

AMENDED IN ASSEMBLY MARCH 11, 2003
AMENDED IN ASSEMBLY FEBRUARY 27, 2003
AMENDED IN ASSEMBLY FEBRUARY 26, 2003

CALIFORNIA LEGISLATURE—2003–04 REGULAR SESSION

ASSEMBLY BILL

No. 76

Introduced by Assembly Member Corbett
(Principal coauthors: Assembly Members Jackson, Koretz, and Steinberg)
(Principal coauthor: Senator Kuehl)
(Coauthors: Assembly Members Cohn, Hancock, Laird, Levine, Lieber, and Yee)
(Coauthor: Senator Romero)

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 amended, Corbett. Employment discrimination.

Existing law makes it an unlawful employment practice for a person, other than a religious association or corporation not organized for private profit, regularly employing one or more persons or regularly receiving the services of one or more persons providing services pursuant to a contract, or any person acting as an agent of such an employer, directly or indirectly, who knows or should have known of harassment of an employee, an applicant, or a person providing services pursuant to a contract, by an employee, to fail to take immediate and

appropriate corrective action and to take all reasonable steps to prevent harassment based upon specified categories from occurring.

Existing law further provides that, without express restriction as to the source of the discrimination or harassment, it is an unlawful employment practice for an employer of 5 or more persons to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring.

This bill would revise the provision summarized in the first paragraph above to include harassment by any person.

The bill would state the Legislature’s intent to construe and clarify existing law and reject the interpretation given to existing law by the appellate court in Salazar v. Diversified Paratransit, Inc., a case currently being reviewed by the California Supreme Court.

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

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

16 (1) This part does not prohibit an employer from refusing to
17 hire or discharging an employee with a physical or mental
18 disability, or subject an employer to any legal liability resulting
19 from the refusal to employ or the discharge of an employee with
20 a physical or mental disability, where the employee, because of his
21 or her physical or mental disability, is unable to perform his or her
22 essential duties even with reasonable accommodations, or cannot



1 perform those duties in a manner that would not endanger his or
2 her health or safety or the health or safety of others even with
3 reasonable accommodations.

4 (2) This part does not prohibit an employer from refusing to
5 hire or discharging an employee who, because of the employee's
6 medical condition, is unable to perform his or her essential duties
7 even with reasonable accommodations, or cannot perform those
8 duties in a manner that would not endanger the employee's health
9 or safety or the health or safety of others even with reasonable
10 accommodations. Nothing in this part shall subject an employer to
11 any legal liability resulting from the refusal to employ or the
12 discharge of an employee who, because of the employee's medical
13 condition, is unable to perform his or her essential duties, or cannot
14 perform those duties in a manner that would not endanger the
15 employee's health or safety or the health or safety of others even
16 with reasonable accommodations.

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

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

23 (B) Prohibit bona fide health plans from providing additional
24 or greater benefits to employees with dependents than to those
25 employees without or with fewer dependents.

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

30 (5) Nothing in this part prohibits an employer from refusing to
31 employ an individual because of his or her age if the law compels
32 or provides for that refusal. Promotions within the existing staff,
33 hiring or promotion on the basis of experience and training,
34 rehiring on the basis of seniority and prior service with the
35 employer, or hiring under an established recruiting program from
36 high schools, colleges, universities, or trade schools do not, in and
37 of themselves, constitute unlawful employment practices.

38 (b) For a labor organization, because of the race, religious
39 creed, color, national origin, ancestry, physical disability, mental
40 disability, medical condition, marital status, sex, age, or sexual



1 orientation of any person, to exclude, expel or restrict from its
2 membership the person, or to provide only second-class or
3 segregated membership or to discriminate against any person
4 because of the race, religious creed, color, national origin,
5 ancestry, physical disability, mental disability, medical condition,
6 marital status, sex, age, or sexual orientation of the person in the
7 election of officers of the labor organization or in the selection of
8 the labor organization's staff or to discriminate in any way against
9 any of its members or against any employer or against any person
10 employed by an employer.

11 (c) For any person to discriminate against any person in the
12 selection or training of that person in any apprenticeship training
13 program or any other training program leading to employment
14 because of the race, religious creed, color, national origin,
15 ancestry, physical disability, mental disability, medical condition,
16 marital status, sex, age, or sexual orientation of the person
17 discriminated against.

18 (d) For any employer or employment agency to print or
19 circulate or cause to be printed or circulated any publication, or to
20 make any non-job-related inquiry of an employee or applicant,
21 either verbal or through use of an application form, that expresses,
22 directly or indirectly, any limitation, specification, or
23 discrimination as to race, religious creed, color, national origin,
24 ancestry, physical disability, mental disability, medical condition,
25 marital status, sex, age, or sexual orientation, or any intent to make
26 any such limitation, specification or discrimination. Nothing in
27 this part prohibits an employer or employment agency from
28 inquiring into the age of an applicant, or from specifying age
29 limitations, where the law compels or provides for that action.

30 (e) (1) Except as provided in paragraph (2) or (3), for any
31 employer or employment agency to require any medical or
32 psychological examination of an applicant, to make any medical
33 or psychological inquiry of an applicant, to make any inquiry
34 whether an applicant has a mental disability or physical disability
35 or medical condition, or to make any inquiry regarding the nature
36 or severity of a physical disability, mental disability, or medical
37 condition.

38 (2) Notwithstanding paragraph (1), an employer or
39 employment agency may inquire into the ability of an applicant to



1 perform job-related functions and may respond to an applicant's
2 request for reasonable accommodation.

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

11 (f) (1) Except as provided in paragraph (2), for any employer
12 or employment agency to require any medical or psychological
13 examination of an employee, to make any medical or
14 psychological inquiry of an employee, to make any inquiry
15 whether an employee has a mental disability, physical disability,
16 or medical condition, or to make any inquiry regarding the nature
17 or severity of a physical disability, mental disability, or medical
18 condition.

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

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

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

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

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

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

18 (3) An employee of an entity subject to this subdivision is
19 personally liable for any harassment prohibited by this section that
20 is perpetrated by the employee, regardless of whether the
21 employer or covered entity knows or should have known of the
22 conduct and fails to take immediate and appropriate corrective
23 action.

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

32 (B) Notwithstanding subparagraph (A), for purposes of this
33 subdivision, “employer” does not include a religious association
34 or corporation not organized for private profit, except as provided
35 in Section 12926.2.

36 (C) For purposes of this subdivision, “harassment” because of
37 sex includes sexual harassment, gender harassment, and
38 harassment based on pregnancy, childbirth, or related medical
39 conditions.



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

4 (A) The person has the right to control the performance of the
5 contract for services and discretion as to the manner of
6 performance.

7 (B) The person is customarily engaged in an independently
8 established business.

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

13 (k) For an employer, labor organization, employment agency,
14 apprenticeship training program, or any training program leading
15 to employment, to fail to take all reasonable steps necessary to
16 prevent discrimination and harassment from occurring.

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

38 (m) For an employer or other entity covered by this part to fail
39 to make reasonable accommodation for the known physical or
40 mental disability of an applicant or employee. Nothing in this



1 subdivision or in paragraph (1) or (2) of subdivision (a) shall be
2 construed to require an accommodation that is demonstrated by the
3 employer or other covered entity to produce undue hardship to its
4 operation.

5 (n) For an employer or other entity covered by this part to fail
6 to engage in a timely, good faith, interactive process with the
7 employee or applicant to determine effective reasonable
8 accommodations, if any, in response to a request for reasonable
9 accommodation by an employee or applicant with a known
10 physical or mental disability or known medical condition.

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

14 *SEC. 2. It is the intent of the Legislature in enacting this act*
15 *to construe and clarify the meaning and effect of existing law and*
16 *to reject the interpretation given to the law in Salazar v. Diversified*
17 *Paratransit, Inc. (2002) 103 Cal.App.4th 131.*

