

AMENDED IN ASSEMBLY APRIL 4, 2000

CALIFORNIA LEGISLATURE—1999–2000 REGULAR SESSION

**ASSEMBLY BILL**

**No. 1856**

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**Introduced by Assembly Member Kuehl**

February 7, 2000

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

LEGISLATIVE COUNSEL'S DIGEST

AB 1856, as amended, 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, martial 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:

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

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

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

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



1 the refusal to employ or the discharge of an employee  
2 who, because of the employee's medical condition, is  
3 unable to perform his or her essential duties, or cannot  
4 perform those duties in a manner that would not  
5 endanger the employee's health or safety or the health or  
6 safety of others even with reasonable accommodations.

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

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

14 (B) Prohibit bona fide health plans from providing  
15 additional or greater benefits to employees with  
16 dependents than to those employees without or with  
17 fewer dependents.

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

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

37 (c) For any person to discriminate against any person  
38 in the selection or training of that person in any  
39 apprenticeship training program or any other training  
40 program leading to employment because of the race,



1 religious creed, color, national origin, ancestry, physical  
2 disability, mental disability, medical condition, marital  
3 status, sex, or sexual orientation of the person  
4 discriminated against.

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

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

37 (f) For any employer, labor organization,  
38 employment agency, or person to discharge, expel, or  
39 otherwise discriminate against any person because the  
40 person has opposed any practices forbidden under this



1 part or because the person has filed a complaint, testified,  
2 or assisted in any proceeding under this part.

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

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

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

26 (3) An employee of an entity subject to this subdivision  
27 is personally liable for any harassment prohibited by this  
28 section that is perpetrated by the employee, *regardless*  
29 *of whether the employer or covered entity knows or*  
30 *should have known of the conduct and fails to take*  
31 *immediate and appropriate corrective action.*

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

1 (B) Notwithstanding subparagraph (A), for purposes  
2 of this subdivision, “employer” does not include a  
3 religious association or corporation not organized for  
4 private profit.

5 (C) For purposes of this subdivision, “harassment”  
6 because of sex includes sexual harassment, gender  
7 harassment, and harassment based on pregnancy,  
8 childbirth, or related medical conditions.

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

12 (A) The person has the right to control the  
13 performance of the contract for services and discretion as  
14 to the manner of performance.

15 (B) The person is customarily engaged in an  
16 independently established business.

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

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

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



1 those duties that conflict with his or her religious belief or  
2 observance or permitting those duties to be performed at  
3 another time or by another person, but is unable to  
4 reasonably accommodate the religious belief or  
5 observance without undue hardship on the conduct of the  
6 business of the employer or other entity covered by this  
7 part. Religious belief or observance, as used in this  
8 section, includes, but is not limited to, observance of a  
9 Sabbath or other religious holy day or days, and  
10 reasonable time necessary for travel prior and subsequent  
11 to a religious observance.

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

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

