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## INVITATION TO COMMENT

### CAI13-02

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Title	Action Requested
Civil Jury Instructions (CAI) Revisions	Review and submit comments by April 5, 2013
Proposed Rules, Forms, Standards, or Statutes	Proposed Effective Date
Revise civil jury instructions	June 28, 2013
Proposed by	Contact
Advisory Committee on Civil Jury Instructions	Bruce Greenlee, Attorney, 415-865-7698
Hon. H. Walter Croskey, Chair	<a href="mailto:bruce.greenlee@jud.ca.gov">bruce.greenlee@jud.ca.gov</a>

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### Executive Summary and Origin

The Judicial Council Advisory Committee on Civil Jury Instructions has posted proposed revisions to the Judicial Council civil jury instructions (CAI) based on the recent California Supreme Court case of *Harris v. City of Santa Monica* (S181004) 2013 Cal. LEXIS 941. Under Rule 10.58 of the California Rules of Court, the advisory committee is responsible for regularly reviewing case law and statutes affecting jury instructions and making recommendations to the Judicial Council for updating, revising, and adding topics to the council's civil jury instructions.

At this time, the committee proposes revising only those current instructions and verdict forms that are affected by *Harris*. Possible new instructions and verdict forms based on *Harris* will be considered in the next release cycle.

A petition for rehearing in *Harris* has been filed. Should rehearing be granted, the committee will withdraw this proposal to await the results of rehearing.

The committee also proposes revoking CAI No. 2441, *False Claims Act: Whistleblower Protection—Essential Factual Elements* (Gov. Code, § 12653), because the legislature has revised Government Code section 12653 in ways that make the current instruction no longer completely accurate. (See Stats 2012 ch 647 § 5 (AB 2492).) The committee will consider whether to revise and restore this instruction in the next release cycle.

Some of these same instructions and verdict forms have proposed changes for reasons other than *Harris*. These changes were previously posted for public comment in Invitation to Comment CAI13-01, for which the comment period ended on March, 1, 2013. Any comments that were previously submitted on these other proposed changes need not be resubmitted. If rehearing is

*The proposals have not been approved by the Judicial Council and are not intended to represent the views of the council, its Rules and Projects Committee, or its Policy Coordination and Liaison Committee. These proposals are circulated for comment purposes only.*

granted in *Harris*, the committee will still consider and possibly present these other proposed changes to the Judicial Council for approval and adoption.

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**2430. Wrongful Discharge/~~Demotion~~ in Violation of Public Policy—Essential Factual Elements**

[Name of plaintiff] claims [he/she] was [~~discharged/demoted~~] from employment for reasons that violate a public policy. It is a violation of public policy to discharge someone from employment for [specify claim in case, e.g., refusing to engage in price fixing]. To establish this claim, [name of plaintiff] must prove all of the following:

1. That [name of plaintiff] was employed by [name of defendant];
2. That [name of defendant] [~~discharged/demoted~~] [name of plaintiff];
3. That [insert alleged violation of public policy, e.g., “[name of plaintiff]’s refusal to engage in price fixing”] was a **substantial** motivating reason for [name of plaintiff]’s [~~discharge/demotion~~]; and
4. That the [~~discharge/demotion~~] caused [name of plaintiff] harm.

*New September 2003; Revised June 2013*

**Directions for Use**

The judge should determine whether the purported reason for firing the plaintiff would amount to a violation of public policy. The jury should then be instructed that the alleged conduct would constitute a public-policy violation if proved.

Note that this instruction uses the term “substantial motivating reason” to express causation between the public policy and the discharge (see element 3). “Substantial motivating reason” has been held to be the appropriate standard under the Fair Employment and Housing Act to address the possibility of both discriminatory and nondiscriminatory motives. (See *Harris v. City of Santa Monica* (2013) – Cal.4th --, -- [-- Cal.Rptr.3d --, -- P.3d --]; CACI No. 2507, “Substantial Motivating Reason” Explained.) 2013 Cal. LEXIS 941 Whether the FEHA standard applies to cases alleging a violation of public policy has not been addressed by the courts.

This instruction must be supplemented with CACI No. 2433, *Wrongful Discharge in Violation of Public Policy—Damages*. If plaintiff alleges he or she was forced or coerced to resign, then CACI No. 2431, *Constructive Discharge in Violation of Public Policy—Plaintiff Required to Violate Public Policy*, or CACI No. 2432, *Constructive Discharge in Violation of Public Policy—Plaintiff Required to Endure Intolerable Conditions for Improper Purpose That Violates Public Policy*, should be given instead. See also CACI No. 2510, “Constructive Discharge” Explained.

This instruction may be modified for adverse employment actions other than discharge, for example demotion, if done in violation of public policy. (See *Garcia v. Rockwell Internat. Corp.* (1986) 187 Cal.App.3d 1556, 1561 [232 Cal.Rptr. 490], disapproved on other grounds in *Gantt v. Sentry Ins.* (1992) 1 Cal.4th 1083, 1093 [4 Cal. Rptr. 2d 874, 824 P.2d 680] [public policy forbids retaliatory action taken

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by employer against employee who discloses information regarding employer's violation of law to government agency].) See also CACI No. 2509, “*Adverse Employment Action*” Explained. ~~The California Supreme Court has extended employment claims to encompass demotions or other similar employment decisions. (See *Scott v. Pac. Gas & Elec. Co.* (1995) 11 Cal.4th 454, 473–474 [46 Cal.Rptr.2d 427, 904 P.2d 834].) The bracketed language regarding an alleged wrongful demotion may be given, depending on the facts of the case, or other appropriate language for other similar employment decisions.~~

### Sources and Authority

- “[W]hile an at-will employee may be terminated for no reason, or for an arbitrary or irrational reason, there can be no right to terminate for an unlawful reason or a purpose that contravenes fundamental public policy. Any other conclusion would sanction lawlessness, which courts by their very nature are bound to oppose.” (*Casella v. SouthWest Dealer Services, Inc.* (2007) 157 Cal.App.4th 1127, 1138–1139 [69 Cal.Rptr.3d 445], internal citations omitted.)
- “[W]hen an employer’s discharge of an employee violates fundamental principles of public policy, the discharged employee may maintain a tort action and recover damages traditionally available in such actions.” (*Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 170 [164 Cal.Rptr. 839, 610 P.2d 1330].)
- “[T]his court established a set of requirements that a policy must satisfy to support a tortious discharge claim. First, the policy must be supported by either constitutional or statutory provisions. Second, the policy must be ‘public’ in the sense that it ‘inures to the benefit of the public’ rather than serving merely the interests of the individual. Third, the policy must have been articulated at the time of the discharge. Fourth, the policy must be ‘fundamental’ and ‘substantial.’ ” (*Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 889-890 [66 Cal.Rptr.2d 888, 941 P.2d 1157], footnote omitted.)
- “[T]he cases in which violations of public policy are found generally fall into four categories: (1) refusing to violate a statute; (2) performing a statutory obligation (3) exercising a statutory right or privilege; and (4) reporting an alleged violation of a statute of public importance.” (*Gantt, supra*, ~~↗: *Sentry Insurance* (1992) 1 Cal.4th at pp.1083, 1090-1091 [4 Cal.Rptr.2d 874, 824 P.2d 680]~~, internal citations and footnote omitted, overruled on other grounds in *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 80, fn. 6 [78 Cal.Rptr.2d 16, 960 P.2d 1046]; accord *Stevenson, supra*, 16 Cal.4th at p. 889.)
- “[Discharge because of employee’s] [r]efusal to violate a governmental regulation may also be the basis for a tort cause of action where the administrative regulation enunciates a fundamental public policy and is authorized by statute.” (*Scott v. Phoenix Schools, Inc.* (2009) 175 Cal.App.4th 702, 708–709 [96 Cal.Rptr.3d 159].)
- “In the context of a tort claim for wrongful discharge, tethering public policy to specific constitutional or statutory provisions serves not only to avoid judicial interference with the legislative domain, but also to ensure that employers have adequate notice of the conduct that will subject them to tort liability to the employees they discharge ... .” (*Stevenson, supra*, 16 Cal.4th at p. 889.)

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- “[A]n employee need not prove an actual violation of law; it suffices if the employer fired him for reporting his ‘reasonably based suspicions’ of illegal activity.” (*Green, supra*, 19 Cal.4th at p. 87, internal citation omitted.)
- “[A]n employer’s authority over its employee does not include the right to demand that the employee commit a criminal act to further its interests, and an employer may not coerce compliance with such unlawful directions by discharging an employee who refuses to follow such an order ... .” (*Tameny, supra*, 27 Cal.3d at p. 178.)
- Employees in both the private and public sector may assert this claim. (*See Shoemaker v. Myers* (1992) 2 Cal.App.4th 1407 [4 Cal.Rptr.2d 203].)
- “Sex discrimination in employment may support a claim of tortious discharge in violation of public policy.” (*Kelley v. The Conco Cos.* (2011) 196 Cal.App.4th 191, 214 [126 Cal.Rptr.3d 651].)
- “That [defendant]’s decision not to renew her contract for an additional season *might* have been influenced by her complaints about an unsafe working condition ... does not change our conclusion in light of the principle that a decision not to renew a contract set to expire is not actionable in tort.” (*Touchstone Television Productions v. Superior Court* (2012) 208 Cal.App.4th 676, 682 [145 Cal.Rptr.3d 766], original italics.)
- “ ‘ “[P]ublic policy’ as a concept is notoriously resistant to precise definition, and ... courts should venture into this area, if at all, with great care ... .” [Citation.] Therefore, *when the constitutional provision or statute articulating a public policy also includes certain substantive limitations in scope or remedy, these limitations also circumscribe the common law wrongful discharge cause of action. Stated another way, the common law cause of action cannot be broader than the constitutional provision or statute on which it depends, and therefore it ‘presents no impediment to employers that operate within the bounds of law.’ [Citation.]’* ” (*Dutra v. Mercy Medical Center Mt. Shasta* (2012) 209 Cal.App.4th 750, 756 [146 Cal.Rptr.3d 922], original italics.)

### Secondary Sources

Chin et al., Cal. Practice Guide: Employment Litigation, Ch. 5-A, *Wrongful Discharge In Violation Of Public Policy (Tameny Claims)*, ¶¶ 5:2, 5:47, 5:50, 5:70, 5:105, 5:115, 5:150, 5:151, 5:170, 5:195, 5:220, 5:235 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Public Policy Violations, § 5.45

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.04 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.12, 249.50–249.52 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, §§ 100.52–100.58 (Matthew Bender)

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California Civil Practice: Employment Litigation §§ 6:23–6:25 (Thomson Reuters West)

**Revoked (See Stats 2012 ch 647 § 5 (AB 2492) May be revised and restored in the next release cycle. 2440. False Claims Act: Whistleblower Protection—Essential Factual Elements (Gov. Code, § 12653)**

~~[Name of plaintiff] claims that [name of defendant] discharged [him/her] because [he/she] [acted in furtherance of a false claims action/disclosed information to a [government/law enforcement] agency concerning a false claim]. A false claims action is a lawsuit against a person or entity who is alleged to have submitted a false claim to a government agency for payment or approval. In order to establish [his/her] unlawful discharge claim, [name of plaintiff] must prove all of the following:~~

- ~~1. That [name of plaintiff] was an employee of [name of defendant];~~
- ~~2. That [name of false claimant] was [under investigation for/charged with/[other]] defrauding the government of money, property, or services by submitting a false or fraudulent claim to the government for payment or approval;~~
- ~~3. That [name of plaintiff] [specify disclosures or acts done in furthering the false claims action];~~
- ~~4. That [name of plaintiff]’s acts were [a disclosure to a [government/law enforcement] agency/in furtherance of a false claims action];~~
- ~~5. That [name of defendant] discharged [name of plaintiff];~~
- ~~6. That [name of plaintiff]’s acts [of disclosure/in furtherance of a false claims action] were a motivating reason for [name of defendant]’s decision to discharge [him/her];~~
- ~~7. That [name of plaintiff] was harmed; and~~
- ~~8. That [name of defendant]’s conduct was a substantial factor in causing [name of plaintiff]’s harm.~~

~~[An act is “in furtherance of” a false claims action if~~

~~[[name of plaintiff] actually filed a false claims action [himself/herself].]~~

~~[or]~~

~~[someone else filed a false claims action but [name of plaintiff] [specify acts in support of action, e.g., gave a deposition in the action], which resulted in the retaliatory acts.]~~

~~[or]~~

~~[no false claims action was ever actually filed, but [name of plaintiff] had reasonable suspicions of a false claim, and it was reasonably possible for [name of plaintiff]’s conduct to lead to a false claims action.]~~

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*New December 2012*

### **Directions for Use**

~~The whistle-blower protection statute of the False Claims Act (Gov. Code, § 12653) prohibits adverse employment actions against an employee who either (1) discloses information to a government or law enforcement agency or (2) takes steps in furtherance of a false claims action. (See Gov. Code, § 12653(b).)~~

~~The second sentence of the opening paragraph defines a false claims action in its most common form: submitting a false claim for payment. (See Gov. Code, § 12651(a)(1).) This sentence and element 2 may be modified if a different prohibited act is involved. (See Gov. Code, § 12651(a)(2)–(8).)~~

~~In element 3, specify the disclosures that the plaintiff made or the steps that the plaintiff did that are alleged to have led to the adverse action.~~

~~The statute reaches a broad range of adverse employment actions short of actual discharge. (See Gov. Code, § 12653(b).) Elements 5 and 6 may be modified to allege constructive discharge or adverse acts other than actual discharge. See CACI No. 2509, “Adverse Employment Action” Explained, and CACI No. 2510, “Constructive Discharge” Explained, for instructions under the Fair Employment and Housing Act that may be adapted for use with this instruction.~~

~~Element 6 uses “motivating reason” to express both intent and causation. See CACI No. 2507, “Motivating Reason” Explained.~~

~~Give the last part of the instruction if the claim is that the plaintiff was discharged for acting in furtherance of a false claims action.~~

~~If the defendant alleges that the plaintiff participated in conduct that directly or indirectly resulted in a false claim being submitted, an additional instruction will be required. In such a case, the plaintiff is entitled to relief only if he or she (1) voluntarily disclosed information to a government or law enforcement agency or acted in furtherance of a false claims action, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed; and (2) had been harassed, threatened with termination or demotion, or otherwise coerced by the defendant into engaging in the fraudulent activity in the first place. (Gov. Code, § 12653(d).)~~

### **Sources and Authority**

- ~~• Government Code section 12653 provides:~~

~~(a) No employer shall make, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency or from acting in furtherance of a false claims action, including investigating, initiating, testifying, or assisting in an action filed or to be filed under Section 12652.~~

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~~(b) No employer shall discharge, demote, suspend, threaten, harass, deny promotion to, or in any other manner discriminate against, an employee in the terms and conditions of employment because of lawful acts done by the employee on behalf of the employee or others in disclosing information to a government or law enforcement agency or in furthering a false claims action, including investigation for, initiation of, testimony for, or assistance in, an action filed or to be filed under Section 12652.~~

~~(c) An employer who violates subdivision (b) shall be liable for all relief necessary to make the employee whole, including reinstatement with the same seniority status that the employee would have had but for the discrimination, two times the amount of back pay, interest on the back pay, compensation for any special damage sustained as a result of the discrimination, and, where appropriate, punitive damages. In addition, the defendant shall be required to pay litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate superior court of the state for the relief provided in this subdivision.~~

~~(d) An employee who is discharged, demoted, suspended, harassed, denied promotion, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of participation in conduct which directly or indirectly resulted in a false claim being submitted to the state or a political subdivision shall be entitled to the remedies under subdivision (c) if, and only if, both of the following occur:~~

~~(1) The employee voluntarily disclosed information to a government or law enforcement agency or acted in furtherance of a false claims action, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed.~~

~~(2) The employee had been harassed, threatened with termination or demotion, or otherwise coerced by the employer or its management into engaging in the fraudulent activity in the first place.~~

- ~~• “The False Claims Act prohibits a “person” from defrauding the government of money, property, or services by submitting to the government a ‘false or fraudulent claim’ for payment.” (*Cordero-Sacks v. Housing Authority of City of Los Angeles* (2011) 200 Cal.App.4th 1267, 1273 [134 Cal.Rptr.3d 883].)~~
- ~~• “The False Claims Act bans retaliatory discharge in section 12653, which speaks not of a ‘person’ being liable for defrauding the government, but of an ‘employer’ who retaliates against an employee who assists in the investigation or pursuit of a false claim. Section 12653 has been ‘characterized as the whistleblower protection provision of the [False Claims Act and] is construed broadly.’” (*Cordero-Sacks, supra*, 200 Cal.App.4th at p. 1274.)~~
- ~~• “[T]he act's retaliation provision applies not only to qui tam actions but to false claims in general. Section 12653 makes it unlawful for an employer to retaliate against an employee who is engaged ‘in furthering a false claims action, including investigation for, initiation of, testimony for, or assistance in, an action filed or to be filed under Section 12652.’” (*Cordero-Sacks, supra*, 200 Cal.App.4th at p. 1276.)~~

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- ~~“Generally, to constitute protected activity under the CFCA, the employee's conduct must be in furtherance of a false claims action. The employee does not have to file a false claims action or show a false claim was actually made; however, the employee must have reasonably based suspicions of a false claim and it must be reasonably possible for the employee's conduct to lead to a false claims action.” (Kaye v. Board of Trustees of San Diego County Public Law Library (2009) 179 Cal.App.4th 48, 60 [101 Cal.Rptr.3d 456], internal citation omitted.)~~
- ~~“There is a dearth of California authority discussing what constitutes protected activity under the CFCA. However, because the CFCA is patterned on a similar federal statute (31 U.S.C. § 3729 et seq.), we may rely on cases interpreting the federal statute for guidance in interpreting the CFCA. (Kaye, supra, 179 Cal.App.4th at pp. 59–60.)~~

***Secondary Sources***

~~3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, § 288~~

~~5 Witkin, Summary of California Law (10th ed. 2005) Torts § 767~~

~~4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.03 (Matthew Bender)~~

~~40 California Forms of Pleading and Practice, Ch. 468, *Public Entities and Officers: False Claims Actions*, § 468.25 (Matthew Bender)~~

~~10 California Points and Authorities, Ch. 100, *Public Entities and Officers: False Claims Actions*, § 100.61 (Matthew Bender)~~

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**2441. Discrimination Against Member of Military—Essential Factual Elements (Mil. & Vet. Code, § 394)**

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[Name of plaintiff] claims that [name of defendant] wrongfully discriminated against [him/her] because of [his/her] [current/past] service in the [United States/California] military. To establish this claim, [name of plaintiff] must prove all of the following:

1. That [name of plaintiff] was an employee of [name of defendant];
  2. That [name of plaintiff] [was serving/had served] in the [specify military branch, e.g., California National Guard];
  3. That [name of defendant] discharged [name of plaintiff];
  4. That [name of plaintiff]’s [[current/past] service in the armed forces/need to report for required military [duty/training]] was a **substantial** motivating reason for [name of defendant]’s decision to discharge [name of plaintiff];
  5. That [name of plaintiff] was harmed; and
  6. That [name of defendant]’s conduct was a substantial factor in causing [name of plaintiff]’s harm.
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| New December 2012; Revised June 2013

**Directions for Use**

Military and Veterans Code section 394 prohibits employment discrimination against members of the military on two grounds. First, discrimination is prohibited based simply on the plaintiff’s military membership or service. In other words, an employer, public or private, may not refuse to hire or discharge someone based on the fact that the person serves or has served in the armed forces. (Mil. & Vet. Code, § 394(a), (b).) Second, a military-member employee is protected from discharge or other adverse actions because of a requirement to participate in military duty or training. (Mil. & Vet. Code, § 394(d).) For element 4, choose the appropriate option.

The statute prohibits a refusal to hire based on military status, and also reaches a broad range of adverse employment actions short of actual discharge. (See Mil. & Vet. Code, § 394(a), (b), (d) [prohibiting prejudice, injury, harm].) Elements 1, 3, 4, and 6 may be modified to refer to seeking employment and refusal to hire. Elements 3, 4, and 6 may be modified to allege constructive discharge or adverse acts other than discharge. See CACI No. 2509, “Adverse Employment Action” Explained, and CACI No. 2510, “Constructive Discharge” Explained, for instructions under the Fair Employment and Housing Act that may be adapted for use with this instruction.

| Element 4 uses the term “substantial motivating reason” to express both intent and causation between the

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the employee’s military service and the discharge. “Substantial motivating reason” has been held to be the appropriate standard under the Fair Employment and Housing Act to address the possibility of both discriminatory and nondiscriminatory motives. (See *Harris v. City of Santa Monica* (2013) – Cal.4th --, -- [-- Cal.Rptr.3d --, -- P.3d --]; CACI No. 2507, “*Substantial Motivating Reason*” Explained.) 2013 Cal. LEXIS 941 Whether the FEHA standard applies to cases alleging military service discrimination has not been addressed by the courts.–See CACI No. 2507, “*Motivating Reason*” Explained.

**Sources and Authority**

- Military and Veterans Code section 394 provides in part:

(a) No person shall discriminate against any officer, warrant officer or enlisted member of the military or naval forces of the state or of the United States because of that membership. No member of the military forces shall be prejudiced or injured by any person, employer, or officer or agent of any corporation, company, or firm with respect to that member's employment, position or status or be denied or disqualified for employment by virtue of membership or service in the military forces of this state or of the United States.

(b) No officer or employee of the state, or of any county, city and county, municipal corporation, or district shall discriminate against any officer, warrant officer or enlisted member of the military or naval forces of the state or of the United States because of that membership. No member of the military forces shall be prejudiced or injured by any officer or employee of the state, or of any county, city and county, municipal corporation, or district with respect to that member's employment, appointment, position or status or be denied or disqualified for or discharged from that employment or position by virtue of membership or service in the military forces of this state or of the United States.

(c) [omitted]

(d) No employer or officer or agent of any corporation, company, or firm, or other person, shall discharge any person from employment because of the performance of any ordered military duty or training or by reason of being an officer, warrant officer, or enlisted member of the military or naval forces of this state, or hinder or prevent that person from performing any military service or from attending any military encampment or place of drill or instruction he or she may be called upon to perform or attend by proper authority; prejudice or harm him or her in any manner in his or her employment, position, or status by reason of performance of military service or duty or attendance at military encampments or places of drill or instruction; or dissuade, prevent, or stop any person from enlistment or accepting a warrant or commission in the California National Guard or Naval Militia by threat or injury to him or her in respect to his or her employment, position, status, trade, or business because of enlistment or acceptance of a warrant or commission.

(e)–(h) [omitted]

- “[I]ndividual employees may not be held personally liable under section 394 for alleged discriminatory acts that arise out of the performance of regular and necessary personnel

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management duties.” (*Haligowski v. Superior Court* (2011) 200 Cal.App.4th 983, 998 [134 Cal. Rptr. 3d 214].)

***Secondary Sources***

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 355, 426

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.03 (Matthew Bender)

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VF-2406. Wrongful Discharge/~~Demotion~~ in Violation of Public Policy

We answer the questions submitted to us as follows:

1. Was [name of plaintiff] employed by [name of defendant]?  
 Yes  No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was [name of plaintiff] [~~discharged/demoted~~]?  
 Yes  No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was [name of plaintiff]’s [insert alleged activity protected by public policy, e.g., “refusal to engage in price fixing”] a **substantial** motivating reason for [name of defendant]’s decision to [~~discharge/demote~~] [name of plaintiff]?  
 Yes  No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Did the [~~discharge/demotion~~] cause [name of plaintiff] harm?  
 Yes  No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. What are [name of plaintiff]’s damages?

[a. Past economic loss

[lost earnings	\$ _____]
[lost profits	\$ _____]
[medical expenses	\$ _____]
[other past economic loss	\$ _____]

Total Past Economic Damages: \$ \_\_\_\_\_]

[b. Future economic loss

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[lost earnings \$ \_\_\_\_\_]  
 [lost profits \$ \_\_\_\_\_]  
 [medical expenses \$ \_\_\_\_\_]  
 [other future economic loss \$ \_\_\_\_\_]  
 Total Future Economic Damages: \$ \_\_\_\_\_]

[c. Past noneconomic loss, including [physical  
 pain/mental suffering:] \$ \_\_\_\_\_]

[d. Future noneconomic loss, including [physical  
 pain/mental suffering:] \$ \_\_\_\_\_]

TOTAL \$ \_\_\_\_\_

Signed: \_\_\_\_\_  
 Presiding Juror

Dated: \_\_\_\_\_

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant] that you are ready to present your verdict in the courtroom.

*New September 2003; Revised April 2007, December 2010, June 2013*

### Directions for Use

~~The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.~~

This verdict form is based on CACI No. 2430, *Wrongful Discharge/Demotion in Violation of Public Policy—Essential Factual Elements*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize “economic” and “noneconomic” damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

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If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

This form may be modified if the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest on specific losses that occurred prior to judgment.

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**2500. Disparate Treatment—Essential Factual Elements (Gov. Code, § 12940(a))**

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*[Name of plaintiff]* **claims that** *[name of defendant]* **wrongfully discriminated against [him/her]. To establish this claim, [name of plaintiff] must prove all of the following:**

1. **That** *[name of defendant]* **was [an employer/[other covered entity]];**
2. **That** *[name of plaintiff]* **[was an employee of [name of defendant]/applied to [name of defendant] for a job/[describe other covered relationship to defendant]];**
3. **[That** *[name of defendant]* **[discharged/refused to hire/[other adverse employment action]] [name of plaintiff];]**

**[or]**

**[That** *[name of defendant]* **subjected [name of plaintiff] to an adverse employment action;]**

**[or]**

**[That** *[name of plaintiff]* **was constructively discharged;]**

4. **That** *[name of plaintiff]*'s *[protected status—for example, race, gender, or age]* **was a substantial motivating reason for [name of defendant]'s [decision to [discharge/refuse to hire/[other adverse employment action]] [name of plaintiff]/conduct];**
  5. **That** *[name of plaintiff]* **was harmed; and**
  6. **That** *[name of defendant]*'s **conduct was a substantial factor in causing [name of plaintiff]'s harm.**
- 

*New September 2003; Revised April 2009, June 2011, June 2012, June 2013*

**Directions for Use**

This instruction is intended for use when a plaintiff alleges disparate treatment discrimination under the FEHA against an employer or other covered entity. Disparate treatment occurs when an employer treats an individual less favorably than others because of the individual's protected status. In contrast, disparate impact (the other general theory of discrimination) occurs when an employer has an employment practice that appears neutral but has an adverse impact on members of a protected group. For disparate impact claims, see CACI No. 2502, *Disparate Impact—Essential Factual Elements*.

If element 1 is given, the court may need to instruct the jury on the statutory definition of “employer” under the FEHA. Other covered entities under the FEHA include labor organizations, employment

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agencies, and apprenticeship training programs. (See Gov. Code, § 12940(a)–(d).)

Read the first option for element 3 if there is no dispute as to whether the employer’s acts constituted an adverse employment action. Read the second option and also give CACI No. 2509, “*Adverse Employment Action*” Explained, if whether there was an adverse employment action is a question of fact for the jury. If constructive discharge is alleged, give the third option for element 3 and also give CACI No. 2510, “*Constructive Discharge*” Explained. Select “conduct” in element 4 if either the second or third option is included for element 3.

Note that there are two causation elements. There must be a causal link between the discriminatory animus and the adverse action (see element 4), and there must be a causal link between the adverse action and the damage (see element 6). (See *Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 713 [81 Cal.Rptr.3d 406].)

Element 4 requires that discrimination based on a protected classification be a substantial motivating reason for the adverse action. (See *Harris v. City of Santa Monica* (2013) – Cal.4th --, -- [– Cal.Rptr.3d --, -- P.3d --]; see also CACI No. 2507, “*Motivating Reason*” Explained.) 2013 Cal. LEXIS 941 Modify element 4 if plaintiff was not actually a member of the protected class, but alleges discrimination because he or she was perceived to be a member, or associated with someone who was or was perceived to be a member, of the protected class. (See Gov. Code, § 12926(n).)

For damages instructions, see applicable instructions on tort damages.

### Sources and Authority

- Government Code section 12940(a) provides that it is an unlawful employment practice “[f]or an employer, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, 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.”
- Government Code section 12926(n) provides: “ ‘Race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, age, or sexual orientation’ includes a perception that the person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics.”
- “[C]onceptually the theory of ‘disparate treatment’ ... is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin.” (*Mixon v. Fair Employment and Housing Com.* (1987) 192 Cal.App.3d 1306, 1317 [237 Cal.Rptr. 884], quoting *Teamsters v. United States* (1977) 431 U.S. 324, 335–336, fn. 15 [97 S.Ct. 1843, 52 L.Ed.2d 396].)
- “California has adopted the three-stage burden-shifting test for discrimination claims set forth in

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*McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 [93 S.Ct. 1817, 36 L.Ed. 2d 668]. “This so-called *McDonnell Douglas* test reflects the principle that direct evidence of intentional discrimination is rare, and that such claims must usually be proved circumstantially. Thus, by successive steps of increasingly narrow focus, the test allows discrimination to be inferred from facts that create a reasonable likelihood of bias and are not satisfactorily explained.’ ” (*Sandell v. Taylor-Listug, Inc.* (2010) 188 Cal.App.4th 297, 307 [115 Cal.Rptr.3d 453], internal citations omitted.)

- “At trial, the *McDonnell Douglas* test places on the plaintiff the initial burden to establish a prima facie case of discrimination. This step is designed to eliminate at the outset the most patently meritless claims, as where the plaintiff is not a member of the protected class or was clearly unqualified, or where the job he sought was withdrawn and never filled. While the plaintiff’s prima facie burden is ‘not onerous’, he must at least show ‘actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were ‘based on a [prohibited] discriminatory criterion . . . .’ . . .’ ” (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354–355 [100 Cal.Rptr.2d 352, 8 P.3d 1089], internal citations omitted.)
- “If, at trial, the plaintiff establishes a prima facie case, a presumption of discrimination arises. This presumption, though ‘rebuttable,’ is ‘legally mandatory.’ Thus, in a trial, ‘[i]f the trier of fact believes the plaintiff’s evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.’ [¶] Accordingly, at this trial stage, the burden shifts to the employer to rebut the presumption by producing admissible evidence, sufficient to ‘raise[] a genuine issue of fact’ and to ‘justify a judgment for the [employer],’ that its action was taken for a legitimate, nondiscriminatory reason. [¶] If the employer sustains this burden, the presumption of discrimination disappears. The plaintiff must then have the opportunity to attack the employer’s proffered reasons as pretexts for discrimination, or to offer any other evidence of discriminatory motive. In an appropriate case, evidence of dishonest reasons, considered together with the elements of the prima facie case, may permit a finding of prohibited bias. The ultimate burden of persuasion on the issue of actual discrimination remains with the plaintiff.” (*Guz, supra*, 24 Cal.4th at pp. 355–356, internal citations omitted.)
- “[W]hether or not a plaintiff has met his or her prima facie burden [under *McDonnell Douglas Corp., supra*, 411 U.S. 792], and whether or not the defendant has rebutted the plaintiff’s prima facie showing, are questions of law for the trial court, not questions of fact for the jury.” (*Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 201 [48 Cal.Rptr.2d 448].)
- “To succeed on a disparate treatment claim at trial, the plaintiff has the initial burden of establishing a prima facie case of discrimination, to wit, a set of circumstances that, if unexplained, permit an inference that it is more likely than not the employer intentionally treated the employee less favorably than others on prohibited grounds. Based on the inherent difficulties of showing intentional discrimination, courts have generally adopted a multifactor test to determine if a plaintiff was subject to disparate treatment. The plaintiff must generally show that: he or she was a member of a protected class; was qualified for the position he sought; suffered an adverse employment action, and there were circumstances suggesting that the employer acted with a discriminatory motive. [¶] On a defense motion for summary judgment against a disparate treatment claim, the defendant must show either that one of these elements cannot be established or that there were one or more legitimate, nondiscriminatory reasons underlying the adverse employment action.” (*Jones v. Department of*

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*Corrections* (2007) 152 Cal.App.4th 1367, 1379 [62 Cal.Rptr.3d 200], internal citations omitted.)

- “[Defendant] still could shift the burden to [plaintiff] by presenting admissible evidence showing a legitimate, nondiscriminatory reason for terminating her. ‘It is the employer’s honest belief in the stated reasons for firing an employee and not the objective truth or falsity of the underlying facts that is at issue in a discrimination case.’ ... ‘[I]f nondiscriminatory, [the employer’s] true reasons need not necessarily have been wise or correct. ... While the objective soundness of an employer’s proffered reasons supports their credibility ... , the ultimate issue is simply whether the employer acted with *a motive to discriminate illegally*. Thus, “legitimate” reasons ... in this context are reasons that are *facially unrelated to prohibited bias*, and which, if true, would thus preclude a finding of *discrimination. ...*’ ” (*Wills v. Superior Court* (2011) 195 Cal.App.4th 143, 170–171 [125 Cal.Rptr.3d 1], original italics, internal citations omitted.)
- “While a complainant need not prove that [discriminatory] animus was the sole motivation behind a challenged action, he must prove by a preponderance of the evidence that there was a ‘causal connection’ between the employee’s protected status and the adverse employment decision.” (*Mixon, supra*, 192 Cal.App.3d at p. 1319.)
- “Requiring the plaintiff to show that discrimination was a *substantial* motivating factor, rather than simply *a* motivating factor, more effectively ensures that liability will not be imposed based on evidence of mere thoughts or passing statements unrelated to the disputed employment decision. At the same time, ... proof that discrimination was a *substantial* factor in an employment decision triggers the deterrent purpose of the FEHA and thus exposes the employer to liability, even if other factors would have led the employer to make the same decision at the time.” (*Harris, supra*, – Cal.4th at p. --, original italics.)
- “We do not suggest that discrimination must be alone sufficient to bring about an employment decision in order to constitute a substantial motivating factor. But it is important to recognize that discrimination can be serious, consequential, and even by itself determinative of an employment decision without also being a “but for” cause.” (*Harris, supra*, -- Cal.4th at p. --.)
- “In cases involving a comparison of the plaintiff’s qualifications and those of the successful candidate, we must assume that a reasonable juror who might disagree with the employer’s decision, but would find the question close, would not usually infer discrimination on the basis of a comparison of qualifications alone. In a close case, a reasonable juror would usually assume that the employer is more capable of assessing the significance of small differences in the qualifications of the candidates, or that the employer simply made a judgment call. [Citation.] But this does not mean that a reasonable juror would in every case defer to the employer’s assessment. If that were so, no job discrimination case could ever go to trial. If a factfinder can conclude that a reasonable employer would have found the plaintiff to be *significantly better* qualified for the job, but this employer did not, the factfinder can legitimately infer that the employer consciously selected a less-qualified candidate—something that employers do not usually do, unless some other strong consideration, such as discrimination, enters into the picture.” (*Reeves v. MV Transportation, Inc.* (2010) 186 Cal.App.4th 666, 674–675 [111 Cal.Rptr.3d 896], original italics.)
- “While not all cases hold that ‘the disparity in candidates’ qualifications “must be so apparent as to

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jump off the page and slap us in the face to support a finding of pretext” ’ the precedents do consistently require that the disparity be substantial to support an inference of discrimination.” (*Reeves, supra*, 186 Cal.App.4th at p. 675, internal citation omitted.)

- “Because of the similarity between state and federal employment discrimination laws, California courts look to pertinent federal precedent when applying our own statutes.” (*Guz, supra*, 24 Cal.4th at p. 354.)
- “We have held ‘that, in a civil action under the FEHA, all relief generally available in noncontractual actions ... may be obtained.’ This includes injunctive relief.” (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 132 [87 Cal.Rptr.2d 132, 980 P.2d 846], internal citations omitted.)
- “The FEHA does not itself authorize punitive damages. It is, however, settled that California’s punitive damages statute, Civil Code section 3294, applies to actions brought under the FEHA ... .” (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1147–1148 [74 Cal.Rptr.2d 510], internal citations omitted.)

***Secondary Sources***

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 915, 916, 918

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair Employment And Housing Act*, ¶¶ 7:194, 7:200–7:201, 7:356, 7:391–7:392 (The Rutter Group)<sup>1</sup>  
Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.44–2.82

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.23[2] (Matthew Bender)

California Civil Practice: Employment Litigation, §§ 2:2, 2:20 (Thomson Reuters West)

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**2505. Retaliation—Essential Factual Elements (Gov. Code, § 12940(h))**

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*[Name of plaintiff]* **claims that** *[name of defendant]* **retaliated against [him/her] for** *[describe activity protected by the FEHA]*. **To establish this claim, [name of plaintiff] must prove all of the following:**

1. **That** *[name of plaintiff]* *[describe protected activity]*;
2. **[That** *[name of defendant]* **[discharged/demoted/[specify other adverse employment action]]** *[name of plaintiff]*;

**[or]**

**[That** *[name of defendant]* **subjected** *[name of plaintiff]* **to an adverse employment action;**

**[or]**

**[That** *[name of plaintiff]* **was constructively discharged;**

3. **That** *[name of plaintiff]*'s *[describe protected activity]* **was a substantial motivating reason for** *[name of defendant]*'s **[decision to [discharge/demote/[specify other adverse employment action]]** *[name of plaintiff]*/**conduct**;
  4. **That** *[name of plaintiff]* **was harmed; and**
  5. **That** *[name of defendant]*'s **conduct was a substantial factor in causing** *[name of plaintiff]*'s **harm.**
- 

*New September 2003; Revised August 2007, April 2008, October 2008, April 2009, June 2010, June 2012, December 2012, June 2013*

**Directions for Use**

In elements 1 and 3, describe the protected activity in question. Government Code section 12940(h) provides that it is unlawful to retaliate against a person “because the person has opposed any practices forbidden under [Government Code sections 12900 through 12966] or because the person has filed a complaint, testified, or assisted in any proceeding under [the FEHA].”

Read the first option for element 2 if there is no dispute as to whether the employer’s acts constituted an adverse employment action. Read the second option and also give CACI No. 2509, “*Adverse Employment Action*” Explained, if whether there was an adverse employment action is a question of fact for the jury. For example, the case may involve a pattern of employer harassment consisting of acts that might not individually be sufficient to constitute retaliation, but taken as a whole establish prohibited conduct. (See *Yanowitz v. L’Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1052–1056 [32 Cal.Rptr.3d 436, 116 P.3d 1123].) Give both the first and second options if the employee presents evidence supporting

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liability under both a sufficient-single-act theory or a pattern-of-harassment theory. (See, e.g., *Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 423–424 [69 Cal.Rptr.3d 1].) Also select “conduct” in element 3 if the second option or both the first and second options are included for element 2.

Retaliation in violation of the FEHA may be established by constructive discharge; that is, that the employer intentionally created or knowingly permitted working conditions to exist that were so intolerable that a reasonable person in the employee’s position would have had no reasonable alternative other than to resign. (See *Steele v. Youthful Offender Parole Bd.* (2008) 162 Cal.App.4th 1241, 1253 [76 Cal.Rptr.3d 632].) If constructive discharge is alleged, give the third option for element 2 and also give CACI No. 2510, “*Constructive Discharge*” Explained. Also select “conduct” in element 3 if the third option is included for element 2.

Element 3 requires that the protected activity be a substantial motivating reason for the retaliatory acts. (See *Harris v. City of Santa Monica* (2013) – Cal.4th --, -- [-- Cal.Rptr.3d --, -- P.3d --]; see also CACI No. 2507, “*Motivating Reason*” Explained.) 2013 Cal. LEXIS 941

Note that there are two causation elements. There must be a causal link between the retaliatory animus and the adverse action (see element 3), and there must be a causal link between the adverse action and damages (see element 5). (See *Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 713 [81 Cal.Rptr.3d 406].)

This instruction has been criticized in dictum because it is alleged that there is no element requiring retaliatory intent. (See *Joaquin v. City of Los Angeles* (2012) 202 Cal.App.4th 1207, 1229–1231 [136 Cal.Rptr.3d 472].) The court urged the Judicial Council to redraft the instruction and the corresponding special verdict form so as to clearly state that retaliatory intent is a necessary element of a retaliation claim under FEHA. The jury in the case was instructed per element 3 “that Richard Joaquin's reporting that he had been sexually harassed was a motivating reason for the City of Los Angeles' decision to terminate Richard Joaquin's employment or deny Richard Joaquin promotion to the rank of sergeant.” The committee believes that the instruction as given is correct for the intent element in a retaliation case. However, in cases such as *Joaquin* that involve allegations of a prohibited motivating reason (based on a report of sexual harassment) and a permitted motivating reason (based on a good faith belief that the report was falsified), the instruction may need to be modified to make it clear that plaintiff must prove that defendant acted based on the *prohibited* motivating reason and not the *permitted* motivating reason.

### Sources and Authority

- Government Code section 12940(h) provides that it is an unlawful employment practice “[f]or any employer, labor organization, employment agency, or person to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part.”
- The FEHA defines a “person” as “one or more individuals, partnerships, associations, corporations, limited liability companies, legal representatives, trustees, trustees in bankruptcy, and receivers or other fiduciaries.” (Gov. Code, § 12925(d).)

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- The Fair Employment and Housing Commission’s regulations provide: “It is unlawful for an employer or other covered entity to demote, suspend, reduce, fail to hire or consider for hire, fail to give equal consideration in making employment decisions, fail to treat impartially in the context of any recommendations for subsequent employment which the employer or other covered entity may make, adversely affect working conditions or otherwise deny any employment benefit to an individual because that individual has opposed practices prohibited by the Act or has filed a complaint, testified, assisted or participated in any manner in an investigation, proceeding, or hearing conducted by the Commission or Department or their staffs.” (Cal. Code Regs., tit. 2, § 7287.8(a).)
- “[I]n order to establish a prima facie case of retaliation under the FEHA, a plaintiff must show (1) he or she engaged in a ‘protected activity,’ (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer’s action. Once an employee establishes a prima facie case, the employer is required to offer a legitimate, nonretaliatory reason for the adverse employment action. If the employer produces a legitimate reason for the adverse employment action, the presumption of retaliation ‘ ‘drops out of the picture,’ ’ ’ and the burden shifts back to the employee to prove intentional retaliation.” (*Yanowitz, supra*, 36 Cal.4th at p. 1042, internal citations omitted.)
- “It is well established that a plaintiff in a retaliation case need only prove that a retaliatory animus was at least a substantial or motivating factor in the adverse employment decision.” (*George v. California Unemployment Ins. Appeals Bd.* (2009) 179 Cal.App.4th 1475, 1492 [102 Cal.Rptr.3d 431].)
- “Retaliation claims are inherently fact-specific, and the impact of an employer’s action in a particular case must be evaluated in context. Accordingly, although an adverse employment action must materially affect the terms, conditions, or privileges of employment to be actionable, the determination of whether a particular action or course of conduct rises to the level of actionable conduct should take into account the unique circumstances of the affected employee as well as the workplace context of the claim.” (*Yanowitz, supra*, 36 Cal.4th at p. 1052.)
- “Contrary to [defendant]’s assertion that it is improper to consider collectively the alleged retaliatory acts, there is no requirement that an employer’s retaliatory acts constitute one swift blow, rather than a series of subtle, yet damaging, injuries. Enforcing a requirement that each act separately constitute an adverse employment action would subvert the purpose and intent of the statute.” (*Yanowitz, supra*, 36 Cal.4th at pp. 1055–1056, internal citations omitted.)
- “Moreover, [defendant]’s actions had a substantial and material impact on the conditions of employment. The refusal to promote [plaintiff] is an adverse employment action under FEHA. There was also a pattern of conduct, the totality of which constitutes an adverse employment action. This includes undeserved negative job reviews, reductions in his staff, ignoring his health concerns and acts which caused him substantial psychological harm.” (*Wysinger, supra*, 157 Cal.App.4th at p. 424, internal citations omitted.)
- “A long period between an employer’s adverse employment action and the employee’s earlier protected activity may lead to the inference that the two events are not causally connected. But if

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between these events the employer engages in a pattern of conduct consistent with a retaliatory intent, there may be a causal connection.” (*Wysinger, supra*, 157 Cal.App.4th at p. 421, internal citation omitted.)

- “Both direct and circumstantial evidence can be used to show an employer’s intent to retaliate. ‘Direct evidence of retaliation may consist of remarks made by decisionmakers displaying a retaliatory motive.’ Circumstantial evidence typically relates to such factors as the plaintiff’s job performance, the timing of events, and how the plaintiff was treated in comparison to other workers.” (*Colarossi v. Coty US Inc.* (2002) 97 Cal.App.4th 1142, 1153 [119 Cal.Rptr.2d 131], internal citations omitted.)
- “The retaliatory motive is ‘proved by showing that plaintiff engaged in protected activities, that his employer was aware of the protected activities, and that the adverse action followed within a relatively short time thereafter.’ ‘The causal link may be established by an inference derived from circumstantial evidence, “such as the employer’s knowledge that the [employee] engaged in protected activities and the proximity in time between the protected action and allegedly retaliatory employment decision.” ’ ” (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 615 [262 Cal.Rptr. 842], internal citations omitted.)
- “[A]n employer generally can be held liable for the retaliatory actions of its supervisors.” (*Wysinger, supra*, 157 Cal.App.4th at p. 420.)
- “Plaintiff, although a partner, is a person whom section 12940, subdivision (h) protects from retaliation for opposing the partnership-employer’s harassment against those employees.” (*Fitzsimons v. California Emergency Physicians Medical Group* (2012) 205 Cal.App.4th 1423, 1429 [141 Cal.Rptr.3d 265].)
- “[A]n employer may be found to have engaged in an adverse employment action, and thus liable for retaliation under section 12940(h), ‘by permitting ... fellow employees to punish [him] for invoking [his] rights.’ We therefore hold that an employer may be held liable for coworker retaliatory conduct if the employer knew or should have known of coworker retaliatory conduct and either participated and encouraged the conduct, or failed to take reasonable actions to end the retaliatory conduct.” (*Kelley v. The Conco Cos.* (2011) 196 Cal.App.4th 191, 213 [126 Cal.Rptr.3d 651], internal citation omitted.)
- “[T]he employer is liable for retaliation under section 12940, subdivision (h), but nonemployer individuals are not personally liable for their role in that retaliation.” (*Jones v. The Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1173 [72 Cal.Rptr.3d 624, 177 P.3d 232].)
- “[U]nder certain circumstances, a retaliation claim may be brought by an employee who has complained of or opposed conduct, even when a court or jury subsequently determines the conduct actually was not prohibited by the FEHA. Indeed, this precept is well settled. An employee is protected against retaliation if the employee reasonably and in good faith believed that what he or she was opposing constituted unlawful employer conduct such as sexual harassment or sexual discrimination.” (*Miller v. Department of Corr.* (2005) 36 Cal.4th 446., 473–474 [30 Cal.Rptr.3d 797, 115 P.3d 77], internal citations omitted.)

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- “The legislative purpose underlying FEHA's prohibition against retaliation is to prevent employers from deterring employees from asserting good faith discrimination complaints ... .’ Employer retaliation against employees who are believed to be prospective complainants or witnesses for complainants undermines this legislative purpose just as effectively as retaliation after the filing of a complaint. To limit FEHA in such a way would be to condone ‘an absurd result’ that is contrary to legislative intent. We agree with the trial court that FEHA protects employees against preemptive retaliation by the employer.” (*Steele, supra*, 162 Cal.App.4th at p. 1255, internal citations omitted.)

***Secondary Sources***

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 922, 940, 941

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair Employment And Housing Act*, ¶¶ 7:680–7:841 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.83–2.88

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.131 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.37, 115.94 (Matthew Bender)

California Civil Practice: Employment Litigation, §§ 2:74–2:75 (Thomson Reuters West)

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2507. “Substantial Motivating Reason” Explained

~~A “motivating reason” is a reason that contributed to the decision to take certain action, even though other reasons also may have contributed to the decision.~~ A “substantial motivating reason” is a reason that a reasonable person would consider to have contributed to the [specify adverse employment action]. It must be more than a remote or trivial reason. It does not have to be the only reason motivating the [adverse employment action].

New December 2007; Revised June 2013

## Directions for Use

Read this instruction with CACI No. 2500, *Disparate Treatment—Essential Factual Elements*, CACI No. 2505, *Retaliation—Essential Factual Elements*, ~~or~~ CACI No. 2540, *Disability Discrimination—Disparate Treatment—Essential Factual Elements*, CACI No. 2560, *Religious Creed Discrimination—Failure to Accommodate—Essential Factual Elements*, or CACI No. 2570, *Age Discrimination—Disparate Treatment—Essential Factual Elements*.

## Sources and Authority

- Government Code section 12940(a) provides:

It is 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, genetic information, marital status, sex, gender, gender identity, gender expression, 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.
- Title 42 United States Code section 2000e-2(m) (a provision of the Civil Rights Action of 1991 amending Title VII of the Civil Rights Act of 1964) provides: "Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."
- “Because of the similarity between state and federal employment discrimination laws, California courts look to pertinent federal precedent when applying our own statutes.” (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354 [100 Cal.Rptr.2d 352, 8 P.3d 1089].)

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- “While a complainant need not prove that [discriminatory] animus was the sole motivation behind a challenged action, he must prove by a preponderance of the evidence that there was a ‘causal connection’ between the employee’s protected status and the adverse employment decision.” (*Mixon v. Fair Employment and Housing Com.* (1987) 192 Cal.App.3d 1306, 1319 [237 Cal.Rptr. 884].)
- “The employee need not show ‘he would have in any event been rejected or discharged solely on the basis of his race, without regard to the alleged deficiencies. ...’ In other words, ‘while a complainant need not prove that racial animus was the sole motivation behind the challenged action, he must prove by a preponderance of the evidence that there was a “causal connection” between the employee's protected status and the adverse employment decision.’ ” (*Clark v. Claremont University Center* (1992) 6 Cal.App.4th 639, 665 [8 Cal.Rptr.2d 151], citing *McDonald v. Santa Fe Trail Transp. Co.* (1976) 427 U.S. 273, 282, fn. 10 [96 S.Ct. 2574, 49 L.Ed.2d 493, 502] and *Mixon, supra*, 192 Cal.App.3d at p. 1319.)
- “Requiring the plaintiff to show that discrimination was a *substantial* motivating factor, rather than simply a motivating factor, more effectively ensures that liability will not be imposed based on evidence of mere thoughts or passing statements unrelated to the disputed employment decision. At the same time, ... proof that discrimination was a *substantial* factor in an employment decision triggers the deterrent purpose of the FEHA and thus exposes the employer to liability, even if other factors would have led the employer to make the same decision at the time.” (*Harris v. City of Santa Monica* (2013) – Cal.4th --, -- [-- Cal.Rptr.3d --, -- P.3d --], original italics.) 2013 Cal. LEXIS 941 ~~But see *Horsford v. Board of Trustees* (2005) 132 Cal.App.4th 359, 377 [33 Cal.Rptr.3d 644] (“A plaintiff's burden is ... to produce evidence that, taken as a whole, permits a rational inference that intentional discrimination was a *substantial* motivating factor in the employer's actions toward the plaintiff”), italics added.~~
- “We do not suggest that discrimination must be alone sufficient to bring about an employment decision in order to constitute a substantial motivating factor. But it is important to recognize that discrimination can be serious, consequential, and even by itself determinative of an employment decision without also being a “but for” cause.” (*Harris, supra*, -- Cal.4th at p. --.)

**Secondary Sources**

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair Employment And Housing Act*, ¶¶ 7:485–7:508 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.61–2.65, 2.87

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.11[1] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.23[2] (Matthew Bender)

**Draft–Not Approved by Judicial Council**

1 California Civil Practice: Employment Litigation Discrimination in Employment, §§ 2:20–2:21, 2:75  
(Thomson Reuters West)

Draft–Not Approved by Judicial Council

**2511. Adverse Action Made by Decision Maker Without Animus (Cat’s Paw)**

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**In this case, the decision to [discharge/[other adverse employment action]] [name of plaintiff] was made by [name of decision maker]. Even if [name of decision maker] did not hold any [discriminatory/retaliatory] intent [or was unaware of [name of plaintiff]'s conduct on which the claim of retaliation is based], [name of defendant] may still be liable for [discrimination/retaliation] if [name of plaintiff] proves both of the following:**

- 1. That [name of plaintiff]’s [specify protected activity or attribute] was a substantial motivating reason for [name of supervisor]’s [specify acts of supervisor on which decision maker relied]; and**
  - 2. That [name of supervisor]’s [specify acts on which decision maker relied] was a substantial motivating reason for [name of decision maker]’s decision to [discharge/[other adverse employment action]] [name of plaintiff].**
- 

*New December 2012; Revised June 2013*

**Directions for Use**

Give this instruction if the “cat’s paw” rule is a factor in the case. Under the cat’s paw rule, the person who actually took the adverse employment action against the employee was not acting out of any improper animus. The decision maker, however, acted on information provided by a supervisor who was acting out of discriminatory or retaliatory animus with the objective of causing the adverse employment action. The decision maker is referred to as the “cat’s paw” of the person with the animus. (See *Reeves v. Safeway Stores, Inc.* (2004) 121 Cal.App.4th 95, 100 [16 Cal.Rptr.3d 717].)

The purpose of this instruction is to make it clear to the jury that they are not to evaluate the motives or knowledge of the decision maker, but rather to decide whether the acts of the supervisor with animus actually caused the adverse action. Give the optional language in the second sentence of the first paragraph in a retaliation case in which the decision maker was not aware of the plaintiff’s conduct that allegedly led to the retaliation (defense of ignorance). (See *Reeves, supra*, 121 Cal.App.4th at pp. 106–108.)

Element 1 requires that the protected activity or attribute be a substantial motivating reason for the retaliatory acts. Element 2 requires that the supervisor’s improper motive be a substantial motivating reason for the decision maker’s action. (See *Harris v. City of Santa Monica* (2013) – Cal.4th –, -- [– Cal.Rptr.3d –, -- P.3d –]; see also CACI No. 2507, “Motivating Reason” Explained.) 2013 Cal. LEXIS 941

**Sources and Authority**

- “This case presents the question whether an employer may be liable for retaliatory discharge when the supervisor who initiates disciplinary proceedings acts with retaliatory animus, but the cause for discipline is separately investigated and the ultimate decision to discharge the plaintiff is

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made by a manager with no knowledge that the worker has engaged in protected activities. We hold that so long as the supervisor's retaliatory motive was an actuating, but-for cause of the dismissal, the employer may be liable for retaliatory discharge. Here the evidence raised triable issues as to the existence and effect of retaliatory motive on the part of the supervisor, and as to whether the manager and the intermediate investigator acted as tools or ‘cat's paws’ for the supervisor, that is, instrumentalities by which his retaliatory animus was carried into effect to plaintiff's injury.” (*Reeves, supra*, 121 Cal.App.4th at p. 100.)

- “This concept—which for convenience we will call the ‘defense of ignorance’—poses few analytical challenges so long as the ‘employer’ is conceived as a single entity receiving and responding to stimuli as a unitary, indivisible organism. But this is often an inaccurate picture in a world where a majority of workers are employed by large economic enterprises with layered and compartmentalized management structures. In such enterprises, decisions significantly affecting personnel are rarely if ever the responsibility of a single actor. As a result, unexamined assertions about the knowledge, ignorance, or motives of ‘the employer’ may be fraught with ambiguities, untested assumptions, and begged questions.” (*Reeves, supra*, 121 Cal.App.4th at p. 108.)
- “[P]laintiff can establish the element of causation by showing that any of the persons involved in bringing about the adverse action held the requisite animus, provided that such person's animus operated as a ‘but-for’ cause, i.e., a force without which the adverse action would not have happened. Certainly a defendant does not conclusively negate the element of causation by showing only that some responsible actors, but not all, were ignorant of the occasion for retaliation.” (*Reeves, supra*, 121 Cal.App.4th at p. 108.)
- “Here a rational fact finder could conclude that an incident of minor and excusable disregard for a supervisor's stated preferences was amplified into a ‘solid case’ of ‘workplace violence,’ and that this metamorphosis was brought about in necessary part by a supervisor's desire to rid himself of a worker who created trouble by complaining of matters the supervisor preferred to ignore. Since those complaints were protected activities under FEHA, a finder of fact must be permitted to decide whether these inferences should in fact be drawn.” (*Reeves, supra*, 121 Cal.App.4th at p. 121.)
- “Our emphasis on the conduct of *supervisors* is not inadvertent. An employer can generally be held liable for the discriminatory or retaliatory actions of supervisors. The outcome is less clear where the only actor possessing the requisite animus is a nonsupervisory coworker.” (*Reeves, supra*, 121 Cal.App.4th at p. 109 fn. 9, original italics, internal citation omitted.)

### Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 921, 940

Chin, et al., California Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair Employment And Housing Act*, ¶ 7:806.5 (The Rutter Group)

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.131 (Matthew Bender)

**Draft–Not Approved by Judicial Council**

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.37[3][a] (Matthew Bender)

## Draft–Not Approved by Judicial Council

**2527. Failure to Prevent Harassment, Discrimination, or Retaliation—Essential Factual Elements—Employer or Entity Defendant (Gov. Code, § 12940(k))**

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[Name of plaintiff] claims that [name of defendant] failed to prevent [harassment/discrimination/retaliation] [based on [describe protected status—e.g., race, gender, or age]]. To establish this claim, [name of plaintiff] must prove all of the following:

1. That [name of plaintiff] [was an employee of [name of defendant]/applied to [name of defendant] for a job/was a person providing services under a contract with [name of defendant]];
2. That [name of plaintiff] was subjected to [harassment/discrimination/retaliation either:] in the workplace;
- 3.— [That [name of plaintiff]’s [protected status, e.g., race, gender, or age] was a substantial motivating reason for the [harassing conduct/discrimination] because [he/she] [was/was believed to be/was associated with a person who was/was associated with a person who was believed to be] [protected status];]

[or]

[That [name of plaintiff]’s [describe protected activity, e.g., filing a complaint with the Department of Fair Employment and Housing] was a substantial motivating reason for the retaliation]retaliation because [he/she] [opposed [name of defendant]’s unlawful and discriminatory employment practices/ [or] [[filed a complaint with/testified before/ [or] assisted in a proceeding before] the Department of Fair Employment and Housing]];

34. That [name of defendant] failed to take reasonable steps to prevent the [harassment/discrimination/retaliation];
  45. That [name of plaintiff] was harmed; and
  56. That [name of defendant]’s failure to take reasonable steps to prevent [harassment/discrimination/retaliation] was a substantial factor in causing [name of plaintiff]’s harm.
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New June 2006; Revised April 2007, June 2013

#### Directions for Use

If harassment is at issue, this instruction should be read in conjunction with CACI No. 2523, “*Harassing Conduct*” Explained. If retaliation is alleged, read this instruction in conjunction with CACI No. 2505, *Retaliation—Essential Factual Elements*.

Read the bracketed language in the opening paragraph beginning with “based on” and the first option for

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element ~~2-3~~ if the claim is for failure to prevent harassment or discrimination. Modify this option if the plaintiff was not actually a member of the protected class, but alleges harassment or discrimination because he or she was perceived to be a member, or associated with someone who was or was perceived to be a member, of the protected class. (See Gov. Code, § 12926(n).)

Choose the second option in element ~~2-3~~ if the claim is based on failure to prevent retaliation because the plaintiff engaged in protected activity, such as (1) ~~opposed-opposing~~ practices forbidden by the FEHA; (2) ~~filed-filing~~ a complaint with the Department of Fair Employment and Housing (DFEH); (3) ~~testifyngied~~ in a DFEH proceeding; or (4) ~~assisted-assisting~~ in a DFEH proceeding. (See Gov. Code, § 12940(h).)

Element 3 requires that the employee’s protected attribute or activity be a substantial motivating reason for the discrimination, harassment, or retaliation. (See *Harris v. City of Santa Monica* (2013) – Cal.4th --, -- [– Cal.Rptr.3d --, -- P.3d --]; see also CACI No. 2507, “Motivating Reason” Explained.) 2013 Cal. LEXIS 941

### Sources and Authority

- Government Code section 12940(k) provides that it is an unlawful employment practice for “an employer, labor organization, employment agency, apprenticeship training program, or any training program leading to employment, to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring.”
- Government Code section 12940(h) provides that it is an unlawful employment practice “[f]or any employer, labor organization, employment agency, or person to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part.”
- “Government Code section 12926(n) provides: “Race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, age, or sexual orientation” includes a perception that the person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics.”
- “The employer’s duty to prevent harassment and discrimination is affirmative and mandatory.” (*Northrop Grumman Corp. v. Workers’ Comp. Appeals Bd.* (2002) 103 Cal.App.4th 1021, 1035 [127 Cal. Rptr. 2d 285].)
- “This section creates a tort that is made actionable by statute. ‘ “[T]he word “tort” means a civil wrong, other than a breach of contract, for which the law will provide a remedy in the form of an action for damages.’ ‘It is well settled the Legislature possesses a broad authority ... to establish ... tort causes of action.’ Examples of statutory torts are plentiful in California law.” ’ Section 12960 et seq. provides procedures for the prevention and elimination of unlawful employment practices. In particular, section 12965, subdivision (a) authorizes the Department of Fair Employment and Housing (DFEH) to bring an accusation of an unlawful employment practice if conciliation efforts are

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unsuccessful, and section 12965, subdivision (b) creates a private right of action for damages for a complainant whose complaint is not pursued by the DFEH.” (*Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 286 [73 Cal.Rptr.2d 596], internal citations omitted.)

- “With these rules in mind, we examine the section 12940 claim and finding with regard to whether the usual elements of a tort, enforceable by private plaintiffs, have been established: Defendants’ legal duty of care toward plaintiffs, breach of duty (a negligent act or omission), legal causation, and damages to the plaintiff.” (*Trujillo, supra*, 63 Cal.App.4th at pp. 286–287, internal citation omitted.)
- “Employers should not be held liable to employees for failure to take necessary steps to prevent such conduct, except where the actions took place and were not prevented. Plaintiffs have not shown this duty was owed to them, under these circumstances. Also, there is a significant question of how there could be legal causation of any damages (either compensatory or punitive) from such a statutory violation, where the only jury finding was the failure to prevent actionable harassment or discrimination, which, however, did not occur.” (*Trujillo, supra*, 63 Cal.App.4th at p. 289.)
- “In accordance with ... the fundamental public policy of eliminating discrimination in the workplace under the FEHA, we conclude that retaliation is a form of discrimination actionable under [Gov. Code] section 12940, subdivision (k).” (*Taylor v. City of Los Angeles Dept. of Water & Power* (2006) 144 Cal.App.4th 1216, 1240 [51 Cal.Rptr.3d 206], disapproved on other grounds in *Jones v. The Lodge at Torrey Pines Partnership* (2008), 42 Cal. 4th 1158 [72 Cal. Rptr. 3d 624, 177 P.3d 232].)

### Secondary Sources

Chin et al., California Practice Guide: Employment Litigation-, [Ch. 7-A, Title VII And The California Fair Employment and Housing Act, \(The Rutter Group\)](#) ¶¶ 7:670–7:672 [\(The Rutter Group\)](#)

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.02[6], 41.80[1], 41.81[7] (Matthew Bender)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[10][g] (Matthew Bender)

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## 2540. Disability Discrimination—Disparate Treatment—Essential Factual Elements

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[Name of plaintiff] claims that [name of defendant] wrongfully discriminated against [him/her] based on [his/her] [perceived] [history of [a]] [select term to describe basis of limitations, e.g., physical condition]. To establish this claim, [name of plaintiff] must prove all of the following:

1. That [name of defendant] was [an employer/[other covered entity]];
2. That [name of plaintiff] [was an employee of [name of defendant]/applied to [name of defendant] for a job/[describe other covered relationship to defendant]];
3. [That [name of defendant] [knew that [name of plaintiff] had/treated [name of plaintiff] as if [he/she] had] [a] [e.g., physical condition] [that limited [insert major life activity]]]; [or]

[That [name of defendant] [knew that [name of plaintiff] had/treated [name of plaintiff] as if [he/she] had] a history of having [a] [e.g., physical condition] [that limited [insert major life activity]]];]

4. That [name of plaintiff] was able to perform the essential job duties [with reasonable accommodation for [his/her] [e.g., physical condition]];
5. [That [name of defendant] [discharged/refused to hire/[other adverse employment action]] [name of plaintiff];]

[or]

[That [name of defendant] subjected [name of plaintiff] to an adverse employment action;]

[or]

[That [name of plaintiff] was constructively discharged;]

6. [That [name of plaintiff]’s [history of [a]] [e.g., physical condition] was a **substantial** motivating reason for [name of defendant]’s [decision to [discharge/refuse to hire/[other adverse employment action]] [name of plaintiff]/conduct];] [or]

[That [name of defendant]’s belief that [name of plaintiff] had [a history of [a]] [e.g., physical condition] was a **substantial** motivating reason for [name of defendant]’s [decision to [discharge/refuse to hire/[other adverse employment action]] [name of plaintiff]/conduct];]

7. That [name of plaintiff] was harmed; and
  8. That [name of defendant]’s conduct was a substantial factor in causing [name of plaintiff]’s harm.
-

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*New September 2003; Revised June 2006, December 2007, April 2009, December 2009, June 2010, June 2012, June 2013*

### Directions for Use

Select a term to use throughout to describe the source of the plaintiff’s limitations. It may be a statutory term such as “physical disability,” “mental disability,” or “medical condition.” (See Gov. Code, § 12940(a).) Or it may be a general term such as “condition,” “disease,” or “disorder.” Or it may be a specific health condition such as “diabetes.”

In the introductory paragraph, include “perceived” or “history of” if the claim of discrimination is based on a perceived disability or a history of disability rather than a current actual disability.

For element 1, the court may need to instruct the jury on the statutory definition of “employer” under the FEHA. Other covered entities under the FEHA include labor organizations, employment agencies, and apprenticeship training programs. (See Gov. Code, § 12940(a)–(d).)

Under element 3, select the claimed basis of discrimination: an actual disability, a history of a disability, a perceived disability, or a perceived history of a disability. For an actual disability, select “knew that [name of plaintiff] had.” For a perceived disability, select “treated [name of plaintiff] as if [he/she] had.” (See Gov. Code, § 12926(j)(4), (l)(4) [mental and physical disability include being regarded or treated as disabled by the employer].)

If medical-condition discrimination as defined by statute (see Gov. Code, § 12926(i)) is alleged, omit “that limited [insert major life activity]” in element 3. (Compare Gov. Code, § 12926(i) with Gov. Code, § 12926(j), (l) [no requirement that medical condition limit major life activity].)

Regarding element 4, it is now settled that the ability to perform the essential duties of the job is an element of the plaintiff’s burden of proof. (See *Green v. State of California* (2007) 42 Cal.4th 254, 257–258 [64 Cal.Rptr.3d 390, 165 P.3d 118].)

Read the first option for element 5 if there is no dispute as to whether the employer’s acts constituted an adverse employment action. Read the second option and also give CACI No. 2509, “*Adverse Employment Action*” Explained, if whether there was an adverse employment action is a question of fact for the jury. If constructive discharge is alleged, give the third option for element 5 and also give CACI No. 2510, “*Constructive Discharge*” Explained. Select “conduct” in element 6 if either the second or third option is included for element 5.

Element 6 requires that the disability be a substantial motivating reason for the adverse action. (See *Harris v. City of Santa Monica* (2013) – Cal.4th --, -- [– Cal.Rptr.3d --, -- P.3d --]; see also CACI No. 2507, “*Motivating Reason*” Explained.) 2013 Cal. LEXIS 941

If the existence of a qualifying disability is disputed, additional instructions defining “physical disability,” “mental disability,” and “medical condition” may be required. (See Gov. Code, § 12926(i), (j), (l).)

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### Sources and Authority

- Government Code section 12940(a) provides that it is an unlawful employment practice “[f]or an employer, because of the ... physical disability, mental disability, [or] medical condition ... 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.”
- Government Code section 12940(a)(1) also provides that the FEHA “does not prohibit an employer from refusing to hire or discharging 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.”
- For a definition of “medical condition,” see Government Code section 12926(i).
- For a definition of “mental disability,” see Government Code section 12926(j).
- For a definition of “physical disability,” see Government Code section 12926(l).
- Government Code section 12926.1(c) provides, in part: “[T]he Legislature has determined that the definitions of ‘physical disability’ and ‘mental disability’ under the law of this state require a ‘limitation’ upon a major life activity, but do not require, as does the Americans with Disabilities Act of 1990, a ‘substantial limitation.’ This distinction is intended to result in broader coverage under the law of this state than under that federal act. Under the law of this state, whether a condition limits a major life activity shall be determined without respect to any mitigating measures, unless the mitigating measure itself limits a major life activity, regardless of federal law under the Americans with Disabilities Act of 1990. Further, under the law of this state, ‘working’ is a major life activity, regardless of whether the actual or perceived working limitation implicates a particular employment or a class or broad range of employments.”
- “[T]he purpose of the ‘regarded-as’ prong is to protect individuals rejected from a job because of the ‘myths, fears and stereotypes’ associated with disabilities. In other words, to find a perceived disability, the perception must stem from a false idea about the existence of or the limiting effect of a disability.” (*Diffey v. Riverside County Sheriff’s Dept.* (2000) 84 Cal.App.4th 1031, 1037 [101 Cal.Rptr.2d 353], internal citation omitted.)
- “[T]he plaintiff initially has the burden to establish a prima facie case of discrimination. The plaintiff can meet this burden by presenting evidence that demonstrates, even circumstantially or by inference, that he or she (1) suffered from a disability, or was regarded as suffering from a disability; (2) could perform the essential duties of the job with or without reasonable accommodations, and (3) was subjected to an adverse employment action because of the disability or perceived disability. To establish a prima facie case, a plaintiff must show ‘ ‘ ‘actions taken by the employer from which

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one can infer, if such actions remain unexplained, that it is more likely than not that such actions were based on a [prohibited] discriminatory criterion ... .” ’ ’ ...’ The prima facie burden is light; the evidence necessary to sustain the burden is minimal. As noted above, while the elements of a plaintiff’s prima facie case can vary considerably, generally an employee need only offer sufficient circumstantial evidence to give rise to a reasonable *inference* of discrimination.” (*Sandell v. Taylor-Listug, Inc.* (2010) 188 Cal.App.4th 297, 310 [115 Cal.Rptr.3d 453], original italics, internal citations omitted.)

- “If the employee meets this [prima facie] burden, it is then incumbent on the employer to show that it had a legitimate, nondiscriminatory reason for its employment decision. When this showing is made, the burden shifts back to the employee to produce substantial evidence that employer’s given reason was either ‘untrue or pretextual,’ or that the employer acted with discriminatory animus, in order to raise an inference of discrimination.” (*Furtado v. State Personnel Bd.* (2013) 212 Cal.App.4th 729, 744 [-- Cal.Rptr.3d --], internal citations omitted.)
- “Summary adjudication of the section 12940(a) claim ... turns on ... whether [plaintiff] could perform the essential functions of the relevant job with or without accommodation. [Plaintiff] does not dispute that she was unable to perform the essential functions of her *former* position as a clothes fitter with or without accommodation. Under federal law, however, when an employee seeks accommodation by being reassigned to a vacant position in the company, the employee satisfies the ‘qualified individual with a disability’ requirement by showing he or she can perform the essential functions of the *vacant position* with or without accommodation. The position must exist and be vacant, and the employer need not promote the disabled employee. We apply the same rule here. To prevail on summary adjudication of the section 12940(a) claim, [defendant] must show there is no triable issue of fact about [plaintiff]’s ability, with or without accommodation, to perform the essential functions of an available vacant position that would not be a promotion.” (*Nadaf-Rahrov v. The Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 965 [83 Cal.Rptr.3d 190], original italics, internal citations omitted.)
- “[Defendant] asserts the statute’s ‘regarded as’ protection is limited to persons who are denied or who lose jobs based on an employer’s reliance on the ‘myths, fears or stereotypes’ frequently associated with disabilities. ... However, the statutory language does not expressly restrict FEHA’s protections to the narrow class to whom [defendant] would limit its coverage. To impose such a restriction would exclude from protection a large group of individuals, like [plaintiff], with more mundane long-term medical conditions, the significance of which is exacerbated by an employer’s failure to reasonably accommodate. Both the policy and language of the statute offer protection to a person who is not actually disabled, but is wrongly perceived to be. The statute’s plain language leads to the conclusion that the ‘regarded as’ definition casts a broader net and protects *any* individual ‘regarded’ or ‘treated’ by an employer ‘as having, or having had, any physical condition that makes achievement of a major life activity difficult’ or may do so in the future. We agree most individuals who sue exclusively under this definitional prong likely are and will continue to be victims of an employer’s ‘mistaken’ perception, based on an unfounded fear or stereotypical assumption. Nevertheless, FEHA’s protection is nowhere expressly premised on such a factual showing, and we decline the invitation to import such a requirement.” (*Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 53 [43 Cal.Rptr.3d 874], original italics, internal citations omitted.)

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- “An adverse employment decision cannot be made “because of” a disability, when the disability is not known to the employer. Thus, in order to prove [a discrimination] claim, a plaintiff must prove the employer had knowledge of the employee’s disability when the adverse employment decision was made. ... While knowledge of the disability can be inferred from the circumstances, knowledge will only be imputed to the employer when the fact of disability is the only reasonable interpretation of the known facts. “Vague or conclusory statements revealing an unspecified incapacity are not sufficient to put an employer on notice of its obligations ... .” ... ’ ” (*Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1008 [93 Cal.Rptr.2d 338].)
- “[W]e interpret FEHA as authorizing an employer to distinguish between disability-caused misconduct and the disability itself in the narrow context of threats or violence against coworkers. If employers are not permitted to make this distinction, they are caught on the horns of a dilemma. They may not discriminate against an employee based on a disability but, at the same time, must provide all employees with a safe work environment free from threats and violence.” (*Wills v. Superior Court* (2011) 195 Cal.App.4th 143, 166 [125 Cal.Rptr.3d 1], internal citations omitted.)
- “Requiring the plaintiff to show that discrimination was a *substantial* motivating factor, rather than simply a motivating factor, more effectively ensures that liability will not be imposed based on evidence of mere thoughts or passing statements unrelated to the disputed employment decision. At the same time, ... proof that discrimination was a *substantial* factor in an employment decision triggers the deterrent purpose of the FEHA and thus exposes the employer to liability, even if other factors would have led the employer to make the same decision at the time.” (*Harris, supra*, – Cal.4th at p. --, original italics.)
- “We do not suggest that discrimination must be alone sufficient to bring about an employment decision in order to constitute a substantial motivating factor. But it is important to recognize that discrimination can be serious, consequential, and even by itself determinative of an employment decision without also being a “but for” cause.” (*Harris, supra*, -- Cal.4th at p. --.)

### Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 936, 937

Chin et al., California Practice Guide: Employment Litigation, Ch. 9-C, *California Fair Employment And Housing Act (FEHA)*, ¶¶ 9:2160–9:2241 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.78–2.80

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.32[2][c] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.14, 115.23, 115.34, 115.77[3][a] (Matthew Bender)

California Civil Practice: Employment Litigation § 2:46 (Thomson Reuters West)

## Draft—Not Approved by Judicial Council

**2560. Religious Creed Discrimination—Failure to Accommodate—Essential Factual Elements**  
**(Gov. Code, § 12940(I))**

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[Name of plaintiff] claims that [name of defendant] wrongfully discriminated against [him/her] by failing to reasonably accommodate [his/her] religious [belief/observance]. To establish this claim, [name of plaintiff] must prove all of the following:

1. That [name of defendant] was [an employer/[other covered entity]];
2. That [name of plaintiff] [was an employee of [name of defendant]/applied to [name of defendant] for a job/[other covered relationship to defendant]];
3. That [name of plaintiff] has a sincerely held religious belief that [describe religious belief, observance, or practice];
4. That [name of plaintiff]'s religious [belief/observance] conflicted with a job requirement;
5. That [name of defendant] knew of the conflict between [name of plaintiff]'s religious [belief/observance] and the job requirement;
6. That [name of defendant] did not reasonably accommodate [name of plaintiff]'s religious [belief/observance];
7. ~~That [name of defendant] [discharged/refused to hire/[other adverse employment action]] [name of plaintiff]'s for failing failure to comply with the conflicting job requirement~~ **was a substantial motivating reason for**

~~[name of defendant]'s decision to [discharge/refuse to hire/[other adverse employment action]] [name of plaintiff];]~~

[or]

~~**[That [name of defendant] subjected [name of plaintiff] to an adverse employment action for failing to comply with the conflicting job requirement [name of defendant]'s subjecting [him/her] to an adverse employment action;]**~~

[or]

~~**[That [name of plaintiff] was constructively discharged for failing to comply with the conflicting job requirement [his/her] constructive discharge;]**~~

8. That [name of plaintiff] was harmed; and
9. That [name of defendant]'s failure to reasonably accommodate [name of plaintiff]'s

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**religious [belief/observance] was a substantial factor in causing [his/her] harm.**

**If more than one accommodation is reasonable, an employer satisfies its obligation to make a reasonable accommodation if it selects one of those accommodations in good faith.**

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*New September 2003; Revised June 2012, December 2012, June 2013*

### Directions for Use

If element 1 is given, the court may need to instruct the jury on the statutory definition of “employer” under the FEHA. Other covered entities under the FEHA include labor organizations, employment agencies, and apprenticeship training programs. (See Gov. Code, § 12940(a)–(d).)

Element 7 requires that the plaintiff’s failure to comply with the conflicting job requirement be a substantial motivating reason for the employer’s adverse action. (See *Harris v. City of Santa Monica* (2013) – Cal.4th --, -- [– Cal.Rptr.3d --, -- P.3d --]; see also CACI No. 2507, “*Motivating Reason Explained*.”) 2013 Cal. LEXIS 941 Read the first option ~~for element 7~~ if there is no dispute as to whether the employer’s acts constituted an adverse employment action. Read the second option and also give CACI No. 2509, “*Adverse Employment Action Explained*,” if whether there was an adverse employment action is a question of fact for the jury. If constructive discharge is alleged, give the third option for element 7 and also give CACI No. 2510, “*Constructive Discharge Explained*.”

Federal courts construing Title VII of the Civil Rights Act of 1964 have held that the threat of an adverse employment action is a violation if the employee acquiesces to the threat and foregoes religious observance. (See, e.g., *EEOC v. Townley Engineering & Mfg. Co.* (9th Cir.1988) 859 F.2d 610, 614 fn. 5.) While no case has been found that construes the FEHA similarly, element 7 may be modified if the court agrees that this rule applies. In the first option, a threat of discharge or discipline may be inserted as an “other adverse employment action.” Or in the second option, “subjected [*name of plaintiff*] to” may be replaced with “threatened [*name of plaintiff*] with.”

### Sources and Authority

- Government Code section 12940(l) provides that it is an unlawful employment practice “[f]or an employer ... to refuse to hire or employ a person, ... or to discharge a person from employment, ... or to discriminate against a person in compensation or in terms, conditions, or privileges of employment because of a conflict between the person’s religious belief or observance and any employment requirement, unless the employer ... demonstrates that it has explored any available reasonable alternative means of accommodating the religious belief or observance ... but is unable to reasonably accommodate the religious belief or observance without undue hardship on the conduct of the business of the employer ... . Religious belief or observance ... includes, but is not limited to, observance of a Sabbath or other religious holy day or days, and reasonable time necessary for travel prior and subsequent to a religious observance.”
- Government Code section 12926(p) provides: “‘Religious creed,’ ‘religion,’ ‘religious observance,’ ‘religious belief,’ and ‘creed’ include all aspects of religious belief, observance, and practice.”

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- The Fair Employment and Housing Commission’s regulations provide: “‘Religious creed’ includes any traditionally recognized religion as well as beliefs, observances, or practices which an individual sincerely holds and which occupy in his or her life a place of importance parallel to that of traditionally recognized religions. Religious creed discrimination may be established by showing: ... [t]he employer or other covered entity has failed to reasonably accommodate the applicant’s or employee’s religious creed despite being informed by the applicant or employee or otherwise having become aware of the need for reasonable accommodation.” (Cal. Code Regs., tit. 2, § 7293.1(b).)
- The Fair Employment and Housing Commission’s regulations provide: “An employer or other covered entity shall make accommodation to the known religious creed of an applicant or employee unless the employer or other covered entity can demonstrate that the accommodation is unreasonable because it would impose an undue hardship.” (Cal. Code Regs., tit. 2, § 7293.3.)
- “In evaluating an argument the employer failed to accommodate an employee’s religious beliefs, the employee must establish a prima facie case that he or she had a bona fide religious belief, of which the employer was aware, that conflicts with an employment requirement ... . Once the employee establishes a prima facie case, then the employer must establish it initiated good faith efforts to accommodate or no accommodation was possible without producing undue hardship.” (*Soldinger v. Northwest Airlines, Inc.* (1996) 51 Cal.App.4th 345, 370 [58 Cal.Rptr.2d 747], internal citation omitted.)
- “Any reasonable accommodation is sufficient to meet an employer’s obligations. However, the employer need not adopt the most reasonable accommodation nor must the employer accept the remedy preferred by the employee. The reasonableness of the employer’s efforts to accommodate is determined on a case by case basis ... . ‘[O]nce it is determined that the employer has offered a reasonable accommodation, the employer need not show that each of the employee’s proposed accommodations would result in undue hardship.’ ‘[W]here the employer has already reasonably accommodated the employee’s religious needs, the ... inquiry [ends].’ ” (*Soldinger, supra*, 51 Cal.App.4th at p. 370, internal citations omitted.)

**Secondary Sources**

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 876, 922, 940, 941

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair Employment And Housing Act*, ¶¶ 7:151, 7:215, 7:305, 7:610–7:611, 7:631–7:634, 7:641 (The Rutter Group)

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.52[3] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.22, 115.35[d], 115.91 (Matthew Bender)

California Civil Practice: Employment Litigation §§ 2:71–2:73 (Thomson Reuters West)

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1 Lindemann and Grossman, *Employment Discrimination Law* (3d ed. 1996) Religion, pp. 219–224, 226–227; *id.* (2000 supp.) at pp. 100–101

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**2570. Age Discrimination—Disparate Treatment—Essential Factual Elements**


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*[Name of plaintiff]* **claims that** *[name of defendant]* **wrongfully discriminated against** *[him/her]* **because of** *[his/her]* **age. To establish this claim, *[name of plaintiff]* must prove all of the following:**

1. **That** *[name of defendant]* **was** **[an employer/[other covered entity]]**;
2. **That** *[name of plaintiff]* **[was an employee of** *[name of defendant]* **/applied to** *[name of defendant]* **for a job/[describe other covered relationship to defendant]]**;
3. **[That** *[name of defendant]* **[discharged/refused to hire/[other adverse employment action]]** *[name of plaintiff]*;

**[or]**

**[That** *[name of defendant]* **subjected** *[name of plaintiff]* **to an adverse employment action];**

**[or]**

**[That** *[name of plaintiff]* **was constructively discharged];**

4. **That** *[name of plaintiff]* **was age 40 or older at the time of the** **[discharge/[other adverse employment action]]**;
  5. **That** *[name of plaintiff]*'s **age was a substantial motivating reason for** *[name of defendant]*'s **[decision to** **[discharge/refuse to hire/[other adverse employment action]]** *[name of plaintiff]* **/conduct]**;
  6. **That** *[name of plaintiff]* **was harmed; and**
  7. **That** *[name of defendant]*'s **conduct was a substantial factor in causing** *[name of plaintiff]*'s **harm.**
- 

*New June 2011; Revised June 2012, June 2013*

#### Directions for Use

~~Give also CACI No. 2507, “Motivating Reason” Explained. See also the Sources and Authority to CACI No. 2500, Disparate Treatment—Essential Factual Elements.~~

Read the first option for element 3 if there is no dispute as to whether the employer’s acts constituted an adverse employment action. Read the second option and also give CACI No. 2509, “Adverse Employment Action” Explained, if whether there was an adverse employment action is a question of fact

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for the jury. If constructive discharge is alleged, give the third option for element 3 and also give CACI No. 2510, “*Constructive Discharge*” Explained. Select “conduct” in element 5 if the either the second or third option is included for element 3.

Note that there are two causation elements. There must be a causal link between the discriminatory animus based on age and the adverse action (see element 5), and there must be a causal link between the adverse action and the damage (see element 7). (See *Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 713 [81 Cal.Rptr.3d 406].)

[Element 5 requires that age discrimination be a substantial motivating reason for the adverse action. \(See \*Harris v. City of Santa Monica\* \(2013\) – Cal.4th --, -- \[– Cal.Rptr.3d --, -- P.3d --\]; see also CACI No. 2507, “\*Motivating Reason\*” Explained.\) 2013 Cal. LEXIS 941](#)

Under the *McDonnell Douglas* (*McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 [93 S.Ct. 1817, 36 L.Ed.2d 668]) process for allocating burdens of proof and producing evidence, which is used in California for disparate-treatment cases under FEHA, the employee must first present a prima facie case of discrimination. The burden then shifts to the employer to produce evidence of a nondiscriminatory reason for the adverse action. At that point, the burden shifts back to the employee to show that the employer’s stated reason was in fact a pretext for a discriminatory act.

Whether or not the employee has met his or her prima facie burden, and whether or not the employer has rebutted the employee’s prima facie showing, are questions of law for the trial court, not questions of fact for the jury. (See *Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 201 [48 Cal.Rptr.2d 448].) In other words, by the time that the case is submitted to the jury, the plaintiff has already established his or her prima facie case, and the employer has already proffered a legitimate, nondiscriminatory reason for the adverse employment decision. The *McDonnell Douglas* shifting burden drops from the case. The jury is left to decide which evidence it finds more convincing, that of the employer’s discriminatory intent or that of the employer’s age-neutral reasons for the employment decision. (See *Muzquiz v. City of Emeryville* (2000) 79 Cal.App.4th 1106, 1118, fn. 5 [94 Cal.Rptr.2d 579]).

Under FEHA, age-discrimination cases require the employee to show that his or her job performance was satisfactory at the time of the adverse employment action as a part of his or her prima facie case (see *Sandell v. Taylor-Listug, Inc.* (2010) 188 Cal.App.4th 297, 321 [115 Cal.Rptr.3d 453]), even though it is the employer’s burden to produce evidence of a nondiscriminatory reason for the action. Poor job performance is the most common nondiscriminatory reason that an employer advances for the action. Even though satisfactory job performance may be an element of the employee’s prima facie case, it is not an element that the employee must prove to the trier of fact. Under element 5 and CACI No. 2507, the burden remains with the employee to ultimately prove that age discrimination was a substantial motivating reason for the action. (See *Muzquiz, supra*, 79 Cal.App.4th at p. 1119.)

[See also the Sources and Authority to CACI No. 2500, \*Disparate Treatment—Essential Factual Elements\*.](#)

### Sources and Authority

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- Government Code section 12940(a) provides that it is an unlawful employment practice “[f]or an employer, because of the ...age... 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.” (emphasis added)
- Government Code section 12926(b) provides: “ ‘Age’ refers to the chronological age of any individual who has reached his or her 40th birthday.”
- Government Code section 12941 provides: “The Legislature hereby declares its rejection of the court of appeal opinion in *Marks v Loral Corp.* (1997) 57 Cal. App.4th 30, and states that the opinion does not affect existing law in any way, including, but not limited to, the law pertaining to disparate treatment. The Legislature declares its intent that the use of salary as the basis for differentiating between employees when terminating employment may be found to constitute age discrimination if use of that criterion adversely impacts older workers as a group, and further declares its intent that the disparate impact theory of proof may be used in claims of age discrimination. The Legislature further reaffirms and declares its intent that the courts interpret the state’s statutes prohibiting age discrimination in employment broadly and vigorously, in a manner comparable to prohibitions against sex and race discrimination, and with the goal of not only protecting older workers as individuals, but also of protecting older workers as a group, since they face unique obstacles in the later phases of their careers. Nothing in this section shall limit the affirmative defenses traditionally available in employment discrimination cases including, but not limited to, those set forth in Section 7286.7 of Title 2 of the California Code of Regulations.”
- “In order to make out a prima facie case of age discrimination under FEHA, a plaintiff must present evidence that the plaintiff (1) is over the age of 40; (2) suffered an adverse employment action; (3) was performing satisfactorily at the time of the adverse action; and (4) suffered the adverse action under circumstances that give rise to an inference of unlawful discrimination, i.e., evidence that the plaintiff was replaced by someone significantly younger than the plaintiff.” (*Sandell, supra*, 188 Cal.App.4th at p. 321.)
- “In other words, ‘[b]y the time that the case is submitted to the jury, . . . the plaintiff has already established his or her prima facie case, and the employer has already proffered a legitimate, nondiscriminatory reason for the adverse employment decision, leaving only the issue of the employer’s discriminatory intent for resolution by the trier of fact. Otherwise, the case would have been disposed of as a matter of law for the trial court. That is to say, if the plaintiff cannot make out a prima facie case, the employer wins as a matter of law. If the employer cannot articulate a nondiscriminatory reason for the adverse employment decision, the plaintiff wins as a matter of law. In those instances, no fact-finding is required, and the case will never reach a jury. [¶] In short, if and when the case is submitted to the jury, the construct of the shifting burden “drops from the case,” and the jury is left to decide which evidence it finds more convincing, that of the employer’s discriminatory intent, or that of the employer’s race or age-neutral reasons for the employment decision.’ ” (*Muzquiz, supra*, 79 Cal.App.4th at p. 1118, fn. 5.)
- “Because the only issue properly before the trier of fact was whether the [defendant]’s adverse

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employment decision was motivated by discrimination on the basis of age, the shifting burdens of proof regarding appellant’s prima facie case and the issue of legitimate nondiscriminatory grounds were actually irrelevant.” (*Muzquiz, supra*, 79 Cal.App.4th at p. 1119.)

- “An employee alleging age discrimination must ultimately prove that the adverse employment action taken was based on his or her age. Since direct evidence of such motivation is seldom available, the courts use a system of shifting burdens as an aid to the presentation and resolution of age discrimination cases. That system necessarily establishes the basic framework for reviewing motions for summary judgment in such cases.” (*Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1002 [67 Cal.Rptr.2d 483], internal citations omitted.)
- “Requiring the plaintiff to show that discrimination was a *substantial* motivating factor, rather than simply a motivating factor, more effectively ensures that liability will not be imposed based on evidence of mere thoughts or passing statements unrelated to the disputed employment decision. At the same time, ... proof that discrimination was a *substantial* factor in an employment decision triggers the deterrent purpose of the FEHA and thus exposes the employer to liability, even if other factors would have led the employer to make the same decision at the time.” (*Harris, supra*, – Cal.4th at p. --, original italics.)
- “We do not suggest that discrimination must be alone sufficient to bring about an employment decision in order to constitute a substantial motivating factor. But it is important to recognize that discrimination can be serious, consequential, and even by itself determinative of an employment decision without also being a “but for” cause.” (*Harris, supra*, -- Cal.4th at p. --.)
- “While we agree that a plaintiff must demonstrate some basic level of competence at his or her job in order to meet the requirements of a prima facie showing, the burden-shifting framework established in *McDonnell Douglas* compels the conclusion that any measurement of such competency should, to the extent possible, be based on objective, rather than subjective, criteria. A plaintiff’s burden in making a prima facie case of discrimination is not intended to be ‘onerous.’ Rather, the prima facie burden exists in order to weed out patently unmeritorious claims.” (*Sandell, supra*, 188 Cal.App.4th at p. 322, internal citations omitted.)
- “A discharge is not ‘on the ground of age’ within the meaning of this prohibition unless age is a ‘motivating factor’ in the decision. Thus, ‘an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer’s decision.’ ‘[A]n employee claiming discrimination must offer substantial evidence that the employer’s stated nondiscriminatory reason for the adverse action was untrue or pretextual, or evidence the employer acted with a discriminatory animus, or a combination of the two, such that a reasonable trier of fact could conclude the employer engaged in intentional discrimination.’ ” (*West v. Bechtel Corp.* (2002) 96 Cal.App.4th 966, 978 [117 Cal.Rptr.2d 647].)

### Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 932–935

Chin et al., California Practice Guide: Employment Litigation, Ch. 8-B, *California Fair Employment and*

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*Housing Act*, ¶¶ 8:740, 8:800 et seq. (The Rutter Group)

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.31 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.22 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, § 100.43 (Matthew Bender)

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## VF-2500. Disparate Treatment (Gov. Code, § 12940(a))

We answer the questions submitted to us as follows:

1. Was *[name of defendant]* an **employer**/*[other covered entity]*?  
 Yes  No

**If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.**

2. Was *[name of plaintiff]* **an employee of** *[name of defendant]*/**an applicant to** *[name of defendant]* **for a job**/*[other covered relationship to defendant]*?  
 Yes  No

**If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.**

3. Did *[name of defendant]* **discharge/refuse to hire**/*[other adverse employment action]* *[name of plaintiff]*?  
 Yes  No

**If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.**

4. Was *[name of plaintiff]*'s *[protected status]* a **substantial** motivating reason for *[name of defendant]*'s **discharge/refusal to hire**/*[other adverse employment action]*?  
 Yes  No

**If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.**

5. Was *[name of defendant]*'s **discharge/refusal to hire**/*[other adverse employment action]* a **substantial factor** in causing harm to *[name of plaintiff]*?  
 Yes  No

**If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.**

6. What are *[name of plaintiff]*'s damages?

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- [a. **Past economic loss**
- |   |           |
|---|-----------|
| [lost earnings                                | \$ _____] |
| [lost profits                                 | \$ _____] |
| [medical expenses                             | \$ _____] |
| [other past economic loss                     | \$ _____] |
| <b>Total Past Economic Damages: \$ _____]</b> |           |
- [b. **Future economic loss**
- |   |           |
|---|-----------|
| [lost earnings                                  | \$ _____] |
| [lost profits                                   | \$ _____] |
| [medical expenses                               | \$ _____] |
| [other future economic loss                     | \$ _____] |
| <b>Total Future Economic Damages: \$ _____]</b> |           |
- [c. **Past noneconomic loss, including [physical pain/mental suffering:]**
- \$ \_\_\_\_\_]
- [d. **Future noneconomic loss, including [physical pain/mental suffering:]**
- \$ \_\_\_\_\_]
- TOTAL \$ \_\_\_\_\_**

Signed: \_\_\_\_\_  
**Presiding Juror**

Dated: \_\_\_\_\_

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant] that you are ready to present your verdict in the courtroom.

| *New September 2003; Revised April 2007, December 2010, June 2013*

**Directions for Use**

| [This verdict form is based on CACI No. 2500, Disparate Treatment—Essential Factual Elements.](#)

The special verdict forms in this section are intended only as models. They may need to be modified

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depending on the facts of the case.

~~This verdict form is based on CACI No. 2500, *Disparate Treatment—Essential Factual Elements*.~~

Relationships other than employer/employee can be substituted in question 2, as in element 2 in CACI No. 2500.

Modify question 4 if plaintiff was not actually a member of the protected class, but alleges discrimination because he or she was perceived to be a member, or associated with someone who was or was perceived to be a member, of the protected class. (See Gov. Code, § 12926(n).)

If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize “economic” and “noneconomic” damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

This form may be modified if the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest on specific losses that occurred prior to judgment.

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VF-2501. Disparate Treatment (~~Gov. Code, § 12940(a)~~)—Affirmative Defense—Bona fide Occupational Qualification (Gov. Code, § 12940(a))

We answer the questions submitted to us as follows:

1. Was [name of defendant] an [employer/[other covered entity]]?  
 Yes  No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was [name of plaintiff] [an employee of [name of defendant]/an applicant to [name of defendant] for a job/[other covered relationship to defendant]]?  
 Yes  No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did [name of defendant] [discharge/refuse to hire/[other adverse employment action]] [name of plaintiff]?  
 Yes  No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was [name of plaintiff]'s [protected status] a **substantial** motivating reason for [name of defendant]'s [discharge/refusal to hire/[other adverse employment action]]?  
 Yes  No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Was the job requirement regarding [protected status] reasonably necessary for the operation of [name of defendant]'s business?  
 Yes  No

If your answer to question 5 is yes, then answer question 6. If you answered no, skip questions 6, 7, and 8, and answer question 9.

6. Did [name of defendant] have a reasonable basis for believing that substantially all [members of protected group] are unable to safely and efficiently perform that job?

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\_\_\_ Yes \_\_\_ No

If your answer to question 6 is yes, then answer question 7. If you answered no, skip questions 7 and 8, and answer question 9.

7. Was it impossible or highly impractical for [*name of defendant*] to consider whether each [applicant/employee] was able to safely and efficiently perform the job?  
\_\_\_ Yes \_\_\_ No

If your answer to question 7 is yes, then answer question 8. If you answered no, skip question 8 and answer question 9.

8. Was it impossible or highly impractical for [*name of defendant*] to rearrange job responsibilities to avoid using [*protected status*] as a job requirement?  
\_\_\_ Yes \_\_\_ No

If your answer to question 8 is no, then answer question 9. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

9. Was [*name of defendant*]'s [*discharge/refusal to hire/[other adverse employment action]*] a substantial factor in causing harm to [*name of plaintiff*]?  
\_\_\_ Yes \_\_\_ No

If your answer to question 9 is yes, then answer question 10. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

10. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings \$ \_\_\_\_\_]

[lost profits \$ \_\_\_\_\_]

[medical expenses \$ \_\_\_\_\_]

[other past economic loss \$ \_\_\_\_\_]

Total Past Economic Damages: \$ \_\_\_\_\_]

[b. Future economic loss

[lost earnings \$ \_\_\_\_\_]

[lost profits \$ \_\_\_\_\_]

[medical expenses \$ \_\_\_\_\_]

[other future economic loss \$ \_\_\_\_\_]

Total Future Economic Damages: \$ \_\_\_\_\_]

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[c. Past noneconomic loss, including [physical pain/mental suffering:] \$ \_\_\_\_\_]

[d. Future noneconomic loss, including [physical pain/mental suffering:] \$ \_\_\_\_\_]

TOTAL \$ \_\_\_\_\_

Signed: \_\_\_\_\_  
Presiding Juror

Dated: \_\_\_\_\_

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant] that you are ready to present your verdict in the courtroom.

*New September 2003; Revised April 2007, December 2010, June 2013*

### Directions for Use

This verdict form is based on CACI No. 2500, *Disparate Treatment—Essential Factual Elements*, and CACI No. 2501, *Affirmative Defense—Bona fide Occupational Qualification*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

~~This verdict form is based on CACI No. 2500, *Disparate Treatment—Essential Factual Elements*, and CACI No. 2501, *Affirmative Defense—Bona fide Occupational Qualification*.~~

Relationships other than employer/employee can be substituted in question 2, as in element 2 in CACI No. 2500.

Modify question 4 if plaintiff was not actually a member of the protected class, but alleges discrimination because he or she was perceived to be a member, or associated with someone who was or was perceived to be a member, of the protected class. (See Gov. Code, § 12926(n).)

If specificity is not required, users do not have to itemize all the damages listed in question 10 and do not have to categorize “economic” and “noneconomic” damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

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If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

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## VF-2504. Retaliation (Gov. Code, § 12940(h))

We answer the questions submitted to us as follows:

1. Did *[name of plaintiff]* *[describe protected activity]*?  
 Yes  No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. [Did *[name of defendant]* [discharge/demote/*[specify other adverse employment action]*] *[name of plaintiff]*?]

[or]

[Did *[name of defendant]* engage in conduct that, taken as a whole, materially and adversely affected the terms and conditions of *[name of plaintiff]*'s employment?]

Yes  No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was *[name of plaintiff]*'s *[describe protected activity]* a **substantial** motivating reason for *[name of defendant]*'s [decision to [discharge/demote/*[specify other adverse employment action]*] *[name of plaintiff]*/conduct]?  
 Yes  No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was *[name of defendant]*'s conduct a substantial factor in causing harm to *[name of plaintiff]*?  
 Yes  No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. What are *[name of plaintiff]*'s damages?

[a. Past economic loss

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[lost earnings	\$ _____]
[lost profits	\$ _____]
[medical expenses	\$ _____]
[other past economic loss	\$ _____]
<b>Total Past Economic Damages: \$ _____]</b>	

[b. **Future economic loss**

[lost earnings	\$ _____]
[lost profits	\$ _____]
[medical expenses	\$ _____]
[other future economic loss	\$ _____]
<b>Total Future Economic Damages: \$ _____]</b>	

[c. **Past noneconomic loss, including [physical pain/mental suffering:]**

\$ \_\_\_\_\_]

[d. **Future noneconomic loss, including [physical pain/mental suffering:]**

\$ \_\_\_\_\_]

**TOTAL \$ \_\_\_\_\_**

**Signed:** \_\_\_\_\_  
**Presiding Juror**

**Dated:** \_\_\_\_\_

**After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant] that you are ready to present your verdict in the courtroom.**

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*New September 2003; Revised April 2007, August 2007, December 2010, June 2013*

### Directions for Use

[This verdict form is based on CACI No. 2505, Retaliation—Essential Factual Elements.](#)

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

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~~This verdict form is based on CACI No. 2505, *Retaliation—Essential Factual Elements*.~~

Read the second option for question 2 in cases involving a pattern of employer harassment consisting of acts that might not individually be sufficient to constitute retaliation, but taken as a whole establish prohibited conduct. Give both options if the employee presents evidence supporting liability under both a sufficient-single-act theory or a pattern-of-harassment theory. Also select “conduct” in question 3 if the second option or both options are included for question 2.

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize “economic” and “noneconomic” damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

This form may be modified if the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest on specific losses that occurred prior to judgment.

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## VF-2508. Disability Discrimination—Disparate Treatment

We answer the questions submitted to us as follows:

1. Was *[name of defendant]* **[an employer/*[other covered entity]*]**?  
 Yes  No

**If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.**

2. Was *[name of plaintiff]* **[an employee of *[name of defendant]*/an applicant to *[name of defendant]* for a job/*[other covered relationship to defendant]*]**?  
 Yes  No

**If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.**

3. Did *[name of defendant]* **[know that *[name of plaintiff]* had/treat *[name of plaintiff]* as if *[he/she]* had] [a history of having] [a] *[select term to describe basis of limitations, e.g., physical condition]* [that limited *[insert major life activity]*]**?  
 Yes  No

**If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.**

4. Was *[name of plaintiff]* **able to perform the essential job duties [with reasonable accommodation] for *[his/her]* *[e.g., physical condition]*]**?  
 Yes  No

**If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.**

5. Did *[name of defendant]* **[discharge/refuse to hire/*[other adverse employment action]*] *[name of plaintiff]*]**?  
 Yes  No

**If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.**

6. Was *[name of plaintiff]*'s **[perceived] [history of [a]] *[e.g., physical condition]* a**

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**substantial** motivating reason for [name of defendant]’s decision to [discharge/refuse to hire/[other adverse employment action]] [name of plaintiff]?

\_\_\_ Yes \_\_\_ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Was [name of defendant]’s [decision/conduct] a substantial factor in causing harm to [name of plaintiff]?

\_\_\_ Yes \_\_\_ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. What are [name of plaintiff]’s damages?

[a. Past economic loss

[lost earnings \$ \_\_\_\_\_]

[lost profits \$ \_\_\_\_\_]

[medical expenses \$ \_\_\_\_\_]

[other past economic loss \$ \_\_\_\_\_]

Total Past Economic Damages: \$ \_\_\_\_\_]

[b. Future economic loss

[lost earnings \$ \_\_\_\_\_]

[lost profits \$ \_\_\_\_\_]

[medical expenses \$ \_\_\_\_\_]

[other future economic loss \$ \_\_\_\_\_]

Total Future Economic Damages: \$ \_\_\_\_\_]

[c. Past noneconomic loss, including [physical pain/mental suffering:]

\$ \_\_\_\_\_]

[d. Future noneconomic loss, including [physical pain/mental suffering:]

\$ \_\_\_\_\_]

TOTAL \$ \_\_\_\_\_

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**Signed:** \_\_\_\_\_  
**Presiding Juror**

**Dated:** \_\_\_\_\_

**After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant] that you are ready to present your verdict in the courtroom.**

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*New September 2003; Revised April 2007, December 2007, December 2009, June 2010, December 2010, June 2013*

**Directions for Use**

*This verdict form is based on CACI No. 2540, Disability Discrimination—Disparate Treatment—Essential Factual Elements.*

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

~~*This verdict form is based on CACI No. 2540, Disability Discrimination—Disparate Treatment—Essential Factual Elements.*~~

Select a term to use throughout to describe the source of the plaintiff’s limitations. It may be a statutory term such as “physical disability,” “mental disability,” or “medical condition.” (See Gov. Code, § 12940(a).) Or it may be a general term such as “condition,” “disease,” or “disorder.” Or it may be a specific health condition such as “diabetes.”

Relationships other than employer/employee can be substituted in question 1, as in element 1 of CACI No. 2540. Depending on the facts of the case, other factual scenarios can be substituted in questions 3 and 6, as in elements 3 and 6 of the instruction.

For question 3, select the claimed basis of discrimination: an actual disability, a history of a disability, a perceived disability, or a perceived history of a disability. For an actual disability, select “know that [name of plaintiff] had.” For a perceived disability, select “treat [name of plaintiff] as if [he/she] had.”

If medical-condition discrimination as defined by statute (see Gov. Code, § 12926(i)) is alleged, omit “that limited [insert major life activity]” in question 3. (Compare Gov. Code, § 12926(i) with Gov. Code, § 12926(j), (l) [no requirement that medical condition limit major life activity].)

If specificity is not required, users do not have to itemize all the damages listed in question 8 and do not have to categorize “economic” and “noneconomic” damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

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If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

This form may be modified if the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest on specific losses that occurred prior to judgment.

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## VF-2511. Religious Creed Discrimination—Failure to Accommodate (Gov. Code, § 12940(I))

We answer the questions submitted to us as follows:

1. Was *[name of defendant]* **[an employer/*[other covered entity]*]**?  
 Yes  No

**If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.**

2. Was *[name of plaintiff]* **[an employee of *[name of defendant]*/an applicant to *[name of defendant]* for a job/*[other covered relationship to defendant]*]**?  
 Yes  No

**If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.**

3. Does *[name of plaintiff]* **have a sincerely held religious belief that *[describe religious belief, observance, or practice]*?**  
 Yes  No

**If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.**

4. Did *[name of plaintiff]*'s religious **[belief/observance]** conflict with a job requirement?  
 Yes  No

**If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.**

5. Did *[name of defendant]* **know of the conflict between *[name of plaintiff]*'s religious [belief/observance] and the job requirement?**  
 Yes  No

**If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.**

6. Did *[name of defendant]* **reasonably accommodate *[name of plaintiff]*'s religious [belief/observance]?**  
 Yes  No

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If your answer to question 6 is no, then answer question 7. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. **Did** *[name of defendant]* ~~**[discharge/refuse to hire/**~~*[other adverse employment action]* ~~**]**~~ *[name of plaintiff]* **because Was** *[name of plaintiff]*'s ~~**failed-failure**~~ to comply with the conflicting job requirement **a substantial motivating reason for** *[name of defendant]*'s ~~**[discharge of/refusal to hire/**~~*[other adverse employment action]* *[name of plaintiff]*?  
 Yes  No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. Was *[name of defendant]*'s failure to reasonably accommodate *[name of plaintiff]*'s religious [belief/observance] a substantial factor in causing harm to *[name of plaintiff]*?  
 Yes  No

If your answer to question 8 is yes, then answer question 9. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

9. What are *[name of plaintiff]*'s damages?

[a. Past economic loss

[lost earnings	\$ _____]
[lost profits	\$ _____]
[medical expenses	\$ _____]
[other past economic loss	\$ _____]
<b>Total Past Economic Damages: \$ _____]</b>	

[b. Future economic loss

[lost earnings	\$ _____]
[lost profits	\$ _____]
[medical expenses	\$ _____]
[other future economic loss	\$ _____]
<b>Total Future Economic Damages: \$ _____]</b>	

[c. Past noneconomic loss, including [physical pain/mental suffering:]  
\$ \_\_\_\_\_]

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[d. Future noneconomic loss, including [physical pain/mental suffering:]

\$ \_\_\_\_\_]

TOTAL \$ \_\_\_\_\_

Signed: \_\_\_\_\_  
**Presiding Juror**

Dated: \_\_\_\_\_

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant] that you are ready to present your verdict in the courtroom.

*New September 2003; Revised April 2007, December 2010, June 2013*

#### Directions for Use

This verdict form is based on CACI No. 2560, *Religious Creed Discrimination—Failure to Accommodate—Essential Factual Elements*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

~~This verdict form is based on CACI No. 2560, *Religious Creed Discrimination—Failure to Accommodate—Essential Factual Elements*.~~

If specificity is not required, users do not have to itemize all the damages listed in question 9 and do not have to categorize “economic” and “noneconomic” damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

This form may be modified if the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest on specific losses that occurred prior to judgment.

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**VF-2512. Religious Creed Discrimination—Failure to Accommodate—~~(Gov. Code, § 12940(I))~~—  
Affirmative Defense—Undue Hardship (Gov. Code, §§ 12926(t), 12940(I))**

---

We answer the questions submitted to us as follows:

1. Was *[name of defendant]* **[an employer/*[other covered entity]*]**?  
 Yes  No

**If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.**

2. Was *[name of plaintiff]* **[an employee of *[name of defendant]*/an applicant to *[name of defendant]* for a job/*[other covered relationship to defendant]*]**?  
 Yes  No

**If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.**

3. Does *[name of plaintiff]* **have a sincerely held religious belief that *[describe religious belief, observance, or practice]*?**  
 Yes  No

**If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.**

4. Did *[name of plaintiff]*'s religious **[belief/observance]** conflict with a job requirement?  
 Yes  No

**If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.**

5. Did *[name of defendant]* **know of the conflict between *[name of plaintiff]*'s religious [belief/observance] and the job requirement?**  
 Yes  No

**If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.**

6. Did *[name of defendant]* **reasonably accommodate *[name of plaintiff]*'s religious [belief/observance]?**

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Yes  No

If your answer to question 6 is no, then answer question 7. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Did *[name of defendant]* explore available ways to accommodate *[name of plaintiff]*'s religious *[belief/observance]*?  
 Yes  No

If your answer to question 7 is yes, then answer question 8. If you answered no, skip question 8 and answer question 9.

8. Could *[name of defendant]* have accommodated *[name of plaintiff]*'s religious *[belief/observance]* without causing undue hardship to *[name of defendant]*'s business?  
 Yes  No

If your answer to question 8 is yes, then answer question 9. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

9. ~~Did *[name of defendant]* **[discharge/refuse to hire/other adverse employment action]** *[name of plaintiff]* because Was *[name of plaintiff]*'s failure to comply with the conflicting job requirement **a substantial motivating reason for *[name of defendant]*'s [discharge of/refusal to hire/other adverse employment action]** *[name of plaintiff]*?~~  
 Yes  No

If your answer to question 9 is yes, then answer question 10. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

10. Was *[name of defendant]*'s failure to reasonably accommodate *[name of plaintiff]*'s religious *[belief/observance]* a substantial factor in causing harm to *[name of plaintiff]*?  
 Yes  No

If your answer to question 10 is yes, then answer question 11. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

11. What are *[name of plaintiff]*'s damages?

- [a. Past economic loss  
                   [lost earnings                   \$ \_\_\_\_\_]  
                   [lost profits                    \$ \_\_\_\_\_]

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[medical expenses \$ \_\_\_\_\_]  
 [other past economic loss \$ \_\_\_\_\_]  
**Total Past Economic Damages: \$ \_\_\_\_\_]**

[b. **Future economic loss**  
 [lost earnings \$ \_\_\_\_\_]  
 [lost profits \$ \_\_\_\_\_]  
 [medical expenses \$ \_\_\_\_\_]  
 [other future economic loss \$ \_\_\_\_\_]  
**Total Future Economic Damages: \$ \_\_\_\_\_]**

[c. **Past noneconomic loss, including [physical pain/mental suffering:]**  
 \$ \_\_\_\_\_]

[d. **Future noneconomic loss, including [physical pain/mental suffering:]**  
 \$ \_\_\_\_\_]

**TOTAL \$ \_\_\_\_\_**

**Signed:** \_\_\_\_\_  
**Presiding Juror**

**Dated:** \_\_\_\_\_

**After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant] that you are ready to present your verdict in the courtroom.**

*New September 2003; Revised April 2007, December 2010, December 2012, June 2013*

**Directions for Use**

~~The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.~~

This verdict form is based on CACI No. 2560, *Religious Creed Discrimination—Failure to Accommodate—Essential Factual Elements*; ~~(See also~~ Gov. Code, §§ 12926(t), 12940(l)); and CACI No. 25452561, Disability Religious Creed Discrimination—Reasonable Accommodation—Affirmative Defense—Undue Hardship.

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The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If specificity is not required, users do not have to itemize all the damages listed in question 11 and do not have to categorize “economic” and “noneconomic” damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

This form may be modified if the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest on specific losses that occurred prior to judgment.

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## VF-2514. Failure to Prevent Harassment, Discrimination, or Retaliation

We answer the questions submitted to us as follows:

1. Was *[name of defendant]* an **employer**/*[other covered entity]*?
- Yes  No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was *[name of plaintiff]* **an employee of** *[name of defendant]*/**an applicant to** *[name of defendant]* **for a job/a person providing services under a contract with** *[name of defendant]*?
- Yes  No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was *[name of plaintiff]* subjected to **harassing conduct/discrimination/retaliation***either* **in the workplace?**
- Yes  No

**If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.**

4. **[Was *[name of plaintiff]*'s *[protected status, e.g., race, gender, or age]* a substantial motivating reason for the *[harassing conduct/discrimination]* ~~*[harassing conduct/discrimination]*~~ because *[he/she]* ~~*[was/was believed to be/was associated with a person who was/was associated with a person who was believed to be]*~~ *[protected status]*?]**

*[or]*

**[Was *[name of plaintiff]*'s *[describe protected activity, e.g., filing a complaint with the Department of Fair Employment and Housing]* a substantial motivating reason for the retaliation because *[he/she]* ~~*[opposed *[name of defendant]*'s unlawful and discriminatory employment practices/*~~ *[or]* ~~*[filed a complaint with/testified before/*~~ *[or]* ~~*assisted in a proceeding before]*~~ the Department of Fair Employment and Housing?]**

Yes  No

If your answer to question ~~3~~ 4 is yes, then answer question ~~4~~ 5. If you answered no,



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TOTAL \$ \_\_\_\_\_

Signed: \_\_\_\_\_  
Presiding Juror

Dated: \_\_\_\_\_

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant] that you are ready to present your verdict in the courtroom.

New June 2010; Revised December 2010, June 2013

## Directions for Use

This verdict form is based on CACI No. 2527, Failure to Prevent Harassment, Discrimination, or Retaliation—Essential Factual Elements—Employer or Entity Defendant.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

~~This verdict form is based on CACI No. 2527, Failure to Prevent Harassment, Discrimination, or Retaliation—Essential Factual Elements—Employer or Entity Defendant.~~

Modify the first option to question 4 if the plaintiff was not actually a member of the protected class, but alleges harassment or discrimination because he or she was perceived to be a member, or associated with someone who was or was perceived to be a member, of the protected class. (See Gov. Code, § 12926(n).)

If specificity is not required, users do not have to itemize all the damages listed in question ~~6-7~~ and do not have to categorize “economic” and “noneconomic” damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

This form may be modified if the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest on specific losses that occurred before judgment.

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**2620. CFRA Rights Retaliation—Essential Factual Elements (Gov. Code, § 12945.2(l))**

*[Name of plaintiff]* claims that *[name of defendant]* retaliated against **[him/her]** for **[[requesting/taking] [family care/medical] leave/[other protected activity]]**. To establish this claim, *[name of plaintiff]* must prove all of the following:

1. That *[name of plaintiff]* was eligible for **[family care/medical] leave**;
2. That *[name of plaintiff]* **[[requested/took] [family care/medical] leave/[other protected activity]]**;
3. That *[name of defendant]* **[discharged/[other adverse employment action]]** *[name of plaintiff]*;
4. That *[name of plaintiff]*'s **[[request for/taking of] [family care/medical] leave/[other protected activity]]** was a **substantial** motivating reason for **[discharging/[other adverse employment action]]** *[him/her]*;
5. That *[name of plaintiff]* was harmed; and
6. That *[name of defendant]*'s retaliatory conduct was a substantial factor in causing *[name of plaintiff]*'s harm.

*New September 2003; Revised December 2012, June 2013*

**Directions for Use**

Use this instruction in cases of alleged retaliation for an employee's exercise of rights granted by the California Family Rights Act (CFRA). (See Gov. Code, § 12945.2(l).) The instruction assumes that the defendant is plaintiff's present or former employer, and therefore it must be modified if the defendant is a prospective employer or other person.

The statute reaches a broad range of adverse employment actions short of actual discharge. (See Gov. Code, § 12945.2(l).) Element 3 may be modified to allege constructive discharge or adverse acts other than actual discharge. See CACI No. 2509, "Adverse Employment Action" Explained, and CACI No. 2510, "Constructive Discharge" Explained, for instructions under the Fair Employment and Housing Act that may be adapted for use with this instruction.

Element 4 uses the term "substantial motivating reason" to express both intent and causation between the employee's exercise of a CFRA right and the adverse employment action. "Substantial motivating reason" has been held to be the appropriate standard under the discrimination prohibitions of the Fair Employment and Housing Act to address the possibility of both discriminatory and nondiscriminatory motives. (See *Harris v. City of Santa Monica* (2013) – Cal.4th --, --[-- Cal.Rptr.3d --, -- P.3d --]; CACI No. 2507, "Substantial Motivating Reason" Explained.) 2013 Cal. LEXIS 941 Whether this standard

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applies to CFRA retaliation cases has not been addressed by the courts.

**Sources and Authority**

- Government Code section 12945.2(l) provides:

It shall be an unlawful employment practice for an employer to refuse to hire, or to discharge, fine, suspend, expel, or discriminate against, any individual because of any of the following:

- (1) An individual’s exercise of the right to family care and medical leave ...
- (2) An individual’s giving information or testimony as to his or her own family care and medical leave, or another person’s family care and medical leave, in any inquiry or proceeding related to rights guaranteed under this section.

- Government Code section 12945.2(t) provides: “It shall be an unlawful employment practice for an employer to interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right provided under this section.”
- Government Code section 12940(h) provides that it is an unlawful employment practice “[f]or any employer, labor organization, employment agency, or person to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under [Government Code sections 12900 through 12996] or because the person has filed a complaint, testified, or assisted in any proceeding under this part.”
- “A plaintiff can establish a prima facie case of retaliation in violation of the CFRA by showing the following: (1) the defendant was a covered employer; (2) the plaintiff was eligible for CFRA leave; (3) the plaintiff exercised his or her right to take a qualifying leave; and (4) the plaintiff suffered an adverse employment action *because he or she exercised the right to take CFRA leave.*” (*Rogers v. County of Los Angeles* (2011) 198 Cal.App.4th 480, 491 [130 Cal.Rptr.3d 350], original italics.)

**Secondary Sources**

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 943, 944

Chin et al., California Practice Guide: Employment Litigation, Ch. 12-B, *Family And Medical Leave Act (FMLA)/California Family Rights Act (CFRA)*, ¶¶ 12:1300, 12:1301 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Other Employee Rights Statutes, §§ 4.18–4.20

1 Wilcox, California Employment Law, Ch. 8, *Leaves of Absence*, § 8.32 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.37[3][c] (Matthew Bender)

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## VF-2602. CFRA Rights Retaliation

We answer the questions submitted to us as follows:

1. Was *[name of plaintiff]* eligible for family care or medical leave?  
 Yes  No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did *[name of plaintiff]* *[[request/take] [family care/medical] leave/[other protected activity]]*?  
 Yes  No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did *[name of defendant]* *[discharge/[other adverse employment action]]* *[name of plaintiff]*?  
 Yes  No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was *[name of plaintiff]*'s *[[request for/taking] [family care/medical] leave/[other protected activity]]* a **substantial** motivating reason for *[name of defendant]*'s decision to *[discharge/[other adverse employment action]]*?  
 Yes  No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Was *[name of defendant]*'s retaliatory conduct a substantial factor in causing harm to *[name of plaintiff]*?  
 Yes  No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. What are *[name of plaintiff]*'s damages?

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- [a. **Past economic loss**
- |   |           |
|---|-----------|
| [lost earnings                                | \$ _____] |
| [lost profits                                 | \$ _____] |
| [medical expenses                             | \$ _____] |
| [other past economic loss                     | \$ _____] |
| <b>Total Past Economic Damages: \$ _____]</b> |           |
- [b. **Future economic loss**
- |   |           |
|---|-----------|
| [lost earnings                                  | \$ _____] |
| [lost profits                                   | \$ _____] |
| [medical expenses                               | \$ _____] |
| [other future economic loss                     | \$ _____] |
| <b>Total Future Economic Damages: \$ _____]</b> |           |
- [c. **Past noneconomic loss, including [physical pain/mental suffering:]**
- \$ \_\_\_\_\_]
- [d. **Future noneconomic loss, including [physical pain/mental suffering:]**
- \$ \_\_\_\_\_]
- TOTAL \$ \_\_\_\_\_**

Signed: \_\_\_\_\_  
**Presiding Juror**

Dated: \_\_\_\_\_

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant] that you are ready to present your verdict in the courtroom.

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| *New September 2003; Revised April 2007, December 2010, June 2013*

### Directions for Use

| ~~The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.~~

This verdict form is based on CACI No. 2620, *CFRA Rights Retaliation—Essential Factual Elements*.

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The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize “economic” and “noneconomic” damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

This form may be modified if the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest on specific losses that occurred prior to judgment.

## Draft—Not Approved by Judicial Council

**2730. Whistleblower Protection—Essential Factual Elements (Lab. Code, § 1102.5)**


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*[Name of plaintiff]* **claims that** *[name of defendant]* **[discharged/[other adverse employment action]]** **[him/her]** **in retaliation for** **[his/her]** **[disclosure of information of/refusal to participate in] an unlawful act. In order to establish this claim, *[name of plaintiff]* must prove all of the following:**

1. **That *[name of plaintiff]* was an employee of *[name of defendant]*;**
2. **[That *[name of plaintiff]* disclosed to a [government/law enforcement] agency that *[specify information disclosed]*;**  
  
*[or]*  
**[That *[name of plaintiff]* refused to *[specify activity in which plaintiff refused to participate]*];**
3. **[That *[name of plaintiff]* had reasonable cause to believe that the information disclosed *[name of defendant]*'s [violation of/noncompliance with] a [state/federal] rule or regulation;**  
  
*[or]*  
**[That *[specify activity]* would result in [a violation of/noncompliance with] a [state/federal] rule or regulation;]**
4. **That *[name of defendant]* [discharged/[other adverse employment action]] *[name of plaintiff]*;**
5. **That *[name of plaintiff]*'s [disclosure of information/refusal to *[specify]*] was a **motivating reason for contributing factor in** *[name of defendant]*'s decision to [discharge/[other adverse employment action]] *[name of plaintiff]*;**
6. **That *[name of plaintiff]* was harmed; and**
7. **That *[name of defendant]*'s conduct was a substantial factor in causing *[name of plaintiff]*'s harm.**

**[The disclosure of policies that an employee believes to be unwise, wasteful, gross misconduct, or the like, is not protected. Instead, *[name of plaintiff]* must have reasonably believed that *[name of defendant]*'s policies violated federal or state statutes, rules, or regulations.]**

**[It is not *[name of plaintiff]*'s motivation for [his/her] disclosure, but only the content of that disclosure, that determines whether the disclosure is protected.]**

**[A report made by an employee of a government agency to his or her employer may be a protected disclosure.]**

**[A report of publicly known facts is not a protected disclosure.]**

*New December 2012; Revised June 2013*

### Directions for Use

The whistle-blower protection statute of the Labor Code prohibits retaliation against an employee who discloses or refuses to participate in illegal activity. (Lab. Code, § 1102.5(b), (c).) Select the first option for elements 2 and 3 for disclosure of information; select the second options for refusal to participate. Also select any of the optional paragraphs explaining what disclosures are and are not protected as appropriate to the facts of the case.

Retaliation is viewed the same as it is under the Fair Employment and Housing Act. (*Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal.App.4th 1378, 1387 [37 Cal.Rptr.3d 113]; see CACI No. 2505, *Retaliation—Essential Factual Elements*.) Element 4 may be modified to allege constructive discharge or adverse acts that might not be obviously prejudicial. See CACI No. 2509, “*Adverse Employment Action*” Explained, and CACI No. 2510, “*Constructive Discharge*” Explained, for instructions that may be adapted for use with this instruction. ~~CACI No. 2507, “*Motivating Reason*” Explained, may be given in support of element 5.~~

The employee must demonstrate by a preponderance of evidence that a protected activity was a contributing factor in the adverse action against the employee. The employer may then attempt to prove by clear and convincing evidence that the action would have been taken anyway for legitimate, independent reasons even if the employee had not engaged in the protected activities. (See Lab. Code, § 1102.6.)

### Sources and Authority

- Labor Code section 1102.5 provides:
  - (a) An employer may not make, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation.
  - (b) An employer may not retaliate against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation.
  - (c) An employer may not retaliate against an employee for refusing to participate in an activity that would result in a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation.
  - (d) An employer may not retaliate against an employee for having exercised his or her rights under subdivision (a), (b), or (c) in any former employment.

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(e) A report made by an employee of a government agency to his or her employer is a disclosure of information to a government or law enforcement agency pursuant to subdivisions (a) and (b).

(f) In addition to other penalties, an employer that is a corporation or limited liability company is liable for a civil penalty not exceeding ten thousand dollars (\$10,000) for each violation of this section.

(g) This section does not apply to rules, regulations, or policies which implement, or to actions by employers against employees who violate, the confidentiality of the lawyer-client privilege of Article 3 (commencing with Section 950), the physician-patient privilege of Article 6 (commencing with Section 990) of Chapter 4 of Division 8 of the Evidence Code, or trade secret information.

- Labor Code section 1102.6 provides: “In a civil action or administrative proceeding brought pursuant to Section 1102.5, once it has been demonstrated by a preponderance of evidence that an activity proscribed by Section 1102.5 was a contributing factor in the alleged prohibited action against the employee, the employer shall have the burden of proof to demonstrate by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in the activities protected by Section 1102.5.”
- “The elements of a section 1102.5(b) retaliation cause of action require that (1) the plaintiff establish a prima facie case of retaliation, (2) the defendant provide a legitimate, nonretaliatory explanation for its acts, and (3) the plaintiff show this explanation is merely a pretext for the retaliation. [¶] We are concerned here with the first element of a section 1102.5(b) retaliation claim, establishing a prima facie case of retaliation. To do that, a plaintiff must show (1) she engaged in a protected activity, (2) her employer subjected her to an adverse employment action, and (3) there is a causal link between the two.” (*Patten, supra*, 134 Cal.App.4th at p. 1384, internal citations omitted.)
- “In 1984, our Legislature provided ‘whistle-blower’ protection in section 1102.5, subdivision (b), stating that an employer may not retaliate against an employee for disclosing a violation of state or federal regulation to a governmental or law enforcement agency. This provision reflects the broad public policy interest in encouraging workplace whistle-blowers to report unlawful acts without fearing retaliation. Section 1102.5, subdivision (b), concerns employees who report to public agencies. It does not protect plaintiff, who reported his suspicions directly to his employer. Nonetheless, it does show the Legislature's interest in encouraging employees to report workplace activity that may violate important public policies that the Legislature has stated. The state's whistle-blower statute includes administrative regulations as a policy source for reporting an employer's wrongful acts and grants employees protection against retaliatory termination. Thus, our Legislature believes that fundamental public policies embodied in regulations are sufficiently important to justify encouraging employees to challenge employers who ignore those policies.” (*Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 76–77 [78 Cal.Rptr.2d 16, 960 P.2d 1046].)
- “As a general proposition, we conclude the court could properly craft instructions in conformity

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with law developed in federal cases interpreting the federal whistleblower statute. As the court acknowledged, it was not bound by such federal interpretations. Nevertheless, the court could properly conclude that the jury required guidance as to what did and did not constitute ‘disclosing information’ or a ‘protected disclosure’ under the California statutes.” (*Mize-Kurzman v. Marin Community College Dist.* (2012) 202 Cal.App.4th 832, 847 [136 Cal.Rptr.3d 259].)

- “The court erred in failing to distinguish between the disclosure of policies that plaintiff believed to be unwise, wasteful, gross misconduct or the like, which are subject to the [debatable differences of opinion concerning policy matters] limitation, and the disclosure of policies that plaintiff reasonably believed violated federal or state statutes, rules, or regulations, which are not subject to this limitation, even if these policies were also claimed to be unwise, wasteful or to constitute gross misconduct.” (*Mize-Kurzman, supra*, 202 Cal.App.4th at pp. 852–853.)
- “[I]t is not the *motive* of the asserted whistleblower, but the nature of the communication that determines whether it is covered.” (*Mize-Kurzman, supra*, 202 Cal.App.4th at p. 852, original italics.)
- “[I]f we interpret section 1102.5 to require an employee to go to a different public agency or directly to a law enforcement agency before he or she can be assured of protection from retaliation, we would be encouraging public employees who suspected wrongdoing to do nothing at all. Under the scenario envisioned by the [defendant], if the employee reports his or her suspicions to the agency, ... , he or she will *have to suffer any retaliatory* conduct with no legal recourse. If the employee reports suspicions to an outside agency or law enforcement personnel, he or she risks subjecting the agency to negative publicity and loss of public support which could ensue without regard to whether the charges prove to be true. At the same time, a serious rift in the employment relationship will have occurred because the employee did not go through official channels within the agency which was prepared to investigate the charges. We see no reason to interpret the statute to create such anomalous results.” (*Gardenhire v. Housing Authority* (2000) 85 Cal.App.4th 236, 243 [101 Cal.Rptr.2d 893].)
- Labor Code section 1102.5, subdivision (b) protects employee reports of unlawful activity by third parties such as contractors and employees, as well unlawful activity by an employer. In support of our conclusion, we note that an employer may have a financial motive to suppress reports of illegal conduct by employees and contractors that reflect poorly on that employer.” (*McVeigh v. Recology San Francisco* (2013) 213 Cal.App.4th 443, 471 [-- Cal.Rptr.3d --], internal citation omitted.)
- “We are persuaded that [instructing the jury that reporting publicly known facts is not a protected disclosure] was a proper limitation on what constitutes disclosure protected by California law.” (*Mize-Kurzman, supra*, 202 Cal.App.4th at p. 858.)
- “Matters such as transferring employees, writing up employees, and counseling employees are personnel matters. ‘To exalt these exclusively internal personnel disclosures with whistleblower status would create all sorts of mischief. Most damagingly, it would thrust the judiciary into micromanaging employment practices and create a legion of undeserving protected ‘whistleblowers’ arising from the routine workings and communications of the job site. ... ’ ”

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(*Mueller v. County of Los Angeles* (2009) 176 Cal.App.4th 809, 822 [98 Cal.Rptr.3d 281].)

***Secondary Sources***

3 Witkin, Summary of California Law (10th ed. 2005) Agency § 349

Chin, et al., California Practice Guide: Employment Litigation, Ch. 5-L, *Employment Torts And Related Claims: Other Statutory Claims*, ¶ 5:894 et seq. (The Rutter Group)

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.03[2][c] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, §§ 250.12, 249.15 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Public Entities and Officers: False Claims Actions*, § 100.42 et seq. (Matthew Bender)

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## 3060. Unruh Civil Rights Act—Essential Factual Elements (Civ. Code, §§ 51, 52)

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[Name of plaintiff] claims that [name of defendant] denied [him/her] full and equal [accommodations/advantages/facilities/privileges/services] because of [his/her] [sex/race/color/religion/ancestry/national origin/disability/medical condition/genetic information/marital status/sexual orientation/[insert other actionable characteristic]]. To establish this claim, [name of plaintiff] must prove all of the following:

1. That [name of defendant] [denied/aided or incited a denial of/discriminated or made a distinction that denied] full and equal [accommodations/advantages/facilities/privileges/services] to [name of plaintiff];
  2. [That a **substantial** motivating reason for [name of defendant]’s conduct was [its perception of] [name of plaintiff]’s [sex/race/color/religion/ancestry/national origin/medical condition/genetic information/marital status/sexual orientation/[insert other actionable characteristic]]];  
  
[That the [sex/race/color/religion/ancestry/national origin/medical condition/genetic information/marital status/sexual orientation/[insert other actionable characteristic]] of a person whom [name of plaintiff] was associated with was a **substantial** motivating reason for [name of defendant]’s conduct;]
  3. That [name of plaintiff] was harmed; and
  4. That [name of defendant]’s conduct was a substantial factor in causing [name of plaintiff]’s harm.
- 

New September 2003; Revised December 2011, June 2012; Renumbered from CACI No. 3020 December 2012; Revised June 2013

#### Directions for Use

Select the bracketed option from element 2 that is most appropriate to the facts of the case.

~~–Note that this instruction element 2 uses the term “substantial includes a motivating reason” to express both intent and causation between the protected classification and the defendant’s conduct element (see element 2). “Substantial motivating reason” has been held to be the appropriate standard under the Fair Employment and Housing Act to address the possibility of both discriminatory and nondiscriminatory motives. (See *Harris v. City of Santa Monica* (2013) – Cal.4th --, -- [– Cal.Rptr.3d --, -- P.3d --]; CACI No. 2507, “Substantial Motivating Reason” Explained.) 2013 Cal. LEXIS 941 Whether the FEHA standard applies under the Unruh Act has not been addressed by the courts. The possible effect of a mixed motive (both discriminatory and nondiscriminatory) is still an open issue under this statute.~~

With the exception of claims that are also violations of the Americans With Disabilities Act (ADA) (see *Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, 665 [94 Cal.Rptr.3d 685, 208 P.3d 623]), intentional

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discrimination is required for violations of the Unruh Act. (See *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1149 [278 Cal.Rptr. 614, 805 P.2d 873].) The intent requirement is encompassed within the motivating-reason element. For claims that are also violations of the ADA, do not give element 2.

Note that there are two causation elements. There must be a causal link between the discriminatory intent and the adverse action (see element 2), and there must be a causal link between the adverse action and the harm (see element 4).

For an instruction on damages under the Unruh Act, see CACI No. 3067, *Unruh Civil Rights Act—Damages*. Note that a successful plaintiff is entitled to an award of up to three times actual damages but not less than minimum recovery of \$4,000 regardless of any actual ~~harm~~ damages. (Civ. Code, § 52(a).) In this regard, harm is presumed, and elements 3 and 4 may be considered as established if no actual damages are sought. (See *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 33 [219 Cal.Rptr. 133, 707 P.2d 195]. [Unruh Act violations are per se injurious]; Civ. Code, § Section-52 [provides for minimum statutory damages for every violation ~~of section-51~~, regardless of the plaintiff's actual damages]; see also Civ. Code, § 52(h) [“actual damages” means special and general damages].)

The judge may decide the issue of whether the defendant is a business establishment as a matter of law. (*Rotary Club of Duarte v. Bd. of Directors* (1986) 178 Cal.App.3d 1035, 1050 [224 Cal.Rptr. 213].) Special interrogatories may be needed if there are factual issues. This element has been omitted from the instruction because it is unlikely to go to a jury.

The Act is not limited to the categories expressly mentioned in the statute. Other forms of arbitrary discrimination by business establishments are prohibited. (*In re Cox* (1970) 3 Cal.3d 205, 216 [90 Cal.Rptr. 24, 474 P.2d 992].) Therefore, this instruction allows the user to “insert other actionable characteristic” throughout. Nevertheless, there are limitations on expansion beyond the statutory classifications. First, the claim must be based on a personal characteristic similar to those listed in the statute. Second, the court must consider whether the alleged discrimination was justified by a legitimate business reason. Third, the consequences of allowing the claim to proceed must be taken into account. (*Semler v. General Electric Capital Corp.* (2011) 196 Cal.App.4th 1380, 1392–1393 [127 Cal.Rptr.3d 794]; see *Harris, supra*, 52 Cal.3d at pp. 1159–1162.) However, these issues are most likely to be resolved by the court rather than the jury. (See *Harris, supra*, 52 Cal.3d at p. 1165.) Therefore, no elements are included to address what may be an “other actionable characteristic.” If there are contested factual issues, additional instructions or special interrogatories may be necessary.

### Sources and Authority

- Civil Code section 51 provides:
  - (a) This section shall be known, and may be cited, as the Unruh Civil Rights Act.
  - (b) All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, or sexual orientation are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

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- (c) This section shall not be construed to confer any right or privilege on a person that is conditioned or limited by law or that is applicable alike to persons of every sex, color, race, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation or to persons regardless of their genetic information.
- (d) Nothing in this section shall be construed to require any construction, alteration, repair, structural or otherwise, or modification of any sort whatsoever, beyond that construction, alteration, repair, or modification that is otherwise required by other provisions of law, to any new or existing establishment, facility, building, improvement, or any other structure, nor shall anything in this section be construed to augment, restrict, or alter in any way the authority of the State Architect to require construction, alteration, repair, or modifications that the State Architect otherwise possesses pursuant to other laws.
- (e) For purposes of this section:
- (1) “Disability” means any mental or physical disability as defined in Section 12926 of the Government Code.
  - (2)
    - (A) “Genetic information” means, with respect to any individual, information about any of the following:
      - (i) The individual’s genetic tests.
      - (ii) The genetic tests of family members of the individual.
      - (iii) The manifestation of a disease or disorder in family members of the individual.
    - (B) “Genetic information” includes any request for, or receipt of, genetic services, or participation in clinical research that includes genetic services, by an individual or any family member of the individual.
    - (C) “Genetic information” does not include information about the sex or age of any individual.
  - (3) “Medical condition” has the same meaning as defined in subdivision (h) of Section 12926 of the Government Code.
  - (4) “Religion” includes all aspects of religious belief, observance, and practice.
  - (5) “Sex” includes, but is not limited to, pregnancy, childbirth, or medical conditions related to pregnancy or childbirth. “Sex” also includes, but is not limited to, a person’s gender. “Gender” means sex, and includes a person’s gender identity and gender expression. “Gender expression” means a person’s gender-related appearance and behavior whether or not stereotypically associated with the person’s assigned sex at birth.
  - (6) “Sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, or sexual orientation” includes a

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perception that the person has any particular characteristic or characteristics within the listed categories or that the person is associated with a person who has, or is perceived to have, any particular characteristic or characteristics within the listed categories.

(7) “Sexual orientation” has the same meaning as defined in subdivision (r) of Section 12926 of the Government Code.

(f) A violation of the right of any individual under the Americans with Disabilities Act of 1990 (Public Law 101-336) shall also constitute a violation of this section.

- Civil Code section 52 provides:

(a) Whoever denies, aids or incites a denial, or makes any discrimination or distinction contrary to Section 51, 51.5, or 51.6, is liable for each and every offense for the actual damages, and any amount that may be determined by a jury, or a court sitting without a jury, up to a maximum of three times the amount of actual damage but in no case less than four thousand dollars (\$4,000), and any attorney’s fees that may be determined by the court in addition thereto, suffered by any person denied the rights provided in Section 51, 51.5, or 51.6.

(b) Whoever denies the right provided by Section 51.7 or 51.9, or aids, incites, or conspires in that denial, is liable for each and every offense for the actual damages suffered by any person denied that right and, in addition, the following:

(1) An amount to be determined by a jury, or a court sitting without a jury, for exemplary damages.

(2) A civil penalty of twenty-five thousand dollars (\$25,000) to be awarded to the person denied the right provided by Section 51.7 in any action brought by the person denied the right, or by the Attorney General, a district attorney, or a city attorney.

(3) Attorney’s fees as may be determined by the court.

(c) Whenever there is reasonable cause to believe that any person or group of persons is engaged in conduct of resistance to the full enjoyment of any of the rights described in this section, and that conduct is of that nature and is intended to deny the full exercise of those rights, the Attorney General, any district attorney or city attorney, or any person aggrieved by the conduct may bring a civil action in the appropriate court by filing with it a complaint. The complaint shall contain the following:

(1) The signature of the officer, or, in his or her absence, the individual acting on behalf of the officer, or the signature of the person aggrieved.

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- (2) The facts pertaining to the conduct.
  - (3) A request for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order against the person or persons responsible for the conduct, as the complainant deems necessary to ensure the full enjoyment of the rights described in this section.
  - (d) Whenever an action has been commenced in any court seeking relief from the denial of equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States on account of race, color, religion, sex, national origin, or disability, the Attorney General or any district attorney or city attorney for or in the name of the people of the State of California may intervene in the action upon timely application if the Attorney General or any district attorney or city attorney certifies that the case is of general public importance. In that action, the people of the State of California shall be entitled to the same relief as if it had instituted the action.
  - (e) Actions brought pursuant to this section are independent of any other actions, remedies, or procedures that may be available to an aggrieved party pursuant to any other law.
  - (f) Any person claiming to be aggrieved by an alleged unlawful practice in violation of Section 51 or 51.7 may also file a verified complaint with the Department of Fair Employment and Housing pursuant to Section 12948 of the Government Code.
  - (g) This section does not require any construction, alteration, repair, structural or otherwise, or modification of any sort whatsoever, beyond that construction, alteration, repair, or modification that is otherwise required by other provisions of law, to any new or existing establishment, facility, building, improvement, or any other structure, nor does this section augment, restrict, or alter in any way the authority of the State Architect to require construction, alteration, repair, or modifications that the State Architect otherwise possesses pursuant to other laws.
  - (h) For the purposes of this section, “actual damages” means special and general damages. This subdivision is declaratory of existing law.
- “The Legislature used the words “all” and “of every kind whatsoever” in referring to business establishments covered by the Unruh Act, and the inclusion of these words without any exception and without specification of particular kinds of enterprises, leaves no doubt that the term “business establishments” was used in the broadest sense reasonably possible. The word “business” embraces everything about which one can be employed, and it is often synonymous with “calling, occupation, or trade, engaged in for the purpose of making a livelihood or gain.” The word “establishment,” as broadly defined, includes not only a fixed location, such as the “place where one is permanently fixed for residence or business,” but also a permanent “commercial force or organization” or “a permanent settled position, (as in life or business).” ’ ’ (O’Connor v. Village Green Owners Assn. (1983) 33

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Cal.3d 790, 795 [191 Cal.Rptr. 320, 662 P.2d 427], internal citations omitted.)

- Whether a defendant is a “business establishment” is decided as an issue of law. (*Rotary Club of Duarte, supra*, 178 Cal.App.3d at p. 1050.)
- “In addition to the particular forms of discrimination specifically outlawed by the Act (sex, race, color, etc.), courts have held the Act ‘prohibit[s] discrimination based on several classifications which are not specifically enumerated in the statute.’ These judicially recognized classifications include unconventional dress or physical appearance, families with children, homosexuality, and persons under 18.” (*Hessians Motorcycle Club v. J.C. Flanagans* (2001) 86 Cal.App.4th 833, 836 [103 Cal.Rptr.2d 552], internal citations omitted.)
- “[T]he language and history of the Unruh Act indicate that the legislative object was to prohibit intentional discrimination in access to public accommodations. We have been directed to no authority, nor have we located any, that would justify extension of a disparate impact test, which has been developed and applied by the federal courts primarily in employment discrimination cases, to a general discrimination-in-public-accommodations statute like the Unruh Act. Although evidence of adverse impact on a particular group of persons may have probative value in public accommodations cases and should therefore be admitted in appropriate cases subject to the general rules of evidence, a plaintiff must nonetheless plead and prove a case of intentional discrimination to recover under the Act.” (*Harris, supra*, 52 Cal.3d at p. 1149.)
- “On examining the language, statutory context, and history of section 51, subdivision (f), we conclude ... [t]he Legislature’s intent in adding subdivision (f) was to provide disabled Californians injured by violations of the ADA with the remedies provided by section 52. A plaintiff who establishes a violation of the ADA, therefore, need not prove intentional discrimination in order to obtain damages under section 52.” (*Munson, supra*, 46 Cal.4th at p. 665.)
- “ ‘Although the Unruh Act proscribes “any form of arbitrary discrimination”, certain types of discrimination have been denominated “reasonable” and, therefore, not arbitrary.’ Thus, for example, ‘legitimate business interests may justify limitations on consumer access to public accommodations.’ ” (*Hankins v. El Torito Restaurants, Inc.* (1998) 63 Cal.App.4th 510, 520 [74 Cal.Rptr.2d 684], internal citations omitted.)
- “Unruh Act issues have often been decided as questions of law on demurrer or summary judgment when the policy or practice of a business establishment is valid on its face because it bears a reasonable relation to commercial objectives appropriate to an enterprise serving the public.” (*Harris, supra*, 52 Cal.3d at p. 1165, internal citations omitted.)
- “It is thus manifested by section 51 that all persons are entitled to the full and equal privilege of associating with others in any business establishment. And section 52, liberally interpreted, makes clear that discrimination by such a business establishment against one’s right of association on account of the associates’ color, is violative of the Act. It follows ... that discrimination by a business establishment against persons on account of their association with others of the black race is actionable under the Act.” (*Winchell v. English* (1976) 62 Cal.App.3d 125, 129 [133 Cal.Rptr. 20].)

**Draft–Not Approved by Judicial Council*****Secondary Sources***

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 898–914

11 California Forms of Pleading and Practice, Ch. 116, *Civil Rights: Discrimination in Business Establishments*, §§ 116.10-116.13 (Matthew Bender)

3 California Points and Authorities, Ch. 35, *Civil Rights: Unruh Civil Rights Act*, § 35.20 et seq. (Matthew Bender)

## Draft—Not Approved by Judicial Council

**3061. Discrimination in Business Dealings—Essential Factual Elements (Civ. Code, § 51.5)**


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*[Name of plaintiff]* **claims that** *[name of defendant]* **denied [him/her] full and equal rights to conduct business because of** *[name of plaintiff]*'s **[sex/race/color/religion/ancestry/national origin/disability/medical condition/genetic information/marital status/sexual orientation/***[insert other actionable characteristic]***]]. To establish this claim, [name of plaintiff] must prove all of the following:**

1. **That** *[name of defendant]* **[discriminated against/boycotted/blacklisted/refused to buy from/refused to contract with/refused to sell to/refused to trade with]** *[name of plaintiff]*;

2. **[That a substantial motivating reason for** *[name of defendant]*'s **conduct was [its perception of]** *[name of plaintiff]*'s **[sex/race/color/religion/ancestry/national origin/disability/medical condition/genetic information/marital status/sexual orientation/***[insert other actionable characteristic]***];]**

*[or]*

**[That a substantial motivating reason for** *[name of defendant]*'s **conduct was [its perception of]** the **[sex/race/color/religion/ancestry/national origin/disability/medical condition/genetic information/marital status/sexual orientation/***[insert other actionable characteristic]***] of** *[name of plaintiff]*'s **[partners/members/stockholders/directors/officers/managers/superintendents/agents/employees/business associates/suppliers/customers];]**

*[or]*

**[That a substantial motivating reason for** *[name of defendant]*'s **conduct was [its perception of]** the **[sex/race/color/religion/ancestry/national origin/disability/medical condition/genetic information/marital status/sexual orientation/***[insert other actionable characteristic]***] of a person with whom** *[name of plaintiff]* **was associated;]**

3. **That** *[name of plaintiff]* **was harmed; and**

4. **That** *[name of defendant]*'s **conduct was a substantial factor in causing** *[name of plaintiff]*'s **harm.**

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*New September 2003; Revised June 2012; Renumbered from CACI No. 3021 and Revised December 2012; Revised June 2013*

**Directions for Use**

Select the bracketed option from element 2 that is most appropriate to the facts of the case. Note that this instruction includes a motivating-reason element (element 2). The possible effect of a mixed motive

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(both discriminatory and nondiscriminatory) is still an open issue under this statute.

Under the Unruh Civil Rights Act (see CACI No. 3060, *Unruh Civil Rights Act—Essential Factual Elements*), the California Supreme Court has held that intentional discrimination is required. (See *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1159–1162 [278 Cal.Rptr. 614, 805 P.2d 873].) While there is no similar California case imposing an intent requirement under Civil Code section 51.5, Civil Code section 51.5 requires that the discrimination be *on account of* the protected category. (Civ. Code, § 51.5(a).) The kinds of prohibited conduct would all seem to involve intentional acts. (See *Nicole M. v. Martinez Unified Sch. Dist.* (N.D. Cal. 1997) 964 F.Supp. 1369, 1389, superseded by statute on other grounds as stated in *Sandoval v. Merced Union High Sch.* (E.D. Cal. 2006) 2006 U.S. Dist. LEXIS 28446.) The intent requirement is encompassed within the motivating-reason element [\(element 2\)](#).

There is an exception to the intent requirement under the Unruh Act for conduct that violates the Americans With Disabilities Act. (See *Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, 665 [94 Cal.Rptr.3d 685, 208 P.3d 623].) Because this exception is based on statutory construction of the Unruh Act (see Civ. Code, § 51(f)), the committee does not believe that it applies to section 51.5, which contains no similar language.

Note that there are two causation elements. There must be a causal link between the discriminatory intent and the adverse action (see element 2), and there must be a causal link between the adverse action and the harm (see element 4).

Element 2 uses the term “substantial motivating reason” to express causation between the protected classification and the defendant’s conduct. “Substantial motivating reason” has been held to be the appropriate standard under the Fair Employment and Housing Act to address the possibility of both discriminatory and nondiscriminatory motives. (See *Harris v. City of Santa Monica* (2013) – Cal.4th --, -- [– Cal.Rptr.3d --, -- P.3d --]; CACI No. 2507, “Substantial Motivating Reason” Explained.) 2013 Cal. LEXIS 941 Whether the FEHA standard applies under Civil Code section 51.5 has not been addressed by the courts.

For an instruction on damages under Civil Code section 51.5, see CACI No. 3067, *Unruh Civil Rights Act—Damages*. Note that ~~a successful plaintiff is entitled to a minimum recovery of \$4,000 regardless of any actual harm.~~the jury may award a successful plaintiff up to three times actual damages but not less than \$4,000. (Civ. Code, § 52(a).); see also Civ. Code, § 52(h) [“actual damages” means special and general damages].)

It is possible that elements 3 and 4 are not needed if only the statutory minimum \$4,000 award is sought. With regard to the Unruh Act (Civ. Code, § 51), which is also governed by Civil Code section 52(a), the California Supreme Court has held that a violation is per se injurious, and that section 52 provides for minimum statutory damages for every violation regardless of the plaintiff’s actual damages. (See *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 33 [219 Cal.Rptr. 133, 707 P.2d 195].) (Civ. Code, § 52(a).) In this regard, harm is presumed, and elements 3 and 4 may be considered as established if no actual damages are sought. (See *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 33 [219 Cal.Rptr. 133, 707 P.2d 195]. [Section 52 provides for minimum statutory damages for every violation of section 51, regardless of the plaintiff’s actual damages]; see also Civ. Code, § 52(h) [“actual damages” means special and general damages].)

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The judge may decide the issue of whether the defendant is a business establishment as a matter of law. (*Rotary Club of Duarte v. Bd. of Directors* (1986) 178 Cal.App.3d 1035, 1050 [224 Cal.Rptr. 213].) Special interrogatories may be needed if there are factual issues. This element has been omitted from the instruction because it is unlikely to go to a jury.

Conceptually, this instruction has some overlap with CACI No. 3060, *Unruh Civil Rights Act—Essential Factual Elements*. For a discussion of the basis of this instruction, see *Jackson v. Superior Court* (1994) 30 Cal.App.4th 936, 941 [36 Cal.Rptr.2d 207].

### Sources and Authority

- Civil Code section 51.5 provides:
  - (a) No business establishment of any kind whatsoever shall discriminate against, boycott or blacklist, or refuse to buy from, contract with, sell to, or trade with any person in this state on account of any characteristic listed or defined in subdivision (b) or (e) of Section 51, of the person’s partners, members, stockholders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers, or customers, because the person is perceived to have one or more of those characteristics, or because the person is associated with a person who has, or is perceived to have, any of those characteristics.
  - (b) As used in this section, “person” includes any person, firm, association, organization, partnership, business trust, corporation, limited liability company, or company.
  - (c) This section shall not be construed to require any construction, alteration, repair, structural or otherwise, or modification of any sort whatsoever, beyond that construction, alteration, repair, or modification that is otherwise required by other provisions of law, to any new or existing establishment, facility, building, improvement, or any other structure, nor shall this section be construed to augment, restrict, or alter in any way the authority of the State Architect to require construction, alteration, repair, or modifications that the State Architect otherwise possesses pursuant to other laws.
- “In 1976 the Legislature added Civil Code section 51.5 to the Unruh Civil Rights Act and amended Civil Code section 52 (which provides penalties for those who violate the Unruh Civil Rights Act), in order to, inter alia, include section 51.5 in its provisions.” (*Pines v. Tomson* (1984) 160 Cal.App.3d 370, 384 [206 Cal.Rptr. 866], footnote omitted.)
- “[I]t is clear from the cases under section 51 that the Legislature did not intend in enacting section 51.5 to limit the broad language of section 51 to include only selling, buying or trading. Both sections 51 and 51.5 have been liberally applied to all types of business activities. Furthermore, section 51.5 forbids a business to ‘discriminate against’ ‘any person’ and does not just forbid a business to ‘boycott or blacklist, refuse to buy from, sell to, or trade with any person.’ ” (*Jackson, supra*, 30

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Cal.App.4th at p. 941, internal citation and footnote omitted.)

- “Although the phrase ‘business establishment of every kind whatsoever’ has been interpreted by the Supreme Court and the Court of Appeal in the context of section 51, we are aware of no case which interprets that term in the context of section 51.5. We believe, however, that the Legislature meant the identical language in both sections to have the identical meaning.” (*Pines, supra*, 160 Cal.App.3d at p. 384, internal citations omitted.)
- “[T]he classifications specified in section 51.5, which are identical to those of section 51, are likewise not exclusive and encompass other personal characteristics identified in earlier cases.” (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 538 [30 Cal.Rptr.2d 706], internal citations omitted.)
- “[T]he analysis under Civil Code section 51.5 is the same as the analysis we have already set forth for purposes of the [Unruh Civil Rights] Act.” (*Semler v. General Electric Capital Corp.* (2011) 196 Cal.App.4th 1380, 1404 [127 Cal.Rptr.3d 794].)

***Secondary Sources***

8 Witkin, Summary of California Law (10<sup>th</sup> ed. 2005) Constitutional Law, §§ 898–914

11 California Forms of Pleading and Practice, Ch. 116, *Civil Rights: Discrimination in Business Establishments*, §§ 116.10–116.13 (Matthew Bender)

3 California Points and Authorities, Ch. 35, *Civil Rights: Unruh Civil Rights Act*, § 35.20 (Matthew Bender)

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**3063. Acts of Violence—Ralph Act—Essential Factual Elements (Civ. Code, § 51.7)**

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*[Name of plaintiff]* claims that *[name of defendant]* committed an act of violence against *[him/her]* because of *[his/her]* *[race/color/religion/ancestry/national origin/political affiliation/sex/sexual orientation/age/disability/position in a labor dispute/[insert other actionable characteristic]]*. To establish this claim, *[name of plaintiff]* must prove all of the following:

1. That *[name of defendant]* committed a violent act against *[name of plaintiff]* *[or [his/her] property]*;
  2. That a **substantial** motivating reason for *[name of defendant]*'s conduct was *[[his/her] perception of]* *[name of plaintiff]*'s *[race/color/religion/ancestry/national origin/political affiliation/sex/sexual orientation/age/disability/position in a labor dispute/[insert other actionable characteristic]]*;
  3. That *[name of plaintiff]* was harmed; and
  4. That *[name of defendant]*'s conduct was a substantial factor in causing *[name of plaintiff]*'s harm.
- 

*Derived from former CACI No. 3023 December 2009; Renumbered from CACI No. 3023A December 2012; Revised June 2013*

**Directions for Use**

Use this instruction for a cause of action under the Ralph Act involving actual acts of violence alleged to have been committed by the defendant against the plaintiff. For an instruction involving only threats of violence, see CACI No. 3064, *Threats of Violence—Ralph Act—Essential Factual Elements*.

Note that element 2 uses the term “substantial motivating reason” to express both intent and causation between the protected classification and the defendant’s acts. “Substantial motivating reason” has been held to be the appropriate standard under the Fair Employment and Housing Act to address the possibility of both discriminatory and nondiscriminatory motives. (See *Harris v. City of Santa Monica* (2013) – Cal.4th --, -- [– Cal.Rptr.3d --, -- P.3d --]; CACI No. 2507, “Substantial Motivating Reason” Explained.) 2013 Cal. LEXIS 941 Whether the FEHA standard applies under the Ralph Act has not been addressed by the courts. Note that this instruction uses the standard of “a motivating reason.” The causation standard is still an open issue under this statute.

Liability may also be found if a defendant “aids, incites, or conspires” in the denial of a right protected under Civil Code section 51.7. (Civ. Code, § 52(b).) This instruction should be modified if aiding, inciting, or conspiring is asserted as theories of liability. See also instructions in the Conspiracy series (CACI No. 3600 et seq.).

**Sources and Authority**

- Civil Code section 51.7 provides:

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- (a) All persons within the jurisdiction of this state have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property because of their race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, disability, or position in a labor dispute, or because another person perceives them to have one or more of those characteristics. The identification in this subdivision of particular bases of discrimination is illustrative rather than restrictive. This section does not apply to statements concerning positions in a labor dispute which are made during otherwise lawful labor picketing.
- (b) As used in this section, “sexual orientation” means heterosexuality, homosexuality, or bisexuality.

- Civil Code section 52(b) provides:

Whoever denies the right provided by Section 51.7 or 51.9, or aids, incites, or conspires in that denial, is liable for each and every offense for the actual damages suffered by any person denied that right and, in addition, the following:

- (1) An amount to be determined by a jury, or a court sitting without a jury, for exemplary damages.
- (2) A civil penalty of twenty-five thousand dollars (\$25,000) to be awarded to the person denied the right provided by Section 51.7 in any action brought by the person denied the right, or by the Attorney General, a district attorney, or a city attorney.
- (3) Attorney’s fees as may be determined by the court.

- “The unambiguous language of this section gives rise to a cause of action in favor of a person against whom violence or intimidation has been committed or threatened.” (*Coon v. Joseph* (1987) 192 Cal.App.3d 1269, 1277 [237 Cal.Rptr. 873].)
- “Section 51 by its express language applies only within California. It cannot (with its companion penalty provisions in § 52) be extended into the Hawaiian jurisdiction. A state cannot regulate or proscribe activities conducted in another state or supervise the internal affairs of another state in any way, even though the welfare or health of its citizens may be affected when they travel to that state.” (*Archibald v. Cinerama Hawaiian Hotels, Inc.* (1977) 73 Cal.App.3d 152, 159 [140 Cal.Rptr. 599], internal citations omitted, disapproved on other grounds in *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24 [219 Cal.Rptr. 133, 707 P.2d 195].)

***Secondary Sources***

11 California Forms of Pleading and Practice, Ch. 116, *Civil Rights: Discrimination in Business Establishments*, § 116.80 (Matthew Bender)

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California Civil Practice: Civil Rights Litigation (Thomson West) §§ 3:1–3:15

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**3064. Threats of Violence—Ralph Act—Essential Factual Elements (Civ. Code, § 51.7)**


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*[Name of plaintiff]* claims that *[name of defendant]* intimidated *[him/her]* by threat of violence because of *[his/her]* *[race/color/religion/ancestry/national origin/political affiliation/sex/sexual orientation/age/disability/position in a labor dispute/[insert other actionable characteristic]]*. To establish this claim, *[name of plaintiff]* must prove all of the following:

1. That *[name of defendant]* intentionally threatened violence against *[name of plaintiff]* *[or [his/her] property]*, *[whether or not [name of defendant] actually intended to carry out the threat]*;
  2. That a **substantial** motivating reason for *[name of defendant]*'s conduct was *[[his/her] perception of] [name of plaintiff]'s [race/color/religion/ancestry/national origin/political affiliation/sex/sexual orientation/age/disability/position in a labor dispute/[insert other actionable characteristic]]*;
  3. That a reasonable person in *[name of plaintiff]*'s position would have believed that *[name of defendant]* would carry out *[his/her]* threat;
  4. That a reasonable person in *[name of plaintiff]*'s position would have been intimidated by *[name of defendant]*'s conduct;
  5. That *[name of plaintiff]* was harmed; and
  6. That *[name of defendant]*'s conduct was a substantial factor in causing *[name of plaintiff]*'s harm.
- 

*Derived from former CACI No. 3023 December 2009; Renumbered from CACI No. 3023B December 2012, Revised June 2013*

**Directions for Use**

Use this instruction for a cause of action under the Ralph Act involving threats of violence alleged to have been directed by the defendant toward the plaintiff. For an instruction involving actual acts of violence, see CACI No. 3063, *Acts of Violence—Ralph Act—Essential Factual Elements*.

Note that element 2 uses the term “substantial motivating reason” to express both intent and causation between the protected classification and the defendant’s threats. “Substantial motivating reason” has been held to be the appropriate standard under the Fair Employment and Housing Act to address the possibility of both discriminatory and nondiscriminatory motives. (See *Harris v. City of Santa Monica* (2013) – Cal.4th --, -- [-- Cal.Rptr.3d --, -- P.3d --]; CACI No. 2507, “Substantial Motivating Reason” Explained.) 2013 Cal. LEXIS 941 Whether the FEHA standard applies under the Ralph Act has not been addressed by the courts.

No published California appellate opinion establishes elements 3 and 4. However the Ninth Circuit Court

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of Appeals and the California Fair Employment and Housing Commission have held that a reasonable person in the plaintiff’s position must have been intimidated by the actions of the defendant and have perceived a threat of violence. (See *Winarto v. Toshiba America Electronics Components, Inc.* (9th Cir. 2001) 274 F.3d 1276, 1289–1290; *Dept. Fair Empl. & Hous. v. Lake Co. Dept. of Health Serv.* (July 22, 1998) 1998 CAFEHC LEXIS 16, 55–56.)

~~Note that this instruction uses the standard of “a motivating reason.” The causation standard is still an open issue under this statute.~~

Liability may also be found if a defendant “aids, incites, or conspires” in the denial of a right protected under Civil Code section 51.7. (Civ. Code, § 52(b).) This instruction should be modified if aiding, inciting, or conspiring is asserted as theories of liability. See also instructions in the Conspiracy series (CACI No. 3600 et seq.).

### Sources and Authority

- Civil Code section 51.7 provides:
  - (a) All persons within the jurisdiction of this state have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property because of their race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, disability, or position in a labor dispute, or because another person perceives them to have one or more of those characteristics. The identification in this subdivision of particular bases of discrimination is illustrative rather than restrictive. This section does not apply to statements concerning positions in a labor dispute which are made during otherwise lawful labor picketing.
  - (b) As used in this section, “sexual orientation” means heterosexuality, homosexuality, or bisexuality.
- Civil Code section 52(b) provides:

Whoever denies the right provided by Section 51.7 or 51.9, or aids, incites, or conspires in that denial, is liable for each and every offense for the actual damages suffered by any person denied that right and, in addition, the following:

- (1) An amount to be determined by a jury, or a court sitting without a jury, for exemplary damages.
- (2) A civil penalty of twenty-five thousand dollars (\$25,000) to be awarded to the person denied the right provided by Section 51.7 in any action brought by the person denied the right, or by the Attorney General, a district attorney, or a city attorney.
- (3) Attorney’s fees as may be determined by the court.

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- “The unambiguous language of this section gives rise to a cause of action in favor of a person against whom violence or intimidation has been committed or threatened.” (*Coon v. Joseph* (1987) 192 Cal.App.3d 1269, 1277 [237 Cal.Rptr. 873].)
- “The test is: ‘would a reasonable person, standing in the shoes of the plaintiff, have been intimidated by the actions of the defendant and have perceived a threat of violence?’ ” (*Winarto, supra*, 274 F.3d at pp. 1289–1290, internal citation omitted.)
- “When a threat of violence would lead a reasonable person to believe that the threat will be carried out, in light of the ‘entire factual context,’ including the surrounding circumstances and the listeners’ reactions, then the threat does not receive First Amendment protection, and may be actionable under the Ralph Act. The only intent requirement is that respondent ‘intentionally or knowingly communicates his [or her] threat, not that he intended or was able to carry out his threat.’ A threat exists if the ‘target of the speaker reasonably believes that the speaker has the ability to act him or herself or to influence others. . . . It is the perception of a reasonable person that is dispositive, not the actual intent of the speaker.’ ” (*Dept. Fair Empl. & Hous., supra*, 1998 CAFEHC LEXIS at pp. 55–56, internal citations omitted.)
- “Section 51 by its express language applies only within California. It cannot (with its companion penalty provisions in § 52) be extended into the Hawaiian jurisdiction. A state cannot regulate or proscribe activities conducted in another state or supervise the internal affairs of another state in any way, even though the welfare or health of its citizens may be affected when they travel to that state.” (*Archibald v. Cinerama Hawaiian Hotels, Inc.* (1977) 73 Cal.App.3d 152, 159 [140 Cal.Rptr. 599], internal citations omitted, disapproved on other grounds in *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24 [219 Cal.Rptr. 133, 707 P.2d 195].)

### *Secondary Sources*

Chin et al., California Practice Guide: Employment Litigation (The Rutter Group) ¶ 5:892.11, ¶¶ 7:1528–7:1529

11 California Forms of Pleading and Practice, Ch. 116, *Civil Rights: Discrimination in Business Establishments*, § 116.80 (Matthew Bender)

California Civil Practice: Civil Rights Litigation (Thomson West) §§ 3:1–3:15

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## VF-3030. Unruh Civil Rights Act (Civ. Code, §§ 51, 52(a))

We answer the questions submitted to us as follows:

1. Did *[name of defendant]* [deny/aid or incite a denial of/discriminate or make a distinction that denied] full and equal [accommodations/advantages/facilities/privileges/services] to *[name of plaintiff]*?  
 Yes  No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was *[[name of defendant]'s perception of]* *[name of plaintiff]'s* [sex/race/color/religion/ancestry/national origin/medical condition/genetic information/marital status/sexual orientation/*[insert other actionable characteristic]*] a **substantial** motivating reason for *[name of defendant]'s* conduct?  
 Yes  No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was *[name of defendant]'s* conduct a substantial factor in causing harm to *[name of plaintiff]*?  
 Yes  No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. What are *[name of plaintiff]'s* damages?

[a. Past economic loss

[lost earnings	\$ _____]
[lost profits	\$ _____]
[medical expenses	\$ _____]
[other past economic loss	\$ _____]

Total Past Economic Damages: \$ \_\_\_\_\_]

[b. Future economic loss

[lost earnings	\$ _____]
[lost profits	\$ _____]
[medical expenses	\$ _____]
[other future economic loss	\$ _____]

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Total Future Economic Damages: \$ \_\_\_\_\_]

[c. Past noneconomic loss, including [physical pain/mental suffering:]  
\$ \_\_\_\_\_]

[d. Future noneconomic loss, including [physical pain/mental suffering:]  
\_\_\_\_\_]

TOTAL \$ \_\_\_\_\_

Answer question 5.

5. What amount, if any, do you award as a penalty against [name of defendant]?  
\$ \_\_\_\_\_

Signed: \_\_\_\_\_  
Presiding Juror

Dated: \_\_\_\_\_

[After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant] that you are ready to present your verdict in the courtroom.

*New September 2003; Revised April 2007, December 2010, June 2012, Renumbered from CACI No. VF-3010 December 2012; Revised June 2013*

**Directions for Use**

This verdict form is based on CACI No. 3060, *Unruh Civil Rights Act—Essential Factual Elements*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If the plaintiff's association with another is the basis for the claim, modify question 2 as in element 2 of CACI No. 3060.

Questions 3 and 4 may be omitted if only the statutory minimum of \$4,000 damages is sought. Harm is assumed-presumed for this amount. (See Civ. Code, § 52(a); *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 33 [219 Cal.Rptr. 133, 707 P.2d 195].)

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~~Because the award of a~~ penalty in question 5 ~~can be~~ refers to the right of the jury to award a maximum of three times the amount of actual damages but not less than \$4,000. (Civ. Code, § 52(a).), ~~the~~ The judge should correct the verdict if the jury award goes over that limit. Also, if the jury awards nothing ~~or inserts~~ an amount less than \$4,000 in question 5, the judge should increase that award to \$4,000 to reflect the statutory minimum.

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize “economic” and “noneconomic” damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

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## VF-3031. Discrimination in Business Dealings (Civ. Code, §§ 51.5, 52(a))

We answer the questions submitted to us as follows:

1. Did *[name of defendant]* [discriminate against/boycott/blacklist/refuse to buy from/refuse to contract with/refuse to sell to/refuse to trade with] *[name of plaintiff]*?  
 Yes  No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was *[[name of defendant]'s perception of]* *[name of plaintiff]'s* [sex/race/color/religion/ancestry/national origin/disability/medical condition/genetic information/marital status/sexual orientation/*[insert other actionable characteristic]*] a **substantial** motivating reason for *[name of defendant]'s* conduct?  
 Yes  No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was *[name of defendant]'s* conduct a substantial factor in causing harm to *[name of plaintiff]*?  
 Yes  No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. What are *[name of plaintiff]'s* damages?

[a. Past economic loss

[lost earnings	\$ _____]
[lost profits	\$ _____]
[medical expenses	\$ _____]
[other past economic loss	\$ _____]

Total Past Economic Damages: \$ \_\_\_\_\_]

[b. Future economic loss

[lost earnings	\$ _____]
[lost profits	\$ _____]
[medical expenses	\$ _____]
[other future economic loss	\$ _____]

Total Future Economic Damages: \$ \_\_\_\_\_]

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[c. Past noneconomic loss, including [physical pain/mental suffering:] \$ \_\_\_\_\_]

[d. Future noneconomic loss, including [physical pain/mental suffering:] \$ \_\_\_\_\_]

TOTAL \$ \_\_\_\_\_

Answer question 5.

5. What amount, if any, do you award as a penalty against [name of defendant]?  
\$ \_\_\_\_\_

Signed: \_\_\_\_\_  
Presiding Juror

Dated: \_\_\_\_\_

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant] that you are ready to present your verdict in the courtroom.

*New September 2003; Revised April 2007, December 2010, June 2012, Renumbered from CACI No. VF-3011 December 2012; Revised June 2013*

### Directions for Use

This verdict form is based on CACI No. 3061, *Discrimination in Business Dealings—Essential Factual Elements*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If an alternative basis for the defendant's alleged motivation is at issue, modify question 2 as in element 2 of CACI No. 3061.

~~Question 3 may be omitted if only the statutory minimum of \$4,000 damages is sought. Harm is assumed for this amount. (See Civ. Code, § 52(a); *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 33 [219 Cal.Rptr. 133, 707 P.2d 195].)~~

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~~Because~~ The award of a penalty in question 5 refers to the right of the jury to award ~~be~~ a maximum of three times the amount of actual damages but not less than \$4,000. (Civ. Code, § 52(a).); ~~the~~ The judge should correct the verdict if the jury award goes over that amount. Also, if the jury awards nothing ~~or inserts~~ an amount less than \$4,000 in question 5, then the judge should increase that award to \$4,000 to reflect the statutory minimum.

It is possible that questions 3 and 4 may be omitted if only the statutory minimum \$4,000 award is sought. With regard to the Unruh Act (Civ. Code, § 51), which is also governed by Civil Code section 52(a), the California Supreme Court has held that a violation is per se injurious, and that section 52 provides for minimum statutory damages for every violation regardless of the plaintiff's actual damages. (See *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 33 [219 Cal.Rptr. 133, 707 P.2d 195].)

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize “economic” and “noneconomic” damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

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## VF-3033. Ralph Act (Civ. Code, § 51.7)

We answer the questions submitted to us as follows:

1. Did *[name of defendant]* [threaten/commit] violent acts against *[name of plaintiff]* [or [his/her] property]?  
 Yes  No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was [*[name of defendant]*'s perception of] *[name of plaintiff]*'s [race/color/religion/ancestry/national origin/political affiliation/sex/sexual orientation/age/disability/position in a labor dispute/*[insert other actionable characteristic]*] a **substantial** motivating reason for *[name of defendant]*'s conduct?  
 Yes  No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

- [3. Would a reasonable person in *[name of plaintiff]*'s position have believed that *[name of defendant]* would carry out [his/her] threats?  
 Yes  No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.]

- [4. Would a reasonable person in *[name of plaintiff]*'s position have been intimidated by *[name of defendant]*'s conduct?  
 Yes  No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.]

5. Was *[name of defendant]*'s conduct a substantial factor in causing harm to *[name of plaintiff]*?  
 Yes  No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

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6. What are [name of plaintiff]’s damages?

[a. Past economic loss

[lost earnings \$ \_\_\_\_\_]

[lost profits \$ \_\_\_\_\_]

[medical expenses \$ \_\_\_\_\_]

[other past economic loss \$ \_\_\_\_\_]

Total Past Economic Damages: \$ \_\_\_\_\_]

[b. Future economic loss

[lost earnings \$ \_\_\_\_\_]

[lost profits \$ \_\_\_\_\_]

[medical expenses \$ \_\_\_\_\_]

[other future economic loss \$ \_\_\_\_\_]

Total Future Economic Damages: \$ \_\_\_\_\_]

[c. Past noneconomic loss, including [physical pain/mental suffering:]

\$ \_\_\_\_\_]

[d. Future noneconomic loss, including [physical pain/mental suffering:]

\$ \_\_\_\_\_]

TOTAL \$ \_\_\_\_\_

[7. What amount do you award as punitive damages?

\$ \_\_\_\_\_]

Signed: \_\_\_\_\_  
Presiding Juror

Dated: \_\_\_\_\_

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant] that you are ready to present your verdict in the courtroom.

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New September 2003; Revised April 2007, December 2009, December 2010; Renumbered from CACI No. VF-3013 December 2012; Revised June 2013

**Draft—Not Approved by Judicial Council****Directions for Use**

This verdict form is based on CACI No. 3063, *Acts of Violence—Ralph Act—Essential Factual Elements*, and CACI No. 3064, *Threats of Violence—Ralph Act—Essential Factual Elements*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Include questions 3 and 4 in a case of threats of violence.

If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize “economic” and “noneconomic” damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

Punitive damages (question 7) are authorized by Civil Code section 52(b)(2). For instructions on punitive damages, see instructions in the Damages series (CACI No. 3900 et seq.)

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.