accommodate claim under section 12940, subdivision (m), and the burden of proof is on the employee. (*Id.* at pp. 977-978; see also *Bates v. United Parcel Service, Inc.*, 511 F.3d at pp. 989-990 [same rule under ADA].) But see *Bagatti v. Department of Rehabilitation* (2002) 97 Cal.App.4th 344, 360-361 and fn. 4, in which the Third District Court of Appeal held ability to perform the essential functions of a job was not a prerequisite to liability. The *Nadaf-Rahrov* court was critical of *Bagatti* for creating the potential for an absurd result—employer liability for failure to accommodate an

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[3/] 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.

employee who could not perform the job even with accommodation, or failure to accommodate when no job existed. (166 Cal.App.4th at p. 975) The *Nadaf-Rahrov* ruling is consistent with *Green v. State of California*, *supra*, 42 Cal.4th 254, in which the California Supreme Court found, under section 12940, subdivision (a), that the employee has the burden of proving his ability to perform the essential functions of the job as part of his prima facie case on a discrimination claim. (*Id.* at p. 264.)

Two Ninth Circuit cases have addressed the interplay of the "qualified to perform essential duties" element of a disability claim and the question of "reasonable accommodation," treating the former as a prerequisite to the latter, subject to separate analysis. In *Johnson v. Board of Trustees* (9th Cir. 2011) 666 F.3d 561, a teacher was fired after she let her state certification lapse; a severe depression had prevented her from completing necessary course work. The Board contended her lack of legal authorization to teach rendered her unqualified to teach. She contended legal authorization could have been obtained if the Board had provided reasonable accommodation, that is, if it had taken steps to seek provisional authorization for her. The Ninth Circuit sided with the Board to hold that an individual who fails to satisfy a job prerequisite (here, certification) cannot be considered "qualified" within the meaning of the ADA, unless she can show the prerequisite is itself discriminatory. (*Id*. at p. 16.) In *Samper v. Providence St. Vincent Medical Center* (9th Cir. 2012) 675 F.3d 1233, 1235, the court concluded that showing up for work on a predictable basis was an essential function of a neo-natal nursing position. The employee had been provided various accommodations for her fibromyalgia, but sought an accommodation by which the hospital would in essence waive its attendance policy and allow her an unspecified number of unplanned absences. In other words, the Ninth Circuit concluded, she sought a reasonable accommodation that exempted her from an essential job duty, "causing the essential functions and reasonable accommodation analyses to run together." (*Id.* at p. 1240.) The court held the hospital had no duty to provide an accommodation which would compromise performance quality that depended on reliable attendance. (*Id.* at p. 1241.) The approach in these two cases is consistent with *Green v. State of California, supra,* in which the California Supreme Court emphasized that "the plaintiff has not shown the defendant has done anything wrong until the plaintiff can show he or she was able to do the job *with or without* reasonable accommodation." (42 Cal.4th at p. 265, emphasis added; see also *Liu v. City and County of San Francisco*, *supra*, 211 Cal.App.4th at p. 985 [FEHA does not require an employer to accommodate an employee by excusing him from performing essential functions of a position].)

The Second District Court of Appeal has held that, under FEHA, the employer's duty of reasonable accommodation runs not only to those who are actually disabled but also to those who may not be actually disabled but who are "regarded as" disabled by the employer. (*Gelfo v. Lockheed Martin Corp.*, *supra*, 140 Cal.App.4th at p. 60.) The court explained that FEHA does not offer a statutory basis for differentiating among actually

disabled plaintiffs and "regarded as" plaintiffs. (*Ibid.*)[4/] Thus, a "regarded as" plaintiff would have to prove the employer believed (rather than knew) she had a condition that limited a major life activity such as working. Note that the Ninth Circuit, construing the ADA, has reached the opposite conclusion to hold that a "regarded as" plaintiff is *not* entitled to reasonable accommodation under the ADA. (*Kaplan v. City of North Las Vegas* (9th Cir. 2003) 323 F.3d 1226, 1232-1233.) This is another example of ADA and FEHA divergence, with FEHA providing greater protection.

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.]" (*Brundage*, *supra*, 57 Cal.App.4th at p. 237.) In *Brundage*, the employee , who had been absent from her job for six weeks and was fired, had not told her employer that she was bi-polar. The Court of Appeal affirmed summary judgment for the employer on the ground that it had fired the employee for job abandonment and not because she was disabled. (*Ibid.*)

In *Avila v. Continental Airlines, Inc.* (2008) 165 Cal.App.4th 1237, the court held that hospital forms informing the employer that the plaintiff employee had been hospitalized, but not specifying the diagnosis, were insufficient to put the employer on notice that the plaintiff was suffering from a qualifying disability. (*Id.* at p. 1249.) The court also held that evidence the employer learned during the internal appeal process that in fact the diagnosis was a qualifying disability was irrelevant to the issue whether the decisionmaker was aware of the plaintiff's disability when he or she made the decision to terminate him. (*Id.* at p. 1251.) A termination decision "'cannot be made because of a disability when the disability is not known to the employer.'" (*Id.* at p. 1247, internal citations omitted.)

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. (l)(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. 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

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[4/] FEHA's definition of physical disability includes being regarded as disabled. (Gov. Code, § 12926, subd. (l)(4) and (5).)

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 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. Two California courts have adopted the definition of reasonable accommodation found in the federal Equal Employment Opportunity Commission guidelines for the Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 et seq.): "a modification or adjustment to the workplace that enables the employee to perform the essential functions of the job held or desired." (*Nadaf-Rahrov v. The Neiman Marcus Group, Inc.*, *supra*, 166 Cal.App.4th at p. 975; *Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1010.) FEHA itself provides examples of what may constitute "reasonable accommodation." (Gov. Code, § 12926, subd. (o).) In *Brundage*, *supra*, the court held that reasonable accommodation does not include reinstatement. (57 Cal.App.4th at pp. 239-240.) Moreover, "'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.)

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,[5/] 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

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

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.) The Ninth Circuit, construing the ADA, has held that "in considering reassignment as a reasonable accommodation, an employer must consider not only those contemporaneously available positions but also those that will become available within a reasonable period." (*Dark v. Curry County* (9th Cir. 2006) 451 F.3d 1078, 1089-1090.) 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.)

In *Raine v. City of Burbank* (2006) 135 Cal.App.4th 1215, the court held that an employer has no duty to accommodate by making a temporary accommodation permanent if to do so would require the employer to create a new position just for the employee. The court rejected the plaintiff police officer's argument that the civilian front-desk position to which he had been assigned temporarily (for six years) to accommodate a knee injury should have been reclassified to be a sworn officer position once it was determined that his disability was permanent and that he would never be able to perform the essential functions of a patrol officer. (*Id*. at pp. 1224-1227.)

But note, in *Cuiellette v. City of Los Angeles* (2011) 194 Cal.App.4th 757, the court held that where the police department maintained *permanent* light-duty positions staffed by police officers with medical issues, and where the plaintiff was qualified to perform the essential duties of one of those positions, and in fact had been assigned to it as an accommodation, removing him from it violated the accommodation provisions of FEHA. (*Id*. at p. 772.)

A disabled employee may be entitled to preferential treatment when it comes to reassignment. (*Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 265.) The *Jensen* court rejected the bank's argument that other employees were more qualified or had seniority with respect to available positions. (*Ibid*.) In *Scotch v. Art Institute of California*, *supra*, an employee attempted to rely on *Jensen* to argue he was entitled to preferential consideration for a stress disorder, namely, priority in assignment. The reviewing court rejected the argument, holding such priority was unnecessary to enable him to perform the essential functions of his position. (173 Cal.App.4th at pp. 1010-1011, 1012.)

In *A.M. v. Albertsons, LLC* (2009) 178 Cal.App.4th 455, the First District Court of Appeal held that an employer's success in accommodating an employee's disability for over a year did not preclude liability for failure to accommodate based on a single incident. (*Id*. at p. 465.)

In *Sanchez v. Swissport, Inc.* (2013) 213 Cal.App.4th 1331, 1334, the court held that a plaintiff who had exhausted leave available under Government Code section 12945, the Pregnancy Disability Leave Law, could state a cause of action under FEHA for discrimination and failure to accommodate. The leave remedy available under the former augments rather than supplants FEHA provisions otherwise applicable to pregnancy-related disability. (*Id*. at p. 1338.)

The Trigger. The question of what triggers the duty to provide reasonable accommodation is somewhat unsettled. Does the employee have the initial burden of 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 and of undertaking to determine what that accommodation might be? (See p. 17, below, for a discussion of the interactive process.)

In *Prilliman v. United Air Lines, Inc.*, *supra*, 53 Cal.App.4th at pp. 950-951, the court put the burden of notifying the employer of disability on the employee but then put the burden of determining whether an accommodation was needed and could be found on the employer; it held that the duty to make a reasonable accommodation requires employers to offer appropriate alternative positions even where seemingly 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."[6/] 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

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[6/] See p. 43, below, for a discussion of the undue hardship defense.

reasonably accommodate would have caused damages since he was incapable of performing an alternate job position.

Prilliman may be somewhat overbroad in its language. Indeed, one court has read *Prilliman* to stand for the proposition that an employee must request accommodation before the employer obligation is triggered. (*Gelfo v. Lockheed Martin Corp.*, *supra*, 140 Cal.App.4th at p. 54.) Certainly that is consistent with the language of the statute. 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, unless the employee requests accommodation.

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.)

5. Failure To Engage In Interactive Process (Disability Discrimination).

An employee alleging disability discrimination may also allege, as a separate cause of action, a related unlawful employment practice, the failure "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 [a disabled] employee." (Gov. Code, § 12940, subd. (n).) The employer's obligation is a continuous one that "'extends beyond the first attempt at accommodation and continues when the employee asks for a different accommodation or where the employer is aware that the initial accommodations is failing and further accommodation is needed.'" (*Scotch v. Art Institute of California, supra,* 173 Cal.App.4th at p. 1013, quoting *Humphrey v. Memorial Hospitals Assn.* (9th Cir. 2001) 239 F.3d 1128, 1138.)

While a claim of failure to engage in an interactive dialogue is independent of a cause of action for failure to accommodate, one obviously implicates the other. (See *Gelfo v. Lockheed Martin Corp.*, *supra*, 140 Cal.App.4th at p. 61 [an employer's duty to accommodate is "inextricably linked" to its obligation to engage the interactive process].)

In *Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, the jury had found against the employer on an interactive process claim under section 12940, subdivision (n) and for the employer on a failure to accommodate claim under section 12940, subdivision (m). (*Id.* at p. 424.) The employer argued that to succeed on an interactive process claim, the plaintiff also had to succeed on his failure to accommodate claim; the court rejected the argument, emphasizing that these were separate causes of action dependent on proof of different facts. (*Id.* at p. 425.) Thus, the verdict was not inconsistent: the jury could have concluded there was no failure to accommodate because, thanks to the employer's refusal to engage in the interactive process, the parties never reached the stage of deciding what accommodation was required. (*Id.* at pp. 424-425; see also, *Claudio v. Regents of University of California* (2005) 134 Cal.App.4th 224, 245 [without a good faith interactive process, "it cannot be known whether an alternative job would have been found"].) However, in *Nadaf-Rahrov v. Neiman Marcus Group, Inc, supra*, the court held that liability for failure to engage in the interactive process can only be imposed if reasonable accommodation is possible, expressly disagreeing with *Wysinger* on the point. (166 Cal.App.4th at p. 984.) The evidence of the availability of a reasonable accommodation can be developed during litigation, even though the failure to interact may have prevented the parties from identifying an accommodation while events were unfolding. (*Ibid.*)

In *Scotch v. Art Institute of California, supra,* the court addressed what a plaintiff does and does not have to prove under sections 12940, subdivisions (m) and (n).

- A failure to accommodate cause of action under section 12940, subdivision (m), may exist "'without a showing that the employer failed to engage in the interactive process . . . [w]here a necessary accommodation is obvious, where the employee requests a specific and available reasonable accommodation that the employer fails to provide, or where an employer participates in a good faith interactive process and identifies a reasonable accommodation but fails to provide it.'" (*Id.* at pp. 1016-1017, quoting *Nadaf-Rahrov*, *supra*, 166 Cal.App.4th at p. 984.).)

- A failure to engage cause of action under section 12940, subdivision (n), "'is the appropriate cause of action where the employee is unable to identify a specific, available reasonable accommodation while in the workplace and the employer fails to engage in a good faith interactive process to help identify one, but the employee is able to identify a specific, available reasonable accommodation through the litigation process.'" (*Id.* at p. 1018, quoting *Nadaf-Rahrov*, *supra*, 166 Cal.App.4th at p. 984, emphasis omitted.)

In reviewing the summary judgment granted in the case before it, the *Scotch* court held that, after full discovery, the plaintiff had failed to produce evidence of a reasonable accommodation that was objectively available in the time period during which the interactive process should have occurred and thus failed to show he had suffered an injury from violation of section 12940, subdivision (n) that could be remedied under that provision. (173 Cal.App.4th at p. 1019.)

In *Wilson v. County of Orange* (2009) 169 Cal.App.4th 1185, 1195, the court held that the employee got exactly the accommodation she sought, albeit after a series of temporary accommodations, and so her claim for failure to engage in the interactive process was precluded.

In *Claudio v. Regents of University of California* , *supra*, 134 Cal.App.4th 224, the court reversed summary judgment in favor of the University, finding a triable issue of fact existed as to whether it had violated its duty to engage in the interactive process. The plaintiff had referred an employment representative of the University to his attorney and the representative had failed to follow through. The court explained that ordinarily a disabled employee cannot require the employer to communicate with his attorney "because the interactive process contemplates that the employee and employer will communicate directly with each other to exchange information about job skills and job openings." (*Id*. at p. 228.) However, because of unusual circumstances created by the University—there was evidence it had informed the plaintiff a number of times that he was terminated—plaintiff's request was deemed not to be unreasonable as a matter of law. (*Id*. at pp. 247-248.)

Practice Suggestions:

- The gist of *Nadaf-Rahrov* and *Scotch* on the failure to accommodate or engage in a good faith interactive process is the notion that the *injury* from a failure to engage in the interactive process is typically the failure to be accommodated; it is from the "loss" of that accommodation that damages, if any, would flow. Where a plaintiff relies on *Wysinger* for the notion that he need not identify an available accommodation to proceed with his cause of action under section 12940, subdivision (n), defense counsel should point out that in *Wysinger* the court was concerned with reconciling an apparently inconsistent verdict and did not have to address the question of remedy, because the jury had also found the employer liable for retaliation, a finding which provided all the remedy to which the employee was entitled. Thus, *Wysinger's* analysis on this issue is incomplete and in that sense, limited to its particular facts.

- The California Rules of Court require that the separate statement of undisputed facts supporting a summary judgment motion identify separately each cause of action, issue of duty, or affirmative defense. (Cal. Rules of Court, rule 3.1350(d).) In preparing a separate statement, defense counsel should not neglect to break out each cause of action—disability discrimination, failure to accommodate, failure to engage in the interactive process—even though there may be considerable duplication of facts and supporting evidence among the causes of action.

- Although notifying an employer of a disability is not necessarily the same thing as requesting accommodation, a court might well view a request for accommodation as being implicit in any form of notice. Thus, a cautious employer, when notified of an

employee's physical or mental problem, would be well advised to "interact" with the employee sufficiently to determine at least whether accommodation is desired or needed.

- Courts have wrestled with the difficult question of whether/when disability-caused conduct must be deemed part of the disability and thus, accommodated. In *Wills v. Superior Court* (2011) 195 Cal.App.4th 143, the plaintiff was bipolar, and her condition caused her to lash out at her coworkers in a threatening manner. The court held the plaintiff's disability discrimination claim failed. "An employer may reasonably distinguish between disability-caused misconduct and the disability itself when the misconduct includes threats or violence against coworkers." (*Id.* at p. 148.) The court was highly critical of certain Ninth Circuit decisions holding, without analysis, that conduct resulting from disability is part of the disability and cannot be a separate basis for termination. (*Id.* at pp. 161-164.) The key may be whether the conduct of the employee can be deemed dangerous or otherwise egregious, or in violation of job-related standards to which other employees are held.

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, citation omitted; *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 in order to avoid liability. (See p. 48, below.)

A reduction in force policy applied in a manner that discriminates can be a predicate for a disparate impact claim. (*Life Technologies v. Superior Court* (2011) 197 Cal.App.4th 640.) 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 unable 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 explicitly "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 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.

In *Ricci v. DeStefano* (2009) __ U.S. __ [129 S.Ct. 2658, 174 L.Ed.2d 490], the United States Supreme Court addressed the interplay between the disparate treatment and disparate impact provisions of Title VII. White and Hispanic fire fighters sued for reverse discrimination. They had passed a promotion examination but, fearing a disparate impact lawsuit from African American fire fighters, the city refused to certify the results on the ground that the examination appeared to be skewed against minority candidates. The issue before the Supreme Court was "whether the purpose to avoid disparate-impact liability excuses what otherwise would be prohibited disparate-treatment discrimination." (*Id.* at p. 2674.) The court held that an employer's race-based action was impermissible under Title VII unless the employer could demonstrate "a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute." (*Id.* at p. 2664.)

Practice Suggestions:

- Summary judgment or JNOV may be possible when a plaintiff's only evidence of disparate impact is that most or all members of a subgroup of employees disadvantaged by an employer policy are also members of a protected group. For example, in *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 court found that "[t]he varnish of plaintiff's words about the law's prohibition of discrimination against women and those over 40 was used as a diversionary tactic to conceal the real complaint—an adverse employment action taken against a very limited subset of the protected group—not because of their status as members of the protected group, but because of their status as members of the limited subset." (*Id.* at

pp. 1325-1326.) Similarly, in *Frank v. County of Los Angeles* (2007) 149 Cal.App.4th 805, plaintiffs prevailed at trial where they challenged the disparate impact of compensation policy on their job classification that was mostly minority. Specifically, County police officers (70 percent of whom were minority) were paid less than deputy sheriffs (70 percent of whom were Caucasian). The reviewing court reversed. There was no evidence that County police officers were paid less because of minority status; rather, they were paid less because they were County police officers (regardless of race), and there was no evidence of any County policy that worked to deter minority application to or hiring by the sheriff's department. (*Id*. at p. 822.)

- 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 allegation, 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.)

- *Ricci v. DeStefano* established a "strong basis in evidence" test for a defense when an employer engages in intentional discrimination to avoid disparate-impact liability. In essence, the employer must make the case against itself for disparate-impact liability. In *Ricci*, there was no dispute that the city employer was faced with a prima facie case of disparate impact, that is, there was a significant statistical disparity in examination pass rates. However, the court made clear that was not enough. The employer would have to demonstrate that the examination was not job-related and not consistent with business necessity, or that there existed a valid, less discriminatory alternative to its conduct. (129 S.Ct. at p. 2678.) The city in *Ricci* was unable to do so.

D. Discrimination: Harassment.

FEHA prohibits harassment of employees on the basis of race, sex, and other enumerated categories. (Gov. Code, § 12940, subd. (j)(1).) Employers may be liable for workplace harassment committed by nonemployees. (*Ibid*.; see, e.g., *Carter v. California Dept. of Veterans Affairs* (2006) 38 Cal.4th 914.) The law regarding harassment has developed primarily in the area of sexual harassment, but certain principles are equally applicable where harassment is engaged in on the basis of, e.g., race.

Plaintiffs frequently allege harassment as a basis of their constructive discharge claims, the theory being that harassment was so severe the employee was compelled to quit in order to escape the hostile work environment. Such claims alleged against public entity employers should not survive *Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876 in which the court held that Government Code section 815 bars a cause of action against public entity employers for common law wrongful termination in violation of public policy. (*Id.* at pp. 900-901.) The same reasoning would apply with respect to claims for constructive discharge.

Harassment claims against public entity employers are nonetheless often alleged against public entity employers in actions where the plaintiffs contend they were discharged for discriminatory or retaliatory reasons. For example, 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 . . . ."].)

1. Hostile Environment.

Harassing conduct is that which takes place "outside the scope of necessary job performance, conduct presumably engaged in for personal gratification, because of meanness or bigotry, or for other personal motives." (*Reno v. Baird, supra,* 18 Cal.4th at p. 646.) "Thus, harassment focuses on situations in which the social environment of the workplace becomes intolerable because the harassment (whether verbal, physical, or visual) communicates an offensive message to the harassed employee." *(Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 706, emphasis omitted.)

A plaintiff alleging hostile environment harassment must prove that the harassment was "sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive work environment." (*Lyle v. Warner Bros. Television Productions*, *supra*, 38 Cal.4th at p. 279 [adopting federal standard for claim under FEHA]; *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 609.)

To establish a hostile environment, a plaintiff must meet both a subjective and an objective standard of proof. (*Lyle v. Warner Bros. Television Productions*, *supra*, 38 Cal.4th at p. 284; see *Fisher v. San Pedro Peninsula Hospital*, *supra*, 214 Cal.App.3d 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. (*Fisher*, *supra*, 214 Cal.App.3d 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*, *supra*, 214 Cal.App.3d at p. 608.) But "when a plaintiff cannot point to a loss of tangible job benefits, she must make a commensurately higher showing that the sexually harassing conduct was pervasive and destructive of the working environment." (*Lyle*, *supra*, 38 Cal.4th at p. 284, internal quotations and citations omitted.)

Circumstances to consider in determining whether a hostile environment existed may include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 462, citations and quotations omitted.)

In *Lyle*, the court cautioned that the evidence in a hostile environment harassment claim should not be viewed too narrowly. (*Id*. at p. 283.) Inquiry into the objective severity of harassment "requires careful consideration of the social context in which particular behavior occurs and is experienced by its target . . . [of] a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed." (*Ibid*.) Thus, evidence of words or conduct may be relevant to show discrimination by harassment, but it will not necessarily be sufficient. (*Id*. at pp. 287-288.) With respect to pervasiveness, a plaintiff generally "cannot recover for harassment that is occasional, isolated, sporadic, or trivial; rather, the employee must show a concerted pattern of harassment of a repeated, routine, or a generalized nature." (*Id*. at p. 283; see also *Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 467 [racial harassment].) In *Brennan* v. *Townsend & O'Leary Enterprises, Inc.* (2011) 199 Cal.App.4th 1336, the trial court granted JNOV in favor of the employer and the court of appeal affirmed, finding the evidence was insufficient as a matter of law to support a jury's finding that the plaintiff had been subjected to severe or pervasive sexual harassment. (*Id.* at p. 1346.) There was no evidence of severe harassment and incidents of offensive conduct were too occasional to show pervasiveness. (*Id*. at p. 1355.)

One may be a victim of sexual harassment even though the harassing conduct is aimed at others, but such a "second-hand" claim requires a higher showing that the conduct has permeated the work environment. (*Lyle*, *supra*, 38 Cal.4th at p. 285.) As a general rule, evidence that other employees were harassed is admissible to prove a hostile work environment where the plaintiff personally witnessed offensive conduct directed at others in her immediate work environment. (*Ibid*.; see *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"] In *Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, the court rejected the view that a plaintiff must personally witness the offensive conduct, but noted she would at least have to know about it in order to establish that she experienced a hostile environment. (*Id*. at p. 520.) *Beyda* affirmed a trial court

ruling that evidence of offensive conduct towards others was inadmissible under Evidence Code section 1101, subdivision (a) to show propensity to engage in such conduct. But another court has held that evidence regarding the harassment of other employees is admissible under Evidence Code section 1101, subdivision (b) to prove discriminatory intent, even where the plaintiff did not observe or otherwise know of that harassment. In *Pantoja v. Anton* (2011) 198 Cal.App.4th 87, 114-115, the court reasoned that harassment is a form of unlawful discrimination, and the evidence would be probative of the unlawful intent behind the bad behavior. In *Brennan* (where the issue was substantial evidence, not admissibility), the evidence of conduct towards others did not help the plaintiff where she "did not have any knowledge or perception of . . . other acts" of sexual harassment until she began inquiring among her fellow employees, and where she herself had not been subjected to pervasive harassment. (*Brennan v. Townsend & O'Leary Enterprises, Inc., supra,* 199 Cal.App. 4th at p. 1359.) .)

Miller v. Department of Corrections, *supra*, 36 Cal.4th 446, presents a variation on the theme of sexual harassment—sexual favoritism. The California Supreme Court held that "although an isolated instance of favoritism on the part of a supervisor toward a female employee with whom the supervisor is conducting a consensual sexual affair ordinarily would not constitute sexual harassment, when such sexual favoritism in a workplace is sufficiently widespread it may create an actionable hostile work environment in which the demeaning message is conveyed to female employees that they are viewed by management as 'sexual playthings' or that the way required for women to get ahead in the workplace is by engaging in sexual conduct with their supervisors or the management." (*Id*. at p. 451; see also *id*. at p. 466 [employee may establish actionable claim by demonstrating widespread sexual favoritism was severe or persuasive enough to alter his or her working conditions and create a hostile working environment]; see also *Rehmani v. Superior Court* (2012) 204 Cal.App.4th 945 [evidence of favoritism toward Indian engineers resulting in discrimination and harassment of a Pakistani engineer].)

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; *Singleton v. United States Gypsum Co.* (2006) 140 Cal.App.4th 1547, 1557.) But not always. In *Kelley v. The Conco Companies* (2011) 196 Cal.App.4th 191, it was undisputed that supervisors and employees routinely made offensive, sexually taunting comments, including gay innuendo, and that the comments were made both jokingly and in anger. The First District Court of Appeal held that such comments directed by a supervisor at the plaintiff did not constitute actionable harassment because there was no evidence the alleged harasser was acting from actual sexual desire or that the taunts resulted from the plaintiff's actual or perceived sexual orientation. (*Id* .at p. 205.) The court respectfully disagreed with the Second District Court of Appeal's opinion in *Singleton v. United States Gypsum Co., supra,* 140 Cal.App.4th 1547, in which that court had found similar conduct was unlawful discrimination based on sex because it was gender-specific, targeting the

plaintiff's identity as a heterosexual male, and because women were not treated in this manner. (*Kelley*, *supra,* 196 Cal.App.4th at pp. 206-207.)

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. Note too that sexual favoritism can be the basis of an "implicit" quid pro quo harassment claim. (*Miller v. Department of Corrections*, *supra*, 36 Cal.4th at p. 464, citing EEOC policy report.)

3. 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. (s).) The employer is strictly liable for all forms of sexual harassment by a supervisor. (*State Dept. 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.) The California Supreme Court has stated that "[h]arassment . . . consists of actions outside the scope of job duties which are not of a type necessary to business and personnel management." (*Reno v. Baird*, *supra*, 18 Cal.4th at p. 647, citing *Janken v. GM Hughes Electronics*, *supra*, 46 Cal.App.4th at p. 65.)

In *Roby v. McKesson Corp.* , *supra*, 47 Cal.4th 686, the California Supreme Court held that the court of appeal had erred in allocating evidence between the plaintiff's discrimination and harassment claims and then ignoring the discrimination evidence when analyzing the sufficiency of the evidence supporting the harassment verdict. The court explained that while discrimination and harassment are separate wrongs under FEHA, a plaintiff may prove the two violations with the same or overlapping evidence. Thus, an official employment action such as a demotion might constitute an evidentiary basis for a harassment cause of action if the supervisor used the official action as a means of

conveying his offensive message; or a jury could reasonably infer from the evidence that a supervisor discriminated against the plaintiff based on her medical condition that the supervisor's demeaning remarks and other such hostile conduct were also based on the plaintiff's medical condition and constituted unlawful harassment. (*Id.* at p. 693.)

Note that the definition of "supervisor" under Title VII is much narrower than under California law, making a plaintiff's task in establishing the strict liability of the employer more difficult. In *Vance v. Ball State University* (2013) __ U.S. __ [133 S.Ct. 2434; __ L.Ed.2d __], the United States Supreme Court held that "an employee is a 'supervisor' for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible actions against the victim." (*Id.* at p. 2439.) Tangible employment actions including "'hiring, firing, failure to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.' [Citation.]" (*Id.* at p. 2442.)

b. Nonsupervisors And Nonemployees.

An employer may be held liable for the sexual harassment of its employee by a nonsupervisory employee or 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); *Roby v. McKesson, supra,* 47 Cal.4th at p. 707.) For a discussion of evidence found sufficient to establish the requisite knowledge, see *Hope v. California Youth Authority* (2005) 134 Cal.App.4th 577, 591-592.

c. 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 after employee had agreed to a date, 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 Dept. 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"]; see also *Myers v. Trendwest Resorts, Inc.* (2007) 148 Cal.App.4th 1403, 1424-1425 [triable issue of fact required reversal of summary judgment in favor of

employer where incidents occurred outside workplace but arguably during working hours, and there was evidence the plaintiff had agreed to go away with supervisor on a personal trip but also evidence that she felt coerced].)

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.

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

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 earlier, 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.) Thus, in *McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 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 in 2001. (*Id*. at pp. 473-474.)

"[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:

- In *Roby v. McKesson Corp.*, *supra*, the Supreme Court emphasized that a hostile message constituting harassment may be conveyed through personnel management decisions. Plaintiffs frequently characterize what are clearly personnel management decisions as "harassment." It may be more difficult after *Roby* for defendant employers to extricate individual supervisors from a lawsuit by means of a summary judgment motion by convincing the trial court to characterize the decisions as "discrimination" and to analyze them under *Reno v. Baird, supra,* 18 Cal.4th 640. However, such a motion is still worth a try if there is no evidence of hostility on the part of a supervisor *other than* the

personnel management decision. In this situation, one can argue the plaintiff is simply attempting to reinstate personal liability for personnel management decisions.

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.)

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. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028,1042.)

Under federal law, at least, the plaintiff need not always be the one to have engaged in protected activity. In *Thompson v. North American Stainless* (2011) __ U.S. __ [131 S.Ct. 863, 178 L.Ed. 694], a Title VII case, the Supreme Court held that an employee who alleged he was fired because of his fiancé's sexual discrimination charge against their employer had standing to sue for retaliation. The court determined that firing the plaintiff was unlawful retaliation because "a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired." (*Id*. at p. 868.) The plaintiff was a person aggrieved under the statute, and injuring him was the employer's means of punishing the fiancé. (*Id*. at p. 870.))

Establishing protected conduct. In *Yanowitz v. L'Oreal USA, Inc.*, *supra*, the California Supreme Court addressed what is and what is not sufficient to establish the protected conduct element of a prima facie case of retaliation. "Standing alone, an employee's unarticulated belief that an employer is engaging in discrimination" is insufficient, as are "complaints about personal grievances or vague or conclusory remarks that fail to put an employer on notice as to what conduct it should investigate." (*Id*. at pp. 1046-1047.) On the other hand, an employee need not use "legal terms or buzzwords" when opposing discrimination, "if the employee's comments, when read in their totality, oppose discrimination." (*Id*. at p. 1047, citations and quotations omitted.) In *Yanowitz*, the issue was whether the employee's refusal to follow an order to fire a sales associate found unattractive by a superior could constitute protected activity. While the *Yanowitz* dissent saw an "unarticulated belief" falling short of protected conduct, the majority held that the employee was not required to notify her employer that she was refusing to obey the order

because she believed it violated FEHA; there was evidence from which a jury could conclude that the employee's supervisors knew that she objected to the order because of a good faith belief it was discriminatory even though she did not explicitly say so. (*Id*. at pp. 1036, 1046-1048; see also *Miller v. Department of Corrections*, *supra*, 36 Cal.4th at pp. 474-475 [employee need not recite specific words "sexual discrimination" or "sexual harassment" or to elaborate on legal theory underlying her complaint for her conduct to be protected].)

In *Crawford v. Metropolitan Government of Nashville and Davidson County, Tenn.* (2009) __ U.S. __ [129 S.Ct. 846, 172 L.Ed.2d 650], a case under Title VII, the Supreme Court held that the protection of the anti-retaliation provision extended to an employee who spoke out about discrimination not on her own initiative, but in answering questions during an employer's internal investigation. (*Id*. at p. 849.) In a separate concurring opinion, Justice Alito raised the issue whether employees who do not communicate their views directly to their employers through purposive conduct would be shielded by the opposition clause of Title VII. (*Id*. at p. 855, conc. opn. Alito, J.) Noting the proliferation of retaliation claims, he warned against an expansive definition of protected conduct that would permit an employee to establish causation simply by showing that, for example, the employer by some indirect means became aware of the views the employee had expressed at a neighborhood picnic attended by a friend of her supervisor. (*Id.* at pp. 854-855, conc. opn. Alito, J.) Alito's concern about the limited scope of protected conduct is not dissimilar to that of the dissenting justices in *Yanowitz*, who disagreed with the majority's view that silent refusal to follow an order was sufficient to constitute protected opposition to discrimination.

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. (*Miller v. Department of Corrections, supra*, 36 Cal.4th at p. 474 [belief that one is opposing unlawful conduct must be reasonable and in good faith]; *Flait v. North American Watch Corp.* (1992) 3 Cal.App.4th 467, 477 [mistake must be a "sincere one" and "reasonable"]; see also *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 (DFEH)]; but see *George v. California Unemployment Ins. Appeals Bd.* (2009) 179 Cal.App.4th 1475, 1490 [the reasonable-and-good faith belief test does not apply when the asserted protected activity is the filing of a charge with DFEH] .)

What is an adverse employment action? In *Yanowitz v. L'Oreal USA, Inc.*, *supra*, the court adopted a materiality test for determining whether a plaintiff could prove a retaliatory adverse employment action: Did the action materially affect the terms and conditions of employment? (36 Cal.4th at pp. 1036, 1050; see also *Akers v. County of San Diego* (2002) 95 Cal.App.4th 1441, 1454-1457.) Actionable retaliation is not limited to

ultimate employment acts, such as a firing, demotion, or failure to promote decision. (*Yanowitz*, *supra*, 36 Cal.4th at pp. 1053-1054; *Akers*, *supra*, 95 Cal.App.4th at p. 1455.) Rather, it includes "the entire spectrum of employment actions that are reasonably likely to adversely and materially affect an employee's job performance or opportunity for advancement in his or her career." (*Yanowitz*, *supra*, 36 Cal.4th at p. 1054.)

In *Yanowitz*, the plaintiff alleged a course of conduct that included negative performance evaluations, unwarranted criticism in the presence of other employees, and rejected requests for assistance. (36 Cal.4th at p. 1055.) The court stated it was unnecessary to decide whether each alleged act was in itself an adverse employment action. "[T]here is no requirement that an employer's retaliatory acts constitute one swift blow, rather than a series of subtle, yet damaging, injuries." (*Id*. at pp. 1055-1056.) In other words, courts will look to the totality of circumstances in order to determine whether an employee has been subjected to treatment materially affecting the terms and conditions of employment. (*Id*. at p. 1036; see *McRae v. Department of Corrections and Rehabilitation* (2006) 142 Cal.App.4th 377, 387-388 [where "employee is affected by a series of employment actions, at least some of which might not, in and of themselves, constitute a material change in the terms or conditions of employment . . . it is appropriate to consider the plaintiff's allegations collectively under a totality of the circumstances approach"].)

Thus, a hostile work environment could conceivably constitute a retaliatory adverse employment action. (See *Yanowitz, supra,* 36 Cal.4th at p. 1053, fn. 12.) If the hostility rose to an intolerable level causing the employee to quit, the employee might choose to file a retaliatory constructive discharge claim, or a retaliation claim under FEHA allegedly entitling him to economic damages for job loss.

Note that federal courts on Title VII claims now apply a broader deterrence test to determine whether employer conduct amounts to actionable retaliation: Would the employer actions likely deter a reasonable employee from complaining about a Title VII violation? (*Burlington Northern & Santa Fe Ry. Co. v. White* (2006) 548 U.S. 53, 68 [126 S.Ct. 2405, 2415, 165 L.Ed.2d 345].) Actionable conduct is not limited to conduct affecting the terms and conditions of employment but extends beyond workplace-related or employment-related acts and harm. (*Id*. at p. 67 [126 S.Ct. at p. 2414].)

Causation. 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; see *Clark County School Dist. v. Breedon* (2001) 532 U.S. 268, 273 [121 S.Ct. 1508, 1511, 149 L.Ed.2d 509] [in cases that accept temporal proximity as sufficient evidence to establish a prima facie case, the temporal proximity must be "very close"].) 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 temporal proximity between protected conduct and an adverse employment action does not disprove causation as a matter of law, although it makes a plaintiff's case more difficult; evidence of a pattern of antagonism following protected conduct may support an inference of causation. (*Porter v. California Dept. of Corrections* (9th Cir. 2005) 419 F.3d 885, 895.)

Motive. 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 protected activity caused her to be 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*, 3 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 *Loggins v. Kaiser Permanente Internat.* (2007) 151 Cal.App.4th 1102, 1112 [temporal proximity without more is insufficient to raise a triable issue of fact as to pretext]; 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"].)

The Supreme Court's analysis of causation in *Harris v. City of Santa Monica, supra*, 56 Cal.4th 203, likely applies to a retaliation claim under subdivision (b) of Government Code section 12940. Thus, for example, the Supreme Court granted review in *Alamo v. Practice Management Information Corp.*, B230909, but ordered briefing deferred pending its decision in *Harris*. *Alamo* included a retaliation cause of action, and the reviewing court had held there was nothing deficient about CACI 2505 which required a plaintiff to prove retaliation was merely a motivating factor in the adverse decision. *Alamo* has been transferred back to the Second District Court of Appeal for reconsideration in light of the *Harris* decision.

Lack of knowledge on the part of the final decisionmaker presumably would not foreclose employer liability so long as retaliatory motive by some supervisor in the chain of decisionmaking was at least a substantial motivating factor in the adverse employment

action. (See *Reeves v. Safeway Stores, Inc.*, *supra*, 121 Cal.App.4th at pp. 107-108 [applying but-for causation].)

Practice Suggestion:

- In *Joaquin v. City of Los Angeles* (2012) 202 Cal.App.4th 1207, the plaintiff had been fired for filing a fabricated charge of sexual harassment against a supervisor. He sued, alleging his termination had been motivated by retaliatory animus, and the jury agreed. The court of appeal reversed, finding no substantial evidence of retaliatory intent. In the course of its opinion, the court criticized CACI 2505 for not including the element of retaliatory intent. The jury, following the corresponding special verdict form, found that plaintiff's report of sexual harassment was a motivating reason for his termination. However, the plaintiff was terminated not because he reported sexual harassment, but because he had done so *falsely*. The court urged the Judicial Council to redraft the retaliation instruction and corresponding special verdict form to state clearly that unlawful retaliatory intent is a necessary element of a retaliation claim under FEHA. (*Id.* at pp. 1229-1231.) Until CACI is revised, counsel should draft and submit an instruction and special verdict of their own reflecting the reviewing court's criticism of the existing instruction in *Joaquin v. City of Los Angeles,* as well as the "substantial motivating factor/reason" language of *Harris*. (See *Harris v. City of Santa Monica, supra*, 56 Cal.4th 203.)

2. Personal Liability Of Individual Supervisors and Co-Workers.

In *Jones v. Lodge At Torrey Pines Partnership* (2008) 42 Cal.4th 1158, a closely-divided Supreme Court held that individual supervisors may not be held personally liable for retaliation under FEHA. (*Id.* at pp. 1160, 1167-1168.) The court disapproved of *Taylor v. Los Angeles Dept. of Water & Power* (2006) 144 Cal.App.4th 1216 and *Walrath v. Sprinkel* (2002) 99 Cal.App.4th 1237 to the extent those cases were inconsistent with its holding. (42 Cal.4th at pp. 1173-1174.) It disagreed with *Winarto v. Toshiba America Electronics Components* (9th Cir. 2001) 274 F.3d 1276 in which the Ninth Circuit had construed FEHA to permit personal liability for retaliatory discharge. NOTE: the court expressed "no opinion on whether an individual who is personally liable for harassment might also be personally liable for retaliating against someone who opposes or reports the same harassment. (*Id.* at p. 1168, fn. 4.) In *Dominguez v. Washington Mut. Bank* (2008) 168 Cal.App.4th 714, 727, the court applied the *Jones* rule to preclude a claim against a co-worker.

3. Failure To Prevent Retaliation.

It is unlawful for an employer "to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring." (Gov. Code, § 12940, subd. (k); see § I.A., *supra*.) In *Taylor v. Los Angeles Dept. of Water & Power*, *supra*, the court held that retaliation is a form of discrimination and the failure to prevent it is therefore actionable under section 12940, subdivision (k). (144 Cal.App.4th at p. 1240.) The court found support for its view in *Yanowitz v. L'Oreal USA, Inc.*, *supra*, 36 Cal.4th at p. 1050, in which

the Supreme Court mentioned FEHA was intended to protect "employees who are discriminated against in retaliation for opposing . . . discrimination." (*Ibid*.)

In *Kelley v. The Conco Companies, supra,* 196 Cal.App.4th 191, the court held that "an employer may be held liable for coworkers' retaliatory conduct if the employer knew or should have known of coworkers' retaliatory conduct and either participated and encouraged the conduct, or failed to take reasonable actions to end the retaliatory conduct." (*Id*. at p. 213.)

Practice Suggestions:

- Where there is no evidence that a plaintiff articulated her opposition to alleged discriminatory conduct directly to the employer, in light of the dissent in *Yanowitz* and Alito's concurrence in *Crawford*, a summary judgment motion to test the limits of what constitutes protected conduct may be appropriate.

- 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]; *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]; *Arteaga v. Brink's, Inc.* (2008) 163 Cal.App.4th 327, 334 ["Although temporal proximity, by itself, may be sufficient to establish a prima facie case of discrimination or retaliation, it does not create a triable fact as to pretext once the employer has offered evidence of a legitimate, nonprohibited reason for its action"].)

- *Yanowitz v. L'Oreal USA, Inc.*, *supra*, has made clear that courts should consider the totality of the circumstances in determining whether a plaintiff has been subjected to actionable treatment materially affecting the terms and conditions of his or her employment. (36 Cal.4th at p. 1036.) But that does not mean that a plaintiff who can point to a host of allegedly adverse acts necessarily wins. In *McRae v. Department of Corrections*, *supra*, 142 Cal.App.4th at p. 382, the court of appeal reversed a jury verdict in favor of the employee finding it was not supported by substantial evidence. In doing so, it distinguished the evidence before it from that in *Yanowitz* where there had been a "continuous course of conduct" with all the wrongful acts being done by the plaintiff's immediate supervisor and his supervisor and all in response to a single protected act. (*Id*. at p. 388.) In *McRae*, by contrast, the continuous course of conduct alleged was in fact "a series of events, each bearing little relationship to the others, and at least some of which clearly were not the result of unlawful retaliation," i.e., acts "taken by many different

persons, for different reasons, some of which indisputably had nothing to do with [the plaintiff's] protected conduct." (*Id.* at p. 391.) A summary judgment motion based on the distinction between *McRae* and *Yanowitz* may be worthwhile, evidence permitting. Note that in *Taylor v. Los Angeles Dept. of Water & Power*, *supra*, the court of appeal rejected the defendants' contention that the case before it was analogous to *McRae* rather than to *Yanowitz*. (144 Cal.App.4th at pp. 1232-1233.)

- 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. Since, per *Yanowitz*, a course of conduct may include acts not in themselves actionable, i.e., that would not in themselves materially affect terms and conditions of employment, it is unclear what conduct might be deemed too trivial to consider. Addressing Title VII in *Burlington Northern & Santa Fe Ry. Co. v. White*, *supra*, the United States Supreme Court reminded that the statute is not "a general civility code for the American workplace." (126 S.Ct. at p. 2415, citations omitted.) Addressing the broader federal test of deterrence, the court explained that "normally petty slights, minor annoyances, and simple lack of good manners" are not sufficient to create a deterrence. (*Ibid.*) One might be able to argue that conduct which would fail to pass to the liberal deterrence test under federal law should not be part of the mix for purposes of a "course of conduct" claim, and evidence of such conduct should be excluded to avoid the prejudice of cumulative impact.

- 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 complained about unlawful discrimination 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 good faith and 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.)

- In *George v. California Unemployment Ins. Appeals Bd.*, *supra,* 179 Cal.App.4th 1475, the employer took the position that a plaintiff alleging retaliation must always prove a reasonable good faith belief that unlawful conduct had occurred. The court rejected that position to hold that in at least one instance a plaintiff does not have to prove her reasonable good faith belief—with respect to the filing of a DFEH complaint. (*Id.* at p. 1490.) While there is no case as yet on point, it may be that the reasonable-good-faith-belief test *only* applies (1) to complaints or opposition other than a DFEH filing, *and* (2) where it is first determined that no discrimination occurred, that is, where a jury has

determined that the plaintiff was mistaken about the employer's discriminatory conduct. Assuming that is so, in a case alleging both discrimination and retaliation, defense counsel should draft the special verdict form with questions regarding the retaliation cause of action coming last, after questions regarding the discrimination cause of action. If jurors reject the discrimination claim, they would then address questions asking whether the plaintiff had a good faith belief unlawful conduct had occurred and whether that belief was reasonable. If the jurors conclude there was discrimination, they would move to a question regarding protected activity such as is found in CACI VF-2504. Note: there is no CACI instruction defining protected activity. Defense counsel should consider drafting one that covers not only a definition based on Government Code section 12940 (h), but also conduct based on a mistaken but reasonable and good faith belief.

- It is not unusual in any context for a plaintiff's expert to overreach and, in the form of an "opinion," to 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 case in the Third District may 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. In any event, it is now settled: "If the trial court fails to rule, the objections are preserved on appeal." (*Reid v. Google, supra,* 50 Cal.4th at p. 532.)

F. Defenses.

1. The Same-Decision Showing.

As mentioned, to limit the remedies available to a plaintiff alleging a FEHA violation, an employer must plead and prove that nondiscriminatory reasons alone would have induced it to make the same adverse decision the plaintiff attributes to unlawful motive. (*Harris v. City of Santa Monica, supra,* 56 Cal.4th at pp. 233-234.)

2. Failure To Exhaust Administrative And Judicial 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, §§ 12960, subd. (b), 12965, subd. (b).) The Second District Court

of Appeal has held that an attorney may verify a DFEH complaint on behalf of a client by subscribing his or her own name. (*Blum v. Superior Court* (2006) 141 Cal.App.4th 418, 428.) In *Rickards v. United Parcel Service, Inc.* (2012) 206 Cal.App.4th 1523, 1525, the court extended the ruling and held that attorney verification of an online complaint is sufficient. An employee who is represented by private counsel must serve a copy of the DFEH complaint on the employer *only if* the complaint was filed to initiate a DFEH investigation, *not* if the DFEH complaint simply seeks a right to sue letter. (*Wasti v. Superior Court* (2006) 140 Cal.App.4th 667, 673.)

In California, the failure to exhaust administrative remedies is considered a jurisdictional, not procedural, defect. (See, e.g., *Campbell v. Regents of University of California* (2005) 35 Cal.4th 311, 321; *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)].)[7/] CAVEAT: That exhaustion is "jurisdictional" does not necessarily mean a failure to exhaust defense can be raised at any time. There is a split in authority as to whether the exhaustion doctrine implicates the court's *subject matter* jurisdiction: if it does, then the defense can be raised at any time, even for the first time on appeal (see, e.g., *Ohton v. Board of Trustees of California State University* (2007) 148 Cal.App.4th 749, 770); if it does not, if instead it is merely a judicially-created rule of procedure, then the defense can be deemed waived to avoid unfairness (see, e.g., *Green v. City of Oceanside* (1987) 194 Cal.App.3d 212, 222). In *Mokler v. County of Orange* (2007) 157 Cal.App.4th 121, the Fourth District Court of Appeal agreed with the line of cases following *Green*. The defendant raised the defense for the first time on appeal, relying on *Campbell v. Regents of University of California, supra,* where the Supreme Court had stated in a footnote, "failure to exhaust administrative remedies presents a jurisdictional question . . . and we may review it at any point in the proceedings." (35 Cal.4th at p. 322, fn.2.) The *Mokler* court rejected the argument, explaining that the Supreme Court had not said a defendant could *raise* the issue at any point, only that the court could *review* it at any point. (157 Cal.App.4th at p. 136.)

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

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[7/] 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.)

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].)

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

In *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, the California 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 in court 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]; see *Miller v. City of Los Angeles* (2008) 169 Cal.App.4th 1373, 1382-1383 [failure to challenge hearing officer's determination by petition for administrative mandamus collaterally estops employee from proceeding with FEHA claim].)

A FEHA claim is not barred under the judicial exhaustion doctrine where the internal grievance proceeding lacked sufficient judicial character (e.g., testimony under oath, opportunity to call witnesses and introduce evidence, formal record of hearing) to support collateral estoppel. (*McDonald v Antelope Valley Community College Dist.* (2008) 45

Cal.4th 88, 113; see also *Ahmadi-Kashani v. Regents of University of California* (2008) 159 Cal.App.4th 449, 461.)

When a public employee asserts both FEHA claims and nonstatutory claims 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, 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.)

3. 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.)

The statute of limitations on a FEHA claim is subject to equitable tolling while an employee voluntarily pursues an internal administrative complaint. (*McDonald v. Antelope*

Valley Community College Dist., supra, 45 Cal.4th at p. 111.) The Supreme Court distinguished *Williams v. City of Belvedere* on the ground that the Legislature had specified a 90-day tolling period for delayed discovery in section 12960, but that provision "is silent on the subject of equitable tolling during the pendency of related administrative proceedings." (*Id.* at p. 107, fn. 4.)

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); see *Hall v. Goodwill Industries of Southern California* (2011) 193 Cal.App.4th 718, 726 [statute of limitations runs from date of notice, not from date of receipt].) 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"].) The Legislature has codified *Downs* by amending Government Code section 12965, subdivision (d).

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." (*Ibid.*) 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 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.)

In *Dominguez v. Washington Mut. Bank, supra*, the court addressed the "similar in kind" issue, finding a triable issue of fact as to the occurrence of a continuing violation. While the harasser had stopped making explicitly offensive remarks outside the limitations period, he continued interfering with the plaintiff's work in other ways within the limitations period; reversing the trial court, the reviewing court found that a jury could reasonably infer that the harasser's campaign to make the plaintiff's work life miserable was just another way to harass the plaintiff for her sexual orientation, that is, amounted to a continuous course of harassing conduct sufficient to invoke the continuing violation doctrine. (168 Cal. App.4th at p. 724.) Compare *Trovato v. Beckman Coulter, Inc.* (2011) 192 Cal.App.4th 319, where the court found that mere evidence the plaintiff continued to be assigned to the supervisor who had once harassed her was insufficient to save her claim under the continuing violation doctrine.

After *Richards* was decided, the United States Supreme Court decided *National Railroad Passenger Corp. v. Morgan* (2002) 536 U.S. 101 [122 S.Ct. 2061, 153 L.Ed.2d 106], a case under Title VII. It held that discrete discriminatory acts falling outside the limitations period are time-barred, even if related to acts occurring within the limitations period. (*Id.* at p. 113 [122 S.Ct. at p. 2072].) In contrast, harassment, unlike discrimination or retaliation, is composed of a series of separate acts collectively constituting one unlawful employment practice. (*Id*. at pp. 116-118 [122 S.Ct. at pp. 2074-2075].) Thus, under federal law, the continuing violation doctrine is limited to hostile environment harassment. In *Yanowitz v. L'Oreal USA, Inc.*, *supra*, the California Supreme Court rejected the reasoning of *Morgan* and

its distinction between discrete acts of discrimination/retaliation on the one hand and harassment on the other. (36 Cal.4th at pp. 1057-1059.) "We believe the better rule is to allow application of the continuing violation doctrine in retaliation cases if the requisite showing of a continuing course of conduct has been made." (*Id*. at p. 1059.)

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*, *supra*, 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.)

4. 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"].)

In *Salas v. Sierra Chemical Co.*, Supreme Court Case Number S196568, the California Supreme Court will weigh in on the issue. It will decide whether the plaintiff's use of false social security documents to obtain the job bars his subsequent disability discrimination claim.

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.

5. 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, subds. (k) and (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. (t); see also *Ansonia Bd. Of Education v. Philbrook* (1986) 479 U.S. 60, 67 [107 S.Ct. 367, 93 L.Ed.2d 305] [an accommodation causes undue hardship when it results in more than de minimis cost to employer]; see also *Soldinger v. Northwest Airlines, Inc.* (1996) 51 Cal.App.4th 345, 371.)

b. Safety of Others (Reasonable Accommodation).

An employer is not prohibited from refusing to hire or from discharging an employee who cannot perform his or her essential duties "in a manner that would not endanger his or her health and safety or the health or safety of others even with reasonable accommodations." (Gov. Code, § 12940, subd. (a)(1).) In a case brought under FEHA, the Ninth Circuit confirmed that "'[i]t is a permissible defense for an employer . . . to demonstrate that after reasonable accommodation has been made, the applicant or employee cannot perform the essential functions of the position in question in a manner which would not *endanger the health or safety of others to a greater extent than if an individual without a disability performed the job*.'" (*EEOC v. United Parcel Service, Inc.* (9th Cir. 2005) 424 F.3d 1060, 1074, citing Cal. Code Regs., tit. 2, § 7293.8(d) with emphasis added.) The court went on to hold that UPS had established the defense with evidence that, e.g., monocular drivers as a class had a higher accident rate, the risk of harm to others was high, and UPS did not categorically exclude monocular individuals from the position at issue but rather made individualized determinations on a case by case basis. (*Id*. at pp. 1076-1077.)

c. 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).

d. 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; see also *DeJung v. Superior Court, supra,* 169 Cal.App.4th at pp. 546-547 [section 820.2 immunity for employee does not protect employer via section 815.2, subd.(b), since employer may be held directly liable under FEHA].)

Since the Supreme Court's decisions in *Reno v. Baird* (see above p. 1) and *Jones v. Lodge at Torrey Pines Partnership*, *supra* (see above p. 33), the immunities in the context of discrimination and retaliation claims appear to be superfluous.

6. Preemption (Disability Discrimination).

The California Supreme Court 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.)

7. 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 that the defendants had failed to show the plaintiff's position in the lawsuit was "clearly inconsistent" with the position taken in his application and had 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 California Supreme Court has adopted the five-factor approach laid out in *Jackson*. (See *Aguilar v. Lerner* (2004) 32 Cal.4th 974, 986-987; *MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co., Inc.* (2005) 36 Cal.4th 412, 422.)

Judicial estoppel is an equitable doctrine and its application is discretionary even when all the above factors are satisfied. (*Ibid*.) Some courts have concluded its application should be linked to "egregious circumstances." (See, e.g., *Jogani v. Jogani* (2006) 141 Cal.App.4th 158, 170; see also *Gottlieb v. Kest* (2006) 141 Cal.App.4th 110, 131 [judicial estoppel is an extraordinary remedy to be invoked only when inconsistent behavior will result in a miscarriage of justice].)

It is now accepted that a party invoking judicial estoppel need not show detrimental reliance. (*Jogani v. Jogani*, *supra*, 141 Cal.App.4th at p. 170; see also *Billmeyer v. Plaza Bank of Commerce* (1995) 42 Cal.App.4th 1086, 1092 [party need not show reliance or prejudice].) Thus, it appears that notwithstanding *Prilliman*, a defendant employer does not necessarily have to show the plaintiff's inconsistent position was somehow "unjust" to it.

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.)

Practice Suggestion:

- Defense counsel planning to assert a judicial estoppel defense should be sure to produce solid *evidence* that in a prior proceeding the plaintiff succeeded in persuading a court or adjudicative agency to accept his or her earlier position. Even if all other factors support application of the defense, lack of success in asserting the prior position (or a failure of proof on this point) will likely doom the defense. (*Jogani v. Jogani*, *supra*, 141 Cal.App.4th at p. 171.) This is because "'[a]bsent success in a prior proceeding, a party's later inconsistent position introduces "no risk of inconsistent court determinations," . . . and thus poses little threat to judicial integrity.'" (*Ibid.*, citing *New Hampshire v. Maine* (2001) 532 U.S. 742, 750-751 [121 S.Ct. 1808, 149 L.Ed.2d 968].)

8. Res Judicata/Collateral Estoppel.

In *Acuña 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. In *George v. California Unemployment Ins. Appeals Bd., supra,* 179 Cal.App.4th 1475, the court of appeal held that a State Personnel Board administrative proceeding in which an employee challenged discipline without raising a FEHA issue was not res judicata barring a subsequent action under FEHA for retaliation. (*Id.* at p. 1479.) The court explained that two distinct rights were at stake: "The primary right protected by the state civil service system is the right to continued employment, while the primary right protected by FEHA is the right to be free from invidious discrimination and from retaliation for opposing discrimination. (*Id.* at p. 1483.)

Note that if a plaintiff files a petition for a writ of administrative mandamus under Code of Civil Procedure section 1094.5 to challenge an adverse ruling in an administrative

proceeding and the writ is denied, 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].)

In *Miller v. County of Santa Cruz* (9th Cir. 1994) 39 F.3d 1030, the Ninth Circuit affirmed the district court's ruling that the doctrines of res judicata and collateral estoppel barred the plaintiff's federal suit under 42 U.S.C. section 1983 because he failed to challenge an adverse administrative ruling upholding his termination through judicial mandamus. (*Id*. at p. 1032.) The court relied on *Swartzendruber v. City of San Diego* (1992) 3 Cal.App.4th 896 in which the court gave preclusive effect to the unreviewed findings of the Civil Service Commission. (*Id*. at p. 1034.)

Practice Suggestion:

- To determine whether a res judicata defense may be raised, despite *George v. California Unemployment Ins. Appeals Bd., supra*, defense counsel must determine exactly what was and was not decided in the administrative proceeding. At issue in *George* were a number of suspensions. The state personnel board had revoked another suspension entirely, and it upheld but reduced two other suspensions, finding no substance to a number of allegations supporting them. This evidence was sufficient to leave open the question of whether the plaintiff was treated more harshly than other employees because of her challenge to a discriminatory policy and precluded a res judicata defense. (179 Cal.App.4th at p. 1488.) Note, however, the plaintiff was collaterally estopped from contesting that she had engaged in the particular misconduct that justified the two suspensions the state board had upheld. (*Ibid*.)

- Defense counsel should assess whether any finding in a prior adjudication prevents the plaintiff from proving an *element* of his FEHA claim. In *Castillo v. City of Los Angeles* (2001) 92 Cal.App.4th 477, an employee had challenged his dismissal before the civil service commission, without alleging discrimination. The court of appeal affirmed summary judgment in favor of the city. A finding by the commission that dismissal was justified by the evidence precluded the plaintiff from proving the employer's stated reasons for dismissal were a pretext for discrimination. (*Id*. at pp. 482-483.)

9. 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.)

10. 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 Dept. 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 them 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 Family Rights Act (CFRA), Cal. Gov. Code, § 12945.2.

CFRA is a part of FEHA providing specific protection for employees who need family or medical leave. (*Neisendorf v. Levi Strauss & Co.* (2006) 143 Cal.App.4th 509, 516.) Eligible employees are entitled to take up to 12 unpaid workweeks in a 12-month period. (Gov.Code, § 12945.2, subd. (a).) The employer must reinstate the employee to the same or a comparable position upon her return if she can perfom her job duties. (*Ibid*; *Neisendorf v. Levi Strauss & Co., supra,*143 Cal.App.4th at p. 519; see *Rogers v. County of Los Angeles* (2011) 198 Cal.App.4th 480, 488 [employee who fails to return to work at the end of 12-week leave is not entitled to reinstatement.) Plaintiffs are asserting CFRA claims with increasing frequency, often in conjunction with retaliation or failure to accommodate claims under Government Code section 12940, subdivisions (h) and (m).

A. Elements Of A Cause Of Action For CFRA Retaliation.[8/]

Among other things, it is unlawful under CFRA for an employer to discharge an employee for the "exercise of the right to family care and medical leave" provided by the statute. (Gov. Code, § 12945.2, subd. (*l*)(1).) To prove a CFRA violation based on retaliation, an employee must prove:

- The defendant was an employer covered by CFRA;
- The plaintiff was an employee eligible to take CFRA leave;
- The plaintiff exercised her right to take leave for a qualifying CFRA purpose; and
- The plaintiff suffered an adverse employment action such as termination because of the exercise of her right to CFRA leave. (*Dudley v. Department of Transportation* (2001) 90 Cal.App.4th 255, 261; *Faust v. California Portland Cement Co.* (2007) 150 Cal.App.4th 864, 885; *Avila v. Continental Airlines, Inc.*, *supra*, 165 Cal.App.4th at p. 1254; *Rogers v. County of Los Angeles, supra*, 198 Cal.App.4th at pp. 490-491.)

[8/] There are two types of CFRA claim: interference claims where the employer interferes with the substantive rights of the employee (by, e.g., improperly denying CFRA leave) and retaliation claims where the employer retaliates against the employee for exercising CFRA rights. (*Rogers v. County of Los Angeles, supra,* 198 Cal.App.4th at pp. 487-488.) Interference claims do not involve *McDonnell Douglas* burden-shifting analysis.. (*Faust v. California Portland Cement Co., supra,* 150 Cal.App.4th at pp. 879-882.)

Courts apply the *McDonnell Douglas* burden-shifting analysis to CFRA retaliation claims based on circumstantial evidence. (See e.g., *Faust v. California Portland Cement Co.*, *supra*, 150 Cal.App.4th at p. 885; see *Neisendorf v. Levi Straus & Co.*, *supra*, 143 Cal.App.4th at p. 520 [unchallenged finding that employer had legitimate reason to discharge rather than reinstate employee bars CFRA cause of action]; accord, *Rogers v. County of Los Angeles, supra,* 198 Cal.App.4th at p. 492.)

Eligibility. A full-time employee is entitled to a medical leave of absence under CFRA for a "serious health condition" that makes the employee "unable to perform the functions of the position of that employee." (Gov. Code, § 12945.2, subd. (c)(3)(C).) In *Lonicki v. Sutter Health Cent.* (2008) 43 Cal.4th 201, the Supreme Court reversed summary judgment that had been granted the employer. The trial court, affirmed by the court of appeal, had ruled that the plaintiff's ability to work part-time for another employer in a job similar to the one she was performing for the defendant conclusively established she was able to perform her duties for the defendant. In reversing, the Supreme Court held that the statute refers to the inability to perform essential job functions for the *specific employer* and not to an inability to perform essential job functions generally. (*Id.* at p. 216.) The plaintiff's part-time work, while entailing similar duties, was in a less stressful environment.

The Trigger. A threshold issue is whether an employee's "request" for leave under CFRA is adequate to trigger CFRA protection. To request such leave, "[a]n employee shall provide at least verbal notice sufficient to make the employer aware that the employee needs CFRA-qualifying leave, and the anticipated timing and duration of the leave. The employee need not expressly assert rights under CFRA . . . or even mention CFRA ." (Cal. Code Regs., tit. 2, § 7297.4, subd. (a)(1); *Avila v. Continental Airlines, Inc., supra,* 165 Cal.App.4th at p. 1256.) Whether the "request" or notice was adequate is usually a question of fact. (*Id.* at p. 1255.) Calling in sick for several days is not adequate. (*Gibbs v. American Airlines, Inc.* (1999) 74 Cal.App.4th 1, 9.) Mere notice that one seeks to use sick time is not adequate. (*Stevens v. Department of Corrections* (2003) 107 Cal.App.4th 285, 292.) In *Avila*, the court determined that a reasonable trier of fact might conclude two hospital forms establishing the employee had been hospitalized were sufficient to establish employer was aware of the employee's need for a CFRA-qualifying leave and so might constitute a "request" under the statute. (*Avila v. Continental Airlines, Inc., supra,* 165 Cal.App.4th at p. 1257.)

Causation. To prove discharge was because of the exercise of her right to medical leave, an employee need only prove employer knowledge of the employee's absences; she need not prove employer knowledge of her protected status. (*Avila v. Continental Airlines, Inc., supra,* 165 Cal.App.4th at pp. 1259-1260.) According to the *Avila* court's reasoning, this follows from the fact that the employer bears the burden of determining whether the leave is protected: upon a request for leave, "[t]he employer should inquire further of the employee if it is necessary to have more information about whether CFRA leave is being

sought . . ." and ultimately "designate leave . . . as CFRA . . . qualifying." (Cal. Code Regs., tit. 2, § 7297.4, subd. (a)(1) and (a)(1)(A).)

B. Defenses.

1. Failure To Exhaust Administrative Remedies.

CFRA is part of FEHA and the same procedures apply. Thus, before filing a lawsuit, a CFRA plaintiff must file a complaint with DFEH. (Gov. Code, § 12960; see *Lonicki v. Sutter Health Cent., supra,* 43 Cal.4th at p. 207 [plaintiff sued after receiving right-to-sue letter].)

2. Statute of Limitations.

A CFRA plaintiff has one year from the date the right-to-sue letter issues to file suit. (Gov. Code, § 12965, subd. (b).) In *Dudley v. Department of Transportation, supra*, the court held that a cause of action for retaliation in violation of CFRA in a state action arising out of the same facts that were alleged in a timely federal court complaint for disability discrimination related back to the federal complaint and thus was itself timely. (90 Cal.App.4th at pp. 265-266.)

3. Subjective Good Faith.

In *Avila v. Continental Airlines, Inc., supra,* Division Five of the Second District Court of Appeal stated that it is unclear whether an employer can defend on the basis of a good faith but mistaken belief that its conduct was legal, honestly believing, for example, that the employee had abandoned her job and was not using a CFRA leave for its intended purpose. (165 Cal. App.4th at p. 1260, fn 12.) Federal circuits interpreting a comparable federal statute are split. (*Id.*) The California Supreme Court has granted review in *Richey v. Autonation, Inc.*, Supreme Court Case Number S207536, a case in which Division Seven of the Second District Court of Appeal held that the employer's honest and good faith belief that an employee was abusing medical leave and violating company policy is not a defense.

Practice Suggestions:

- CFRA law is relatively undeveloped. Since it is part of FEHA, defense counsel with unanswered questions may justifiably turn to cases addressing retaliation under Government Code section 12940, subdivision (h) for the proper resolution of an issue under section 12945.2. For example, on the issue of personal liability for individual supervisors for CFRA retaliation, defense counsel could argue *Jones v. Lodge At Torrey Pines Partnership, supra,* 42 Cal.4th 1158, is controlling. Be aware that CFRA is modeled after federal legislation, the Family and Medical Leave Act of 1993 (29 U.S.C. §§ 2601-2654; FMLA). Thus, courts frequently draw on FMLA cases when construing CFRA. (See, e.g., *Lonicki v. Sutter Health Cent., supra*, 43 Cal.4th at p. 214.) On the issue of personal liability,

however, that would not be helpful because federal courts have construed FMLA to impose liability on individual supervisors. (See e.g., *Mercer v. Borden* (C.D.Cal. 1998) 11 F.Supp.2d 1190, 1191; *Bryant v. Delbar Products, Inc.* (M.D. Tenn. 1998) 18 F.Supp.2d 799, 807.) Defense counsel should argue that this particular issue must be decided in a manner consistent with case law under section 12940, subdivision (h), since CFRA is part of FEHA.

- In the real world, the distinction between a CFRA retaliation claim and an interference claim is not always obvious—where the claim is based on the failure to reinstate, for example. Assuming an interference claim, there is no *McDonnell Douglas* burden shifting, and the employer must prove (not merely produce evidence of) a legitimate reason not to reinstate—in other words, that the employee would have been discharged regardless of the request for or the taking of leave. (See *Faust v. California Portland Cement Co., supra*, 150 Cal.App.4th at p. 879.) At least one California court maintained that an employer's good faith subjective belief that a plaintiff was abusing leave was not a defense. (*See Richey v. Autonation Inc., supra,* Supreme Court Case Number S207536.) Assuming a retaliation claim where burden shifting does apply, presumably a good faith belief that a plaintiff was abusing leave may be proffered as evidence of a legitimate reason to terminate (i.e., not reinstate), since under pretext analysis an employer may be mistaken; it just cannot be motivated by unlawful animus. Until the Supreme Court brings clarity to the situation in a ruling on *Richey*, defense counsel would do well to determine if there are *objective* facts to support the employer's decision not to reinstate. For example, judgment against an employee accused of misusing leave was upheld in *McDaneld v. Eastern Municipal Water Dist. Bd.* (2003) 109 Cal.App.4th 702, where there were administrative findings that the employee played golf and fixed sprinklers instead of caring for his injured father and that he had lied on a number of points.

III. Whistleblower Retaliation.

A. Labor Code Section 1102.5, subdivision (b).

1. Unlawful Conduct.

It is unlawful for an employer to retaliate against an employee "for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or violation or noncompliance with a state or federal rule or regulation." (Lab. Code, § 1102.5, subd. (b).)

2. Personal Liability Of Individual Supervisors.

On its face, the statute applies only to employers. (Lab. Code, § 1102.5, subd. (b), emphasis added ["An *employer* may not retaliate . . ."].) One federal district court has concluded individual supervisors may not be held liable under the statute. (*Faurie v. Berkeley Unified School Dist.* (N.D.Cal. 2008) 2008 WL 820682.) In light of *Jones v. Lodge At*

Torrey Pines Partnership, supra, 42 Cal.4th 1158, which precludes supervisor liability under FEHA for retaliation, California courts will likely conclude the same.

3. Plaintiff's Prima Facie Burden.

To establish a prima facie case of section 1102.5 retaliatory discharge, a plaintiff must show:

- He engaged in protected activity;
- He was subsequently discharged;
- There was a causal link between the protected activity and the adverse employment action. (*Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal.App.4th 1378, 1384.)

The *McDonnell Douglas* burden-shifting analysis applies to whistleblower retaliation claims based on circumstantial evidence. (*Id*. at p. 1383.) Note that at trial, once the employee establishes by a preponderance of the evidence that retaliation was a contributing factor in the adverse employment action, the employer has the burden of proving *by clear and convincing evidence* that termination would have occurred for independent legitimate reasons even if the employee had not engaged in protected activity. (Lab. Code, § 1102.6.)

Protected Activity. The statute requires an employee to establish that he reported a violation of or noncompliance with a state or federal statute, rule or regulation. Thus, disclosures pertaining to internal personnel matters are not protected conduct. (*Patten v. Grant Joint Union High School Dist., supra,* 134 Cal.App.4th at pp. 1384-1385 [disclosures about off-color remarks or about a male coach spying on the girl's locker room do not support whistleblower claim, but disclosure to legislature concerning school district's violation of the law regarding budgets does]; see also *Carter v. Escondido Union High School Dist.* (2007) 148 Cal.App.4th 922, 933 [report that football coach recommended nutritional supplement to students insufficient to support whistleblower claim].)

In *McVeigh v. Recology San Francisco* (2013) 213 Cal.App.4th 443, the court of appeal reversed summary judgment for the employer, finding that a whistleblower employee is protected for reports of illegal conduct by fellow employees, as well as by an employer. (*Id*. at p. 448.) It rejected an argument that the whistleblower was not protected because the reports were part of his job. (*Id*. at p. 467.)

As is the case under FEHA, a plaintiff may satisfy the protected activity element of the prima facie case even if he turns out to have been mistaken about the employer's violation of the law, as long as the plaintiff can prove he had "reasonable cause to believe" the information reported disclosed a violation of the law. (Lab. Code, § 1102.5, subd. (b); see *Carter v. Escondido Union High School Dist., supra,* 148 Cal.App.4th at p. 933 [denying

whistleblower status on the additional ground that employee was not motivated by a belief the law had been broken]; see *Mokler v. County of Orange, supra,* 157 Cal.App.4th at p. 138 ["reasonably based suspicions" of illegal activity sufficient].) A plaintiff need not prove he was motivated by worthy concerns for the public good. (*Mize-Kurzman v. Marin Community College Dist.* (2012) 202 Cal.App.4th 832, 850-852.)

In the public employment context, a public employee's report to his supervisors is a disclosure to a government or law enforcement agency. (Lab. Code, § 1102.5, subd. (e); *Patten v. Grant Joint Union High School Dist., supra,* 134 Cal.App.4th at p. 1385.) In *Jaramillo v. County of Orange* (2011) 200 Cal.App.4th 811, the reviewing court held that a report of wrongdoing to the supervisor who engaged in the wrongdoing, namely the county sheriff, is protected by the statute. (*Id*. at p. 827.)

Adverse Employment Action. The definition of adverse employment action for FEHA retaliation claims, turning on a "materiality test," applies to retaliation claims under section 1102.5, subdivision (b). (*Patten v. Grant Joint Union High School Dist., supra,* 134 Cal.App.4th at pp. 1387-1388 [rejecting broader "deterence test"].)

B. The California Whistleblower Protection Act (CWPA), Cal. Gov. Code, § 8547.

State employers may not retaliate against state employees who "report waste, fraud, abuse of authority, violation of law, or threat to public health." (Gov. Code, § 8547.1.)

CWPA authorizes an action for damages to redress retaliation. (Gov. Code, § 8547.8, subd. (c).) In *State Board of Chiropractic Examiners v. Superior Court* (2009) 45 Cal.4th 963, the California Supreme Court held that a state employee may proceed with a damages action in superior court once the State Personnel Board has issued findings or the deadline for issuing findings has passed; the employee is not required to have the findings set aside in a mandate action. (*Id.* at pp. 975-976.) The ruling turned on the express language in section 8547.8, subdivision (c). (*Id.* at p. 971.)

Damages are not available to University of California employees ". . . unless the injured party has first filed a complaint with the [designated] university officer . . . , and the university has failed to reach a decision regarding the complaint within the time limits established for that purpose by the regents." (Gov. Code, § 8547.10, subd. (c); see *Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876, 898 ["a civil action for damages against the University is available only when the plaintiff employee has first filed a complaint with the University and the University has failed to reach a timely decision on the complaint"].) In *Miklosy*, the University had timely determined the retaliation claim was meritless, leaving plaintiffs without a viable claim under the Act.

C. Defenses.

1. Failure To Exhaust Administrative Remedies.

"'[W]here an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act.'" (*Campbell v. Regents of University of California* (2005) 35 Cal.4th 311, 321, quoting *Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 292.)

Labor Code section 98.7 provides an administrative remedy for violation of an employee's rights under the Labor Code:

> Any person who believes that he or she has been discharged or otherwise discriminated against in violation of any law under the jurisdiction of the Labor Commissioner may file a complaint with the division . . . .

(Lab. Code, § 98.7, subd. (a); see also *id.*, § 6312 ["Any employee who believes he or she has been discharged or otherwise discriminated against . . . in violation of Section 6310 or 6311 may file a complaint with the Labor Commissioner pursuant to Section 98.7"].)

Division Three of the Second District Court of Appeal has held that a plaintiff suing directly under the Labor Code for violation of section 1102.5, among other provisions, need not exhaust Labor Code remedies. (*Lloyd v. County of Los Angeles* (2009) 172 Cal.App.4th 320, 323; but see *Gutierrez v. RWD Technologies, Inc.* (E.D.Cal. 2003) 279 F.Supp.2d 1223, 1228 [exhaustion of remedies provided by Labor Code section 98.7 required].)

It has long been the rule that internal grievance procedures must be exhausted "'where the Legislature has not specifically mandated its own administrative review process . . . .'" (*Campbell v. Regents of University of California, supra,* 35 Cal.4th at pp. 321-322, citing *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1092.) In *Campbell*, the California Supreme Court held that the plaintiff was required to exhaust the University's administrative remedies before suing for retaliatory termination under two whistleblower statutes, Government Code section 12653 and Labor Code section 1102.5. (35 Cal.4th at p. 333.)

Practice Suggestion:

- Although the Court of Appeal in *Lloyd v. County of Los Angeles* held that exhaustion of Labor Code remedies was not required for causes of action directly under the statute, counsel may wish to preserve the defense until the Supreme Court addresses the issue. (172 Cal.App.4th 320.) *Lloyd* is not on solid analytical ground. The court based its ruling on *Daly v. Exxon Corp.* (1997) 55 Cal.App.4th 39. *Daly* affirmed the sustaining of a demurrer to a cause of action for wrongful termination in violation of public policy but also held the plaintiff should be given leave to amend to add a cause of action directly under the Labor Code, stating exhaustion of remedies with the Labor Commission was not

required. (*Id*. at p. 46.) On this point, the *Daly* court offered no analysis but simply relied on two cases, neither of which involved statutory causes of action, *Hentzel v. Singer Co.* (1982) 138 Cal.App.3d 290 and *Jenkins v. Family Health Program* (1989) 214 Cal.App.3d 440. In the context of FEHA claims, exhaustion with DFEH is not required for common law causes of action based on the policies embodied in FEHA. (*Rojo v. Kliger* (1990) 52 Cal.3d 65, 88). However, exhaustion is required for causes of action directly under the statute. (*Id*. at p. 83; *Okoli v. Lockheed Technical Operations Co.*, *supra*, 36 Cal.App.4th at p. 1612.) Arguably, the same distinction should apply in the context of Labor Code violations.

2. Government Code Immunities.

It is unlikely that these immunities protect public employers from whistleblower claims. In *Shoemaker v. Myers* (1992) 2 Cal.App.4th 1407, 1425, the court held that Government Code section 821.6 immunity does not protect employers or employees in actions directly under Government Code section 19683, a whistleblower statute pertaining to state employment. The rationale for the holding was based on a rule of statutory construction: where two statutes conflict, the one more narrow in scope and purpose, in this case the whistleblower statute, prevails. (*Ibid*.) Note: arguably Government Code section 12940 prohibiting discrimination and retaliation is also more narrow in scope and purpose than the Government Code immunity provisions, and yet the California Supreme Court has held that the latter are a defense to FEHA causes of action alleged against employees; they are *not* a defense that can be asserted by public employers, however, as their liability under the statute is direct, not vicarious. (*Caldwell v. Montoya, supra*, 10 Cal.4th 972, 982, 989, fn. 9.) The analysis would likely be the same here.

IV. California Constitution.

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 in both the federal and the state constitutions, 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.)

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.)

Lachtman v. Regents of University of California (2007) 158 Cal.App.4th 187 addresses the due process rights of a graduate student "fired" from a Ph.D. program. Assuming without deciding that the student had a protected interest in continued enrollment in the program, the court considered how much procedural due process he was entitled to before dismissal for academic reasons. (*Id.* at p. 201.) Relying on the well-settled principle that the judicial role in reviewing academic decisions is limited, the court held that the University satisfied due process when it informed the student of the deficiencies of his performance and the consequences they posed to his advancement and when it made a careful and deliberate decision to deny advancement. (*Id.* at pp. 201, 203.) The court also rejected the student's claim that his substantive due process rights had been violated, finding the decision to deny advancement to a Ph.D. was not "'such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.'" (*Id.* at pp. 206-207, quoting *Regents of University of Michigan* v. *Ewing* (1985) 474 U.S. 214, 225 [106 S.Ct. 507, 513, 88 L.Ed.2d 523]; see also *Paulsen v. Golden Gate University* (1979) 25 Cal.3d 803, 808 [no due process violation absent evidence of arbitrariness or bad faith]; *Banks v. Dominican College* (1995) 35 Cal.App.4th 1545, 1551 [educational institutions have a right to summary judgment in cases

challenging academic dismissal, absent evidence decision was arbitrary and capricious, not based on academic criteria, and the result of irrelevant or discriminatory factors].)

3. Right To Privacy.

The right to privacy is among those rights specified in Article I, section 1, of the California 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. Protection for employee speech rights under the state constitution is said to be greater than under the federal. (See *Edelstein v. City & County of San Francisco* (2002) 29 Cal.4th 164, 168 ["The California free speech clause is broader and more protective than the First Amendment free speech clause," comparing state and federal provisions regarding speech in context of voting regulations]; *Kaye v. Board of Trustees of the San Diego County Public Law Library* (2009) 179 Cal.App.4th 48, 57.) However, when public employees allege they were fired in retaliation for "speaking out" in violation of the state Constitution, courts usually turn to United States Supreme Court analysis in the context of public employee First Amendment claims. (See *Edelstein*, *supra*, 29 Cal.4th at p. 168 ["Generally, when we interpret a provision of the California Constitution that is similar to a provision of the federal Constitution, we will not depart from the United States Supreme Court's construction of the similar federal provision unless we are given cogent reasons to do so"].)

To prove a violation of his speech rights, a plaintiff must prove that his speech (or speech-related activity) 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.)

a. Is The Speech Protected?

The question of whether speech is protected involves two steps: First, a plaintiff employee must prove that he "spoke as a citizen on a matter of public concern." *(Garcetti v. Ceballos* (2006) 547 U.S. 410, 418 [126 S.Ct. 1951, 1958, 164 L.Ed.2d 689]; *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 the employee speaks as a citizen and his 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 *Garcetti v. Ceballos*, *supra*, the United States Supreme Court held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." (547 U.S. at p. 421 [126 S.Ct. at p. 1960].) Ceballos was a deputy district attorney who in a memorandum to his supervisors advised that a case be dismissed because there were misrepresentations in a search warrant affidavit. (*Id*. at p. 414 [126 S.Ct. at p. 1955].) The court contrasted his position with that of the teacher in *Pickering v. Board of Education*, *supra*, who wrote a letter to a local newspaper addressing such issues as the funding policy of the school board, and whose letter had "no official significance and bore similarities to letters submitted by numerous citizens every day." (547 U.S. at p. 422 [126 S.Ct. at p. 1960].)

Once a plaintiff employee establishes he was not speaking pursuant to his official duties, he must still pass the public concern test. Courts examine the "'content of form, and context of a given statement, as revealed by the whole record.'" (*City of San Diego v. Roe* (2004) 543 U.S. 77, 83 [125 S.Ct. 521, 525, 160 L.Ed.2d 410], citing *Connick v. Myers*, *supra*, 461 U.S. at pp. 146-147 [103 S.Ct. at pp. 1689-1690].) In *City of San Diego*, the court held that the employee, a former police officer who was terminated for selling videotapes of himself stripping off his uniform and engaging in sexually explicit acts, failed the threshold public concern test, and the *Pickering* balancing of employer/employee interests did not come into play. (543 U.S. at pp. 78, 84 [125 S.Ct. at pp. 522, 526].)

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.

Practice Suggestion:

- In *Garcetti v. Ceballos*, *supra*, the parties did not dispute that Ceballos wrote his memo pursuant to his job duties, so there was no need for the court "to articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate." (547 U.S. at p. 424 [126 S.Ct. at p. 1961].) The court did caution that the listing of a given task in a formal job description was "neither necessary nor sufficient" evidence that the tasks fell within the scope of the employee's duties for First Amendment purposes. (*Id*. at p. 425 [126 S.Ct. at p. 1962].) Defense counsel should therefore be prepared to offer evidence other than or in addition to a written job description, for example, evidence that the employee was routinely or often asked by his or her supervisor to make the type of report at issue, and routinely or often did so.

b. 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 also unclear whether a plaintiff would have to prove official policy or custom and practice caused a violation of his state 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 California 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 reviewing 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 Dist.* (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 Article I, section 1; reviewing 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, damages may be 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.[9/] (*City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 454.)

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 p. 40, 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, the Code of Civil Procedure, rather than the Government Code, is controlling on the limitations issue. In *Acuña v. Regents of University of California*, *supra*, 56 Cal.App.4th at p. 646, the court held that the limitation period for personal injury applied to a claim for violation of speech rights under the California constitution. This is in line with claims under 42 U.S.C. section 1983 for violation of the federal constitution. Note that the statute of limitations for personal injury is now two years under Code Civil Procedure, section 335.1, rather than one year per former Code of Civil Procedure, section 340, subdivision (3), the statute at issue in *Acuña*. Section 335.1 presumably now covers claims against the Regents based on constitutional violations.

[9/] 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).

5. Immunities.

a. Statutory Immunities.

The question of whether any immunities apply to direct constitutional claims is significant only to the extent damages are available for the violation. (See p. 63, above.) Moreover, the applicability of governmental immunities under state law 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].) For cases alleging violations of the state constitution, this would be a useful defense, since per *Caldwell v. Montoya*, *supra*, 10 Cal.4th 972, discretionary immunity is limited to policy-making officials. The court in *Hansen v. California Dept. of Corrections*, *supra*, noted the potential unfairness of immunizing a director but not subordinate employees who may have been doing their jobs in good faith, 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 to a claim

under the state constitution.[10/] Be aware, however, one court has rejected a qualified immunity defense in the context of claims for civil rights violations under Civil Code section 52.1. (*Venegas v. County of Los Angeles* (2007) 153 Cal.App.4th 1230.)

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

V. Wrongful Termination In Violation Of Public Policy.

In *Miklosy v. Regents of University of California, supra,* 44 Cal.4th 876, the California Supreme Court addressed this tort in the context of public employment. It held that Government Code section 815 bars this common law cause of action against public entities; since only employers, not employees, may be liable for wrongful termination, there is no

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[10/] 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.

way to impose vicarious liability on public entities pursuant to Government Code section 815.2, subdivision (a). (*Id*. at pp. 900-901.)

TABLE OF CONTENTS

		Page
INTRODUCTION		1
I.	Fair Employment And Housing Act (FEHA), Cal. Gov. Code, § 12900, et seq.	1
A.	Unlawful Conduct.	1
B.	Discrimination: Disparate Treatment.	1
1.	Personal Liability Of Individual Supervisors.	1
2.	Shifting Burdens: The *McDonnell Douglas* Framework.	2
a.	The Prima Facie Case.	2
b.	Pretext: Discriminatory Motive And Causation.	5
3.	The Mixed-Motive Case.	7
4.	Failure To Make Reasonable Accommodation (Disability, Discrimination).	11
5.	Failure To Engage In Interactive Process (Disability Discrimination).	17
C.	Discrimination: Disparate Impact.	20
D.	Discrimination: Harassment.	22
1.	Hostile Environment.	23
2.	Quid Pro Quo.	26
3.	Employer Liability.	26
a.	Harassment By Supervisors.	26
b.	Nonsupervisors And Nonemployees.	27
c.	Conduct Outside The Workplace.	27
4.	Personal Liability Of Individual Supervisors And Co-Workers.	28
E.	Retaliation.	29
1.	Plaintiff's Prima Facie Burden.	29
2.	Personal Liability Of Individual Supervisors and Co-Workers.	33
3.	Failure To Prevent Retaliation.	33

TABLE OF CONTENTS
(continued)

				Page
F.	Defenses.			36
	1.	The Same-Decision Showing.		36
	2.	Failure To Exhaust Administrative And Judicial Remedies.		36
	3.	Statute Of Limitations.		39
	4.	After-Acquired Evidence.		42
	5.	Statutory Defenses.		43
		a.	Undue Hardship (Reasonable Accommodation).	43
		b.	Safety of Others (Reasonable Accommodation).	44
		c.	Bona Fide Occupational Qualification (BFOQ).	44
		d.	Statutory Immunities Under The Government Code.	44
	6.	Preemption (Disability Discrimination).		45
	7.	Judicial Estoppel.		45
	8.	Res Judicata/Collateral Estoppel.		47
	9.	Business Necessity (Disparate Impact).		48
	10.	The Avoidable Consequences Defense.		49
II.	California Family Rights Act (CFRA), Cal. Gov. Code, § 12945.2.			50
A.	Elements Of A Cause Of Action For CFRA Retaliation.			50
B.	Defenses.			52
	1.	Failure To Exhaust Administrative Remedies.		52
	2.	Statute of Limitations.		52
	3.	Subjective Good Faith.		52
III.	Whistleblower Retaliation.			53
A.	Labor Code Section 1102.5, subdivision (b).			53
	1.	Unlawful Conduct.		53
	2.	Personal Liability Of Individual Supervisors.		53

TABLE OF CONTENTS
(continued)

		Page
3.	Plaintiff's Prima Facie Burden.	54
B.	The California Whistleblower Protection Act (CWPA), Cal. Gov. Code, § 8547.	55
C.	Defenses.	56
1.	Failure To Exhaust Administrative Remedies.	56
2.	Government Code Immunities.	57
IV.	California Constitution.	57
A.	Elements Of A Cause Of Action.	57
1.	Equal Protection.	57
2.	Due Process.	58
3.	Right To Privacy.	59
4.	Free Speech And Association.	60
a.	Is The Speech Protected?	60
b.	Is The Employer Liable?	62
B.	Defenses.	63
1.	Damages May Be Barred.	63
2.	Exhaustion Of Administrative Remedies.	64
3.	Failure To Comply In A Timely Manner With The Claims Statute.	64
4.	Statute Of Limitations.	65
5.	Immunities.	65
a.	Statutory Immunities.	65
b.	Qualified Immunity.	66
6.	Justification (Privacy).	67
V.	Wrongful Termination In Violation Of Public Policy.	67
APPENDIX OF AUTHORITIES		AOA-1

APPENDIX OF AUTHORITIES

Page

WRONGFUL TERMINATION CLAIMS AGAINST GOVERNMENT EMPLOYERS

THEORIES OF LIABILITY AND DEFENSE UNDER CALIFORNIA LAW:

AN OVERVIEW

(Revised 2013)
Alison M. Turner