

ASSEMBLY BILL

No. 1856

Introduced by Assembly Member Kuehl

February 7, 2000

An act to amend Section 12940 of the Government Code, relating to harassment.

LEGISLATIVE COUNSEL'S DIGEST

AB 1856, as introduced, Kuehl. Harassment: liability of employees.

Under existing provisions of the California Fair Employment and Housing Act, employers, labor organizations, apprenticeship and employment training programs, other persons, their agents, and supervisors, are civilly liable for harassment of an employee, an applicant for employment, or a person providing services under a contract, as defined, on the basis of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation.

This bill would expressly provide that employees of any entity covered by these provisions are personally liable for prohibited harassment perpetrated by the employee.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 12940 of the Government Code
2 is amended to read:

1 12940. It shall be an unlawful employment practice,
2 unless based upon a bona fide occupational qualification,
3 or, except where based upon applicable security
4 regulations established by the United States or the State
5 of California:

6 (a) For an employer, because of the race, religious
7 creed, color, national origin, ancestry, physical disability,
8 mental disability, medical condition, marital status, sex, or
9 sexual orientation of any person, to refuse to hire or
10 employ the person or to refuse to select the person for a
11 training program leading to employment, or to bar or to
12 discharge the person from employment or from a training
13 program leading to employment, or to discriminate
14 against the person in compensation or in terms,
15 conditions, or privileges of employment.

16 (1) This part does not prohibit an employer from
17 refusing to hire or discharging an employee with a
18 physical or mental disability, or subject an employer to
19 any legal liability resulting from the refusal to employ or
20 the discharge of an employee with a physical or mental
21 disability, where the employee, because of his or her
22 physical or mental disability, is unable to perform his or
23 her essential duties even with reasonable
24 accommodations, or cannot perform those duties in a
25 manner that would not endanger his or her health or
26 safety or the health or safety of others even with
27 reasonable accommodations.

28 (2) This part does not prohibit an employer from
29 refusing to hire or discharging an employee who, because
30 of the employee's medical condition, is unable to perform
31 his or her essential duties even with reasonable
32 accommodations, or cannot perform those duties in a
33 manner that would not endanger the employee's health
34 or safety or the health or safety of others even with
35 reasonable accommodations. Nothing in this part shall
36 subject an employer to any legal liability resulting from
37 the refusal to employ or the discharge of an employee
38 who, because of the employee's medical condition, is
39 unable to perform his or her essential duties, or cannot
40 perform those duties in a manner that would not



1 endanger the employee's health or safety or the health or
2 safety of others even with reasonable accommodations.

3 (3) Nothing in this part relating to discrimination on
4 account of marital status shall do either of the following:

5 (A) Affect the right of an employer to reasonably
6 regulate, for reasons of supervision, safety, security, or
7 morale, the working of spouses in the same department,
8 division, or facility, consistent with the rules and
9 regulations adopted by the commission.

10 (B) Prohibit bona fide health plans from providing
11 additional or greater benefits to employees with
12 dependents than to those employees without or with
13 fewer dependents.

14 (4) Nothing in this part relating to discrimination on
15 account of sex shall affect the right of an employer to use
16 veteran status as a factor in employee selection or to give
17 special consideration to Vietnam-era veterans.

18 (b) For a labor organization, because of the race,
19 religious creed, color, national origin, ancestry, physical
20 disability, mental disability, medical condition, marital
21 status, sex, or sexual orientation of any person, to exclude,
22 expel or restrict from its membership the person, or to
23 provide only second-class or segregated membership or
24 to discriminate against any person because of the race,
25 religious creed, color, national origin, ancestry, physical
26 disability, mental disability, medical condition, marital
27 status, sex, or sexual orientation of the person in the
28 election of officers of the labor organization or in the
29 selection of the labor organization's staff or to
30 discriminate in any way against any of its members or
31 against any employer or against any person employed by
32 an employer.

33 (c) For any person to discriminate against any person
34 in the selection or training of that person in any
35 apprenticeship training program or any other training
36 program leading to employment because of the race,
37 religious creed, color, national origin, ancestry, physical
38 disability, mental disability, medical condition, marital
39 status, sex, or sexual orientation of the person
40 discriminated against.



1 (d) For any employer or employment agency, unless
2 specifically acting in accordance with federal equal
3 employment opportunity guidelines and regulations
4 approved by the commission, to print or circulate or
5 cause to be printed or circulated any publication, or to
6 make any non-job-related inquiry of an employee or
7 applicant, either verbal or through use of an application
8 form, that expresses, directly or indirectly, any limitation,
9 specification, or discrimination as to race, religious creed,
10 color, national origin, ancestry, physical disability, mental
11 disability, medical condition, marital status, sex, or sexual
12 orientation, or any intent to make any such limitation,
13 specification or discrimination. Except as provided in the
14 Americans with Disabilities Act of 1990 (Public Law
15 101-336) and the regulations adopted pursuant thereto,
16 nothing in this subdivision shall prohibit any employer
17 from making, in connection with prospective
18 employment, an inquiry as to, or a request for information
19 regarding, the physical fitness, medical condition,
20 physical condition, or medical history of applicants if that
21 inquiry or request for information is directly related and
22 pertinent to the position the applicant is applying for or
23 directly related to a determination of whether the
24 applicant would endanger his or her health or safety or
25 the health or safety of others.

26 (e) For any employer, labor organization, or
27 employment agency to harass, discharge, expel, or
28 otherwise discriminate against any person because the
29 person has made a report pursuant to Section 11161.8 of
30 the Penal Code that prohibits retaliation against hospital
31 employees who report suspected patient abuse by health
32 facilities or community care facilities.

33 (f) For any employer, labor organization,
34 employment agency, or person to discharge, expel, or
35 otherwise discriminate against any person because the
36 person has opposed any practices forbidden under this
37 part or because the person has filed a complaint, testified,
38 or assisted in any proceeding under this part.



1 (g) For any person to aid, abet, incite, compel, or
2 coerce the doing of any of the acts forbidden under this
3 part, or to attempt to do so.

4 (h) (1) For an employer, labor organization,
5 employment agency, apprenticeship training program or
6 any training program leading to employment, or any
7 other person, because of race, religious creed, color,
8 national origin, ancestry, physical disability, mental
9 disability, medical condition, marital status, sex, age, or
10 sexual orientation, to harass an employee, an applicant, or
11 a person providing services pursuant to a contract.
12 Harassment of an employee, an applicant, or a person
13 providing services pursuant to a contract by an employee
14 other than an agent or supervisor shall be unlawful if the
15 entity, or its agents or supervisors, knows or should have
16 known of this conduct and fails to take immediate and
17 appropriate corrective action. An entity shall take all
18 reasonable steps to prevent harassment from occurring.
19 Loss of tangible job benefits shall not be necessary in
20 order to establish harassment.

21 (2) The provisions of this subdivision are declaratory
22 of existing law, except for the new duties imposed on
23 employers with regard to harassment.

24 (3) *An employee of an entity subject to this subdivision*
25 *is personally liable for any harassment prohibited by this*
26 *section that is perpetrated by the employee.*

27 (4) (A) For purposes of this subdivision only,
28 “employer” means any person regularly employing one
29 or more persons or regularly receiving the services of one
30 or more persons providing services pursuant to a
31 contract, or any person acting as an agent of an employer,
32 directly or indirectly, the state, or any political or civil
33 subdivision of the state, and cities. The definition of
34 “employer” in subdivision (d) of Section 12926 applies to
35 all provisions of this section other than this subdivision.

36 (B) Notwithstanding subparagraph (A), for purposes
37 of this subdivision, “employer” does not include a
38 religious association or corporation not organized for
39 private profit.



1 (C) For purposes of this subdivision, “harassment”
2 because of sex includes sexual harassment, gender
3 harassment, and harassment based on pregnancy,
4 childbirth, or related medical conditions.

5 ~~(4)~~

6 (5) For purposes of this subdivision, “a person
7 providing services pursuant to a contract” means a
8 person who meets all of the following criteria:

9 (A) The person has the right to control the
10 performance of the contract for services and discretion as
11 to the manner of performance.

12 (B) The person is customarily engaged in an
13 independently established business.

14 (C) The person has control over the time and place the
15 work is performed, supplies the tools and instruments
16 used in the work, and performs work that requires a
17 particular skill not ordinarily used in the course of the
18 employer’s work.

19 (i) For an employer, labor organization, employment
20 agency, apprenticeship training program, or any training
21 program leading to employment, to fail to take all
22 reasonable steps necessary to prevent discrimination and
23 harassment from occurring.

24 (j) For an employer or other entity covered by this
25 part to refuse to hire or employ a person or to refuse to
26 select a person for a training program leading to
27 employment or to bar or to discharge a person from
28 employment or from a training program leading to
29 employment, or to discriminate against a person in
30 compensation or in terms, conditions, or privileges of
31 employment because of a conflict between the person’s
32 religious belief or observance and any employment
33 requirement, unless the employer or other entity
34 covered by this part demonstrates that it has explored any
35 available reasonable alternative means of
36 accommodating the religious belief or observance,
37 including the possibilities of excusing the person from
38 those duties that conflict with his or her religious belief or
39 observance or permitting those duties to be performed at
40 another time or by another person, but is unable to



1 reasonably accommodate the religious belief or
2 observance without undue hardship on the conduct of the
3 business of the employer or other entity covered by this
4 part. Religious belief or observance, as used in this
5 section, includes, but is not limited to, observance of a
6 Sabbath or other religious holy day or days, and
7 reasonable time necessary for travel prior and subsequent
8 to a religious observance.

9 (k) For an employer or other entity covered by this
10 part to fail to make reasonable accommodation for the
11 known physical or mental disability of an applicant or
12 employee. Nothing in this subdivision or in paragraph (1)
13 or (2) of subdivision (a) shall be construed to require an
14 accommodation that is demonstrated by the employer or
15 other covered entity to produce undue hardship to its
16 operation.

17 (l) For an employer or other entity covered by this
18 part, to subject, directly or indirectly, any employee,
19 applicant, or other person to a test for the presence of a
20 genetic characteristic.

