

ASSEMBLY BILL

No. 76

Introduced by Assembly Member Corbett

December 23, 2002

An act to amend Section 12940 of the Government Code, relating to unlawful employment practices.

LEGISLATIVE COUNSEL'S DIGEST

AB 76, as introduced, Corbett. Employment discrimination.

Existing law makes it an unlawful employment practice for an employer to harass any employee because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation, or to fail to take immediate and appropriate corrective action to prevent harassment by an employee other than an agent or supervisor, if the employer knows or should have known of this conduct.

This bill would make it unlawful for an employer to fail to take immediate and appropriate corrective action to prevent harassment of an employee by any person, once the employer knows or should have known of this conduct.

Vote: majority. Appropriation: no. Fiscal committee: yes. 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 is
- 2 amended to read:
- 3 12940. It shall be an unlawful employment practice, unless
- 4 based upon a bona fide occupational qualification, or, except

1 where based upon applicable security regulations established by
2 the United States or the State of California:

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

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

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

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

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



1 (B) Prohibit bona fide health plans from providing additional
2 or greater benefits to employees with dependents than to those
3 employees without or with fewer dependents.

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

8 (b) For a labor organization, because of the race, religious
9 creed, color, national origin, ancestry, physical disability, mental
10 disability, medical condition, marital status, sex, or sexual
11 orientation of any person, to exclude, expel, or restrict from its
12 membership the person, or to provide only second-class or
13 segregated membership or to discriminate against any person
14 because of the race, religious creed, color, national origin,
15 ancestry, physical disability, mental disability, medical condition,
16 marital status, sex, or sexual orientation of the person in the
17 election of officers of the labor organization or in the selection of
18 the labor organization's staff or to discriminate in any way against
19 any of its members or against any employer or against any person
20 employed by an employer.

21 (c) For any person to discriminate against any person in the
22 selection or training of that person in any apprenticeship training
23 program or any other training program leading to employment
24 because of the race, religious creed, color, national origin,
25 ancestry, physical disability, mental disability, medical condition,
26 marital status, sex, or sexual orientation of the person
27 discriminated against.

28 (d) For any employer or employment agency to print or
29 circulate or cause to be printed or circulated any publication, or to
30 make any non-job-related inquiry of an employee or applicant,
31 either verbal or through use of an application form, that expresses,
32 directly or indirectly, any limitation, specification, or
33 discrimination as to race, religious creed, color, national origin,
34 ancestry, physical disability, mental disability, medical condition,
35 marital status, sex, or sexual orientation, or any intent to make any
36 limitation, specification, or discrimination.

37 (e) (1) Except as provided in paragraph (2) or (3), for any
38 employer or employment agency to require any medical or
39 psychological examination of an applicant, to make any medical
40 or psychological inquiry of an applicant, to make any inquiry

1 whether an applicant has a mental disability or physical disability
2 or medical condition, or to make any inquiry regarding the nature
3 or severity of a physical disability, mental disability, or medical
4 condition.

5 (2) Notwithstanding paragraph (1), an employer or
6 employment agency may inquire into the ability of an applicant to
7 perform job-related functions and may respond to an applicant's
8 request for reasonable accommodation.

9 (3) Notwithstanding paragraph (1), an employer or
10 employment agency may require a medical or psychological
11 examination or make a medical or psychological inquiry of a job
12 applicant after an employment offer has been made but prior to the
13 commencement of employment duties, provided that the
14 examination or inquiry is job-related and consistent with business
15 necessity and that all entering employees in the same job
16 classification are subject to the same examination or inquiry.

17 (f) (1) Except as provided in paragraph (2), for any employer
18 or employment agency to require any medical or psychological
19 examination of an employee, to make any medical or
20 psychological inquiry of an employee, to make any inquiry
21 whether an employee has a mental disability, physical disability,
22 or medical condition, or to make any inquiry regarding the nature
23 or severity of a physical disability, mental disability, or medical
24 condition.

25 (2) Notwithstanding paragraph (1), an employer or
26 employment agency may require any examinations or inquiries
27 that it can show to be job-related and consistent with business
28 necessity. An employer or employment agency may conduct
29 voluntary medical examinations, including voluntary medical
30 histories, which are part of an employee health program available
31 to employees at that worksite.

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

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



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

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

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

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

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

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

38 (B) Notwithstanding subparagraph (A), for purposes of this
39 subdivision, “employer” does not include a religious association

1 or corporation not organized for private profit, except as provided
2 in Section 12926.2.

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

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

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

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

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

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

23 (l) For an employer or other entity covered by this part to refuse
24 to hire or employ a person or to refuse to select a person for a
25 training program leading to employment or to bar or to discharge
26 a person from employment or from a training program leading to
27 employment, or to discriminate against a person in compensation
28 or in terms, conditions, or privileges of employment because of a
29 conflict between the person’s religious belief or observance and
30 any employment requirement, unless the employer or other entity
31 covered by this part demonstrates that it has explored any available
32 reasonable alternative means of accommodating the religious
33 belief or observance, including the possibilities of excusing the
34 person from those duties that conflict with his or her religious
35 belief or observance or permitting those duties to be performed at
36 another time or by another person, but is unable to reasonably
37 accommodate the religious belief or observance without undue
38 hardship on the conduct of the business of the employer or other
39 entity covered by this part. Religious belief or observance, as used
40 in this section, includes, but is not limited to, observance of a



1 Sabbath or other religious holy day or days, and reasonable time
2 necessary for travel prior and subsequent to a religious
3 observance.

4 (m) For an employer or other entity covered by this part to fail
5 to make reasonable accommodation for the known physical or
6 mental disability of an applicant or employee. Nothing in this
7 subdivision or in paragraph (1) or (2) of subdivision (a) shall be
8 construed to require an accommodation that is demonstrated by the
9 employer or other covered entity to produce undue hardship to its
10 operation.

11 (n) For an employer or other entity covered by this part to fail
12 to engage in a timely, good faith, interactive process with the
13 employee or applicant to determine effective reasonable
14 accommodations, if any, in response to a request for reasonable
15 accommodation by an employee or applicant with a known
16 physical or mental disability or known medical condition.

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

