

AMENDED IN ASSEMBLY APRIL 4, 2000

CALIFORNIA LEGISLATURE—1999–2000 REGULAR SESSION

ASSEMBLY BILL

No. 2142

Introduced by Assembly Member Keeley

February 23, 2000

An act to amend Section 12926 of the Government Code, relating to discrimination.

LEGISLATIVE COUNSEL'S DIGEST

AB 2142, as amended, Keeley. Employment *and housing* discrimination: gender ~~identity~~.

Under the California Fair Employment and Housing Act, it is unlawful to engage in specified discriminatory employment practices, including hiring, promotion, and termination on the basis of sex. Existing provisions of the act also make it unlawful to engage in specified discriminatory practices in housing accommodations on the basis of sex. Under existing law, "sex," for purposes of the act, includes pregnancy, child birth, and related medical conditions.

This bill would provide that, for the purposes of the act, "sex" also includes ~~"gender," as defined for purposes of certain provisions of the Penal Code, including provisions specifying gender-related criminal offenses and penalty enhancements,~~ "gender." *The bill would define "gender" for this purpose to mean the victim's, in the context of the act's antidiscrimination provisions, a person's actual sex or the defendant's perception of the victim's a person's identity, appearance, or behavior, regardless of whether different from*

that traditionally associated with the ~~victim's~~ *person's* sex at birth.

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 12926 of the Government Code
2 is amended to read:

3 12926. As used in this part in connection with
4 unlawful practices, unless a different meaning clearly
5 appears from the context:

6 (a) “Affirmative relief” or “prospective relief”
7 includes the authority to order reinstatement of an
8 employee, awards of backpay, reimbursement of
9 out-of-pocket expenses, hiring, transfers, reassignments,
10 grants of tenure, promotions, cease and desist orders,
11 posting of notices, training of personnel, testing,
12 expunging of records, reporting of records, and any other
13 similar relief that is intended to correct unlawful
14 practices under this part.

15 (b) “Age” refers to the chronological age of any
16 individual who has reached his or her 40th birthday.

17 (c) “Employee” does not include any individual
18 employed by his or her parents, spouse, or child, or any
19 individual employed under a special license in a nonprofit
20 sheltered workshop or rehabilitation facility.

21 (d) “Employer” includes any person regularly
22 employing five or more persons, or any person acting as
23 an agent of an employer, directly or indirectly, the state
24 or any political or civil subdivision of the state, and cities,
25 except as follows:

26 “Employer” does not include a religious association or
27 corporation not organized for private profit.

28 (e) “Employment agency” includes any person
29 undertaking for compensation to procure employees or
30 opportunities to work.

31 (f) “Essential functions” means the fundamental job
32 duties of the employment position the individual with a



1 disability holds or desires. “Essential functions” does not
2 include the marginal functions of the position.

3 (1) A job function may be considered essential for any
4 of several reasons, including, but not limited to, any one
5 or more of the following:

6 (A) The function may be essential because the reason
7 the position exists is to perform that function.

8 (B) The function may be essential because of the
9 limited number of employees available among whom the
10 performance of that job function can be distributed.

11 (C) The function may be highly specialized, so that the
12 incumbent in the position is hired for his or her expertise
13 or ability to perform the particular function.

14 (2) Evidence of whether a particular function is
15 essential includes, but is not limited to, the following:

16 (A) The employer’s judgment as to which functions
17 are essential.

18 (B) Written job descriptions prepared before
19 advertising or interviewing applicants for the job.

20 (C) The amount of time spent on the job performing
21 the function.

22 (D) The consequences of not requiring the incumbent
23 to perform the function.

24 (E) The terms of a collective bargaining agreement.

25 (F) The work experiences of past incumbents in the
26 job.

27 (G) The current work experience of incumbents in
28 similar jobs.

29 (g) “Labor organization” includes any organization
30 that exists and is constituted for the purpose, in whole or
31 in part, of collective bargaining or of dealing with
32 employers concerning grievances, terms or conditions of
33 employment, or of other mutual aid or protection.

34 (h) “Medical condition” includes either of the
35 following:

36 (1) Any health impairment related to or associated
37 with a diagnosis of cancer, for which a person has been
38 rehabilitated or cured, based on competent medical
39 evidence.



1 (2) Genetic characteristics. For purposes of this
2 section, “genetic characteristics” means either of the
3 following:

4 (A) Any scientifically or medically identifiable gene or
5 chromosome, or combination or alteration thereof, that
6 is known to be a cause of a disease or disorder in a person
7 or his or her offspring, or that is determined to be
8 associated with a statistically increased risk of
9 development of a disease or disorder, and that is presently
10 not associated with any symptoms of any disease or
11 disorder.

12 (B) Inherited characteristics that may derive from the
13 individual or family member, that are known to be a
14 cause of a disease or disorder in a person or his or her
15 offspring, or that are determined to be associated with a
16 statistically increased risk of development of a disease or
17 disorder, and that are presently not associated with any
18 symptoms of any disease or disorder.

19 (i) “Mental disability” includes any mental or
20 psychological disorder, such as mental retardation,
21 organic brain syndrome, emotional or mental illness, and
22 specific learning disabilities. However, “mental
23 disability” does not include conditions excluded from the
24 federal definition of “disability” pursuant to Section 511
25 of the Americans with Disabilities Act of 1990 (42 U.S.C.
26 Sec. 12211). Additionally, for purposes of this part, the
27 unlawful use of controlled substances or other drugs shall
28 not be deemed, in and of itself, to constitute a mental
29 disability.

30 (j) “On the bases enumerated in this part” means or
31 refers to discrimination on the basis of one or more of the
32 following: race, religious creed, color, national origin,
33 ancestry, physical disability, mental disability, medical
34 condition, marital status, sex, age, or sexual orientation.

35 (k) “Physical disability” includes, but is not limited to,
36 all of the following:

37 (1) Having any physiological disease, disorder,
38 condition, cosmetic disfigurement, or anatomical loss that
39 does both of the following:



1 (A) Affects one or more of the following body systems:
2 neurological, immunological, musculoskeletal, special
3 sense organs, respiratory, including speech organs,
4 cardiovascular, reproductive, digestive, genitourinary,
5 hemic and lymphatic, skin, and endocrine.

6 (B) Limits an individual's ability to participate in
7 major life activities.

8 (2) Any other health impairment not described in
9 paragraph (1) that requires special education or related
10 services.

11 (3) Being regarded as having or having had a disease,
12 disorder, condition, cosmetic disfigurement, anatomical
13 loss, or health impairment described in paragraph (1) or
14 (2).

15 (4) Being regarded as having, or having had, a disease,
16 disorder, condition, cosmetic disfigurement, anatomical
17 loss, or health impairment that has no present disabling
18 effect but may become a physical disability as described
19 in paragraph (1) or (2).

20 It is the intent of the Legislature that the definition of
21 "physical disability" in this subdivision shall have the
22 same meaning as the term "physical handicap" formerly
23 defined by this subdivision and construed in American
24 National Ins. Co. v. Fair Employment & Housing Com.
25 (1982) 32 Cal.3d 603. However, "physical disability" does
26 not include conditions excluded from the federal
27 definition of "disability" pursuant to Section 511 of the
28 Americans with Disabilities Act of 1990 (42 U.S.C. Sec.
29 12211). Additionally, for purposes of this part, the
30 unlawful use of controlled substances or other drugs shall
31 not be deemed, in and of itself, to constitute a physical
32 disability.

33 (l) Notwithstanding subdivisions (i) and (k), if the
34 definition of "disability" used in the Americans with
35 Disabilities Act of 1990 (P.L. 101-336) would result in
36 broader protection of the civil rights of individuals with
37 a mental disability or physical disability, as defined in
38 subdivision (i) or (k), or would include any medical
39 condition not included within those definitions, then that
40 broader protection or coverage shall be deemed



1 incorporated by reference into, and shall prevail over
2 conflicting provisions of, the definitions in subdivisions
3 (i) and (k).

4 (m) “Race, religious creed, color, national origin,
5 ancestry, physical disability, mental disability, medical
6 condition, marital status, sex, age, or sexual orientation”
7 includes a perception that the person has any of those
8 characteristics or that the person is associated with a
9 person who has, or is perceived to have, any of those
10 characteristics.

11 (n) “Reasonable accommodation” may include either
12 of the following:

13 (1) Making existing facilities used by employees
14 readily accessible to, and usable by, individuals with
15 disabilities.

16 (2) Job restructuring, part-time or modified work
17 schedules, reassignment to a vacant position, acquisition
18 or modification of equipment or devices, adjustment or
19 modifications of examinations, training materials or
20 policies, the provision of qualified readers or interpreters,
21 and other similar accommodations for individuals with
22 disabilities.

23 (o) “Religious creed,” “religion,” “religious
24 observance,” “religious belief,” and “creed” include all
25 aspects of religious belief, observance, and practice.

26 (p) “Sex” includes, but is not limited to, pregnancy,
27 childbirth, *or* medical conditions related to pregnancy or
28 childbirth, ~~and~~. *“Sex” also includes, but is not limited to,*
29 *a person’s gender, as defined in Section 422.76 of the*
30 *Penal Code, except that the references in that definition*
31 *to the “victim” and “defendant” shall, for purposes of this*
32 *part, be deemed to refer respectively to the victim of a*
33 *discriminatory act prohibited by this part and the person*
34 *engaging in that prohibited conduct.*

35 (q) “Sexual orientation” means heterosexuality,
36 homosexuality, and bisexuality.

37 (r) “Supervisor” means any individual having the
38 authority, in the interest of the employer, to hire,
39 transfer, suspend, lay off, recall, promote, discharge,
40 assign, reward, or discipline other employees, or the



1 responsibility to direct them, or to adjust their grievances,
2 or effectively to recommend that action, if, in connection
3 with the foregoing, the exercise of that authority is not of
4 a merely routine or clerical nature, but requires the use
5 of independent judgment.

6 (s) “Undue hardship” means an action requiring
7 significant difficulty or expense, when considered in light
8 of the following factors: (1) the nature and cost of the
9 accommodation needed, (2) the overall financial
10 resources of the facilities involved in the provision of the
11 reasonable accommodations, the number of persons
12 employed at the facility, and the effect on expenses and
13 resources or the impact otherwise of these
14 accommodations upon the operation of the facility, (3)
15 the overall financial resources of the covered entity, the
16 overall size of the business of a covered entity with
17 respect to the number of employees, and the number,
18 type, and location of its facilities, (4) the type of
19 operations, including the composition, structure, and
20 functions of the work force of the entity, and (5) the
21 geographic separateness, administrative, or fiscal
22 relationship of the facility or facilities.

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