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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 nonemployees if the employer knows or should have known of the incident and fails to take corrective action.

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



1 disability, or subject an employer to any legal liability resulting
2 from the refusal to employ or the discharge of an employee with
3 a physical or mental disability, where the employee, because of his
4 or her physical or mental disability, is unable to perform his or her
5 essential duties even with reasonable accommodations, or cannot
6 perform those duties in a manner that would not endanger his or
7 her health or safety or the health or safety of others even with
8 reasonable accommodations.

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

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

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

28 (B) Prohibit bona fide health plans from providing additional
29 or greater benefits to employees with dependents than to those
30 employees without or with fewer dependents.

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

35 (5) Nothing in this part prohibits an employer from refusing to
36 employ an individual because of his or her age if the law compels
37 or provides for that refusal. Promotions within the existing staff,
38 hiring or promotion on the basis of experience and training,
39 rehiring on the basis of seniority and prior service with the
40 employer, or hiring under an established recruiting program from



1 high schools, colleges, universities, or trade schools do not, in and
2 of themselves, constitute unlawful employment practices.

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

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

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

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



1 or severity of a physical disability, mental disability, or medical
2 condition.

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

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

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

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

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

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



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

4 (j) (1) For an employer, labor organization, employment
5 agency, apprenticeship training program or any training program
6 leading to employment, or any other person, because of race,
7 religious creed, color, national origin, ancestry, physical disability,
8 mental disability, medical condition, marital status, sex, age, or
9 sexual orientation, to harass an employee, an applicant, or a person
10 providing services pursuant to a contract. Harassment of an
11 employee, an applicant, or a person providing services pursuant to
12 a contract by an employee, other than an agent or supervisor, shall
13 be unlawful if the entity, or its agents or supervisors, knows or
14 should have known of this conduct and fails to take immediate and
15 appropriate corrective action. An employer may also be
16 responsible for the acts of nonemployees, with respect to
17 harassment of employees, applicants, or persons providing
18 services pursuant to a contract in the workplace, where the
19 employer, or its agents or supervisors, knows or should have
20 known of the conduct and fails to take immediate and appropriate
21 corrective action. In reviewing cases involving the acts of
22 nonemployees, ~~the trier of fact shall consider~~ the extent of the
23 employer's control and any other legal responsibility which the
24 employer may have with respect to the conduct of those
25 nonemployees *shall be considered*. An entity shall take all
26 reasonable steps to prevent harassment from occurring. Loss of
27 tangible job benefits shall not be necessary in order to establish
28 harassment.

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

32 (3) An employee of an entity subject to this subdivision is
33 personally liable for any harassment prohibited by this section that
34 is perpetrated by the employee, regardless of whether the
35 employer or covered entity knows or should have known of the
36 conduct and fails to take immediate and appropriate corrective
37 action.

38 (4) (A) For purposes of this subdivision only, "employer"
39 means any person regularly employing one or more persons or
40 regularly receiving the services of one or more persons providing



1 services pursuant to a contract, or any person acting as an agent of
2 an employer, directly or indirectly, the state, or any political or
3 civil subdivision of the state, and cities. The definition of
4 “employer” in subdivision (d) of Section 12926 applies to all
5 provisions of this section other than this subdivision.

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

10 (C) For purposes of this subdivision, “harassment” because of
11 sex includes sexual harassment, gender harassment, and
12 harassment based on pregnancy, childbirth, or related medical
13 conditions.

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

17 (A) The person has the right to control the performance of the
18 contract for services and discretion as to the manner of
19 performance.

20 (B) The person is customarily engaged in an independently
21 established business.

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

26 (k) For an employer, labor organization, employment agency,
27 apprenticeship training program, or any training program leading
28 to employment, to fail to take all reasonable steps necessary to
29 prevent discrimination and harassment from occurring.

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



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

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

18 (n) For an employer or other entity covered by this part to fail
19 to engage in a timely, good faith, interactive process with the
20 employee or applicant to determine effective reasonable
21 accommodations, if any, in response to a request for reasonable
22 accommodation by an employee or applicant with a known
23 physical or mental disability or known medical condition.

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

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

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