

ASSEMBLY BILL

No. 2889

Introduced by Assembly Member Laird

February 20, 2004

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

LEGISLATIVE COUNSEL'S DIGEST

AB 2889, as introduced, Laird. Employment discrimination.

Existing law makes it an unlawful employment practice for an employer to harass or discriminate against an employee because of the employee's race, religious creed, color, national origin, ancestry, physical or mental disability, medical condition, marital status, sex, age, or sexual orientation. Existing law further makes employers responsible for the acts of nonemployees with respect to sexual harassment in the workplace where the employer or its agents or supervisors knew or should have known of the conduct and failed to take immediate and appropriate corrective action.

This bill would make employers responsible for the acts of nonemployees with respect to all forms of harassment in the workplace where the employer or its agents or supervisors knew or should have known of the conduct and failed to take immediate and appropriate corrective action.

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

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

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

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

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

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

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

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

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

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

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

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

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

(c) For any person to discriminate against any person in the selection or training of that person in any apprenticeship training program or any other training program leading to employment because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition,

1 marital status, sex, age, or sexual orientation of the person
2 discriminated against.

3 (d) For any employer or employment agency to print or
4 circulate or cause to be printed or circulated any publication, or to
5 make any non-job-related inquiry of an employee or applicant,
6 either verbal or through use of an application form, that expresses,
7 directly or indirectly, any limitation, specification, or
8 discrimination as to race, religious creed, color, national origin,
9 ancestry, physical disability, mental disability, medical condition,
10 marital status, sex, age, or sexual orientation, or any intent to make
11 any such limitation, specification or discrimination. Nothing in
12 this part prohibits an employer or employment agency from
13 inquiring into the age of an applicant, or from specifying age
14 limitations, where the law compels or provides for that action.

15 (e) (1) Except as provided in paragraph (2) or (3), for any
16 employer or employment agency to require any medical or
17 psychological examination of an applicant, to make any medical
18 or psychological inquiry of an applicant, to make any inquiry
19 whether an applicant has a mental disability or 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 inquire into the ability of an applicant to
25 perform job-related functions and may respond to an applicant's
26 request for reasonable accommodation.

27 (3) Notwithstanding paragraph (1), an employer or
28 employment agency may require a medical or psychological
29 examination or make a medical or psychological inquiry of a job
30 applicant after an employment offer has been made but prior to the
31 commencement of employment duties, provided that the
32 examination or inquiry is job-related and consistent with business
33 necessity and that all entering employees in the same job
34 classification are subject to the same examination or inquiry.

35 (f) (1) Except as provided in paragraph (2), for any employer
36 or employment agency to require any medical or psychological
37 examination of an employee, to make any medical or
38 psychological inquiry of an employee, to make any inquiry
39 whether an employee has a mental disability, 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 require any examinations or inquiries
5 that it can show to be job-related and consistent with business
6 necessity. An employer or employment agency may conduct
7 voluntary medical examinations, including voluntary medical
8 histories, which are part of an employee health program available
9 to employees at that worksite.

10 (g) For any employer, labor organization, or employment
11 agency to harass, discharge, expel, or otherwise discriminate
12 against any person because the person has made a report pursuant
13 to Section 11161.8 of the Penal Code that prohibits retaliation
14 against hospital employees who report suspected patient abuse by
15 health facilities or community care facilities.

16 (h) For any employer, labor organization, employment agency,
17 or person to discharge, expel, or otherwise discriminate against
18 any person because the person has opposed any practices
19 forbidden under this part or because the person has filed a
20 complaint, testified, or assisted in any proceeding under this part.

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

24 (j) (1) For an employer, labor organization, employment
25 agency, apprenticeship training program or any training program
26 leading to employment, or any other person, because of race,
27 religious creed, color, national origin, ancestry, physical disability,
28 mental disability, medical condition, marital status, sex, age, or
29 sexual orientation, to harass an employee, an applicant, or a person
30 providing services pursuant to a contract. Harassment of an
31 employee, an applicant, or a person providing services pursuant to
32 a contract by an employee, other than an agent or supervisor, shall
33 be unlawful if the entity, or its agents or supervisors, knows or
34 should have known of this conduct and fails to take immediate and
35 appropriate corrective action. An employer may also be
36 responsible for the acts of nonemployees, with respect to ~~sexual~~
37 harassment of employees, applicants, or persons providing
38 services pursuant to a contract in the workplace, where the
39 employer, or its agents or supervisors, knows or should have
40 known of the conduct and fails to take immediate and appropriate

1 corrective action. In reviewing cases involving the acts of
2 nonemployees, the extent of the employer's control and any other
3 legal responsibility which the employer may have with respect to
4 the conduct of those nonemployees shall be considered. An entity
5 shall take all reasonable steps to prevent harassment from
6 occurring. Loss of tangible job benefits shall not be necessary in
7 order to establish harassment.

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

11 (3) An employee of an entity subject to this subdivision is
12 personally liable for any harassment prohibited by this section that
13 is perpetrated by the employee, regardless of whether the
14 employer or covered entity knows or should have known of the
15 conduct and fails to take immediate and appropriate corrective
16 action.

17 (4) (A) For purposes of this subdivision only, "employer"
18 means any person regularly employing one or more persons or
19 regularly receiving the services of one or more persons providing
20 services pursuant to a contract, or any person acting as an agent of
21 an employer, directly or indirectly, the state, or any political or
22 civil subdivision of the state, and cities. The definition of
23 "employer" in subdivision (d) of Section 12926 applies to all
24 provisions of this section other than this subdivision.

25 (B) Notwithstanding subparagraph (A), for purposes of this
26 subdivision, "employer" does not include a religious association
27 or corporation not organized for private profit, except as provided
28 in Section 12926.2.

29 (C) For purposes of this subdivision, "harassment" because of
30 sex includes sexual harassment, gender harassment, and
31 harassment based on pregnancy, childbirth, or related medical
32 conditions.

33 (5) For purposes of this subdivision, "a person providing
34 services pursuant to a contract" means a person who meets all of
35 the following criteria:

36 (A) The person has the right to control the performance of the
37 contract for services and discretion as to the manner of
38 performance.

39 (B) The person is customarily engaged in an independently
40 established business.

1 (C) The person has control over the time and place the work is
2 performed, supplies the tools and instruments used in the work,
3 and performs work that requires a particular skill not ordinarily
4 used in the course of the employer's work.

5 (k) For an employer, labor organization, employment agency,
6 apprenticeship training program, or any training program leading
7 to employment, to fail to take all reasonable steps necessary to
8 prevent discrimination and harassment from occurring.

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

30 (m) For an employer or other entity covered by this part to fail
31 to make reasonable accommodation for the known physical or
32 mental disability of an applicant or employee. Nothing in this
33 subdivision or in paragraph (1) or (2) of subdivision (a) shall be
34 construed to require an accommodation that is demonstrated by the
35 employer or other covered entity to produce undue hardship to its
36 operation.

37 (n) For an employer or other entity covered by this part to fail
38 to engage in a timely, good faith, interactive process with the
39 employee or applicant to determine effective reasonable
40 accommodations, if any, in response to a request for reasonable

- 1 accommodation by an employee or applicant with a known
- 2 physical or mental disability or known medical condition.
- 3 (o) For an employer or other entity covered by this part, to
- 4 subject, directly or indirectly, any employee, applicant, or other
- 5 person to a test for the presence of a genetic characteristic.

