

Judicial Council of California

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INVITATION TO COMMENT CACI18-01

Title	Action Requested
Civil Jury Instructions (CACI) Revisions	Review and submit comments by March 2, 2018
Proposed Rules, Forms, Standards, or Statutes	Proposed Effective Date
Add, revise, renumber, and revoke jury instructions and verdict forms	May 2018
Proposed by	Contact
Advisory Committee on Civil Jury Instructions	Bruce Greenlee, Attorney, 415-865-7698 bruce.greenlee@jud.ca.gov
Hon. Martin J. Tangeman, Chair	

Executive Summary and Origin

The Judicial Council Advisory Committee on Civil Jury Instructions has posted proposed additions, revisions, and revocations to the Judicial Council civil jury instructions (CACI). 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. On approval by the Judicial Council, all changes will be published in the 2018 midyear supplement to the official LexisNexis CACI publication.

Attachments

Proposed revised and new instructions and verdict forms: pp. 2–120

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 These proposals are circulated for comment purposes only.

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206. Evidence Admitted for Limited Purpose

During the trial, I explained to you that certain evidence was admitted for a limited purpose. You may consider that evidence only for the limited purpose that I described, and not for any other purpose.

New September 2003; Revised May 2018

Directions for Use

Where-If appropriate, an instruction limiting the purpose for which evidence is to be considered must be given upon request. (Evid. Code, § 355; *Daggett v. Atchison, Topeka & Santa Fe Ry. Co.* (1957) 48 Cal.2d 655, 665-666 [313 P.2d 557]; *Continental Airlines, Inc. v. McDonnell Douglas Corp.* (1989) 216 Cal.App.3d 388, 412 [264 Cal.Rptr. 779].) It is recommended that the judge call attention to the purpose to which the evidence applies.

A limited-purpose instruction is insufficient to cure hearsay problems with case-specific testimony given by an expert witness. (*People v. Sanchez* (2016) 63 Cal.4th 665, 684 [204 Cal.Rptr.3d 102, 374 P.3d 320].)

For an instruction on evidence applicable to one party or a limited number of parties, see CACI No. 207, *Evidence Applicable to One Party*.

Sources and Authority

- Evidence Admitted for Limited Purpose. Evidence Code section 355.
- Refusal to give a requested instruction limiting the purpose for which evidence is to be considered may constitute error. (*Adkins v. Brett* (1920) 184 Cal. 252, 261–262 [193 P. 251].)
- Courts have observed that “[w]here the information is admitted for a purpose other than showing the truth of the matter asserted ... , prejudice is likely to be minimal and a limiting instruction under section 355 may be requested to control the jury’s use of the information.” (*Korsak v. Atlas Hotels, Inc.* (1992) 2 Cal.App.4th 1516, 1525 [3 Cal.Rptr.2d 833].)
- An adverse party may be excused from the requirement of requesting a limiting instruction and may be permitted to assert error if the trial court unequivocally rejects the argument upon which a limiting instruction would be based. (*Warner Construction Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, 298-299 [85 Cal.Rptr. 444, 466 P.2d 996].)

Secondary Sources

1 Witkin, California Evidence (5th ed. 2012) Circumstantial Evidence, §§ 32–36

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Jefferson, California Evidence Benchbook (3d ed. 1997) §§ 20.11–20.13

1A California Trial Guide, Unit 21, *Procedures for Determining Admissibility of Evidence*, § 21.21 (Matthew Bender)

48 California Forms of Pleading and Practice, Ch. 551, *Trial*, §§ 551.66, 551.77 (Matthew Bender)

California Judges Benchbook: Civil Proceedings—Trial (2d ed.) §§ 4.106, 13.26 (Cal CJER 2010)

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430. Causation: Substantial Factor

A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm.

[Conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct.]

New September 2003; Revised October 2004, June 2005, December 2005, December 2007, May 2018

Directions for Use

As phrased, this definition of “substantial factor” subsumes the “but for” test of causation, that is, “but for” the defendant’s conduct, the plaintiff’s harm would not have occurred. (*Mitchell v. Gonzales* (1991) 54 Cal.3d 1041, 1052 [1 Cal.Rptr.2d 913, 819 P.2d 872]; see Rest.2d Torts, § 431.) The optional last sentence makes this explicit, and in some cases it may be error not to give this sentence. (See *Soule v. GM Corp.* (1994) 8 Cal.4th 548, 572–573 [34 Cal.Rptr.2d 607, 882 P.2d 298]; Rest.2d Torts, § 432(1).)

“Conduct,” in this context, refers to the culpable acts or omissions on which a claim of legal fault is based, e.g., negligence, product defect, breach of contract, or dangerous condition of public property. This is in contrast to an event that is not a culpable act but that happens to occur in the chain of causation, e.g., that the plaintiff’s alarm clock failed to go off, causing her to be at the location of the accident at a time when she otherwise would not have been there. The reference to “conduct” may be changed as appropriate to the facts of the case.

The “but for” test of the last optional sentence does not apply to concurrent independent causes, which are multiple forces operating at the same time and independently, each of which would have been sufficient by itself to bring about the same harm. (*Viner v. Sweet* (2003) 30 Cal.4th 1232, 1240 [135 Cal.Rptr.2d 629, 70 P.3d 1046]; *Barton v. Owen* (1977) 71 Cal.App.3d 484, 503–504 [139 Cal.Rptr. 494]; see Rest.2d Torts, § 432(2).) Accordingly, do not include the last sentence in a case involving concurrent independent causes. (*See also Major v. R.J. Reynolds Tobacco Co.* (2017) 14 Cal.App.5th 1179, 1198 [222 Cal.Rptr.3d 563]. [court did not err in refusing to give last sentence in case involving exposure to carcinogens in cigarettes].)

In cases of multiple (concurrent dependent) causes, CACI No. 431, *Causation: Multiple Causes*, should also be given.

In asbestos-related ~~cancer disease~~ cases, *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 977 [67 Cal.Rptr.2d 16, 941 P.2d 1203] requires a different instruction regarding exposure to a particular product. Give CACI No. 435, *Causation for Asbestos-Related Cancer Claims*, and do not give this instruction, as CACI No. 435 is intended as a complete statement of causation for asbestos-related diseases with regard to defendant manufacturers and suppliers. (But see *Petitpas v. Ford Motor Co.* (2017) 13 Cal.App.5th 261, 298–299 [220 Cal.Rptr.3d 185] [not error to give both CACI Nos. 430 and

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435 in case with both product liability and premises liability defendants].)

Under this instruction, a remote or trivial factor is not a substantial factor. This sentence could cause confusion in an asbestos case. “Remote” connotes a time limitation. Nothing in *Rutherford* suggests such a limitation; indeed asbestos cases are brought long after exposure due to the long-term latent nature of asbestos-related diseases. (See *City of Pasadena v. Superior Court (Jauregui)* (2017) 12 Cal.App.5th 1340, 1343–1344 [220 Cal.Rptr.3d 99] [cause of action for a latent injury or disease generally accrues when the plaintiff discovers or should reasonably have discovered he has suffered a compensable injury].)

Although the court in *Rutherford* did not use the word “trivial,” it did state that “a force [that] plays only an ‘infinitesimal’ or ‘theoretical’ part in bringing about injury, damage, or loss is not a substantial factor.” (*Rutherford, supra*, 16 Cal.4th at p. 969.) While it may be argued that “trivial” and “infinitesimal” are synonyms, a very minor force that does cause harm *is* a substantial factor. This rule honors the principle of comparative fault. (*Bockrath v. Aldrich Chem. Co.* (1999) 21 Cal.4th 71, 79 [86 Cal.Rptr.2d 846, 980 P.2d 398].) In *Rutherford*, the jury allocated the defendant only 1.2 percent of comparative fault, and the court upheld this allocation. (See *Rutherford, supra*, 16 Cal.4th at p. 985.) Instructing the jury that a *de minimis* force (whether trivial or infinitesimal) is not a substantial factor could confuse the jury in allocating comparative fault at the lower end of the exposure spectrum.

Sources and Authority

- “The test for joint tort liability is set forth in section 431 of the Restatement of Torts 2d, which provides: ‘The actor’s negligent conduct is a legal cause of harm to another if (a) his conduct is a substantial factor in bringing about the harm, and, (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm.’ Section 431 correctly states California law as to the issue of causation in tort cases.” (*Wilson v. Blue Cross of So. Cal.* (1990) 222 Cal.App.3d 660, 671–672 [271 Cal.Rptr. 876].)
- “California has definitively adopted the substantial factor test of the Restatement Second of Torts for cause-in-fact determinations. Under that standard, a cause in fact is something that is a substantial factor in bringing about the injury. The substantial factor standard generally produces the same results as does the ‘but for’ rule of causation which states that a defendant’s conduct is a cause of the injury if the injury would not have occurred ‘but for’ that conduct. The substantial factor standard, however, has been embraced as a clearer rule of causation—one which subsumes the ‘but for’ test while reaching beyond it to satisfactorily address other situations, such as those involving independent or concurrent causes in fact.” (*Rutherford, supra*, 16 Cal.4th at pp. 968–969, internal citations omitted.)
- “The term ‘substantial factor’ has not been judicially defined with specificity, and indeed it has been observed that it is ‘neither possible nor desirable to reduce it to any lower terms.’ This court has suggested that a force which plays only an ‘infinitesimal’ or ‘theoretical’ part in bringing about injury, damage, or loss is not a substantial factor. Undue emphasis should not be placed on the term ‘substantial.’ For example, the substantial factor standard, formulated to aid plaintiffs as a broader rule of causality than the ‘but for’ test, has been invoked by defendants whose conduct is clearly a ‘but for’ cause of plaintiff’s injury but is nevertheless urged as an insubstantial contribution to the injury. Misused in this way, the substantial factor test ‘undermines the principles of comparative

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negligence, under which a party is responsible for his or her share of negligence and the harm caused thereby.’ ” (*Rutherford, supra*, 16 Cal.4th at pp. 968–969, internal citations omitted.)

- “The substantial factor standard is a relatively broad one, requiring only that the contribution of the individual cause be more than negligible or theoretical. Thus, ‘a force which plays only an “infinitesimal” or “theoretical” part in bringing about injury, damage, or loss is not a substantial factor’, but a very minor force that does cause harm is a substantial factor. This rule honors the principle of comparative fault.” (*Bockrath v. Aldrich Chemical Co.* (1999) 21 Cal.4th 71, 79 [86 Cal.Rptr.2d 846, 980 P.2d 398], internal citations omitted.)
- “The text of Restatement Torts second section 432 demonstrates how the ‘substantial factor’ test subsumes the traditional ‘but for’ test of causation. Subsection (1) of section 432 provides: ‘Except as stated in Subsection (2), the actor’s negligent conduct *is not a substantial factor* in bringing about harm to another *if the harm would have been sustained even if the actor had not been negligent.*’ ... Subsection (2) states that if ‘two forces are actively operating ... and each of itself is sufficient to bring about harm to another, the actor’s negligence may be found to be a substantial factor in bringing it about.’ ” (*Viner, supra*, 30 Cal.4th at p. 1240, original italics.)
- “Because the ‘substantial factor’ test of causation subsumes the ‘but for’ test, the ‘but for’ test has been phrased in terms of ‘substantial factor,’ as follows, in the context, as here, of a combination of causes dependent on one another: A defendant’s negligent conduct may combine with another factor to cause harm; if a defendant’s negligence was a substantial factor in causing the plaintiff’s harm, then the defendant is responsible for the harm; a defendant cannot avoid responsibility just because some other person, condition, or event was also a substantial factor in causing the plaintiff’s harm; but conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct.” (*Yanez v. Plummer* (2013) 221 Cal.App.4th 180, 187 [164 Cal.Rptr.3d 309].)
- “A tort is a legal cause of injury only when it is a substantial factor in producing the injury. If the external force of a vehicle accident was so severe that it would have caused identical injuries notwithstanding an abstract ‘defect’ in the vehicle’s collision safety, the defect cannot be considered a substantial factor in bringing them about. [¶] The general causation instruction given by the trial court correctly advised that plaintiff could not recover for a design defect unless it was a ‘substantial factor’ in producing plaintiff’s ‘enhanced’ injuries. However, this instruction dealt only by ‘negative implication’ with [defendant]’s theory that any such defect was *not* a ‘substantial factor’ in this case because this particular accident would have broken plaintiff’s ankles in any event. As we have seen, [defendant] presented substantial evidence to that effect. [Defendant] was therefore entitled to its special instruction, and the trial court’s refusal to give it was error.” (*Soule, supra*, 8 Cal.4th at p. 572–573, original italics, footnote and internal citations omitted.)
- “The first element of legal cause is cause in fact The ‘but for’ rule has traditionally been applied to determine cause in fact. The Restatement formula uses the term *substantial factor* ‘to denote the fact that the defendant’s conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause.’ ” (*Mayes v. Bryan* (2006) 139 Cal.App.4th 1075, 1095 [44 Cal.Rptr.3d 14], internal citations omitted.)
- “If the accident would have happened anyway, whether the defendant was negligent or not, then his

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or her negligence was not a cause in fact, and of course cannot be the legal or responsible cause.” (*Toste v. CalPortland Construction* (2016) 245 Cal.App.4th 362, 370 [199 Cal.Rptr.3d 522].)

- “We have recognized that proximate cause has two aspects. ‘ “One is *cause in fact*. An act is a cause in fact if it is a necessary antecedent of an event.” ’ This is sometimes referred to as ‘but-for’ causation. In cases where concurrent independent causes contribute to an injury, we apply the ‘substantial factor’ test of the Restatement Second of Torts, section 423, which subsumes traditional ‘but for’ causation. This case does not involve concurrent independent causes, so the ‘but for’ test governs questions of factual causation.” (*State Dept. of State Hospitals v. Superior Court* (2015) 61 Cal.4th 339, 354 [188 Cal.Rptr.3d 308, 349 P.3d 1013], original italics, footnote omitted.)
- “ ‘Whether a defendant’s conduct actually caused an injury is a question of fact ... that is ordinarily for the jury’ ‘[C]ausation in fact is ultimately a matter of probability and common sense: “[A plaintiff] is not required to eliminate entirely all possibility that the defendant’s conduct was not a cause. It is enough that he introduces evidence from which reasonable [persons] may conclude that it is more probable that the event was caused by the defendant than that it was not. The fact of causation is incapable of mathematical proof, since no [person] can say with absolute certainty what would have occurred if the defendant had acted otherwise. If, as a matter of ordinary experience, a particular act or omission might be expected to produce a particular result, and if that result has in fact followed, the conclusion may be justified that the causal relation exists. In drawing that conclusion, the triers of fact are permitted to draw upon ordinary human experience as to the probabilities of the case.” ’ ... ‘ “A mere possibility of ... causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant.” ’ ” (*Raven H. v. Gamette* (2007) 157 Cal.App.4th 1017, 1029–1030 [68 Cal.Rptr.3d 897], internal citations omitted.)
- “[E]vidence of causation ‘must rise to the level of a reasonable probability based upon competent testimony. [Citations.] “A possible cause only becomes ‘probable’ when, in the absence of other reasonable causal explanations, it becomes more likely than not that the injury was a result of its action.” [Citation.] The defendant’s conduct is not the cause in fact of harm “ ‘where the evidence indicates that there is less than a probability, i.e., a 50–50 possibility or a mere chance,’ ” that the harm would have ensued.’ ” (*Bowman v. Wyatt* (2010) 186 Cal.App.4th 286, 312 [111 Cal.Rptr.3d 787].)
- “However the test is phrased, causation in fact is ultimately a matter of probability and common sense.” (*Osborn v. Irwin Memorial Blood Bank* (1992) 5 Cal.App.4th 234, 253 [7 Cal.Rptr.2d 101], relying on Rest.2d Torts, § 433B, com. b.)
- “The Supreme Court ... set forth explicit guidelines for plaintiffs attempting to allege injury resulting from exposure to toxic materials: A plaintiff must ‘allege that he was exposed to each of the toxic materials claimed to have caused a specific illness’; ‘identify each product that allegedly caused the injury’; allege ‘the toxins entered his body’ ‘as a result of the exposure’; allege that ‘he suffers from a specific illness, and that each toxin that entered his body was a substantial factor in bringing about, prolonging, or aggravating that illness’; and, finally, allege that ‘each toxin he absorbed was manufactured or supplied by a named defendant.’ ” (*Jones v. ConocoPhillips Co.* (2011) 198 Cal.App.4th 1187, 1194 [130 Cal.Rptr.3d 571], quoting *Bockrath, supra*, 21 Cal.4th at p. 80, footnote

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omitted.)

- “The term ‘substantial factor’ has not been judicially defined with specificity, and indeed it has been observed that it is ‘neither possible nor desirable to reduce it to any lower terms.’ This court has suggested that a force which plays only an ‘infinitesimal’ or ‘theoretical’ part in bringing about injury, damage, or loss is not a substantial factor. Undue emphasis should not be placed on the term ‘substantial.’ For example, the substantial factor standard, formulated to aid plaintiffs as a broader rule of causality than the ‘but for’ test, has been invoked by defendants whose conduct is clearly a ‘but for’ cause of plaintiff’s injury but is nevertheless urged as an insubstantial contribution to the injury. Misused in this way, the substantial factor test ‘undermines the principles of comparative negligence, under which a party is responsible for his or her share of negligence and the harm caused thereby.’ ” (Rutherford, supra, 16 Cal.4th at p. 969, internal citations omitted.)
- “[A] very minor force that does cause harm is a substantial factor. This rule honors the principle of comparative fault.” (Bockrath, supra, 21 Cal.4th at p. 79, internal citation omitted.)
- California Supreme Court’s decision in *Viner v. Sweet* (2003) 30 Cal.4th 1232 [135 Cal. Rptr. 2d 629, 70 P.3d 1046] (*Viner*) did not alter the causation requirement in asbestos-related cases. In *Viner*, the court noted that subsection (1) of section 432 of the Restatement Second of Torts, which provides that ‘the actor’s negligent conduct is not a substantial factor in bringing about harm to another if the harm would have been sustained even if the actor had not been negligent,’ ‘demonstrates how the “substantial factor” test subsumes the traditional “but for” test of causation.’ Defendant argues that *Viner* required plaintiffs to show that defendant’s product ‘independently caused [plaintiff’s] injury or that, but for that exposure, [plaintiff] would not have contracted lung cancer.’ *Viner*, however, is a legal malpractice case. It does not address the explicit holding in *Rutherford* that ‘plaintiffs may prove causation in asbestos-related cancer cases by demonstrating that the plaintiff’s exposure to defendant’s asbestos-containing product in reasonable medical probability was a substantial factor in contributing to the aggregate dose of asbestos the plaintiff or decedent inhaled or ingested, and hence to the risk of developing asbestos-related cancer, without the need to demonstrate that fibers from the defendant’s particular product were the ones, or among the ones, that actually produced the malignant growth.’ ” *Viner* is consistent with *Rutherford* insofar as *Rutherford* requires proof that an individual asbestos-containing product is a substantial factor contributing to the plaintiff’s risk or probability of developing cancer.” (Jones, supra, 132 Cal.App.4th at p. 998, fn. 3, internal citations omitted.)
- “[M]ultiple sufficient causes exist not only when there are two causes each of which is sufficient to cause the harm, but also when there are more than two causes, partial combinations of which are sufficient to cause the harm. As such, the trial court did not err in refusing to instruct the jury with the but-for test.” (Major, supra, 14 Cal.App.5th at p. 1200.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1185–1189, 1191

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 1.13–1.15

1 Levy et al., California Torts, Ch. 2, *Causation*, § 2.02 (Matthew Bender)

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4 California Trial Guide, Unit 90, *Closing Argument*, § 90.89 (Matthew Bender)

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.22, Ch. 7, *Proof*, § 7.06 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.71 (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence*, §§ 165.260–165.263 (Matthew Bender)

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435. Causation for Asbestos-Related Cancer Claims

A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It does not have to be the only cause of the harm.

[Name of plaintiff] may prove that exposure to asbestos from [name of defendant]’s product was a substantial factor causing [his/her/[name of decedent]’s] illness by showing, through expert testimony, that there is a reasonable medical probability that the exposure was a substantial factor contributing to [his/her] risk of developing cancer.

New September 2003; Revised December 2007, [May 2018](#)

Directions for Use

If the issue of medical causation is tried separately, revise this instruction to focus on that issue.

If necessary, CACI No. 431, *Causation: Multiple Causes*, may also be given. Unless there are other defendants who are not asbestos manufacturers or suppliers, do not give CACI No. 430, *Causation: Substantial Factor*. [See the discussion in the Directions for Use to CACI No. 430.](#)

Sources and Authority

- “In the context of a cause of action for asbestos-related latent injuries, the plaintiff must first establish some threshold *exposure* to the defendant’s defective asbestos-containing products, and must further establish in reasonable medical probability that a particular exposure or series of exposures was a ‘legal cause’ of his injury, i.e., a *substantial factor* in bringing about the injury. In an asbestos-related cancer case, the plaintiff need *not* prove that fibers from the defendant’s product were the ones, or among the ones, that actually began the process of malignant cellular growth. Instead, the plaintiff may meet the burden of proving that exposure to defendant’s product was a substantial factor causing the illness by showing that in reasonable medical probability it was a substantial factor contributing to the plaintiff’s or decedent’s *risk* of developing cancer. The jury should be so instructed. The standard instructions on substantial factor and concurrent causation remain correct in this context and should also be given.” (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 982–983 [67 Cal.Rptr.2d 16, 941 P.2d 1203], original italics, internal citation and footnotes omitted.)
- “The term ‘substantial factor’ has not been judicially defined with specificity, and indeed it has been observed that it is ‘neither possible nor desirable to reduce it to any lower terms.’ This court has suggested that a force which plays only an ‘infinitesimal’ or ‘theoretical’ part in bringing about injury, damage, or loss is not a substantial factor. Undue emphasis should not be placed on the term ‘substantial.’ For example, the substantial factor standard, formulated to aid plaintiffs as a broader rule of causality than the ‘but for’ test, has been invoked by defendants whose conduct is clearly a ‘but for’ cause of plaintiff’s injury but is nevertheless urged as an insubstantial contribution to the injury. Misused in this way, the substantial factor test ‘undermines the principles of comparative negligence, under which a party is responsible for his or her share of negligence and the harm caused

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thereby.’ ” (*Rutherford, supra*, 16 Cal.4th at p. 969, internal citations omitted.)

- “[A] very minor force that does cause harm is a substantial factor. This rule honors the principle of comparative fault.” (*Bockrath v. Aldrich Chem. Co.* (1999) 21 Cal.4th 71, 79 [86 Cal.Rptr.2d 846, 980 P.2d 398], internal citation omitted.)
- “Contrary to defendant’s assertion, the California Supreme Court’s decision in *Viner v. Sweet* (2003) 30 Cal.4th 1232 [135 Cal. Rptr. 2d 629, 70 P.3d 1046] (*Viner*) did not alter the causation requirement in asbestos-related cases. In *Viner*, the court noted that subsection (1) of section 432 of the Restatement Second of Torts, which provides that ‘the actor’s negligent conduct is not a substantial factor in bringing about harm to another if the harm would have been sustained even if the actor had not been negligent,’ ‘demonstrates how the “substantial factor” test subsumes the traditional “but for” test of causation.’ Defendant argues that *Viner* required plaintiffs to show that defendant’s product ‘independently caused [plaintiff’s] injury or that, but for that exposure, [plaintiff] would not have contracted lung cancer.’ *Viner*, however, is a legal malpractice case. It does not address the explicit holding in *Rutherford* that ‘plaintiffs may prove causation in asbestos-related cancer cases by demonstrating that the plaintiff’s exposure to defendant’s asbestos-containing product in reasonable medical probability was a substantial factor in contributing to the aggregate dose of asbestos the plaintiff or decedent inhaled or ingested, and hence to the risk of developing asbestos-related cancer, without the need to demonstrate that fibers from the defendant’s particular product were the ones, or among the ones, that actually produced the malignant growth.’ ” *Viner* is consistent with *Rutherford* insofar as *Rutherford* requires proof that an individual asbestos-containing product is a substantial factor contributing to the plaintiff’s risk or probability of developing cancer.” (*Jones v. John Crane, Inc.* (2005) 132 Cal.App.4th 990, 998, fn. 3 [35 Cal.Rptr.3d 144], internal citations omitted.)
- “ ‘A threshold issue in asbestos litigation is exposure to the defendant’s product. ... If there has been no exposure, there is no causation.’ Plaintiffs bear the burden of ‘demonstrating that exposure to [defendant’s] asbestos products was, in reasonable medical probability, a substantial factor in causing or contributing to [plaintiff’s] risk of developing cancer.’ ‘Factors relevant to assessing whether such a medical probability exists include frequency of exposure, regularity of exposure and proximity of the asbestos product to [plaintiff].’ Therefore, ‘[plaintiffs] cannot prevail against [defendant] without evidence that [plaintiff] was exposed to asbestos-containing materials manufactured or furnished by [defendant] with enough frequency and regularity as to show a reasonable medical probability that this exposure was a factor in causing the plaintiff’s injuries.’ ” (*Whitmire v. Ingersoll-Rand Co.* (2010) 184 Cal.App.4th 1078, 1084 [109 Cal.Rptr.3d 371], internal citations omitted.)
- “Further, ‘[t]he mere “possibility” of exposure’ is insufficient to establish causation. ‘[P]roof that raises mere speculation, suspicion, surmise, guess or conjecture is not enough to sustain [the plaintiff’s] burden’ of persuasion.” (*Izell v. Union Carbide Corp.* (2014) 231 Cal.App.4th 962, 969 [180 Cal.Rptr.3d 382], internal citations omitted.)
- “To support an allocation of liability to another party in an asbestos case, a defendant must ‘present evidence that the aggregate dose of asbestos particles arising from’ exposure to that party’s asbestos ‘constituted a substantial factor in the causation of [the decedent’s] cancer.’ ” (*Soto v. BorgWarner Morse TEC Inc.* (2015) 239 Cal.App.4th 165, 205 [191 Cal.Rptr.3d 263].)

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- “[G]iven the long latency period of asbestos-related disease, and the occupational settings that commonly exposed the worker to multiple forms and brands of asbestos products with varying degrees of toxicity,’ our Supreme Court has held that a plaintiff ‘need *not* prove with medical exactitude that fibers from a particular defendant’s asbestos-containing products were those, or among those, that actually began the cellular process of malignancy.’ Rather, a ‘plaintiff may meet the burden of proving that exposure to defendant’s product was a substantial factor causing the illness by showing that in reasonable medical probability it was a substantial factor contributing to the plaintiff’s or decedent’s *risk* of developing cancer.’ ” (*Izell, supra*, 231 Cal.App.4th at p. 975, original italics, internal citation omitted.)
- “Many factors are relevant in assessing the medical probability that an exposure contributed to plaintiff’s asbestos disease. Frequency of exposure, regularity of exposure, and proximity of the asbestos product to plaintiff are certainly relevant, although these considerations should not be determinative in every case. [Citation.] Additional factors may also be significant in individual cases, such as the type of asbestos product to which plaintiff was exposed, the type of injury suffered by plaintiff, and other possible sources of plaintiff’s injury. [Citations.] ‘Ultimately, the sufficiency of the evidence of causation will depend on the unique circumstances of each case.’ [Citation.] ” (*Paulus v. Crane Co.* (2014) 224 Cal.App.4th 1357, 1363–1364 [169 Cal.Rptr.3d 373].)
- “In this case, [defendant] argues the trial court’s refusal to give its proposed instruction was error because the instruction set forth ‘the requirement in *Rutherford* that causation be decided by taking into account “the length, frequency, proximity and intensity of exposure, the peculiar properties of the individual product, [and] any other potential causes to which the disease could be attributed.” ’ But *Rutherford* does not require the jury to take these factors into account when deciding whether a plaintiff’s exposure to an asbestos-containing product was a substantial factor in causing mesothelioma. Instead, those factors are ones that a medical expert may rely upon in forming his or her expert medical opinion.” (*Davis v. Honeywell Internat. Inc.* (2016) 245 Cal.App.4th 477, 495 [199 Cal.Rptr.3d 583], internal citation omitted.)
- “Mere presence at a site where asbestos was present is insufficient to establish legally significant asbestos exposure.” (*Shiffer v. CBS Corp.* (2015) 240 Cal.App.4th 246, 252 [192 Cal.Rptr.3d 346].)
- “We disagree with the trial court’s view that *Rutherford* mandates that a medical doctor must expressly link together the evidence of substantial factor causation. The *Rutherford* court did not create a requirement that specific words must be recited by appellant’s expert. Nor did the *Rutherford* court specify that the testifying expert in asbestos cases must always be ‘somebody with an M.D. after his name.’ The *Rutherford* court agreed with the *Lineaweaver* court that ‘the reference to “medical probability” in the standard “is no more than a recognition that asbestos injury cases (like medical malpractice cases) involve the use of medical evidence.” [Citation.]’ The Supreme Court has since clarified that medical evidence does not necessarily have to be provided by a medical doctor.” (*Hernandez v. Amcord, Inc.* (2013) 215 Cal.App.4th 659, 675 [156 Cal.Rptr.3d 90], internal citations omitted.)
- “Nothing in *Rutherford* precludes a plaintiff from establishing legal causation through opinion testimony by a competent medical expert to the effect that every exposure to respirable asbestos contributes to the risk of developing mesothelioma. On the contrary, *Rutherford* acknowledges the

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scientific debate between the ‘every exposure’ and ‘insignificant exposure’ camps, and recognizes that the conflict is one for the jury to resolve.” (*Izell, supra*, 231 Cal.App.4th at p. 977.)

- “[T]he identified-exposure theory is a more rigorous standard of causation than the every-exposure theory. As a single example of the difference, we note [expert]’s statement that it ‘takes significant exposures’ to increase the risk of disease. This statement uses the plural ‘exposures’ and also requires that those exposures be ‘significant.’ The use of ‘significant’ as a limiting modifier appears to be connected to [expert]’s earlier testimony about the concentrations of airborne asbestos created by particular activities done by [plaintiff], such as filing, sanding and using an airhose to clean a brake drum.” (*Phillips v. Honeywell Internat. Inc.* (2017) 9 Cal.App.5th 1061, 1088 [217 Cal.Rptr.3d 147].)
- “Nor is there a requirement that ‘specific words must be recited by [plaintiffs]’ expert.’ [¶] The connection, however, must be made between the defendant’s asbestos products and the risk of developing mesothelioma suffered by the decedent.” (*Paulus, supra*, 224 Cal.App.4th at p. 1364.)
- “We hold that the duty of employers and premises owners to exercise ordinary care in their use of asbestos includes preventing exposure to asbestos carried by the bodies and clothing of on-site workers. Where it is reasonably foreseeable that workers, their clothing, or personal effects will act as vectors carrying asbestos from the premises to household members, employers have a duty to take reasonable care to prevent this means of transmission. This duty also applies to premises owners who use asbestos on their property, subject to any exceptions and affirmative defenses generally applicable to premises owners, such as the rules of contractor liability. Importantly, we hold that this duty extends only to members of a worker’s household. Because the duty is premised on the foreseeability of both the regularity and intensity of contact that occurs in a worker’s home, it does not extend beyond this circumscribed category of potential plaintiffs.” (*Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1140 [210 Cal.Rptr.3d 283, 384 P.3d 283].)

Secondary Sources

3 Witkin, California Procedure (5th ed. 2008) Actions, § 570

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-D, Theories of Recovery—Strict Liability For Defective Products, ¶ 2:1259 (The Rutter Group)

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-O, Theories of Recovery—Causation Issues, ¶ 2:2409 (The Rutter Group)

1 Levy et al., California Torts, Ch. 2, *Causation*, § 2.03 (Matthew Bender)

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.22, Ch. 7, *Proof*, § 7.06 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.72 (Matthew Bender)

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470. Primary Assumption of Risk—Exception to Nonliability— Coparticipant in Sport or Other Recreational Activity

[Name of plaintiff] claims *[he/she]* was harmed while participating in *[specify sport or other recreational activity, e.g., touch football]* and that *[name of defendant]* is responsible for that harm. To establish this claim, *[name of plaintiff]* must prove all of the following:

[1. That *[name of defendant]* either intentionally injured *[name of plaintiff]* or acted so recklessly that *[his/her]* conduct was entirely outside the range of ordinary activity involved in *[e.g., touch football];*]

[or]

[1. That *[name of defendant]* unreasonably increased the risks to *[name of plaintiff]* over and above those inherent in *[e.g., touch football];*]

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

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

Conduct is entirely outside the range of ordinary activity involved in *[e.g., touch football]* if that conduct can be prohibited without discouraging vigorous participation or otherwise fundamentally changing the *[sport/activity]*.

***[Name of defendant]* is not responsible for an injury resulting from conduct that was merely accidental, careless, or negligent.**

New September 2003; Revised April 2004, October 2008, April 2009, December 2011, December 2013; Revised and Renumbered From CACI No. 408 May 2017; Revised May 2018

Directions for Use

This instruction sets forth a plaintiff's response to the affirmative defense of primary assumption of risk asserted by a defendant who was a coparticipant in the sport or other recreational activity. For an instruction applicable to coaches, instructors, or trainers, see CACI No. 471, *Primary Assumption of Risk—Exception to Nonliability—Instructors, Trainers, or Coaches*. For an instruction applicable to facilities owners and operators and to event sponsors, see CACI No. 472, *Primary Assumption of Risk—Exception to Nonliability— Facilities Owners and Operators and Event Sponsors*. For an instruction applicable to occupations with inherent risk, see CACI No. 473, *Primary Assumption of Risk—Exception to Nonliability—Occupation Involving Inherent Risk*.

Primary assumption of risk generally absolves the defendant of a duty of care toward the plaintiff with

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regard to injury incurred in the course of a sporting or other recreational activity covered by the doctrine. (See *Knight v. Jewett* (1992) 3 Cal.4th 296, 320 [11 Cal.Rptr.2d 2, 834 P.2d 696].) Element 1 sets forth the exceptions in which there is a duty.

While duty is generally a question of law, courts have held that whether the defendant has unreasonably increased the risk is a question of fact for the jury. (See *Luna v. Vela* (2008) 169 Cal.App.4th 102, 112–113 [86 Cal.Rptr.3d 588] [and cases cited therein].) There may also be disputed facts that must be resolved by a jury before it can be determined if the doctrine applies. (See *Shin v. Ahn* (2007) 42 Cal.4th 482, 486 [64 Cal.Rptr.3d 803, 165 P.3d 581].)

Sources and Authority

- “Primary assumption of risk arises where a plaintiff voluntarily participates in an activity or sport involving certain inherent risks; primary assumption of risk ... bar[s] recovery because no duty of care is owed as to such risks.” (*Connelly v. Mammoth Mountain Ski Area* (1995) 39 Cal.App.4th 8, 11 [45 Cal.Rptr.2d 855], internal citations omitted.)
- “Although the doctrine is often applied as between sports coparticipants, it defines the duty owed as between persons engaged in any activity involving inherent risks. The doctrine applies to activity ‘done for enjoyment or thrill, requires physical exertion as well as elements of skill, and involves a challenge containing a potential risk of injury’” (*Jimenez v. Roseville City School Dist.* (2016) 247 Cal.App.4th 594, 601 [202 Cal.Rptr.3d 536], internal citations omitted; see also *Bertsch v. Mammoth Community Water Dist.* (2016) 247 Cal.App.4th 1201, 1208 [202 Cal.Rptr.3d 757] [“These factors certainly apply to skateboarding”]; *Swigart v. Bruno* (2017) 13 Cal.App.5th 529, 540 [220 Cal.Rptr.3d 556] [horseback riding is an inherently dangerous sport]; *Foltz v. Johnson* (2017) 16 Cal.App.5th 647, 656 [224 Cal.Rptr.3d 506] [off-road dirt bike riding])
- “A coparticipant in an active sport ordinarily bears no liability for an injury resulting from conduct in the course of the sport that is merely careless or negligent.” (*Ford v. Gouin* (1992) 3 Cal.4th 339, 342 [11 Cal.Rptr.2d 30, 834 P.2d 724].)
- “[W]e conclude that a participant in an active sport breaches a legal duty of care to other participants—i.e., engages in conduct that properly may subject him or her to financial liability—only if the participant intentionally injures another player or engages in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport.” (*Knight, supra*, 3 Cal.4th at p. 320.)
- “The *Knight* rule, however, ‘does not grant unbridled legal immunity to all defendants participating in sporting activity. The Supreme Court has stated that “it is well established that defendants generally do have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport.” Thus, even though “defendants generally have no legal duty to eliminate (or protect a plaintiff against) risks inherent in the sport itself,” they may not increase the likelihood of injury above that which is inherent.’ ” (*Distefano v. Forester* (2001) 85 Cal.App.4th 1249, 1261 [102 Cal.Rptr.2d 813], internal citations omitted.)
- “In *Freeman v. Hale*, the Court of Appeal advanced a test ... for determining what risks are inherent

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in a sport: ‘[C]onduct is totally outside the range of ordinary activity involved in the sport (and thus any risks resulting from that conduct are not inherent to the sport) if the prohibition of that conduct would neither deter vigorous participation in the sport nor otherwise fundamentally alter the nature of the sport.’ ” (*Distefano, supra*, 85 Cal.App.4th at p. 1261.)

- “[G]olfers have a limited duty of care to other players, breached only if they intentionally injure them or engage in conduct that is ‘so reckless as to be totally outside the range of the ordinary activity involved in the sport.’ ” (*Shin, supra*, 42 Cal.4th at p. 497.)
- “The question of which risks are inherent in a recreational activity is fact intensive but, on a sufficient record, may be resolved on summary judgment. Judges deciding inherent risk questions under this doctrine ‘may consider not only their own or common experience with the recreational activity involved but may also consult case law, other published materials, and documentary evidence introduced by the parties on a motion for summary judgment.’ ” (*Foltz, supra*, 16 Cal.App.5th at p. 656.)
- “[W]hether defendant breached the limited duty of care he owed other golfers by engaging in conduct that was ‘so reckless as to be totally outside the range of the ordinary activity involved in [golf]’ depends on resolution of disputed material facts. Thus, defendant’s summary judgment motion was properly denied.” (*Shin, supra*, 42 Cal.4th at p. 486, internal citation omitted.)
- “Although we recognize the Court of Appeal decisions specifically addressing the point are in conflict, we believe resolving this issue is not a matter of further defining [defendant]’s duty, which would be a question of law for the court. Rather, it requires application of the governing standard of care (the duty not to increase the risks inherent in the sport) to the facts of this particular case—the traditional role of the trier of fact. (See, e.g., *Vine v. Bear Valley Ski Co., supra*, 118 Cal.App.4th at pp. 591–592 [whether defendant’s design of snowboard jump increased inherent risks of snowboarding is question for jury]; *Solis v. Kirkwood Resort Co., supra*, 94 Cal.App.4th at p. 365 [whether artificial jumps built by resort increased inherent risk of falling while skiing is question for jury]; *Lowe v. California League of Prof. Baseball* (1997) 56 Cal.App.4th 112, 123 [65 Cal.Rptr.2d 105] [whether distraction caused by activities of minor league baseball team’s mascot increased inherent risk of spectator being hit by a foul ball ‘is issue of fact to be resolved at trial’]; but see *Huff v. Wilkins, supra*, 138 Cal.App.4th at p. 745 [‘it is the trial court’s province to determine whether defendants breached their duty not to increase the inherent risk of a collision [in the sport of off-roading], and it should hold a hearing for this purpose before impaneling a jury’]; *American Golf Corp. v. Superior Court* (2000) 79 Cal.App.4th 30, 37 [93 Cal.Rptr.2d 683] [‘[i]t is for the court to decide ... whether the defendant has increased the risks of the activity beyond the risks inherent in the sport’]; see also *Huffman v. City of Poway* (2000) 84 Cal.App.4th 975, 995, fn. 23 [101 Cal.Rptr.2d 325] [indicating it is for the court to determine whether defendant’s conduct increased the risk inherent in participating in a particular sport, but that trial court may receive expert testimony on the customary practices in the sport to make that determination].) [¶] Our conclusion it is for the trier of fact to determine whether [defendant] breached his limited duty not to increase the risks inherent in the sport of volleyball finds solid support in the Supreme Court’s most recent sports injury, primary assumption of the risk decision, *Shin v. Ahn, supra*, 42 Cal.4th 482, a case that postdates the appellate court decisions suggesting the issue is one for the court to resolve.” (*Luna v. Vela* (2008) 169 Cal.App.4th 102, 112–113 [86 Cal.Rptr.3d 588].)

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- “The determinant of duty, ‘inherent risk,’ is to be decided solely as a question of law and based on the general characteristics of the sport activity and the parties' relationship to it.” (*Griffin v. The Haunted Hotel, Inc.* (2015) 242 Cal.App.4th 490, 501 [194 Cal.Rptr.3d 830].)
- “Admittedly, it is sometimes said that ‘[t]he existence and scope of a defendant's duty of care in the primary assumption of risk context “is a *legal* question which depends on the nature of the sport or activity ... and on the parties’ general relationship to the activity, and is an issue to be decided by the court, rather than the jury.”’ This statement of the rule is correct where there is no dispute about the inherent risks, and such cases may be resolved on summary judgment. [¶] However this statement is overly broad. Although the risks inherent in *many* activities are not subject to reasonable dispute (e.g., being hit with a baseball during a game), the risks inherent in *some* activities are not commonly known. In such cases, expert testimony may be required ‘ “for purposes of weighing whether the inherent risks of the activity were increased by the defendant's conduct.” ’ Thus, it is not entirely accurate to say inherent risks of an activity always present purely legal questions, because sometimes the nature of an activity and its risks must be gleaned from the evidence.” (*Jimenez, supra*, 247 Cal.App.4th at p. 608, original italics.)
- “[Plaintiff] has repeatedly argued that primary assumption of the risk does not apply because she did not impliedly consent to having a weight dropped on her head. However, a plaintiff's expectation does not define the limits of primary assumption of the risk. ‘Primary assumption of risk focuses on the legal question of duty. It does not depend upon a plaintiff's implied consent to injury, nor is the plaintiff's subjective awareness or expectation relevant.’ ” (*Cann v. Stefanec* (2013) 217 Cal.App.4th 462, 471 [158 Cal.Rptr.3d 474].)
- “Primary assumption of the risk does not depend on whether the plaintiff subjectively appreciated the risks involved in the activity; instead, the focus is an objective one that takes into consideration the risks that are ‘inherent’ in the activity at issue.” (*Swigart, supra*, 13 Cal.App.5th at p. 538.)
- “A jury could find that, by using a snowboard without the retention strap, in violation of the rules of the ski resort and a county ordinance, defendant unnecessarily increased the danger that his snowboard might escape his control and injure other participants such as plaintiff. The absence of a retention strap could therefore constitute conduct not inherent to the sport which increased the risk of injury.” (*Campbell v. Derylo* (1999) 75 Cal.App.4th 823, 829 [89 Cal.Rptr.2d 519].)
- “The existence and scope of a defendant's duty depends on the role that defendant played in the activity. Defendants were merely the hosts of a social gathering at their cattle ranch, where [plaintiff] asked to ride one of their horses; they were not instructors and did not assume any of the responsibilities of an instructor.” (*Levinson v. Owens* (2009) 176 Cal.App.4th 1534, 1550–1551 [98 Cal.Rptr.3d 779], internal citation omitted.)
- “[T]he primary assumption of risk doctrine is not limited to activities classified as sports, but applies as well to other recreational activities ‘involving an inherent risk of injury to voluntary participants ... where the risk cannot be eliminated without altering the fundamental nature of the activity.’ ” (*Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148, 1156 [150 Cal.Rptr.3d 551, 290 P.3d 1158].)

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- “Whether a duty exists ‘does not turn on the reasonableness or unreasonableness of the plaintiff’s conduct, but rather on [(1)] the nature of the activity or sport in which the defendant is engaged and [(2)] the relationship of the defendant and the plaintiff to that activity or sport.’ It is the ‘nature of the activity’ and the parties’ relationship to it that determines whether the doctrine applies—not its characterization as a sporting event.” (*McGarry v. Sax* (2008) 158 Cal.App.4th 983, 999–1000 [70 Cal.Rptr.3d 519], internal citations omitted.)
- “[T]o the extent that ‘ ‘ ‘a plaintiff *unreasonably* undertakes to encounter a specific known risk imposed by a defendant’s negligence,’ ’ ’ he or she is subject to the defense of comparative negligence but not to an absolute defense. This type of comparative negligence has been referred to as ‘ “secondary assumption of risk.” ’ Assumption of risk that is based upon the absence of a defendant’s duty of care is called ‘ “primary assumption of risk.” ’ ‘First, in “primary assumption of risk” cases—where the defendant owes no duty to protect the plaintiff from a particular risk of harm—a plaintiff who has suffered such harm is not entitled to recover from the defendant, whether the plaintiff’s conduct in undertaking the activity was *reasonable* or unreasonable. Second, in “secondary assumption of risk” cases—involving instances in which the defendant has breached the duty of care owed to the plaintiff—the defendant is not entitled to be entirely relieved of liability for an injury proximately caused by such breach, simply because the plaintiff’s conduct in encountering the risk of such an injury was reasonable rather than unreasonable.’ ” (*Kindrich v. Long Beach Yacht Club* (2008) 167 Cal.App.4th 1252, 1259 [84 Cal.Rptr.3d 824], original italics, internal citations omitted.)
- “Even were we to conclude that [plaintiff]’s decision to jump off the boat was a voluntary one, and that therefore he assumed a risk inherent in doing so, this is not enough to provide a complete defense. Because voluntary assumption of risk as a complete defense in a negligence action was abandoned in *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 829 [119 Cal.Rptr. 858, 532 P.2d 1226], only the absence of duty owed a plaintiff under the doctrine of primary assumption of risk would provide such a defense. But that doctrine does not come into play except when a plaintiff and a defendant are engaged in certain types of activities, such as an ‘active sport.’ That was not the case here; plaintiff was merely the passenger on a boat. Under *Li*, he may have been contributorily negligent but this would only go to reduce the amount of damages to which he is entitled.” (*Kindrich, supra*, 167 Cal.App.4th at p. 1258.)
- “Though most cases in which the doctrine of primary assumption of risk exists involve recreational sports, the doctrine has been applied to dangerous activities in other contexts (see, e.g., *Saville v. Sierra College* (2005) 133 Cal.App.4th 857 [36 Cal.Rptr.3d 515] [training in peace officer takedown maneuvers]; *Hamilton v. Martinelli & Associates* (2003) 110 Cal.App.4th 1012 [2 Cal.Rptr.3d 168] [training on physical restraint methods]; *Aaris v. Las Virgenes Unified School Dist.* (1998) 64 Cal.App.4th 1112 [75 Cal.Rptr.2d 801] [practice of cheerleader routines]; *Bushnell [v. Japanese-American Religious & Cultural Center]*, 43 Cal.App.4th 525 [50 Cal.Rptr.2d 671] [practice of moves in judo class]; and *Herrle v. Estate of Marshall* (1996) 45 Cal.App.4th 1761 [53 Cal.Rptr.2d 713] [injury to nurse’s aide by nursing home patient]).” (*McGarry, supra*, 158 Cal.App.4th at pp. 999–1000, internal citation omitted.)

Secondary Sources

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6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1339, 1340, 1343–1350

1 Levy et al., California Torts, Ch. 4, *Comparative Negligence, Assumption of the Risk, and Related Defenses*, § 4.03, Ch. 15, *General Premises Liability*, § 15.21 (Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 273, *Games, Sports, and Athletics*, § 273.30 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.172 (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence*, § 165.401 (Matthew Bender)

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1004. Obviously Unsafe Conditions

If an unsafe condition of the property is so obvious that a person could reasonably be expected to observe it, then the [owner/lessor/occupier/one who controls the property] does not have to warn others about the dangerous condition.

However, the [owner/lessor/occupier/one who controls the property] does still have to use reasonable care to protect against the risk of harm if it is foreseeable that the condition may cause injury to someone who, because of necessity or other circumstances, encounters the condition.

New September 2003; Revised May 2018

Directions for Use

Give this instruction with CACI No. 1001, *Basic Duty of Care*, if it is alleged that the condition causing injury was obvious. Generally, there is no duty to warn of an obviously unsafe condition. (*Jacobs v. Coldwell Banker Residential Brokerage Co.* (2017) 14 Cal.App.5th 438, 447 [221 Cal.Rptr.3d 701].). However, ~~landowners~~ ~~Defendants~~ may have a duty to take precautions to protect against the risk of harm from an obviously unsafe condition, even if they do not have a duty to warn. (*Osborn v. Mission Ready Mix* (1990) 224 Cal.App.3d 104, 121-122 [273 Cal.Rptr. 457].)

Sources and Authority

- “Foreseeability of harm is typically absent when a dangerous condition is open and obvious. ‘Generally, if a danger is so obvious that a person could reasonably be expected to see it, the condition itself serves as a warning, and the landowner is under no further duty to remedy or warn of the condition.’ In that situation, owners and possessors of land are entitled to assume others will ‘perceive the obvious’ and take action to avoid the dangerous condition.” (*Jacobs, supra*, 14 Cal.App.5th at p. 447, internal citations omitted.)
- “An exception to this general rule exists when ‘it is foreseeable that the danger may cause injury despite the fact that it is obvious (e.g., when necessity requires persons to encounter it).’ In other words, while the obviousness of the condition and its dangerousness may obviate the landowner’s duty to remedy or warn of the condition in some situations, such obviousness will not negate a duty of care when it is foreseeable that, because of necessity or other circumstances, a person may choose to encounter the condition.” (*Jacobs, supra*, 14 Cal.App.5th at p. 447.)
- “Generally, if a danger is so obvious that a person could reasonably be expected to see it, the condition itself serves as a warning, and the landowner is under no further duty to remedy or warn of the condition. (6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1126.) However, this is not true in all cases. “[I]t is foreseeable that even an obvious danger may cause injury, if the practical necessity of encountering the danger, when weighed against the apparent risk involved, is such that under the circumstances, a person might choose to encounter the danger. The foreseeability of injury, in turn, when considered along with various other policy considerations such as the extent of the

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burden to the defendant and consequences to the community of imposing a duty to remedy such danger may lead to the legal conclusion that the defendant “owes a duty of due ~~care~~ care’ [to the person injured.]” (*Osborn, supra*, 224 Cal.App.3d at p. 121, internal citations omitted.)

- “[W]hen a worker, whose work requires him or her to encounter a danger which is obvious or observable, is injured, ‘[t]he jury [is] entitled to balance the [plaintiff’s] necessity against the danger, even if it be assumed that it was an apparent one. This [is] a factual issue. [Citations.]’ In other words, under certain circumstances, an obvious or apparent risk of danger does not automatically absolve a defendant of liability for injury caused thereby.” (*Osborn, supra*, 224 Cal.App.3d at p. 118, original italics, internal citations omitted.)
- “[T]he obvious nature of a danger is not, in and of itself, sufficient to establish that the owner of the premises on which the danger is located is not liable for injuries caused thereby, and that although obviousness of danger may negate any duty to warn, it does not necessarily negate the duty to remedy.” ~~It is incorrect to instruct a jury categorically that a business owner cannot be held liable for an injury resulting from an obvious danger.~~ (*Osborn, supra*, 224 Cal.App.3d at p. ~~116~~119.) ~~There may be a duty to remedy a dangerous condition, even though there is no duty to warn thereof, if the condition is foreseeable. (Id. at pp. 121–122.)~~
- “The issue is whether there is any evidence from which a trier of fact could find that, as a practical necessity, [plaintiff] was foreseeably required to expose himself to the danger of falling into the empty pool.” (*Jacobs, supra*, 14 Cal.App.5th at p. 447.)
- In *Felmlee v. Falcon Cable TV* (1995) 36 Cal.App.4th 1032, 1039-1040 [43 Cal.Rptr.2d 158], the court found that an instruction stating that the defendant “owed no duty to warn plaintiff of a danger which was obvious or which should have been observed in the exercise of ordinary care” was proper: “The jury was free to consider whether Falcon was directly negligent in failing to correct any foreseeable, dangerous condition of the cables which may have contributed to the cause of Felmlee’s injuries.” (*Id.* at p. 1040.)
- ~~One court has observed:~~ “[T]he ‘obvious danger’ exception to a landowner’s ordinary duty of care is in reality a recharacterization of the former assumption of the risk doctrine, i.e., where the condition is so apparent that the plaintiff must have realized the danger involved, he assumes the risk of injury even if the defendant was negligent. ... [T]his type of assumption of the risk has now been merged into comparative negligence.” (*Donohue v. San Francisco Housing Authority* (1993) 16 Cal.App.4th 658, 665 [20 Cal.Rptr.2d 148], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1125–1127

1 Levy et al., California Torts, Ch. 15, *General Premises Liability*, § 15.04[4] (Matthew Bender)

11 California Real Estate Law and Practice, Ch. 381, *Tort Liability of Property Owners*, §§ 381.20, 381.32 (Matthew Bender)

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36 California Forms of Pleading and Practice, Ch. 421, *Premises Liability*, § 421.14 (Matthew Bender)

17 California Points and Authorities, Ch. 178, *Premises Liability*, § 178.25 et seq. (Matthew Bender)

Draft—Not Approved by Judicial Council

1005. ~~Business Proprietor's~~Property Owner's Liability for the ~~Negligent/Intentional~~/Criminal Conduct of Others

[An owner of a business that is open to the public/A landlord] must use reasonable care to protect [patrons/guests/tenants] from another person's criminal~~armful~~ conduct on [his/her/its] property if the [owner/landlord] can reasonably anticipate sueh-that type of conduct.

You must decide whether the steps taken by [name of defendant] to protect persons such as [name of plaintiff] were adequate and reasonable under the circumstances.

New September 2003; Revised May 2018

Directions for Use

A business owner or a landlord has a duty to take affirmative steps to protect against the criminal acts of a third party if the conduct can be reasonably anticipated. (Ann M. v. Pacific Plaza Shopping Center (1993) 6 Cal.4th 666, 676 [25 Cal.Rptr.2d 137, 863 P.2d 207], disapproved on other grounds in Reid v. Google, Inc. (2010) 50 Cal.4th 512, 527, fn. 5 [113 Cal.Rptr.3d 327, 235 P.3d 988].) Whether there is a duty is a question of law for the court. The jury then decides whether the defendant's remedial measures were reasonable and adequate under the circumstances. (Isaacs v. Huntington Memorial Hospital (1985) 38 Cal.3d 112, 131 [211 Cal.Rptr. 356, 695 P.2d 653].)

Sources and Authority

- “A landlord generally owes a tenant the duty, arising out of their special relationship, to take reasonable measures to secure areas under the landlord's control against foreseeable criminal acts of third parties.” (Castaneda v. Olsher (2007) 41 Cal.4th 1205, 1213 [63 Cal.Rptr.3d 99, 162 P.3d 610].)
- “[B]road language used in Isaacs has tended to confuse duty analysis generally in that the opinion can be read to hold that foreseeability in the context of determining duty is normally a question of fact reserved for the jury. Any such reading of Isaacs is in error. Foreseeability, when analyzed to determine the existence or scope of a duty, is a question of law to be decided by the court.” (Ann M., supra, 6 Cal.4th at p. 678, internal citation omitted.)
- “[T]he decision to impose a duty of care to protect against criminal assaults requires ‘balancing the foreseeability of the harm against the burden of the duty to be imposed. [Citation.] “ [I]n cases where the burden of preventing future harm is great, a high degree of foreseeability may be required. [Citation.] On the other hand, in cases where there are strong policy reasons for preventing the harm, or the harm can be prevented by simple means, a lesser degree of foreseeability may be required.’ [Citation.]” [Citation.] Or, as one appellate court has accurately explained, duty in such circumstances is determined by a balancing of “foreseeability” of the criminal acts against the “burdensomeness, vagueness, and efficacy” of the proposed security measures.’ ” (Wiener v. Southcoast Childcare Centers, Inc. (2004) 32 Cal.4th 1138, 1146-1147 [12 Cal.Rptr.3d 615, 88 P.3d 517].)
- “ ‘A possessor of land who holds it open to the public for entry for his business purposes is subject to

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liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to (a) discover that such acts are being done or are likely to be done, or (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.’ ” (Taylor, supra, 65 Cal.2d at p. 124, quoting Restatement of Torts, § 344.)

- “[T]he property holder only ‘has a duty to protect against types of crimes of which he has notice and which are likely to recur if the common areas are not secure.’ The court’s focus in determining duty ‘ ‘is not to decide whether a particular plaintiff’s injury was reasonably foreseeable in light of a particular defendant’s conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed on the negligent party.’ [Citation.]” ’ ” (Janice H. v. 696 North Robertson, LLC (2016) 1 Cal.App.5th 586, 594 [205 Cal.Rptr.3d 103], internal citation omitted.)
- “[O]nly when ‘heightened’ foreseeability of third party criminal activity on the premises exists—shown by prior similar incidents or other indications of a reasonably foreseeable risk of violent criminal assaults in that location—does the scope of a business proprietor’s special-relationship-based duty *include an obligation to provide guards* to protect the safety of patrons.” (Delgado v. Trax Bar & Grill (2005) 36 Cal.4th 224, 240 [30 Cal.Rptr.3d 145, 113 P.3d 1159], internal citations and footnote omitted, original italics.)
- “[F]oreseeability, whether heightened or reduced, is tested by what the defendant knows, not what the defendant could have or should have learned.” (Margaret W. v. Kelley R. (2006) 139 Cal.App.4th 141, 158 [42 Cal.Rptr.3d 519].)
- “Here [defendant] argues it has no duty unless and until it experiences a similar criminal incident. We disagree. While a property holder generally has a duty to protect against types of crimes of which he is on notice, the absence of previous occurrences does not end the duty inquiry. We look to all of the factual circumstances to assess foreseeability.” (Janice H., supra, 1 Cal.App.5th at p. 595, internal citation omitted.)
- “Even when proprietors ... have no duty ... to provide a security guard or undertake other similarly burdensome preventative measures, the proprietor is not necessarily insulated from liability under the special relationship doctrine. A proprietor that has no duty ... to hire a security guard or to undertake other similarly burdensome preventative measures still owes a duty of due care to a patron or invitee by virtue of the special relationship, and there are circumstances (apart from the failure to provide a security guard or undertake other similarly burdensome preventative measures) that may give rise to liability based upon the proprietor’s special relationship.” (Delgado, supra, 36 Cal.4th at pp. 240-241.)
- A business proprietor is not an insurer of the safety of his invitees, “but he is required to exercise reasonable care for their safety and is liable for injuries resulting from a breach of this duty. The general duty includes not only the duty to inspect the premises in order to uncover dangerous conditions, but, as well, the duty to take affirmative action to control the wrongful acts of third persons which threaten invitees where the occupant has reasonable cause to anticipate such acts and

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the probability of injury resulting therefrom.” (*Taylor, supra, v. Centennial Bowl, Inc.* (1966) 65 Cal.2d at p. 114, 121 [52 Cal.Rptr. 561, 416 P.2d 793], internal citations omitted.)

- ~~“Once a court finds that the defendant was under a duty to protect the plaintiff, it is for the factfinder to decide whether the security measures were reasonable under the circumstances. The jury must decide whether the security was adequate.” (*Isaacs v. Huntington Memorial Hospital* (1985) 38 Cal.3d 112, 131 [211 Cal.Rptr. 356, 695 P.2d 653], internal citation omitted.)~~
- ~~“[A]s frequently recognized, a duty to take affirmative action to control the wrongful acts of a third party will be imposed only where such conduct can be reasonably anticipated.” (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 676 [25 Cal.Rptr.2d 137, 863 P.2d 207], internal citations omitted.)~~
- “In the case of a landlord, this general duty of maintenance, which is owed to tenants and patrons, has been held to include the duty to take reasonable steps to secure common areas against foreseeable criminal acts of third parties that are likely to occur in the absence of such precautionary measures.” (*Ann M., supra*, 6 Cal.4th at p. 674, internal citation omitted.); (*Frances T. v. Village Green Owners Assn.* (1986) 42 Cal.3d 490, 499-501 [229 Cal.Rptr. 456, 723 P.2d 573].)
- “[Restatement Second of Torts] Section 314A identifies ‘special relations’ which give rise to a duty to protect another. Section 344 of the Restatement Second of Torts expands on that duty as it applies to business operators.” (*Ky. Fried Chicken of Cal. v. Superior Court* (1997) 14 Cal.4th 814, 823 [59 Cal.Rptr.2d 756, 927 P.2d 1260].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1129–1149

1 Levy et al., California Torts, Ch. 15, *General Premises Liability*, § 15.06 (Matthew Bender)

6 California Real Estate Law and Practice, Ch. 170, *The Premises: Duties and Liabilities*, § 170.05 (Matthew Bender)

11 California Real Estate Law and Practice, Ch. 381, *Tort Liability of Property Owners*, § 381.21 (Matthew Bender)

29 California Forms of Pleading and Practice, Ch. 334, *Landlord and Tenant: Claims for Damages*, §§ 334.12, 334.23, 334.57 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 421, *Premises Liability*, § 421.30 et seq. (Matthew Bender)

17 California Points and Authorities, Ch. 178, *Premises Liability*, § 178.60 et seq. (Matthew Bender)

1 California Civil Practice: Torts § 16:5 (Thomson Reuters)

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1500. Former Criminal Proceeding—Essential Factual Elements

[Name of plaintiff] claims that *[name of defendant]* wrongfully caused a criminal proceeding to be brought against *[him/her/it]*. To establish this claim, *[name of plaintiff]* must prove all of the following:

1. That *[name of defendant]* was actively involved in causing *[name of plaintiff]* to be **arrested and prosecuted** *[or in causing the continuation of the prosecution];*
2. That the criminal proceeding ended in *[name of plaintiff]*'s favor;
3. That no reasonable person in *[name of defendant]*'s circumstances would have believed that there were grounds for causing *[name of plaintiff]* to be arrested **~~or~~ and prosecuted**;
4. That *[name of defendant]* acted primarily for a purpose other than to bring *[name of plaintiff]* to justice;
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.

[The law requires that the trial judge, rather than the jury, decide if *[name of plaintiff]* has proven element 2 above, whether the criminal proceeding ended in *[his/her/its]* favor. But before I can do so, you must decide whether *[name of plaintiff]* has proven the following:

[List all factual disputes that must be resolved by the jury.]

The special [verdict/interrogatory] form will ask for your finding on [this/these] issue[s].]

[The law [also] requires that the trial judge, rather than the jury, decide if *[name of plaintiff]* has proven element 3 above, whether a reasonable person in *[name of defendant]*'s circumstances would have believed that there were grounds for causing *[name of plaintiff]* to be arrested **and ~~or~~ prosecuted**. But before I can do so, you must decide whether *[name of plaintiff]* has proven the following:

[List all factual disputes that must be resolved by the jury.]

The special [verdict/interrogatory] form will ask for your finding on [this/these] issue[s].]

New September 2003; Revised April 2008, October 2008, June 2015

Directions for Use

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Give this instruction in a malicious prosecution case based on an underlying criminal prosecution. If there is an issue as to what it means to be “actively involved” in element 1, also give CACI No. 1504, *Former Criminal Proceeding—“Actively Involved” Explained*.

In elements 1 and 3 and in the next-to-last paragraph, include the bracket references to prosecution if the arrest was without a warrant. Whether prosecution is required in an arrest on a warrant has not definitively been resolved. (See *Van Audenhove v. Perry* (2017) 11 Cal.App.5th 915, 919–925 [217 Cal.Rptr.3d 843].)

Malicious prosecution requires that the criminal proceeding have ended in the plaintiff’s favor (element 2) and that the defendant did not reasonably believe that there were any grounds (probable cause) to initiate the proceeding (element 3). Probable cause is to be decided by the court as a matter of law. However, it may require the jury to find some preliminary facts before the court can make its legal determination, including facts regarding what the defendant knew or did not know at the time. (See *Sheldon Appel Co. v. Albert & Olier* (1989) 47 Cal.3d 863, 881 [254 Cal.Rptr. 336, 765 P.2d 498].) If so, include element 3 and also the bracketed part of the instruction that refers to element 3.

Favorable termination is handled in much the same way. If a proceeding is terminated other than on the merits, there may be disputed facts that the jury must find in order to determine whether there has been a favorable termination. (See *Fuentes v. Berry* (1995) 38 Cal.App.4th 1800, 1808 [45 Cal.Rptr.2d 848].) If so, include element 2 and also the bracketed part of the instruction that refers to element 2. Once these facts are determined, the jury does not then make a second determination as to whether there has been a favorable termination. The matter is determined by the court based on the resolution of the disputed facts. (See *Sierra Club Found. v. Graham* (1999) 72 Cal.App.4th 1135, 1159 [85 Cal.Rptr.2d 726] [element of favorable termination is for court to decide].)

Either or both of the elements of probable cause and favorable termination should be omitted if there are no disputed facts regarding that element for the jury.

Element 4 expresses the malice requirement.

Sources and Authority

- Public Employee Immunity. Government Code section 821.6.
- “Malicious prosecution consists of initiating or procuring the arrest and prosecution of another under lawful process, but from malicious motives and without probable cause.” (*Cedars-Sinai Medical Center v. Superior Court* (1988) 206 Cal.App.3d 414, 417 [253 Cal.Rptr. 561], internal citation omitted.)
- “The remedy of a malicious prosecution action lies to recompense the defendant who has suffered out of pocket loss in the form of attorney fees and costs, as well as emotional distress and injury to reputation because of groundless allegations made in pleadings which are public records.” (*Sagonowsky v. More* (1998) 64 Cal.App.4th 122, 132 [75 Cal.Rptr.2d 118], internal citations omitted.)

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- “[A] cause of action for malicious prosecution cannot be premised on an arrest that does not result in formal charges (at least when the arrest is not pursuant to a warrant).” (*Van Audenhove, supra, v. Perry* (2017) 11 Cal.App.5th at p.915, 917 [~~217 Cal.Rptr.3d 843~~] [rejecting Rest.2d Torts, § 654. subd. (2)(c)].)
- “Cases dealing with actions for malicious prosecution against private persons require that the defendant has at least sought out the police or prosecutorial authorities and falsely reported facts to them indicating that plaintiff has committed a crime.” (*Sullivan v. County of Los Angeles* (1974) 12 Cal.3d 710, 720 [117 Cal.Rptr. 241, 527 P.2d 865], internal citations omitted.)
- “[T]he effect of the approved instruction [in *Dreux v. Domec* (1861) 18 Cal. 83] was to impose liability upon one who had not taken part until after the commencement of the prosecution.” (*Lujan v. Gordon* (1977) 70 Cal.App.3d 260, 263 [138 Cal.Rptr. 654].)
- “When, as here, the claim of malicious prosecution is based upon initiation of a criminal prosecution, the question of probable cause is whether it was objectively reasonable for the defendant ... to suspect the plaintiff ... had committed a crime.” (*Greene v. Bank of America* (2013) 216 Cal.App.4th 454, 465 [156 Cal.Rptr.3d 901].)
- “When there is a dispute as to the state of the defendant's knowledge and the existence of probable cause turns on resolution of that dispute, ... the jury must resolve the threshold question of the defendant's factual knowledge or belief. Thus, when ... there is evidence that the defendant may have known that the factual allegations on which his action depended were untrue, the jury must determine what facts the defendant knew before the trial court can determine the legal question whether such facts constituted probable cause to institute the challenged proceeding.” (*Sheldon Appel Co., supra*, 47 Cal.3d at p. 881, internal citations omitted.)
- “Admittedly, the fact of the grand jury indictment gives rise to a prima facie case of probable cause, which the malicious prosecution plaintiff must rebut. However, as respondents' own authorities admit, that rebuttal may be by proof that the indictment was based on false or fraudulent testimony.” (*Williams v. Hartford Ins. Co.* (1983) 147 Cal.App.3d 893, 900 [195 Cal.Rptr. 448].)
- “Acquittal of the criminal charge, in the criminal action, did not create a conflict of evidence on the issue of probable cause. [Citations.]” (*Verdier v. Verdier* (1957) 152 Cal.App.2d 348, 352, fn. 3 [313 P.2d 123].)
- “ ‘[T]he plaintiff in a malicious prosecution action must plead and prove that the prior judicial proceeding of which he complains terminated in his favor.’ Termination of the prior proceeding is not necessarily favorable simply because the party prevailed in the prior proceeding; the termination must relate to the merits of the action by reflecting either on the innocence of or lack of responsibility for the misconduct alleged against him.” (*Sagonowsky, supra*, 64 Cal.App.4th at p. 128, internal citations omitted.)
- “ ‘The theory underlying the requirement of favorable termination is that it tends to indicate the innocence of the accused, and coupled with the other elements of lack of probable cause and malice,

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establishes the tort, that is, the malicious and unfounded charge of crime against an innocent person.’” (*Cote v. Henderson* (1990) 218 Cal.App.3d 796, 804 [267 Cal.Rptr. 274], quoting *Jaffe v. Stone* (1941) 18 Cal.2d 146, 150 [114 P.2d 335].)

- “Where a proceeding is terminated other than on the merits, the reasons underlying the termination must be examined to see if it reflects the opinion of the court or the prosecuting party that the action would not succeed. If a conflict arises as to the circumstances explaining a failure to prosecute an action further, the determination of the reasons underlying the dismissal is a question of fact.” (*Fuentes, supra*, 38 Cal.App.4th at p. 1808, internal citations omitted.)
- “Generally, the requirements of the doctrine of collateral estoppel ‘will be met when courts are asked to give preclusive effect to preliminary hearing probable cause findings in subsequent civil actions for false arrest and malicious prosecution. [Citation.]’ ‘A determination of probable cause at a preliminary hearing may preclude a suit for false arrest or for malicious prosecution’.) ‘One notable exception to this rule would be in a situation where the plaintiff alleges that the arresting officer lied or fabricated evidence presented at the preliminary hearing. [Citation.] When the officer misrepresents the nature of the evidence supporting probable cause and that issue is not raised at the preliminary hearing, a finding of probable cause at the preliminary hearing would not preclude relitigation of the issue of integrity of the evidence.’ Defendants argue, and we agree, that the stated exception itself contains an exception—i.e., if the plaintiff alleges that the arresting officer lied or fabricated evidence at the preliminary hearing, plaintiff challenges that evidence at the preliminary hearing as being false, and the magistrate decides the credibility issue in the arresting officer's favor, then collateral estoppel still may preclude relitigation of the issue in a subsequent civil proceeding involving probable cause.” (*Greene v. Bank of America* (2015) 236 Cal.App.4th 922, 933 [186 Cal.Rptr.3d 887], internal citations omitted.)
- “The plea of nolo contendere is considered the same as a plea of guilty. Upon a plea of nolo contendere the court shall find the defendant guilty, and its legal effect is the same as a plea of guilty for all purposes. It negates the element of a favorable termination, which is a prerequisite to stating a cause of action for malicious prosecution.” (*Cote, supra*, 218 Cal.App.3d at p. 803, internal citation omitted.)
- “‘Should a conflict arise as to the circumstances explaining the failure to prosecute, the trier of fact must exercise its traditional role in deciding the conflict.’” (*Weaver v. Superior Court* (1979) 95 Cal.App.3d 166, 185 [156 Cal.Rptr. 745], disapproved on other grounds in *Sheldon Appel Co., supra*, 47 Cal.3d at p. 882, original italics, internal citations omitted.)
- “‘For purposes of a malicious prosecution claim, malice “is not limited to actual hostility or ill will toward the plaintiff. ...” [Citation.]’ ‘[I]f the defendant had no substantial grounds for believing in the plaintiff's guilt, but, nevertheless, instigated proceedings against the plaintiff, it is logical to infer that the defendant's motive was improper.’” (*Greene, supra*, 216 Cal.App.4th at pp. 464-465, internal citation omitted.)
- “Malice may be inferred from want of probable cause, but want of probable cause cannot be inferred from malice, but must be affirmatively shown by the plaintiff.” (*Verdier, supra*, 152 Cal.App.2d at p. 354.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 552–570, 605

4 Levy et al., California Torts, Ch. 43, *Malicious Prosecution and Abuse of Process*, §§ 43.01–43.06 (Matthew Bender)

31 California Forms of Pleading and Practice, Ch. 357, *Malicious Prosecution and Abuse of Process*, §§ 357.10–357.32 (Matthew Bender)

14 California Points and Authorities, Ch. 147, *Malicious Prosecution and Abuse of Process*, §§ 147.20–147.53 (Matthew Bender)

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1503. Affirmative Defense—Proceeding Initiated by Public Entities and Employee Within Scope of Employments (Gov. Code, § 821.6)

[Name of *public entity* defendant] claims that ~~it~~he/she cannot be held responsible for [name of plaintiff]'s harm, if any, because ~~the~~ [specify proceeding, e.g., civil action] ~~was initiated by its~~he/she ~~was a public~~ employee who was acting within the scope of [his/her] employment. To establish this defense, [name of defendant] must prove that [name of employee~~he/she~~] was acting within the scope of [his/her] employment.

New September 2003; Renumbered from CACI No. 1506 June 2013, Revised November 2018

Directions for Use

Give this instruction if there is an issue of fact as to whether the proceeding giving rise to the alleged malicious prosecution claim was initiated as a governmental action. Government Code section 821.6 provides immunity from liability for malicious prosecution for a public employee who is acting within the scope of employment, even if the employee acts maliciously and without probable cause. This immunity is not unqualified, however; it applies only if the employee was acting within the scope of employment. (*Tur v. City of Los Angeles* (1996) 51 Cal.App.4th 897, 904 [59 Cal.Rptr.2d 470].)

For an instruction on scope of employment, see CACI No. 3720, *Scope of Employment*, in the Vicarious Responsibility series.

Sources and Authority

- Public Employee Immunity. Government Code section 821.6.
- ~~In *Tur v. City of Los Angeles* (1996) 51 Cal.App.4th 897, 904 [59 Cal.Rptr.2d 470], the court concluded that “the failure to instruct under section 821.6 was prejudicial error.” The court observed that “The [d]efendants did not enjoy an unqualified immunity from suit. Their immunity would have depended on their proving by a preponderance of the evidence [that] they were acting within the scope of their employment in doing the acts alleged to constitute malicious prosecution.” (*Tur, supra*, 51 Cal.App.4th at p. 904 [failure to instruct jury under section 821.6 was prejudicial error] *ibid.*)~~

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 368

4 Levy et al., California Torts, Ch. 43, *Malicious Prosecution and Abuse of Process*, § 43.06 (Matthew Bender)

31 California Forms of Pleading and Practice, Ch. 357, *Malicious Prosecution and Abuse of Process*, § 357.23 (Matthew Bender)

14 California Points and Authorities, Ch. 147, *Malicious Prosecution and Abuse of Process*, § 147.31

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VF-1500. Malicious Prosecution—Former Criminal Proceeding

We answer the questions submitted to us as follows:

1. Was [name of defendant] actively involved in causing [name of plaintiff] to be **arrested** **[and prosecuted]** [or in causing the continuation of the prosecution]?
 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] act primarily for a purpose other than that of bringing [name of plaintiff] to justice?
 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 \$ _____

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, April 2008, December 2010, December 2016

Directions for Use

This verdict form is based on CACI No. 1500, *Former Criminal Proceeding*. This form can be adapted to include the affirmative defense of reliance on counsel. See VF-1502 for a form that includes this affirmative defense.

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 there are disputed issues of fact on the elements of probable cause or favorable termination that the jury must resolve, include additional questions or provide special interrogatories on these elements. (See CACI No. 1500, *Former Criminal Proceeding*, elements 2 and 3.)

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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If the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

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1730. Slander of Title—Essential Factual Elements

[Name of plaintiff] **claims that** *[name of defendant]* **harmed [him/her] by [making a statement/taking an action] that cast doubts about** *[name of plaintiff]*'s ownership of *[describe real or personal property, e.g., the residence located at [address]]*. **To establish this claim, [name of plaintiff] must prove all of the following:**

- 1. That** *[name of defendant]* **[made a statement/[specify other act, e.g., recorded a deed] that cast doubts about** *[name of plaintiff]*'s ownership of the property;
 - 2. That the** **[statement was made to a person other than** *[name of plaintiff]***]/[specify other publication, e.g., deed became a public record]];**
 - 3. That [the statement was untrue and] [name of plaintiff] did in fact own the property;**
 - 4. That** *[name of defendant]* **[knew that/acted with reckless disregard of the truth or falsity as to whether] [name of plaintiff] owned the property;**
 - 5. That** *[name of defendant]* **knew or should have recognized that someone else might act in reliance on the [statement/e.g., deed], causing [name of plaintiff] financial loss;**
 - 6. That** *[name of plaintiff]* **did in fact suffer immediate and direct financial harm because someone else acted in reliance on the [statement/e.g., deed];**
 - 7. That** *[name of defendant]*'s conduct was a substantial factor in causing *[name of plaintiff]*'s harm.
-

New December 2012; Revised May 2018

Directions for Use

Slander of title may be either by words or an act that clouds title to the property. (See, e.g., *Alpha & Omega Development, LP v. Whillock Contracting, Inc.* (2011) 200 Cal.App.4th 656, 661 [132 Cal.Rptr.3d 781] [filing of lis pendens].) If the slander is by means other than words, specify the means in element 1. If the slander is by words, select the first option in element 2.

An additional element of a slander of title claim is that the alleged slanderous statement was without privilege or justification. (*Schep v. Capital One, N.A.* (2017) [12 Cal.App.5th 1331, 1335 [220 Cal.Rptr.3d 408]].) If this element presents an issue for the jury, an instruction on it must be given. ~~The privileges of Civil Code section 47 apply to actions for slander of title. (*Albertson v. Raboff* (1956) 46 Cal.2d 375, 378–379 [295 P.2d 405].) The defendant has the burden of proving privilege as an affirmative defense. (See *Smith v. Commonwealth Land Title Ins. Co.* (1986) 177 Cal.App.3d 625, 630–631 [223 Cal.Rptr. 339].) If privilege is claimed, additional instructions will be necessary to state the~~

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~~affirmative defense and frame the privilege.~~

~~Under the common-interest privilege of Civil Code section 47(c), the defendant bears the initial burden of showing facts to bring the communication within the privilege. The plaintiff then must prove that the statement was made with malice. (*Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1203 [31 Cal.Rptr.2d 776, 875 P.2d 1279].) If the common-interest privilege is at issue, give CACI No. 1723, *Common Interest Privilege—Malice*. The elements of CACI No. 1723 constitute the “unprivileged” element of this basic claim.~~

~~If the privilege of Civil Code section 47(d) for a privileged publication or broadcast is alleged, give CACI No. 1724, *Fair and True Reporting Privilege*. (See *J-M Manufacturing Co., Inc. v. Phillips & Cohen LLP* (2016) 247 Cal.App.4th 87 [201 Cal.Rptr.3d 782].) If some other privilege is at issue, an additional element or instruction targeting that privilege will be required. The privilege of Civil Code section 47(e), applicable to communications between “interested” persons (see CACI No. 1723, *Qualified Privilege*), requires an absence of malice. To defeat this privilege, the plaintiff must show malice defined as a state of mind arising from hatred or ill will, evidencing a willingness to vex, annoy, or injure another person. (*Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 723 [257 Cal.Rptr. 708, 771 P.2d 406].) While defendant has the burden of proving that an allegedly defamatory statement falls within the scope of the common interest privilege, plaintiffs have the burden of proving that the statement was made with malice. (*Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1203 [31 Cal.Rptr.2d 776, 875 P.2d 1279].) Give CACI No. 1723 if the defendant presents evidence to put the privilege of Civil Code section 47(e) at issue.~~

Beyond the privilege of Civil Code section 47(c), it would appear that actual malice in the sense of ill will toward and intent to harm the plaintiff is not required and that malice may be implied in law from absence of privilege (see *Gudger v. Manton* (1943) 21 Cal.2d 537, 543–544 [134 P.2d 217], disapproved on other grounds in *Albertson v. Raboff* (1956) 46 Cal.2d 375, 381 [295 P.2d 405] *Albertson, supra*, 46 Cal.2d at p. 381.) or from the attempt to secure property to which the defendant had no legitimate claim (see *Spencer v. Harmon Enterprises, Inc.* (1965) 234 Cal.App.2d 614, 623 [44 Cal.Rptr. 683].) or from accusations made without foundation (element 4) (See *Contra Costa County Title Co. v. Waloff* (1960) 184 Cal.App.2d 59, 67 [7 Cal.Rptr. 358].)

Sources and Authority

- “[S]lander of title is not a form of deceit. It is a form of the separate common law tort of disparagement, also sometimes referred to as injurious falsehood.” (*Finch Aerospace Corp. v. City of San Diego* (2017) 8 Cal.App.5th 1248, 1253 [214 Cal.Rptr.3d 628].)
- “The Supreme Court has recently determined a viable disparagement claim, which necessarily includes a slander of title claim, requires the existence of a ‘misleading statement that (1) specifically refers to the plaintiff’s product or business and (2) clearly derogates that product or business. Each requirement must be satisfied by express mention or by clear implication.’ ” (*Finch Aerospace Corp., supra*, 8 Cal.App.5th at p. 1253)
- “ ‘Slander of title is effected by one who without privilege publishes untrue and disparaging statements with respect to the property of another under such circumstances as would lead a

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reasonable person to foresee that a prospective purchaser or lessee thereof might abandon his intentions. It is an invasion of the interest in the vendibility of property. In order to commit the tort actual malice or ill will is unnecessary. Damages usually consist of loss of a prospective purchaser. To be disparaging a statement need not be a complete denial of title in others, but may be any unfounded claim of an interest in the property which throws doubt upon its ownership.’ ‘However, it is not necessary to show that a particular pending deal was hampered or prevented, since recovery may be had for the depreciation in the market value of the property.’ ” (*M.F. Farming, Co. v. Couch Distributing Co.* (2012) 207 Cal.App.4th 180, 198–199 [143 Cal.Rptr.3d 160], internal citations omitted.)

- “Slander of title ‘occurs when a person, without a privilege to do so, publishes a false statement that disparages title to property and causes pecuniary loss. [Citation.]’ The false statement must be ‘ “maliciously made with the intent to defame.” ’ ” (*Cyr v. McGovran* (2012) 206 Cal.App.4th 645, 651 [142 Cal.Rptr.3d 34], internal citations omitted.)
- “One who publishes a false statement harmful to the interests of another is subject to liability for pecuniary loss resulting to the other if (a) he intends for publication of the statement to result in harm to interests of the other having a pecuniary value, or either recognizes or should recognize that it is likely to do so, and (b) he knows that the statement is false or acts in reckless disregard of its truth or falsity.” (*Appel v. Burman* (1984) 159 Cal.App.3d 1209, 1214 [206 Cal.Rptr. 259], quoting Rest. 2d Torts § 623A.)
- “One who, without a privilege to do so, publishes matter which is untrue and disparaging to another's property in land, chattels or intangible things under such circumstances as would lead a reasonable man to foresee that the conduct of a third person as purchaser or lessee thereof might be determined thereby is liable for pecuniary loss resulting to the other from the impairment of vendibility thus caused.” (*Chrysler Credit Corp. v. Ostly* (1974) 42 Cal.App.3d 663, 674 [117 Cal.Rptr. 167], quoting Rest. Torts, § 624 [motor vehicle case].)
- “Sections 623A, 624 and 633 of the Restatement Second of Torts further refine the definition so it is clear included elements of the tort are that there must be (a) a publication, (b) which is without privilege or justification and thus with malice, express or implied, and (c) is false, either knowingly so or made without regard to its truthfulness, and (d) causes direct and immediate pecuniary loss.” (*Howard v. Schaniel* (1980) 113 Cal.App.3d 256, 263–264 [169 Cal.Rptr. 678], footnote and internal citations omitted.)
- “Although the gravamen of an action for disparagement of title is different from that of an action for personal defamation, substantially the same privileges are recognized in relation to both torts in the absence of statute. Questions of privilege relating to both torts are now resolved in the light of section 47 of the Civil Code.” (*Albertson, supra*, 46 Cal.2d at pp. 378–379, internal citations omitted.)
- “[The privilege of Civil Code section 47(c)] is lost, however, where the person making the communication acts with malice. Malice exists where the person making the statement acts out of hatred or ill will, or has no reasonable grounds for believing the statement to be true, or makes the statement for any reason other than to protect the interest for the protection of which the privilege

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is given.” (*Earp v. Nobmann* (1981) 122 Cal.App.3d 270, 285 [175 Cal.Rptr. 767], disapproved on other grounds in *Silberg v. Anderson* (1990) 50 Cal.3d 205, 219 [266 Cal.Rptr. 638, 786 P.2d 365].)

- “The existence of privilege is a defense to an action for defamation. Therefore, the burden is on the defendant to plead and prove the challenged publication was made under circumstances that conferred the privilege.” (*Palmer v. Zaklama* (2003) 109 Cal.App.4th 1367, 1380 [1 Cal.Rptr.3d 116] [applying rule to slander of title].)
- “The principal issue presented in this case is whether the trial court properly instructed the jury that, in the jury's determination whether the common-interest privilege set forth in section 47(c) has been established, defendants bore the burden of proving not only that the allegedly defamatory statement was made upon an occasion that falls within the common-interest privilege, but also that the statement was made without malice. Defendants contend that, in California and throughout the United States, the general rule is that, although a defendant bears the initial burden of establishing that the allegedly defamatory statement was made upon an occasion falling within the purview of the common-interest privilege, once it is established that the statement was made upon such a privileged occasion, the plaintiff may recover damages for defamation only if the plaintiff successfully meets the burden of proving that the statement was made with malice. As stated above, the Court of Appeal agreed with defendants on this point. Although, as we shall explain, there are a few (primarily early) California decisions that state a contrary rule, both the legislative history of section 47(c) and the overwhelming majority of recent California decisions support the Court of Appeal's conclusion. Accordingly, we agree with the Court of Appeal insofar as it concluded that the trial court erred in instructing the jury that defendants bore the burden of proof upon the issue of malice, for purposes of section 47(c).” (*Lundquist, supra*, 7 Cal.4th at pp. 1202–1203, internal citations omitted.)
- ~~“The burden is also upon the defendant to prove any affirmative defense upon which he relies, including . . . that the communication is privileged. But when the pleadings admit . . . such facts, manifestly the defendant is thereby relieved of this burden.” ‘Normally, privilege is an affirmative defense which must be pleaded in the answer [citation]. However, if the complaint discloses existence of a qualified privilege, it must allege malice to state a cause of action [citation].’ Finally, ‘Ordinarily privilege must be specially pleaded by the defendant, and the burden of proving it is on him. [Citations.] But where the complaint shows that the communication or publication is one within the classes qualifiedly privileged, it is necessary for the plaintiff to go further and plead and prove that the privilege is not available as a defense in the particular case, e.g., because of malice.’” (*Smith, supra*, 177 Cal.App.3d at pp. 630–631, internal citations omitted.)~~
- “Civil Code section 47(b)(4) clearly describes the conditions for application of the [litigation] privilege to a recorded lis pendens as follows: ‘A recorded lis pendens is not a privileged publication unless it identifies an action previously filed with a court of competent jurisdiction which affects the title or right of possession of real property, as authorized or required by law.’ Those conditions are (1) the lis pendens must identify a previously filed action and (2) the previously filed action must be one that affects title or right of possession of real property. We decline to add a third requirement that there must also be evidentiary merit.” (*La Jolla Group II v.*

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Bruce (2012) 211 Cal.App.4th 461, 476 [149 Cal.Rptr.3d 716], internal citation omitted.)

- “[T]he property owner may recover for the impairment of the vendibility ‘of his property’ without showing that the loss was caused by prevention of a particular sale. ‘The most usual manner in which a third person’s reliance upon disparaging matter causes pecuniary loss is by preventing a sale to a particular purchaser. . . . The disparaging matter may, if widely disseminated, cause pecuniary loss by depriving its possessor of a market in which, but for the disparagement, his land or other thing might with reasonable certainty have found a purchaser.’ ” (*Glass v. Gulf Oil Corp.* (1970) 12 Cal.App.3d 412, 424 [96 Cal.Rptr. 902].)

Secondary Sources

5 Witkin, Summary of California Law (~~11th ed. 2017~~~~10th ed. 2005~~) Torts § ~~642~~747

6 Witkin, Summary of California Law (~~11th ed. 2017~~~~10th ed. 2005~~) Torts § ~~1703~~1886

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.80 et seq. (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander*, § 340.90 (Matthew Bender)

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1731. Trade Libel—Essential Factual Elements

[Name of plaintiff] claims that [name of defendant] harmed [him/her] by making a statement that disparaged [name of plaintiff]’s [specify product]. To establish this claim, [name of plaintiff] must prove all of the following:

- 1. That [name of defendant] made a statement that [would be clearly or necessarily understood to have] disparaged the quality of [name of plaintiff]’s [product/service];**
 - 2. That the statement was made to a person other than [name of plaintiff];**
 - 3. That the statement was untrue;**
 - 4. That [name of defendant] [knew that the statement was untrue/acted with reckless disregard of the truth or falsity of the statement];**
 - 5. That [name of defendant] knew or should have recognized that someone else might act in reliance on the statement, causing [name of plaintiff] financial loss;**
 - 6. That [name of plaintiff] suffered direct financial harm because someone else acted in reliance on the statement; and**
 - 7. That [name of defendant]’s conduct was a substantial factor in causing [name of plaintiff]’s harm.**
-

New December 2013; Revised June 2015, May 2018

Directions for Use

The tort of trade libel is a form of injurious falsehood similar to slander of title. (See *Polygram Records, Inc. v. Superior Court* (1985) 170 Cal.App.3d 543, 548 [216 Cal.Rptr. 252]; *Erlich v. Etner* (1964) 224 Cal.App.2d 69, 74 [36 Cal.Rptr. 256].) The tort has not often reached the attention of California’s appellate courts (see *Polygram Records, Inc., supra*, 170 Cal.App.3d at p. 548.), perhaps because of the difficulty in proving damages. (See *Erlich, supra*, 224 Cal.App.2d at pp. 73–74.)

Include the optional language in element 1 if the plaintiff alleges that disparagement may be reasonably implied from the defendant’s words. Disparagement by reasonable implication requires more than a statement that may conceivably or plausibly be construed as derogatory. A “reasonable implication” means a clear or necessary inference. (*Hartford Casualty Ins. Co. v. Swift Distribution, Inc.* (2014) 59 Cal.4th 277, 295 [172 Cal.Rptr.3d 653, 326 P.3d 253].)

Elements 4 and 5 are supported by section 623A of the Restatement 2d of Torts, which has been accepted in California. (See *Melaleuca, Inc. v. Clark* (1998) 66 Cal.App.4th 1344, 1360–1361 [78 Cal.Rptr.2d 627].) There is some authority, however, for the proposition that no intent or reckless disregard is

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required (element 4) if the statement was understood in its disparaging sense and if the understanding is a reasonable construction of the language used or the acts done by the publisher. (See *Nichols v. Great Am. Ins. Cos.* (1985) 169 Cal.App.3d 766, 773 [215 Cal.Rptr. 416].)

The privileges of Civil Code section 47 almost certainly apply to actions for trade libel. (See *Albertson v. Raboff* (1956) 46 Cal.2d 375, 378–379 [295 P.2d 405] [slander-of-title case]; *117 Sales Corp. v. Olsen* (1978) 80 Cal.App.3d 645, 651 [145 Cal.Rptr. 778] [publication by filing small claims suit is absolutely privileged].) ~~The defendant has the burden of proving privilege as an affirmative defense. (See *Smith v. Commonwealth Land Title Ins. Co.* (1986) 177 Cal.App.3d 625, 630–631 [223 Cal.Rptr. 339].) If a~~ privilege is claimed, additional instructions will be necessary to ~~state the affirmative defense and~~ frame the privilege.

Under the common-interest privilege of Civil Code section 47(c), the defendant bears the initial burden of showing facts to bring the communication within the privilege. The plaintiff then must prove that the statement was made with malice. (*Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1203 [31 Cal.Rptr.2d 776, 875 P.2d 1279].) If the common-interest privilege is at issue, give CACI No. 1723, *Common Interest Privilege—Malice*. The elements of CACI No. 1723 constitute the “unprivileged” element of this basic claim. For further discussion, see the Directions for Use to CACI No. 1730, *Slander of Title—Essential Factual Elements*. See also CACI No. 1723, *Common Interest Privilege—Malice*.

If the privilege of Civil Code section 47(d) for a privileged publication or broadcast is at issue, give CACI No. 1724, *Fair and True Reporting Privilege*. (See *J-M Manufacturing Co., Inc. v. Phillips & Cohen LLP* (2016) 247 Cal.App.4th 87 [201 Cal.Rptr.3d 782].) If some other privilege is at issue, an additional element or instruction targeting that privilege will be required.

Limitations on liability arising from the First Amendment apply. (*Hofmann Co. v. E. I. du Pont de Nemours & Co.* (1988) 202 Cal.App.3d 390, 397 [248 Cal.Rptr. 384]; see CACI Nos. 1700–1703, instructions on public figures and matters of public concern.) See also CACI No. 1707, *Fact Versus Opinion*.

Sources and Authority

- “Trade libel is the publication of matter disparaging the quality of another's property, which the publisher should recognize is likely to cause pecuniary loss to the owner. [Citation.] The tort encompasses ‘all false statements concerning the quality of services or product of a business which are intended to cause that business financial harm and in fact do so.’ [Citation.] [¶] To constitute trade libel, a statement must be false.” (*City of Costa Mesa v. D'Alessio Investments, LLC* (2013) 214 Cal.App.4th 358, 376 [154 Cal.Rptr.3d 698].)
- “To constitute trade libel the statement must be made with actual malice, that is, with knowledge it was false or with reckless disregard for whether it was true or false.” (*J-M Manufacturing Co., Inc. v. Phillips & Cohen LLP* (2016) 247 Cal.App.4th 87, 97 [201 Cal.Rptr.3d 782].)
- “The distinction between libel and trade libel is that the former concerns the person or reputation of plaintiff and the latter relates to his goods.” (*Shores v. Chip Steak Co.* (1955) 130 Cal.App.2d 627, 630 [279 P.2d 595].)

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- “[A]n action for ‘slander of title’ ... is a form of action somewhat related to trade libel” (*Erlich, supra*, 224 Cal.App.2d at p. 74.)
- “Confusion surrounds the tort of ‘commercial disparagement’ because not only is its content blurred and uncertain, so also is its very name. The tort has received various labels, such as ‘commercial disparagement,’ ‘injurious falsehood,’ ‘product disparagement,’ ‘trade libel,’ ‘disparagement of property,’ and ‘slander of goods.’ These shifting names have led counsel and the courts into confusion, thinking that they were dealing with different bodies of law. In fact, all these labels denominate the same basic legal claim.” (*Hartford Casualty Ins. Co., supra*, 59 Cal.4th at p. 289.)
- “The protection the common law provides statements which disparage products as opposed to reputations is set forth in the Restatement Second of Torts sections 623A and 626. Section 623A provides: ‘One who publishes a false statement harmful to the interests of another is subject to liability for pecuniary loss resulting to the other if [P] (a) he intends for publication of the statement to result in harm to interests of the other having a pecuniary value, or either recognizes or should recognize that it is likely to do so, and [P](b) *he knows that the statement is false or acts in reckless disregard of its truth or falsity.*’ [¶] Section 626 of Restatement Second of Torts in turn states: ‘The rules on liability for the publication of an injurious falsehood stated in § 623A apply to the publication of matter disparaging the quality of another's land, chattels or intangible things, that the publisher should recognize as likely to result in pecuniary loss to the other through the conduct of a third person in respect to the other's interests in the property.’ ” (*Melaleuca, Inc., supra*, 66 Cal.App.4th at pp. 1360–1361, original italics.)
- “According to section 629 of the Restatement Second of Torts (1977), ‘[a] statement is disparaging if it is understood to cast doubt upon the quality of another's land, chattels or intangible things, or upon the existence or extent of his property in them, and [¶] (a) the publisher intends the statement to cast the doubt, or [¶] (b) the recipient's understanding of it as casting the doubt was reasonable.’ ” (*Hartford Casualty Ins. Co., supra*, 59 Cal.4th at p. 288.)
- “What distinguishes a claim of disparagement is that an injurious falsehood has been directed *specifically* at the plaintiff's business or product, derogating that business or product and thereby causing that plaintiff special damages.” (*Hartford Casualty Ins. Co., supra*, 59 Cal.4th at p. 294, original italics.)
- “The Restatement [2d Torts] view is that, like slander of title, what is commonly called ‘trade libel’ is a particular form of the tort of injurious falsehood and need not be in writing.” (*Polygram Records, Inc., supra*, 170 Cal.App.3d at p. 548.)
- “While ... general damages are presumed in a libel of a businessman, this is not so in action for trade libel. Dean Prosser has discussed the problems in such actions as follows: ‘Injurious falsehood, or disparagement, then, may consist of the publication of matter derogatory to the plaintiff's title to his property, or its quality, or to his business in general, . . . The cause of action founded upon it resembles that for defamation, but differs from it materially in the greater burden of proof resting on the plaintiff, and the necessity for special damage in all cases. . . . [The]

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plaintiff must prove in all cases that the publication has played a material and substantial part in inducing others not to deal with him, and that as a result he has suffered special damages. . . . Usually, . . . the damages claimed have consisted of loss of prospective contracts with the plaintiff's customers. Here the remedy has been so hedged about with limitations that its usefulness to the plaintiff has been seriously impaired. It is nearly always held that it is not enough to show a general decline in his business resulting from the falsehood, even where no other cause for it is apparent, and that it is only the loss of specific sales that can be recovered. This means, in the usual case, that the plaintiff must identify the particular purchasers who have refrained from dealing with him, and specify the transactions of which he claims to have been deprived.' ” (*Erlich, supra*, 224 Cal.App. 2d at pp. 73–74.)

- “Because the gravamen of the complaint is the allegation that respondents made false statements of fact that injured appellant's business, the ‘limitations that define the First Amendment's zone of protection’ are applicable. ‘[It] is immaterial for First Amendment purposes whether the statement in question relates to the plaintiff himself or merely to his property’ ” (*Hofmann Co., supra*, 202 Cal.App.3d at p. 397, internal citation omitted.)
- “If respondents' statements about appellant are opinions, the cause of action for trade libel must of course fail. ‘Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.’ Statements of fact can be true or false, but an opinion—‘a view, judgment, or appraisal formed in the mind . . . [a] belief stronger than impression and less strong than positive knowledge’—is the result of a mental process and not capable of proof in terms of truth or falsity.” (*Hofmann Co., supra*, 202 Cal.App.3d at p. 397, footnote and internal citation omitted.)
- “[I]t is not absolutely necessary that the disparaging publication be intentionally designed to injure. If the statement was understood in its disparaging sense and if the understanding is a reasonable construction of the language used or the acts done by the publisher, it is not material that the publisher did not intend the disparaging statement to be so understood.” (*Nichols, supra*, 169 Cal.App.3d at p. 773.)
- “Disparagement by ‘reasonable implication’ requires more than a statement that may conceivably or plausibly be construed as derogatory to a specific product or business. A ‘reasonable implication’ in this context means a clear or necessary inference.” (*Hartford Casualty Ins. Co., supra*, 59 Cal.4th at p. 295, internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 642-645

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.70 et seq. (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander*, § 340.103 (Matthew Bender)

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1 Matthew Bender Practice Guide: California Unfair Competition and Business Torts, Ch. 9, *Commercial Defamation*, 9.04

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1802. False Light

[Name of plaintiff] claims that *[name of defendant]* violated *[his/her]* right to privacy. To establish this claim, *[name of plaintiff]* must prove all of the following:

1. That *[name of defendant]* publicized information or material that showed *[name of plaintiff]* in a false light;
2. That the false light created by the publication would be highly offensive to a reasonable person in *[name of plaintiff]*'s position;
3. [That there is clear and convincing evidence that *[name of defendant]* knew the publication would create a false impression about *[name of plaintiff]* or acted with reckless disregard for the truth;]

[or]

[That *[name of defendant]* was negligent in determining the truth of the information or whether a false impression would be created by its publication;]

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

[or]

[That *[name of plaintiff]* sustained harm to *[his/her]* property, business, profession, or occupation [including money spent as a result of the statement(s)]; and]

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

~~[In deciding whether *[name of defendant]* publicized the information or material, you should determine whether it was made public either by communicating it to the public at large or to so many people that the information or material was substantially certain to become public knowledge.]~~

New September 2003; Revised November 2017, [May 2018](#)

Directions for Use

If the plaintiff is asserting more than one privacy right, give an introductory instruction stating that a person's right to privacy can be violated in more than one way and listing the legal theories under which the plaintiff is suing.

False light claims are subject to the same constitutional protections that apply to defamation claims.

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(Briscoe v. Reader’s Digest Assn. (1971) 4 Cal.3d 529, 543 [93 Cal.Rptr. 866, 483 P.2d 34], overruled on other grounds in Gates v. Discovery Communications, Inc. (2004) 34 Cal.4th 679, 696 fn. 9 [21 Cal.Rptr.3d 663, 101 P.3d 552] [false light claim should meet the same requirements of a libel claim, including proof of malice when required].) Thus, a knowing violation of or reckless disregard for the plaintiff’s rights is required if the plaintiff is a public figure ~~or the subject matter of the communication is a matter of public concern.~~ *(See Brown v. Kelly Broadcasting Co. (1989) 48 Cal.3d 711, 721–722 [257 Cal.Rptr. 708, 771 P.2d 406].)* Give the first option for element 3 if the publication involves a public figure ~~or a matter of public concern.~~ Otherwise, give the second option for a private citizen, at least with regard to a matter of private concern. *(See id., at p. 742 [private person need prove only negligence rather than malice to recover for defamation].)*

There is perhaps some question as to which option for element 3 to give for a private person if the matter is one of public concern. For defamation, a private figure plaintiff must prove malice to recover presumed and punitive damages for a matter of public concern, but not to recover for damages to reputation. (Khawar v. Globe Internat. (1998) 19 Cal.4th 254, 273-274 [79 Cal.Rptr.2d 178, 965 P.2d 696].) No case has been found that provides for presumed damages for a false light violation. Therefore, the court will need to decide whether proof of malice is required from a private plaintiff even though the matter may be one of public concern.

If the jury will also be instructed on defamation, ~~the court should consider whether~~ an instruction on false light would be superfluous and therefore need not be given. *(See Eisenberg v. Alameda Newspapers (1999) 74 Cal.App.4th 1359, 1385, fn. 13 [88 Cal.Rptr.2d 802];* ~~see also~~ *Briscoe, supra*, 4 Cal.3d at p. 543.) For defamation, utterance of a defamatory statement to a single third person constitutes sufficient publication. (Cunningham v. Simpson (1969) 1 Cal.3d 301, 307 [81 Cal.Rptr. 855, 461 P.2d 39]; but see Warfield v. Peninsula Golf & Country Club (1989) 214 Cal. App. 3d 646, 660 [262 Cal. Rptr. 890] [false light case holding that "account" published in defendant's membership newsletter does not meet threshold allegation of a general public disclosure].)

~~Comment (a) to Restatement Second of Torts, section 652D states that “publicity” “means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge.” The final paragraph addressing this point has been placed in brackets because it may not be an issue in every case.~~

Sources and Authority

- “ ‘False light is a species of invasion of privacy, based on publicity that places a plaintiff before the public in a false light that would be highly offensive to a reasonable person, and where the defendant knew or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the plaintiff would be placed.’ ” *(Jackson v. Mayweather (2017) 10 Cal.App.5th 1240, 1264 [217 Cal.Rptr.3d 234].)*
- “California common law has generally followed Prosser’s classification of privacy interests as embodied in the Restatement.” *(Hill v. National Collegiate Athletic Assn. (1994) 7 Cal.4th 1, 24 [26 Cal.Rptr.2d 834, 865 P.2d 633], internal citation omitted.)*
- “In order to be actionable, the false light in which the plaintiff is placed must be highly offensive to a

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reasonable person. Although it is not necessary that the plaintiff be defamed, publicity placing one in a highly offensive false light will in most cases be defamatory as well.” (*Fellows v. National Enquirer* (1986) 42 Cal.3d 234, 238-239 [228 Cal.Rptr. 215, 721 P.2d 97], internal citation omitted.)

- “When a false light claim is coupled with a defamation claim, the false light claim is essentially superfluous, and stands or falls on whether it meets the same requirements as the defamation cause of action.” (*Eisenberg, supra*, 74 Cal.App.4th at p. 1385, fn. 13, internal citations omitted.)

“[A] ‘false light’ cause of action ‘is in substance equivalent to ... [a] libel claim, and should meet the same requirements of the libel claim ... including proof of malice and fulfillment of the requirements of [the retraction statute] section 48a [of the Civil Code]’.” (*Briscoe, supra*, 4 Cal.3d at p. 543, internal citation omitted.)

- “Because in this defamation action [plaintiff] is a private figure plaintiff, he was required to prove only negligence, and not actual malice, to recover damages for actual injury to his reputation. But [plaintiff] was required to prove actual malice to recover punitive or presumed damages” (*Khawar v. Globe Internat.* (1998) 19 Cal.4th 254, 274 [79 Cal.Rptr.2d 178, 965 P.2d 696].) (*Khawar, supra*, 19 Cal.4th at p. 274.)
- “The *New York Times* decision defined a zone of constitutional protection within which one could publish concerning a public figure without fear of liability. That constitutional protection does not depend on the label given the stated cause of action; it bars not only actions for defamation, but also claims for invasion of privacy.” (*Reader’s Digest Assn., Inc. v. Superior Court* (1984) 37 Cal.3d 244, 265 [208 Cal.Rptr. 137, 690 P.2d 610], internal citations omitted.)
- “[T]he constitutional protections for speech and press preclude the application of the New York statute to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth.” (*In-Time, Inc. v. Hill* (1967) 385 U.S. 374, 387–388 [87 S.Ct. 534, 17 L.Ed.2d 456], ~~the Court held that the *New York Times v. Sullivan* malice standard applied to a privacy action that was based on a “false light” statute where the matter involved a public figure. Given the similarities between defamation and false light actions, it appears likely that the negligence standard for private figure defamation plaintiffs announced in *Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323 [94 S.Ct. 2997, 41 L.Ed.2d 789] should apply to private figure false light plaintiffs.~~
- “We hold that whenever a claim for false light invasion of privacy is based on language that is defamatory within the meaning of section 45a, pleading and proof of special damages are required.” (*Fellows, supra*, 42 Cal.3d at p. 251.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 784–786

4 Levy et al., California Torts, Ch. 46, *Invasion of Privacy*, § 46.04 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 429, *Privacy*, § 429.33 (Matthew Bender)

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18 California Points and Authorities, Ch. 184, *Privacy: Invasion of Privacy*, § 184.21 (Matthew Bender)

1 California Civil Practice: Torts §§ 20:12–20:15 (Thomson Reuters)

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2021. Private Nuisance—Essential Factual Elements

[Name of plaintiff] claims that *[name of defendant]* interfered with *[name of plaintiff]*'s use and enjoyment of *[his/her]* land. To establish this claim, *[name of plaintiff]* must prove all of the following:

1. That *[name of plaintiff]* [owned/leased/occupied/controlled] the property;
2. That *[name of defendant]*, by acting or failing to act, created a condition or permitted a condition to exist that *[insert one or more of the following:]*

[was harmful to health;] [or]

[was indecent or offensive to the senses;] [or]

[was an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property;] [or]

[unlawfully obstructed the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway;] [or]

[was [a/an] [fire hazard/specify other potentially dangerous condition] to *[name of plaintiff]*'s property;]

3. That *[name of defendant]*'s conduct in acting or failing to act was **intentional and unreasonable/unintentional, but negligent or reckless/the result of an abnormally dangerous activity;**

34. That this condition substantially interfered with *[name of plaintiff]*'s use or enjoyment of *[his/her]* land;

45. That an ordinary person would reasonably be annoyed or disturbed by *[name of defendant]*'s conduct;

56. That *[name of plaintiff]* did not consent to *[name of defendant]*'s conduct;

67. That *[name of plaintiff]* was harmed;

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

89. That the seriousness of the harm outweighs the public benefit of *[name of defendant]*'s conduct.

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New September 2003; Revised February 2007, December 2011, December 2015, June 2016, May 2017, May 2018

Directions for Use

Private nuisance liability depends on some sort of conduct by the defendant that either directly and unreasonably interferes with the plaintiff’s property or creates a condition that does so. (*Lussier v. San Lorenzo Valley Water Dist.* (1988) 206 Cal.App.3d 92, 100 [253 Cal.Rptr. 470].) Element 2 requires that the defendant have acted to create a condition or allowed a condition to exist by failing to act. If there is an issue as to the nature of defendant’s conduct in acting or failing to act that caused the interference, include Element 3.

If the act that causes the interference is intentional but reasonable or entirely accidental, there is generally no liability. (*Lussier, supra*, 206 Cal.App.3d at p. 100.)

The intent required is only to do the act that interferes, not an intent to cause harm. (*Lussier, supra*, 206 Cal.App.3d at pp. 100, 106; see Rest. 2d Torts, § 822.) For example, it is sufficient that one intend to chop down a tree; it is not necessary to intend that it fall on a neighbor’s property.

If the conduct results from an abnormally dangerous activity, it must be one for which there is strict liability. (*Lussier, supra*, 206 Cal.App.3d at pp. 100; see Rest. 2d Torts, § 822).

There is an exception for at least some harm caused by trees. A property owner is strictly liable for damage caused by tree branches and roots that encroach on neighboring property. (*Lussier, supra*, 206 Cal.App.3d at p.106 fn. 5; see also *Mattos v. Mattos* (1958) 162 Cal.App.2d 41, 43 [328 P.2d 269] [absolute liability of an owner to remove portions of his fallen trees that extend over and upon another's land]; cf. *City of Pasadena v. Superior Court* (2014) 228 Cal.App.4th 1228, 1236 [176 Cal.Rptr.3d 422] [plaintiff must prove negligent maintenance of trees that fell onto plaintiff’s property in a windstorm].) Do not give element 3 if the court decides that there is strict liability for damage caused by encroaching or falling trees.

If the claim is that the defendant failed to abate a nuisance, negligence must be proved. (*City of Pasadena, supra*, 228 Cal.App.4th at p. 1236.)

Element ~~8-9~~ must be supplemented with CACI No. 2022, *Private Nuisance—Balancing-Test Factors—Seriousness of Harm and Public Benefit*. (See *Wilson v. Southern California Edison Co.* (2015) 234 Cal.App.4th 123, 160–165 [184 Cal.Rptr.3d 26].) For instruction on control of property, see CACI No. 1002, *Extent of Control Over Premises Area*, in the Premises Liability series.

Sources and Authority

- “Nuisance” Defined. Civil Code section 3479.

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- Acts Done Under Express Authority of Statute. Civil Code section 3482.
- “A nuisance is considered a ‘public nuisance’ when it ‘affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.’ A ‘private nuisance’ is defined to include any nuisance not covered by the definition of a public nuisance, and also includes some public nuisances. ‘In other words, it is possible for a nuisance to be public and, from the perspective of individuals who suffer an interference with their use and enjoyment of land, to be private as well.’ ” (*Mendez v. Rancho Valencia Resort Partners, LLC* (2016) 3 Cal.App.5th 248, 261-262 [207 Cal.Rptr.3d 532], internal citations omitted.)
- “In distinction to trespass, liability for nuisance does not require proof of damage to the plaintiff’s property; proof of interference with the plaintiff’s use and enjoyment of that property is sufficient.” (*San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 937 [55 Cal.Rptr.2d 724, 920 P.2d 669].)
- “[T]he essence of a private nuisance is its interference with the use and enjoyment of land. The activity in issue must ‘disturb or prevent the comfortable enjoyment of property,’ such as smoke from an asphalt mixing plant, noise and odors from the operation of a refreshment stand, or the noise and vibration of machinery.” (*Oliver v. AT&T Wireless Services* (1999) 76 Cal.App.4th 521, 534 [90 Cal.Rptr.2d 491], internal citations omitted.)
- “[T]o proceed on a private nuisance theory the plaintiff must prove an injury specifically referable to the use and enjoyment of his or her land. The injury, however, need not be different in kind from that suffered by the general public.” (*Koll-Irvine Center Property Owners Assn. v. County of Orange* (1994) 24 Cal.App.4th 1036, 1041 [29 Cal.Rptr.2d 664], internal citation omitted.)
- “So long as the interference is substantial and unreasonable, and such as would be offensive or inconvenient to the normal person, virtually any disturbance of the enjoyment of the property may amount to a nuisance;” (*Mendez, supra*, 3 Cal.App.5th at p. 262.)
- “The requirements of *substantial damage* and *unreasonableness* are not inconsequential. These requirements stem from the law’s recognition that: ‘ “Life in organized society and especially in populous communities involves an unavoidable clash of individual interests. Practically all human activities unless carried on in a wilderness interfere to some extent with others or involve some risk of interference, and these interferences range from mere trifling annoyances to serious harms. It is an obvious truth that each individual in a community must put up with a certain amount of annoyance, inconvenience and interference and must take a certain amount of risk in order that all may get on together. The very existence of organized society depends upon the principle of ‘give and take, live and let live,’ and *therefore the law of torts does not attempt to impose liability or shift the loss in every case in which one person’s conduct has some detrimental effect on another.* Liability ... is imposed in those cases in which the harm or risk to one is greater than he ought to be required to bear under the circumstances, at least without compensation.’ ” ” (*Mendez, supra*, 3 Cal.App.5th at p. 263, original italics.)

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- “The first additional requirement for recovery of damages on a nuisance theory is proof that the invasion of the plaintiff’s interest in the use and enjoyment of the land was substantial, i.e., that it caused the plaintiff to suffer ‘substantial actual damage.’ The Restatement recognizes the same requirement as the need for proof of ‘significant harm,’ which it variously defines as ‘harm of importance’ and a ‘real and appreciable invasion of the plaintiff’s interests’ and an invasion that is ‘definitely offensive, seriously annoying or intolerable.’ The degree of harm is to be judged by an objective standard, i.e., what effect would the invasion have on persons of normal health and sensibilities living in the same community? ‘If normal persons in that locality would not be substantially annoyed or disturbed by the situation, then the invasion is not a significant one, even though the idiosyncrasies of the particular plaintiff may make it unendurable to him.’ This is, of course, a question of fact that turns on the circumstances of each case.” (*San Diego Gas & Electric Co.*, *supra*, 13 Cal.4th at p. 938, internal citations omitted.)
- “The second additional requirement for nuisance is superficially similar but analytically distinct: ‘The interference with the protected interest must not only be substantial, but it must also be unreasonable’, i.e., it must be ‘of such a nature, duration or amount as to constitute unreasonable interference with the use and enjoyment of the land.’ The primary test for determining whether the invasion is unreasonable is whether the gravity of the harm outweighs the social utility of the defendant’s conduct, taking a number of factors into account. Again the standard is objective: the question is not whether the particular plaintiff found the invasion unreasonable, but ‘whether reasonable persons generally, looking at the whole situation impartially and objectively, would consider it unreasonable.’ And again this is a question of fact: ‘Fundamentally, the unreasonableness of intentional invasions is a problem of relative values to be determined by the trier of fact in each case in the light of all the circumstances of that case.’ ”(*San Diego Gas & Electric Co.*, *supra*, 13 Cal.4th at pp. 938-939, internal citations omitted.)
- “Appellant first argues that the judgment is erroneous because there is no showing that any act or conduct of his caused the damage. It is true that there is neither showing nor finding of any negligent or wrongful act or omission of defendant proximately causing the falling of the trees. But no such showing is required. If the trees remained upright, with some of their branches extending over or upon plaintiff’s land, they clearly would constitute a nuisance, which defendant could be required to abate.” (*Mattos, supra, v. Mattos (1958)*-162 Cal.App.2d at p.41, 42-~~[328 P.2d 269]~~.)
- “Although the central idea of nuisance is the unreasonable invasion of this interest and not the particular type of conduct subjecting the actor to liability, liability nevertheless depends on some sort of conduct that either directly and unreasonably interferes with it or creates a condition that does so. ‘The invasion may be intentional and unreasonable. It may be unintentional but caused by negligent or reckless conduct; or it may result from an abnormally dangerous activity for which there is strict liability. On any of these bases the defendant may be liable. On the other hand, the invasion may be intentional but reasonable; or it may be entirely accidental and not fall within any of the categories mentioned above. In these cases there is no liability.’ ” (*Lussier, supra*, 206 Cal.App.3d at p. 100, internal citations omitted..)

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- “Clearly, a claim of nuisance based on [intent] is easier to prove than one based on negligent conduct, for in the former, a plaintiff need only show that the defendant committed the acts that caused injury, whereas in the latter, a plaintiff must establish a duty to act and prove that the defendant's failure to act reasonably in the face of a known danger breached that duty and caused damages.” (*Lussier, supra*, 206 Cal.App.3d at p. 106.)
- “We note, however, a unique line of cases, starting with *Grandona v. Lovdal* (1886) 70 Cal. 161 [11 P. 623], which holds that to the extent that the branches and roots of trees encroach upon another's land and cause or threaten damage, they may constitute a nuisance. Superficially, these cases appear to impose nuisance liability in the absence of wrongful conduct.” (*Lussier, supra*, 206 Cal.App.3d at p. 102, fn. 5, internal citations omitted.)
- “The fact that the defendants’ alleged misconduct consists of omission rather than affirmative actions does not preclude nuisance liability.” (*Birke v. Oakwood Worldwide* (2009) 169 Cal.App.4th 1540, 1552 [87 Cal.Rptr.3d 602], internal citations omitted.)
- “A nuisance may be either a negligent or an intentional tort.” (*Stoiber v. Honeychuck* (1980) 101 Cal.App.3d 903, 920 [162 Cal.Rptr. 194], internal citation omitted.)
- “Nuisance liability is not necessarily based on negligence, thus, ‘one may be liable for a nuisance even in the absence of negligence. [Citations.]’ However, ‘ “ ‘where liability for the nuisance is predicated on the omission of the owner of the premises to abate it, rather than on his having created it, then negligence is said to be involved. ...” [Citations.]’ ” (*City of Pasadena v. Superior Court* (2014) 228 Cal.App.4th 1228, 1236 [176 Cal.Rptr.3d 422, internal citations omitted.)
- “We acknowledge that to recover on a nuisance claim the harm the plaintiff suffers need not be a physical injury. Thus, the absence of evidence in this case to establish that [plaintiff] 's physical injuries were caused by the stray voltage would not preclude recovery on her nuisance claim.” (*Wilson, supra*, 234 Cal.App.4th at p. 159, internal citations omitted.)
- “[M]ere apprehension of injury from a dangerous condition may constitute a nuisance where it interferes with the comfortable enjoyment of property... .” (*McIvor v. Mercer-Fraser Co.* (1946) 76 Cal.App.2d 247, 254 [172 P.2d 758].)
- “A fire hazard, at least when coupled with other conditions, can be found to be a public nuisance and abated.” (*People v. Oliver* (1948) 86 Cal.App.2d 885, 889 [195 P.2d 926].)
- “[T]he exculpatory effect of Civil Code section 3482 has been circumscribed by decisions of this court. ... ‘ “A statutory sanction cannot be pleaded in justification of acts which by the general rules of law constitute a nuisance, unless the acts complained of are authorized by the express terms of the statute under which the justification is made, or by the plainest and most necessary implication from the powers expressly conferred, so that it can be fairly stated that the Legislature contemplated the doing of the very act which occasions the injury.’ ” ” (*Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 291 [142 Cal.Rptr. 429, 572 P.2d 43],

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internal citation omitted.)

Secondary Sources

13 Witkin, Summary of California Law (10th ed. 2005) Equity, § 153

2 Levy et al., California Torts, Ch. 17, *Nuisance and Trespass*, §§ 17.01–17.05 (Matthew Bender)

34 California Forms of Pleading and Practice, Ch. 391, *Nuisance*, § 391.13 (Matthew Bender)

16 California Points and Authorities, Ch. 167, *Nuisance*, § 167.20 (Matthew Bender)

California Civil Practice: Torts §§ 17:1, 17:2, 17:4 (Thomson Reuters)

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2521A. Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant (Gov. Code, § 12940(j))

[Name of plaintiff] claims that *[he/she]* was subjected to harassment based on *[his/her]* *[describe protected status, e.g., race, gender, or age]* at *[name of defendant]*, causing a hostile or abusive work environment. To establish this claim, *[name of plaintiff]* must prove all of the following:

1. That *[name of plaintiff]* was **[an employee of/a person providing services under a contract with/an unpaid intern with/a volunteer with]** *[name of defendant]*;
 2. That *[name of plaintiff]* was subjected to unwanted harassing conduct because *[he/she]* was *[protected status, e.g., a woman]*;
 3. That the harassing conduct was severe or pervasive;
 4. That a reasonable *[e.g., woman]* in *[name of plaintiff]*'s circumstances would have considered the work environment to be hostile or abusive;
 5. That *[name of plaintiff]* considered the work environment to be hostile or abusive;
 6. *[Select applicable basis of defendant's liability:]*

[That a supervisor engaged in the conduct;]

[That [name of defendant] [or [his/her/its] supervisors or agents] knew or should have known of the conduct and failed to take immediate and appropriate corrective action;]
 7. That *[name of plaintiff]* was harmed; and
 8. That the conduct was a substantial factor in causing *[name of plaintiff]*'s harm.
-

Derived from former CACI No. 2521 December 2007; Revised June 2013, December 2015

Directions for Use

This instruction is for use in a hostile work environment case when the defendant is an employer or other entity covered by the FEHA. For an individual defendant, such as the alleged harasser or plaintiff's coworker, see CACI No. 2522A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant*. For a case in which the plaintiff is not the target of the harassment, see CACI No. 2521B, *Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant*. For an instruction for use if the hostile environment is due to sexual favoritism, see CACI No. 2521C, *Hostile Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant*. Also read CACI No. 2523, “*Harassing Conduct*” Explained, and CACI No. 2524,

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“Severe or Pervasive” Explained.

Modify element 2 if plaintiff was not actually a member of the protected class, but alleges harassment 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(o).)

In element 6, select the applicable basis of employer liability: (a) vicarious liability for a supervisor’s harassing conduct, or (b) the employer’s ratification of the conduct. For a definition of “supervisor,” see CACI No. 2525, *Harassment—“Supervisor” Defined*. If there are both employer and individual defendants (see CACI No. 2522A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant*), both are jointly and severally liable for any damages. Comparative fault and Proposition 51 do not apply to vicarious liability. (*Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 1000 [16 Cal.Rptr.2d 787], disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal. 4th 644, 664 [25 Cal. Rptr. 2d 109, 863 P.2d 179]; see also *Rashian v. BRAC-BH, Inc.* (1992) 9 Cal.App.4th 1847, 1851 [12 Cal.Rptr.2d 411] [Proposition 51 cannot be applied to those who are without fault and only have vicarious liability by virtue of some statutory fiat].)

Sources and Authority

- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- “Employer” Defined for Harassment. Government Code section 12940(j)(4)(A).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C).
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Perception and Association. Government Code section 12926(o).
- “[A]n employer is strictly liable for all acts of sexual harassment by a supervisor.” (*State Dep’t of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1042 [6 Cal.Rptr.3d 441, 79 P.3d 556].)
- “When the harasser is a nonsupervisory employee, employer liability turns on a showing of negligence (that is, the employer knew or should have known of the harassment and failed to take appropriate corrective action).” (*Rehmani v. Superior Court* (2012) 204 Cal.App.4th 945, 952 [139 Cal.Rptr.2d 464].)
- “[I]n order for the employer to avoid strict liability for the supervisor’s actions under the FEHA, the harassment must result from a completely private relationship unconnected with the employment. Otherwise, the employer is strictly liable for the supervisor’s actions regardless of whether the

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supervisor was acting as the employer’s agent.” (*Myers v. Trendwest Resorts, Inc.* (2007) 148 Cal.App.4th 1403, 1421 [56 Cal.Rptr.3d 501].)

- Employers may be liable for the conduct of certain agents. (See Gov. Code, §§ 12925(d), 12926(d), and 12940(j)(1) and *Reno v. Baird* (1998) 18 Cal.4th 640, 658 [76 Cal.Rptr.2d 499, 957 P.2d 1333] [California Supreme Court declined to express opinion whether “agent” language in the FEHA merely incorporates respondeat superior principles or has some other meaning].)
- “Here, [defendant] was jointly liable with its employees on a respondeat superior or vicarious liability theory on every cause of action in which it was named as a defendant.” (*Bihun, supra*, 13 Cal.App.4th at p. 1000.)
- “The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior.” (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)
- “[A]lthough no California cases have directly addressed racial harassment in the workplace, the California courts have applied the federal threshold standard to claims of sexual harassment and held that FEHA is violated when the harassment was ‘sufficiently severe or pervasive to alter the conditions of the victim’s employment.’ ” (*Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 464–465 [79 Cal.Rptr.2d 33], internal citations and footnote omitted.)
- “When the workplace is permeated with discriminatory intimidation, ridicule and insult that is ‘sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment,’ the law is violated.” (*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 409 [27 Cal.Rptr.2d 457], internal citation omitted.)
- “[N]ot every utterance of a racial slur in the workplace violates the FEHA or Title VII. As the United States Supreme Court has recognized in the context of sexual harassment: ‘[N]ot all workplace conduct that may be described as “harassment” affects a “term, condition, or privilege” of employment within the meaning of Title VII. For sexual harassment to be actionable, it must be sufficiently severe or pervasive “to alter the conditions of [the victim’s] employment and create an abusive working environment.” ’ . . . ‘Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII’s purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim’s employment, and there is no Title VII violation.’ . . . California courts have adopted the same standard in evaluating claims under the FEHA.” (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 129–130 [87 Cal.Rptr.2d 132, 980 P.2d 846], internal citations omitted.)
- “If an employee other than an agent or supervisor commits the harassment, and the employer takes immediate and appropriate corrective action when it becomes or reasonably should become aware of the conduct—for example, when the victim or someone else informs the employer—there simply is

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no ‘unlawful employment practice’ that the FEHA governs.” (*Carrisales v. Dept. of Corrections* (1999) 21 Cal.4th 1132, 1136 [90 Cal.Rptr.2d 804, 988 P.2d 1083], called into doubt on other grounds by statute.)

- Under federal Title VII, an employer’s liability may be based on the conduct of an official “within the class of an employer organization’s officials who may be treated as the organization’s proxy.” (*Faragher v. City of Boca Raton* (1998) 524 U.S. 775, 790 [118 S.Ct. 2275, 141 L.Ed.2d 662].)
- “To be actionable, ‘a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.’ That means a plaintiff who subjectively perceives the workplace as hostile or abusive will not prevail under the FEHA, if a reasonable person in the plaintiff’s position, considering all the circumstances, would not share the same perception. Likewise, a plaintiff who does not perceive the workplace as hostile or abusive will not prevail, even if it objectively is so.” (*Lyle v. Warner Brothers. Television Productions* (2006) 38 Cal.4th 264, 284 [42 Cal.Rptr.3d 2, 132 P.3d 211], internal citations omitted.)
- “[A]llegations of a racially hostile work-place must be assessed from the perspective of a reasonable person belonging to the racial or ethnic group of the plaintiff.” (*McGinest v. GTE Serv. Corp.* (9th Cir. 2004) 360 F.3d 1103, 1115.)
- “Under ... FEHA, sexual harassment can occur between members of the same gender as long as the plaintiff can establish the harassment amounted to discrimination *because of sex*.” (*Lewis v. City of Benicia* (2014) 224 Cal.App.4th 1519, 1525 [169 Cal.Rptr.3d 794], original italics.)
- “[T]here is no requirement that the *motive* behind the sexual harassment must be sexual in nature. ‘[H]arassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex.’ Sexual harassment occurs when, as is alleged in this case, sex is used as a weapon to create a hostile work environment.” (*Singleton v. United States Gypsum Co.* (2006) 140 Cal.App.4th 1547, 1564 [45 Cal.Rptr.3d 597], original italics, internal citation omitted.)
- “The plaintiff must show that the harassing conduct took place because of the plaintiff’s sex, but need not show that the conduct was motivated by sexual desire. For example, a female plaintiff can prevail by showing that the harassment was because of the defendant’s bias against women; she need not show that it was because of the defendant’s sexual interest in women. In every case, however, the plaintiff must show a discriminatory intent or motivation based on gender.” (*Pantoja v. Anton* (2011) 198 Cal.App.4th 87, 114 [129 Cal.Rptr.3d 384], internal citations omitted.)
- “[A] heterosexual male is subjected to harassment because of sex under the FEHA when attacks on his heterosexual identity are used as a tool of harassment in the workplace, irrespective of whether the attacks are motivated by sexual desire or interest.” (*Taylor v. Nabors Drilling USA, LP* (2014) 222 Cal.App.4th 1228, 1239 [166 Cal.Rptr.3d 676].)
- “A recent legislative amendment modifies section 12940, subdivision (j)(4)(C) (a provision of FEHA specifying types of conduct that constitute harassment because of sex) to read: ‘For purposes of this subdivision, “harassment” because of sex includes sexual harassment, gender harassment, and

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harassment based on pregnancy, childbirth, or related medical conditions. *Sexually harassing conduct need not be motivated by sexual desire.*” (Lewis, *supra*, 224 Cal.App.4th at p. 1527 fn. 8, original italics.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 340, 346

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-A, *Sources Of Law Prohibiting Harassment*, ¶¶ 10:18–10:19, 10:22, 10:31 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-B, *Sexual Harassment*, ¶¶ 10:40, 10:110–10:260 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.21, 3.36, 3.45

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

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

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36 (Matthew Bender)

California Civil Practice: Employment Litigation § 2:56 (Thomson Reuters)

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2521B. Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant (Gov. Code, § 12940(j))

[Name of plaintiff] claims that *[he/she]* was subjected to a hostile or abusive work environment because coworkers at *[name of defendant]* were subjected to harassment 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/a person providing services under a contract with/an unpaid intern with/a volunteer with]** *[name of defendant]*;
 2. That *[name of plaintiff]*, although not personally subjected to unwanted harassing conduct, personally witnessed harassing conduct that took place in *[his/her]* immediate work environment;
 3. That the harassing conduct was severe or pervasive;
 4. That a reasonable *[describe member of protected group, e.g., woman]* in *[name of plaintiff]*'s circumstances would have considered the work environment to be hostile or abusive;
 5. That *[name of plaintiff]* considered the work environment to be hostile or abusive toward *[e.g., women]*;
 6. *[Select applicable basis of defendant's liability:]*

[That a supervisor engaged in the conduct;]

[or]

[That *[name of defendant]* [or *[his/her/its]* supervisors or agents] knew or should have known of the conduct and failed to take immediate and appropriate corrective action;]
 7. That *[name of plaintiff]* was harmed; and
 8. That the conduct was a substantial factor in causing *[name of plaintiff]*'s harm.
-

Derived from former CACI No. 2521 December 2007; Revised June 2013, December 2015

Directions for Use

This instruction is for use in a hostile work environment case if the plaintiff was not the target of the harassing conduct and the defendant is an employer or other entity covered by the FEHA. For an individual defendant, such as the alleged harasser or plaintiff's coworker, see CACI No. 2522B, *Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual*

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Defendant. For a case in which the plaintiff is the target of the harassment, see CACI No. 2521A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant*. For an instruction for use if the hostile environment is due to widespread sexual favoritism, see CACI No. 2521C, *Hostile Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant*. Also read CACI No. 2523, “*Harassing Conduct*” Explained, and CACI No. 2524, “*Severe or Pervasive*” Explained.

In element 6, select the applicable basis of employer liability: (a) vicarious liability for a supervisor’s harassing conduct, or (b) the employer’s ratification of the conduct. For a definition of “supervisor,” see CACI No. 2525, *Harassment—“Supervisor” Defined*. If there are both employer and individual defendants (see CACI No. 2522B, *Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant*), both are jointly and severally liable for any damages. Comparative fault and Proposition 51 do not apply to vicarious liability. (*Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 1000 [16 Cal.Rptr.2d 787], disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal. 4th 644, 664 [25 Cal. Rptr. 2d 109, 863 P.2d 179]; see also *Rashtian v. BRAC-BH, Inc.* (1992) 9 Cal.App.4th 1847, 1851 [12 Cal.Rptr.2d 411] [Proposition 51 cannot be applied to those who are without fault and only have vicarious liability by virtue of some statutory fiat].)

Sources and Authority

- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- “Employer” Defined for Harassment. Government Code section 12940(j)(4)(A).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C),
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Perception and Association. Government Code section 12926(o).
- “The plaintiff’s work environment is affected not only by conduct directed at herself but also by the treatment of others. A woman’s perception that her work environment is hostile to women will obviously be reinforced if she witnesses the harassment of other female workers.” (*Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 519 [76 Cal.Rptr.2d 547], internal citations omitted.)
- “Harassment against others in the workplace is only relevant to the plaintiff’s case if she has personal knowledge of it. Unless plaintiff witnesses the conduct against others, or is otherwise aware of it, that conduct cannot alter the conditions of her employment and create an abusive working environment. Stated another way, a reasonable person in plaintiff’s position would not find the environment hostile or abusive unless that person had knowledge of the objectionable conduct toward others.” (*Beyda, supra*, 65 Cal.App.4th at p. 520.)

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- “To state that an employee must be the direct victim of the sexually harassing conduct is somewhat misleading as an employee who is subjected to a hostile work environment is a victim of sexual harassment even though no offensive remarks or touchings are directed to or perpetrated upon that employee. Generally, however, sexual conduct that involves or is aimed at persons other than the plaintiff is considered less offensive and severe than conduct that is directed at the plaintiff. A hostile work environment sexual harassment claim by a plaintiff who was not personally subjected to offensive remarks and touchings requires ‘an even higher showing’ than a claim by one who had been sexually harassed without suffering tangible job detriment: such a plaintiff must ‘establish that the sexually harassing conduct permeated [her] direct work environment.’ [¶] To meet this burden, the plaintiff generally must show that the harassment directed at others was in her immediate work environment, and that she personally witnessed it. The reason for this is obvious: if the plaintiff does not witness the incidents involving others, ‘those incidents cannot affect ... her perception of the hostility of the work environment.’ ” (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 284-285 [42 Cal.Rptr.3d 2, 132 P.3d 211], internal citations omitted.)
- “The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior.” (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)
- “[A]lthough no California cases have directly addressed racial harassment in the workplace, the California courts have applied the federal threshold standard to claims of sexual harassment and held that FEHA is violated when the harassment was ‘sufficiently severe or pervasive to alter the conditions of the victim’s employment.’ ” (*Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 464–465 [79 Cal.Rptr.2d 33], internal citations and footnote omitted.)
- “When the workplace is permeated with discriminatory intimidation, ridicule and insult that is ‘sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment,’ the law is violated.” (*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 409 [27 Cal.Rptr.2d 457], internal citation omitted.)
- “[N]ot every utterance of a racial slur in the workplace violates the FEHA or Title VII. As the United States Supreme Court has recognized in the context of sexual harassment: ‘[N]ot all workplace conduct that may be described as “harassment” affects a “term, condition, or privilege” of employment within the meaning of Title VII. For sexual harassment to be actionable, it must be sufficiently severe or pervasive “to alter the conditions of [the victim’s] employment and create an abusive working environment.”’ . . . ‘Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII’s purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim’s employment, and there is no Title VII violation.’ . . . California courts have adopted the same standard in evaluating claims under the FEHA.” (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 129–130 [87 Cal.Rptr.2d 132, 980 P.2d 846], internal citations omitted.)

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- “To be actionable, ‘a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.’ That means a plaintiff who subjectively perceives the workplace as hostile or abusive will not prevail under the FEHA, if a reasonable person in the plaintiff’s position, considering all the circumstances, would not share the same perception. Likewise, a plaintiff who does not perceive the workplace as hostile or abusive will not prevail, even if it objectively is so.” (*Lyle, supra*, 38 Cal.4th at p. 284, internal citations omitted.)
- “[U]nder the FEHA, an employer is strictly liable for *all* acts of sexual harassment by a supervisor. (*State Dep’t of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1041 [6 Cal.Rptr.3d 441, 79 P.3d 556], original italics.)
- “[I]n order for the employer to avoid strict liability for the supervisor’s actions under the FEHA, the harassment must result from a completely private relationship unconnected with the employment. Otherwise, the employer is strictly liable for the supervisor’s actions regardless of whether the supervisor was acting as the employer’s agent.” (*Myers v. Trendwest Resorts, Inc.* (2007) 148 Cal.App.4th 1403, 1421 [56 Cal.Rptr.3d 501].)
- “In order to be actionable, it must be shown that respondents knew, or should have known, of the alleged harassment and failed to take appropriate action.” (*McCoy v. Pacific Maritime Assn.* (2013) 216 Cal.App.4th 283, 294 [156 Cal.Rptr.3d 851].)
- “If an employee other than an agent or supervisor commits the harassment, and the employer takes immediate and appropriate corrective action when it becomes or reasonably should become aware of the conduct—for example, when the victim or someone else informs the employer—there simply is no ‘unlawful employment practice’ that the FEHA governs.” (*Carrisales v. Dept. of Corrections* (1999) 21 Cal.4th 1132, 1136 [90 Cal.Rptr.2d 804, 988 P.2d 1083], called into doubt on other grounds by statute.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 340, 346

Chin et al., Cal. Practice Guide: Employment Litigation, Ch. 10-B, *Sexual Harassment*, ¶¶ 10:40, 10:110–10:260 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.21, 3.36, 3.45

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

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

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §

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115.36 (Matthew Bender)

California Civil Practice: Employment Litigation § 2:56 (Thomson Reuters)

Draft—Not Approved by Judicial Council

2521C. Hostile Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant (Gov. Code, § 12940(j))

[Name of plaintiff] claims that widespread sexual favoritism at *[name of defendant]* created a hostile or abusive work environment. “Sexual favoritism” means that another employee has received preferential treatment with regard to promotion, work hours, assignments, or other significant employment benefits or opportunities because of a sexual relationship with an individual representative of the employer who was in a position to grant those preferences. To establish this claim, *[name of plaintiff]* must prove all of the following:

1. That *[name of plaintiff]* was **[an employee of/a person providing services under a contract with/an unpaid intern with/a volunteer with]** *[name of defendant]*;
2. That there was sexual favoritism in the work environment;
3. That the sexual favoritism was widespread and also severe or pervasive;
4. That a reasonable *[describe member of protected group, e.g., woman]* in *[name of plaintiff]*’s circumstances would have considered the work environment to be hostile or abusive;
5. That *[name of plaintiff]* considered the work environment to be hostile or abusive because of the widespread sexual favoritism;
6. *[Select applicable basis of defendant’s liability:]*

[That a supervisor [engaged in the conduct/created the widespread sexual favoritism];]

[That *[name of defendant]* [or [his/her/its] supervisors or agents] knew or should have known of the widespread sexual favoritism and failed to take immediate and appropriate corrective action;]

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

Derived from former CACI No. 2521 December 2007; Revised December 2015

Directions for Use

This instruction is for use in a hostile work environment case involving widespread sexual favoritism when the defendant is an employer or other entity covered by the FEHA. For an individual defendant, such as the alleged harasser or plaintiff’s coworker, see CACI No. 2522C, *Hostile Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Individual Defendant*. For a case in which the plaintiff is the target of harassment based on a protected status such as gender, race, or

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sexual orientation, see CACI No. 2521A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant*. For an instruction for use if the plaintiff is not the target of the harassment, see CACI No. 2521B, *Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant*. Also read CACI No. 2523, “*Harassing Conduct*” *Explained*, and CACI No. 2524, “*Severe or Pervasive*” *Explained*.

In element 6, select the applicable basis of employer liability: (a) vicarious liability for a supervisor’s harassing conduct, or (b) the employer’s ratification of the conduct. For a definition of “supervisor,” see CACI No. 2525, *Harassment—“Supervisor” Defined*. If there are both employer and individual defendants (see CACI No. 2522C, *Hostile Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Individual Defendant*), both are jointly and severally liable for any damages. Comparative fault and Proposition 51 do not apply to vicarious liability. (*Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 1000 [16 Cal.Rptr.2d 787], disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal. 4th 644, 664 [25 Cal. Rptr. 2d 109, 863 P.2d 179]; see also *Rashtian v. BRAC-BH, Inc.* (1992) 9 Cal.App.4th 1847, 1851 [12 Cal.Rptr.2d 411] [Proposition 51 cannot be applied to those who are without fault and only have vicarious liability by virtue of some statutory fiat].)

Sources and Authority

- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- “Employer” Defined for Harassment. Government Code section 12940(j)(4)(A).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C).
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Perception and Association. Government Code section 12926(o).
- “Following the guidance of the EEOC, and also employing standards adopted in our prior cases, we believe that an employee may establish an actionable claim of sexual harassment under the FEHA by demonstrating that widespread sexual favoritism was severe or pervasive enough to alter his or her working conditions and create a hostile work environment.” (*Miller v. Dept. of Corrections* (2005) 36 Cal.4th 446, 466 [30 Cal.Rptr.3d 797, 115 P.3d 77], internal citations omitted.)
- “[S]exual favoritism by a manager may be actionable when it leads employees to believe that ‘they [can] obtain favorable treatment from [the manager] if they became romantically involved with him’, the affair is conducted in a manner ‘so indiscreet as to create a hostile work environment,’ or the manager has engaged in ‘other pervasive conduct ... which created a hostile work environment.’ ” (*Miller, supra*, 36 Cal.4th at p. 465, internal citations omitted.)

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- “[A] romantic relationship between a supervisor and an employee does not, without more, give rise to a sexual discrimination or sexual harassment claim either under the FEHA or the public policy of the state.” (*Proksel v. Gattis* (1996) 41 Cal.App.4th 1626, 1631 [49 Cal.Rptr.2d 322].)
- “The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior.” (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)
- “ ‘[N]ot all workplace conduct that may be described as “harassment” affects a “term, condition, or privilege” of employment within the meaning of Title VII. For sexual harassment to be actionable, it must be sufficiently severe or pervasive “to alter the conditions of [the victim’s] employment and create an abusive working environment.” ’ . . . ‘Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII’s purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim’s employment, and there is no Title VII violation.’ . . . [¶] California courts have adopted the same standard in evaluating claims under the FEHA.” (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 130 [87 Cal.Rptr.2d 132, 980 P.2d 846], internal citations omitted.)
- “To be actionable, ‘a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.’ That means a plaintiff who subjectively perceives the workplace as hostile or abusive will not prevail under the FEHA, if a reasonable person in the plaintiff’s position, considering all the circumstances, would not share the same perception. Likewise, a plaintiff who does not perceive the workplace as hostile or abusive will not prevail, even if it objectively is so.” (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 284 [42 Cal.Rptr.3d 2, 132 P.3d 211], internal citations omitted.)
- “The FEHA imposes two standards of employer liability for sexual harassment, depending on whether the person engaging in the harassment is the victim’s supervisor or a nonsupervisory coemployee. The employer is liable for harassment by a nonsupervisory employee only if the employer (a) knew or should have known of the harassing conduct and (b) failed to take immediate and appropriate corrective action. This is a negligence standard. Because the FEHA imposes this negligence standard only for harassment ‘by an employee other than an agent or supervisor’, by implication the FEHA makes the employer strictly liable for harassment by a supervisor.” (*State Dep’t of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1040-1041 [6 Cal.Rptr.3d 441, 79 P.3d 556], original italics.)
- “[I]n order for the employer to avoid strict liability for the supervisor’s actions under the FEHA, the harassment must result from a completely private relationship unconnected with the employment. Otherwise, the employer is strictly liable for the supervisor’s actions regardless of whether the

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supervisor was acting as the employer’s agent.” (*Myers v. Trendwest Resorts, Inc.* (2007) 148 Cal.App.4th 1403, 1421 [56 Cal.Rptr.3d 501].)

- “In order to be actionable, it must be shown that respondents knew, or should have known, of the alleged harassment and failed to take appropriate action.” (*McCoy v. Pacific Maritime Assn.* (2013) 216 Cal.App.4th 283, 294 [156 Cal.Rptr.3d 851].)
- “If an employee other than an agent or supervisor commits the harassment, and the employer takes immediate and appropriate corrective action when it becomes or reasonably should become aware of the conduct—for example, when the victim or someone else informs the employer—there simply is no ‘unlawful employment practice’ that the FEHA governs.” (*Carrisales v. Dept. of Corrections* (1999) 21 Cal.4th 1132, 1136 [90 Cal.Rptr.2d 804, 988 P.2d 1083], called into doubt on other grounds by statute.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 340, 346

Chin et al., Cal. Practice Guide: Employment Litigation, Ch. 10-B, *Sexual Harassment*, ¶¶ 10:40, 10:110–10:260 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.21, 3.36, 3.45

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

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

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36 (Matthew Bender)

California Civil Practice: Employment Litigation § 2:56 (Thomson Reuters)

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2522A. Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant (Gov. Code, § 12940(j))

[Name of plaintiff] claims that *[name of defendant]* subjected *[him/her]* to harassment based on *[describe protected status, e.g., race, gender, or age]*, causing a hostile or abusive work environment. To establish this claim, *[name of plaintiff]* must prove all of the following:

1. That *[name of plaintiff]* was **[an employee of/a person providing services under a contract with/an unpaid intern with/a volunteer with]** *[name of employer]*;
2. That *[name of plaintiff]* was subjected to unwanted harassing conduct because **[he/she]** was *[protected status, e.g., a woman]*;
3. That the harassing conduct was severe or pervasive;
4. That a reasonable *[e.g., woman]* in *[name of plaintiff]*'s circumstances would have considered the work environment to be hostile or abusive;
5. That *[name of plaintiff]* considered the work environment to be hostile or abusive;
6. That *[name of defendant]* **[participated in/assisted/ [or] encouraged]** the harassing conduct;
7. That *[name of plaintiff]* was harmed; and
8. That the conduct was a substantial factor in causing *[name of plaintiff]*'s harm.

Derived from Former CACI No. 2522 December 2007; Revised June 2013, December 2015, May 2018

Directions for Use

This instruction is for use in a hostile work environment case if the plaintiff was the target of the harassing conduct and the defendant is an individual such as the alleged harasser or plaintiff's coworker. For an employer defendant, see CACI No. 2521A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant*. For a case in which the plaintiff is not the target of the harassment, see CACI No. 2522B, *Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant*. For an instruction for use if the hostile environment is due to sexual favoritism, see CACI No. 2522C, *Hostile Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Individual Defendant*. Also read CACI No. 2523, "*Harassing Conduct*" Explained, and CACI No. 2524, "*Severe or Pervasive*" Explained.

Modify element 2 if plaintiff was not actually a member of the protected class, but alleges harassment 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(o).)

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If there are both employer and individual defendants (see CACI No. 2521A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer Defendant*), both are jointly and severally liable for any damages. Comparative fault and Proposition 51 do not apply to vicarious liability. (*Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 1000 [16 Cal.Rptr.2d 787], disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal. 4th 644, 664 [25 Cal. Rptr. 2d 109, 863 P.2d 179]; see also *Rashtian v. BRAC-BH, Inc.* (1992) 9 Cal.App.4th 1847, 1851 [12 Cal.Rptr.2d 411] [Proposition 51 cannot be applied to those who are without fault and only have vicarious liability by virtue of some statutory fiat].)

Sources and Authority

- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- Personal Liability for Harassment. Government Code section 12940(j)(3).
- “Employer” Defined for Harassment. Government Code section 12940(j)(4)(A).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Perception and Association. Government Code section 12926(o).
- “The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior.” (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)
- “When the workplace is permeated with discriminatory intimidation, ridicule and insult that is ‘sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment,’ the law is violated.” (*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 409 [27 Cal.Rptr.2d 457], internal citation omitted.)
- “Under FEHA, an employee who harasses another employee may be held personally liable.” (*Lewis v. City of Benicia* (2014) 224 Cal.App.4th 1519, 1524 [169 Cal.Rptr.3d 794].)
- “A supervisor who, without more, fails to take action to prevent sexual harassment of an employee is not personally liable as an aider and abettor of the harasser, an aider and abettor of the employer or an agent of the employer.” (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1331 [58 Cal.Rptr.2d 308].)

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- “[A]lthough no California cases have directly addressed racial harassment in the workplace, the California courts have applied the federal threshold standard to claims of sexual harassment and held that FEHA is violated when the harassment was ‘ ‘ ‘sufficiently severe or pervasive to alter the conditions of the victim’s employment.’ ’ ’ ” (*Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 464–465 [79 Cal.Rptr.2d 33], internal citations and footnote omitted.)
- “To be actionable, ‘a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.’ That means a plaintiff who subjectively perceives the workplace as hostile or abusive will not prevail under the FEHA, if a reasonable person in the plaintiff’s position, considering all the circumstances, would not share the same perception. Likewise, a plaintiff who does not perceive the workplace as hostile or abusive will not prevail, even if it objectively is so.” (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 284 [42 Cal.Rptr.3d 2, 132 P.3d 211], internal citations omitted.)
- “[A]llegations of a racially hostile work-place must be assessed from the perspective of a reasonable person belonging to the racial or ethnic group of the plaintiff.” (*McGinest v. GTE Serv. Corp.* (9th Cir. 2004) 360 F.3d 1103, 1115.)
- “Under ... FEHA, sexual harassment can occur between members of the same gender as long as the plaintiff can establish the harassment amounted to discrimination *because of sex*.” (*Lewis, supra*, 224 Cal.App.4th at p. 1525, original italics.)
- “[T]here is no requirement that the *motive* behind the sexual harassment must be sexual in nature. ‘[H]arassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex.’ Sexual harassment occurs when, as is alleged in this case, sex is used as a weapon to create a hostile work environment.” (*Singleton v. United States Gypsum Co.* (2006) 140 Cal.App.4th 1547, 1564 [45 Cal.Rptr.3d 597], original italics, internal citation omitted.)
- “The plaintiff must show that the harassing conduct took place because of the plaintiff’s sex, but need not show that the conduct was motivated by sexual desire. For example, a female plaintiff can prevail by showing that the harassment was because of the defendant’s bias against women; she need not show that it was because of the defendant’s sexual interest in women. In every case, however, the plaintiff must show a discriminatory intent or motivation based on gender.” (*Pantoja v. Anton* (2011) 198 Cal.App.4th 87, 114 [129 Cal.Rptr.3d 384], internal citations omitted.)
- “[A] heterosexual male is subjected to harassment because of sex under the FEHA when attacks on his heterosexual identity are used as a tool of harassment in the workplace, irrespective of whether the attacks are motivated by sexual desire or interest.” (*Taylor v. Nabors Drilling USA, LP* (2014) 222 Cal.App.4th 1228, 1229 [166 Cal.Rptr.3d 676].) .)
- “A recent legislative amendment modifies section 12940, subdivision (j)(4)(C) (a provision of FEHA specifying types of conduct that constitute harassment because of sex) to read: ‘For purposes of this subdivision, “harassment” because of sex includes sexual harassment, gender harassment, and harassment based on pregnancy, childbirth, or related medical conditions. *Sexually harassing conduct*

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need not be motivated by sexual desire.’ ” (Lewis, supra, 224 Cal.App.4th at p. 1527, fn. 8, original italics.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 340, 346

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-B, *Sexual Harassment*, ¶¶ 10:40, 10:110–10:260 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.36–3.45

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

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

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36 (Matthew Bender)

California Civil Practice: Employment Litigation §§ 2:56–2:56.1 (Thomson Reuters)

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2522B. Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant (Gov. Code, § 12940(j))

[Name of plaintiff] claims that *[he/she]* was subjected to a hostile or abusive work environment because coworkers at *[name of employer]* were subjected to harassment 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/a person providing services under a contract with/an unpaid intern with/a volunteer with]** *[name of employer]*;
 2. That *[name of plaintiff]* **although not personally subjected to unwanted harassing conduct, personally witnessed harassing conduct that took place in [his/her] immediate work environment;**
 3. That the harassing conduct was severe or pervasive;
 4. That a reasonable *[describe member of protected group, e.g., woman]* in *[name of plaintiff]*'s circumstances would have considered the work environment to be hostile or abusive;
 5. That *[name of plaintiff]* considered the work environment to be hostile or abusive toward *[e.g., women]*;
 6. That *[name of defendant]* **[participated in/assisted/ [or] encouraged]** the harassing conduct;
 7. That *[name of plaintiff]* was harmed; and
 8. That the conduct was a substantial factor in causing *[name of plaintiff]*'s harm.
-

Derived from former CACI No. 2522 December 2007; Revised June 2013, December 2015

Directions for Use

This instruction is for use in a hostile work environment case if the plaintiff was not the target of the harassing conduct and the defendant is an individual such as the alleged harasser or plaintiff's coworker. For an employer defendant, see CACI No. 2521B, *Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant*. For a case in which the plaintiff is the target of the harassment, see CACI No. 2522A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant*. For an instruction for use if the hostile environment is due to sexual favoritism, see CACI No. 2522C, *Hostile Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Individual Defendant*. Also read CACI No. 2523, "Harassing Conduct" Explained, and CACI No. 2524, "Severe

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or Pervasive” Explained.

If there are both employer and individual defendants (see CACI No. 2521B, *Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer Defendant*), both are jointly and severally liable for any damages. Comparative fault and Proposition 51 do not apply to vicarious liability. (*Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 1000 [16 Cal.Rptr.2d 787], disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal. 4th 644, 664 [25 Cal. Rptr. 2d 109, 863 P.2d 179]; see also *Rashtian v. BRAC-BH, Inc.* (1992) 9 Cal.App.4th 1847, 1851 [12 Cal.Rptr.2d 411] [Proposition 51 cannot be applied to those who are without fault and only have vicarious liability by virtue of some statutory fiat].)

Sources and Authority

- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- Personal Liability for Harassment. Government Code section 12940(j)(3).
- “Employer” Defined for Harassment. Government Code section 12940(j)(4)(A).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Perception and Association. Government Code section 12926(o).
- “The plaintiff’s work environment is affected not only by conduct directed at herself but also by the treatment of others. A woman’s perception that her work environment is hostile to women will obviously be reinforced if she witnesses the harassment of other female workers.” (*Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 519 [76 Cal.Rptr.2d 547], internal citations omitted.)
- “Harassment against others in the workplace is only relevant to the plaintiff’s case if she has personal knowledge of it. Unless plaintiff witnesses the conduct against others, or is otherwise aware of it, that conduct cannot alter the conditions of her employment and create an abusive working environment. Stated another way, a reasonable person in plaintiff’s position would not find the environment hostile or abusive unless that person had knowledge of the objectionable conduct toward others.” (*Beyda, supra*, 65 Cal.App.4th at p. 520.)
- “To state that an employee must be the direct victim of the sexually harassing conduct is somewhat misleading as an employee who is subjected to a hostile work environment is a victim of sexual harassment even though no offensive remarks or touchings are directed to or perpetrated upon that employee. Generally, however, sexual conduct that involves or is aimed at persons other than the plaintiff is considered less offensive and severe than conduct that is directed at the plaintiff. A hostile

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work environment sexual harassment claim by a plaintiff who was not personally subjected to offensive remarks and touchings requires ‘an even higher showing’ than a claim by one who had been sexually harassed without suffering tangible job detriment: such a plaintiff must ‘establish that the sexually harassing conduct permeated [her] direct work environment.’ [¶] To meet this burden, the plaintiff generally must show that the harassment directed at others was in her immediate work environment, and that she personally witnessed it. The reason for this is obvious: if the plaintiff does not witness the incidents involving others, ‘those incidents cannot affect ... her perception of the hostility of the work environment.’ ” (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 284–285 [42 Cal.Rptr.3d 2, 132 P.3d 211], internal citations omitted.)

- “The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior.” (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)
- “When the workplace is permeated with discriminatory intimidation, ridicule and insult that is ‘sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment,’ the law is violated.” (*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 409 [27 Cal.Rptr.2d 457], internal citation omitted.)
- “[W]e conclude a nonharassing supervisor, who fails to take action to prevent sexual harassment, is not personally liable for sexual harassment under the Fair Employment and Housing Act (FEHA).” (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1322 [58 Cal.Rptr.2d 308].)
- “A supervisor who, without more, fails to take action to prevent sexual harassment of an employee is not personally liable as an aider and abettor of the harasser, an aider and abettor of the employer or an agent of the employer.” (*Fiol, supra*, 50 Cal.App.4th at p. 1331.)
- “[A]lthough no California cases have directly addressed racial harassment in the workplace, the California courts have applied the federal threshold standard to claims of sexual harassment and held that FEHA is violated when the harassment was ‘sufficiently severe or pervasive to alter the conditions of the victim’s employment.’ ” (*Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 464-465 [79 Cal.Rptr.2d 33], internal citations and footnote omitted.)
- “To be actionable, ‘a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.’ That means a plaintiff who subjectively perceives the workplace as hostile or abusive will not prevail under the FEHA, if a reasonable person in the plaintiff’s position, considering all the circumstances, would not share the same perception. Likewise, a plaintiff who does not perceive the workplace as hostile or abusive will not prevail, even if it objectively is so.” (*Lyle, supra*, 38 Cal.4th at p. 284, internal citations omitted.)

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- “[A]llegations of a racially hostile work-place must be assessed from the perspective of a reasonable person belonging to the racial or ethnic group of the plaintiff.” (*McGinest v. GTE Serv. Corp.* (9th Cir. 2004) 360 F.3d 1103, 1115.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 340, 346

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-B, *Sexual Harassment*, ¶¶ 10:40, 10:110–10:260 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.36–3.45

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

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

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36 (Matthew Bender)

California Civil Practice: Employment Litigation §§ 2:56, 2:56.50 (Thomson Reuters)

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2522C. Hostile Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Individual Defendant (Gov. Code, § 12940(j))

[Name of plaintiff] claims that widespread sexual favoritism by *[name of defendant]* created a hostile or abusive work environment. “Sexual favoritism” means that another employee has received preferential treatment with regard to promotion, work hours, assignments, or other significant employment benefits or opportunities because of a sexual relationship with an individual representative of the employer who was in a position to grant these preferences. To establish this claim, *[name of plaintiff]* must prove all of the following:

1. That *[name of plaintiff]* was [an employee of/a person providing services under a contract with/an unpaid intern with/a volunteer with] *[name of employer]*;
 2. That there was sexual favoritism in the work environment;
 3. That the sexual favoritism was widespread and also severe or pervasive;
 4. That a reasonable *[describe member of protected group, e.g., woman]* in *[name of plaintiff]*’s circumstances would have considered the work environment to be hostile or abusive because of the widespread sexual favoritism;
 5. That *[name of plaintiff]* considered the work environment to be hostile or abusive because of the widespread sexual favoritism;
 6. That *[name of defendant]* [participated in/assisted/ [or] encouraged] the sexual favoritism;
 7. That *[name of plaintiff]* was harmed; and
 8. That the conduct was a substantial factor in causing *[name of plaintiff]*’s harm.
-

Derived from former CACI No. 2522 December 2007; Revised December 2015

Directions for Use

This instruction is for use in a hostile work environment case involving widespread sexual favoritism when the defendant is an individual such as the alleged harasser or plaintiff’s coworker. For an employer defendant, see CACI No. 2521C, *Hostile Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant*. For a case in which the plaintiff is the target of harassment based on a protected status such as gender, race, or sexual orientation, see CACI No. 2522A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant*. For an instruction for use if the plaintiff is not the target of the harassment, see CACI No. 2522B, *Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant*. Also read CACI No. 2523, “*Harassing Conduct*” Explained, and CACI No. 2524, “*Severe or Pervasive*” Explained.

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If there are both employer and individual defendants (see CACI No. 2521C, *Hostile Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Employer Defendant*), both are jointly and severally liable for any damages. Comparative fault and Proposition 51 do not apply to vicarious liability. (*Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 1000 [16 Cal.Rptr.2d 787], disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal. 4th 644, 664 [25 Cal. Rptr. 2d 109, 863 P.2d 179]; see also *Rashtian v. BRAC-BH, Inc.* (1992) 9 Cal.App.4th 1847, 1851 [12 Cal.Rptr.2d 411] [Proposition 51 cannot be applied to those who are without fault and only have vicarious liability by virtue of some statutory fiat].)

Sources and Authority

- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- Personal Liability for Harassment. Government Code section 12940(j)(3).
- “Employer” Defined for Harassment. Government Code section 12940(j)(4)(A).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Perception and Association. Government Code section 12926(o).
- “Following the guidance of the EEOC, and also employing standards adopted in our prior cases, we believe that an employee may establish an actionable claim of sexual harassment under the FEHA by demonstrating that widespread sexual favoritism was severe or pervasive enough to alter his or her working conditions and create a hostile work environment.” (*Miller v. Dept. of Corrections* (2005) 36 Cal.4th 446, 466 [30 Cal.Rptr.3d 797, 115 P.3d 77], internal citations omitted.)
- “[S]exual favoritism by a manager may be actionable when it leads employees to believe that ‘they [can] obtain favorable treatment from [the manager] if they became romantically involved with him’, the affair is conducted in a manner ‘so indiscreet as to create a hostile work environment,’ or the manager has engaged in ‘other pervasive conduct ... which created a hostile work environment.’ ” (*Miller, supra*, 36 Cal.4th at p. 465, internal citations omitted.)
- “[A] romantic relationship between a supervisor and an employee does not, without more, give rise to a sexual discrimination or sexual harassment claim either under the FEHA or the public policy of the state.” (*Proksel v. Gattis* (1996) 41 Cal.App.4th 1626, 1631 [49 Cal.Rptr.2d 322].)
- “The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the

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harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior.” (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)

- “When the workplace is permeated with discriminatory intimidation, ridicule and insult that is ‘sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment,’ the law is violated.” (*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 409 [27 Cal.Rptr.2d 457], internal citation omitted.)
- “[W]e conclude a nonharassing supervisor, who fails to take action to prevent sexual harassment, is not personally liable for sexual harassment under the Fair Employment and Housing Act (FEHA).” (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1322 [58 Cal.Rptr.2d 308].)
- “A supervisor who, without more, fails to take action to prevent sexual harassment of an employee is not personally liable as an aider and abettor of the harasser, an aider and abettor of the employer or an agent of the employer.” (*Fiol, supra*, 50 Cal.App.4th at p. 1331.)
- “[A]lthough no California cases have directly addressed racial harassment in the workplace, the California courts have applied the federal threshold standard to claims of sexual harassment and held that FEHA is violated when the harassment was ‘sufficiently severe or pervasive to alter the conditions of the victim’s employment.’ ” (*Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 464–465 [79 Cal.Rptr.2d 33], internal citations and footnote omitted.)
- “To be actionable, ‘a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.’ That means a plaintiff who subjectively perceives the workplace as hostile or abusive will not prevail under the FEHA, if a reasonable person in the plaintiff’s position, considering all the circumstances, would not share the same perception. Likewise, a plaintiff who does not perceive the workplace as hostile or abusive will not prevail, even if it objectively is so.” (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 284 [42 Cal.Rptr.3d 2, 132 P.3d 211], internal citations omitted.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 340, 346

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-B, *Sexual Harassment*, ¶¶ 10:40, 10:110–10:260 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.36–3.45

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

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

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36 (Matthew Bender)

California Civil Practice: Employment Litigation §§ 2:56, 2:56.50 (Thomson Reuters)

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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, May 2018

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.

This instruction may also be given for a claim of retaliation under the New Parent Leave Act. The "other protected activity" option of element 2 may be used to assert what is protected from retaliation under this act. (See Gov. Code, § 12945.6(g), (h).)

The-Both statutes reaches a broad range of adverse employment actions short of actual discharge. (See Gov. Code, §§ 12945.2(l), 12945.6(g).) 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

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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) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; CACI No. 2507, “*Substantial Motivating Reason*” Explained.) Whether this standard applies to CFRA retaliation cases has not been addressed by the courts.

Sources and Authority

- Retaliation Prohibited Under California Family Rights Act. Government Code section 12945.2(l), (t).
- Retaliation Prohibited Under New Parent Leave Act. Government Code section 12945.6(g), (h).
- Retaliation Prohibited Under Fair Employment and Housing Act. Government Code section 12940(h).
- “The elements of a cause of action for retaliation in violation of CFRA are “ ‘(1) the defendant was an employer covered by CFRA; (2) the plaintiff was an employee eligible to take CFRA [leave]; (3) the plaintiff exercised her right to take leave for a qualifying CFRA purpose; and (4) the plaintiff suffered an adverse employment action, such as termination, fine, or suspension, because of her exercise of her right to CFRA [leave].” ’ ’ (Soria v. Univision Radio Los Angeles, Inc. (2016) 5 Cal.App.5th 570, 604 [210 Cal.Rptr.3d 59].)
- “Similar to causes of action under FEHA, the *McDonnell Douglas* burden shifting analysis applies to retaliation claims under CFRA.” (Moore v. Regents of University of California (2016) 248 Cal.App.4th 216, 248 [206 Cal.Rptr.3d 841].)
- “ ‘When an adverse employment action “follows hard on the heels of protected activity, the timing often is strongly suggestive of retaliation.” ’ ’ (Bareno v. San Diego Community College Dist. (2017) 7 Cal.App.5th 546, 571 [212 Cal.Rptr.3d 682].)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 1058–1060

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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2630. Violation of New Parent Leave Act—Essential Factual Elements

[Name of plaintiff] claims that *[name of defendant]* refused to [grant [him/her] parental leave/return [him/her] to the same or a comparable job when [his/her] parental leave ended]. To establish this claim, *[name of plaintiff]* must prove all of the following:

1. That *[name of defendant]* employs at least 20 employees within 75 miles of the site where *[name of plaintiff]* worked;
 2. That *[name of plaintiff]* worked for *[name of defendant]* for more than a year, and for at least 1,250 hours during the previous twelve months;
 3. That *[name of plaintiff]* [requested/took] leave to bond with a new child within one year of the child’s [birth/adoption/foster care placement];
 4. That *[name of defendant]* refused to [grant *[name of plaintiff]*’s request for parental leave/return *[name of plaintiff]* to the same or a comparable job when [his/her] parental leave ended];
 5. That *[name of plaintiff]* was harmed; and
 6. That *[name of defendant]*’s refusal was a substantial factor in causing *[name of plaintiff]*’s harm.
-

New May 2018

Directions for Use

The New Parent Leave Act (Gov. Code, § 12945.6) extends some of the rights provided to employees by the California Family Rights Act (CFRA: Gov. Code, § 12945.2) to employees of employers with 20 or more employees. (See Gov. Code, § 12945.6(a)(1); cf. Gov. Code, § 12945.2(b) [CFRA applies to employers with 50 or more employees].) The New Parent Leave Act allows employees to take up to 12 weeks of parental leave to bond with a new child within one year of the child’s birth, adoption, or foster care placement. The act also requires the employer to guarantee employment in the same or a comparable position on the termination of the leave. (Gov. Code, § 12945.6(a)(1).) The employer must maintain the employee’s health care coverage during the leave. (Gov. Code, § 12945.6(a)(2).)

Elements 1 and 2 set forth the eligibility requirements for employer and employee under the act. (See Gov. Code, § 12945.6(a)(1).) These elements may be omitted if there are no disputed facts over the act’s applicability to the parties.

The New Parent Leave Act contains no specific notice requirements. (Cf. Gov. Code, § 12945.2(h) [reasonable notice required under CFRA]; see also Cal. Code Regs., tit. 2, § 11091(a)(2); CACI No. 2602, *Reasonable Notice of CFRA Leave*.) Nevertheless, it is likely that a reasonable-notice requirement

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would be implied. Lack of reasonable notice could possibly be viewed as an affirmative defense.

Sources and Authority

- New Parent Leave Act. Government Code section 12945.6.

Secondary Sources

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2740. Violation of Equal Pay Act—Essential Factual Elements (Lab. Code, § 1197.5)

[Name of plaintiff] claims that *[he/she]* is paid at a wage rate that is less than the rate paid to employees of *[the opposite sex/another race/another ethnicity]*. To establish this claim, *[name of plaintiff]* must prove all of the following:

1. That *[name of plaintiff]* was paid less than the rate paid to *[a] person[s]* of *[the opposite sex/another race/another ethnicity]*;
 2. That *name of plaintiff* was performing substantially similar work as the other person[s] with regard to skill, effort, and responsibility; and
 3. That *[name of plaintiff]* was working under similar working conditions as the other person[s].
-

New May 2018

Directions for Use

The California Equal Pay Act prohibits discrepancies on pay due to gender, race, or ethnicity. (Lab. Code, § 1197.5(a), (b).) An employee receiving less than the wage to which he or she is entitled may bring a civil action to recover the balance of the wages, including interest, and an equal amount as liquidated damages. Costs and attorney fees may also be awarded. (Lab. Code, § 1197.5(h).)

There are a number of defenses that the employer may assert to defend what appears to be an improper pay differential. (Lab. Code, § 1197.5(a), (b).) See CACI Nos. 2741, *Affirmative Defense—Different Pay Justified*, and 2742, *Bona Fide Factor Other Than Sex, Race, or Ethnicity*, for instructions on the employer’s affirmative defenses. (See Lab. Code, § 1197.5(a)(1), (b)(1).)

Sources and Authority

- Right to Equal Pay Based on Gender, Race, or Ethnicity. Labor Code section 1197.5(a), (b).
- Private Right of Action to Enforce Equal Pay Claim. Labor Code section 1197.5(h).
- “This section was intended to codify the principle that an employee is entitled to equal pay for equal work without regard to gender.” (*Jones v. Tracy School Dist.* (1980) 27 Cal.3d 99, 104 [165 Cal.Rptr. 100, 611 P.2d 441].)
- “[I]t is appropriate to apply the three-stage burden-shifting test which is used to establish sex discrimination under the federal Equal Pay Act to the trial of an action under section 1197.5 that alleges sexual discrimination by the payment of unequal wages. In the equal pay context, the burden-shifting test requires only that the plaintiff must show that the employer pays workers of one sex more than workers of the opposite sex for equal work. If the plaintiff does so, the employer then has the burden of showing that one of the exceptions listed in section 1197.5 is

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applicable. If the employer does so, the employee may show that the employer’s stated reasons are pretextual.” (*Green v. Par Pools, Inc.* (2003) 111 Cal.App.4th 620, 626 [3 Cal.Rptr.3d 844].)

- “The California statute is nearly identical to the federal Equal Pay Act of 1963. (29 U.S.C. § 206(d)(1).) Accordingly, in the absence of California authority, it is appropriate to rely on federal authorities construing the federal statute: ‘Although state and federal antidiscrimination laws “differ in some particulars, their objectives are identical, and California courts have relied upon federal law to interpret analogous provisions of the state statute.” ’ ” (*Green, supra*, 111 Cal.App.4th at p. 623.)
- “To establish her prima facie case, [plaintiff] had to show not only that she is paid lower wages than a male comparator for equal work, but that she has selected the proper comparator. ‘The EPA does not require perfect diversity between the comparison classes, but at a certain point, when the challenged policy effects [sic] both male and female employees equally, there can be no EPA violation. [Citation.] [A plaintiff] cannot make a comparison of one classification composed of males and females with another classification of employees also composed of males and females.’ ” (*Hall v. County of Los Angeles* (2007) 148 Cal.App.4th 318, 324-325 [55 Cal.Rptr.3d 732].)

Secondary Sources

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2741. Affirmative Defense—Different Pay Justified

[Name of defendant] claims that [he/she/it] was justified in paying [name of plaintiff] a wage rate that was less than the rate paid to employees of [the opposite sex/another race/another ethnicity]. To establish this claim, [name of defendant] must prove all of the following:

1. That the wage differential was based on one or more of the following factors:

[a. A seniority system;]

[b. A merit system;]

[c. A system that measures earnings by quantity or quality of production;]

[d. (Specify bona fide factor other than sex, race, or ethnicity, such as education, training, or experience.).]

2. That the factor(s) [was/were] applied reasonably; and

3. That the factor[s] that [name of defendant] relied on account[s] for the entire wage differential.

Prior salary does not, by itself, justify any disparity in current compensation.

New May 2018

Directions for Use

The California Equal Pay act presents four factors that an employer may offer to justify a pay differential that results in an apparent pay disparity based on gender, race, or ethnicity. Factors a, b, and c in element 1 are specific; factor d may perhaps be considered a “catchall” factor. (See *Corning Glass Works v. Brennan* (1974) 417 U.S. 188, 196 [94 S.Ct. 2223, 2229, 41 L.Ed.2d 1, 10-11].) Choose the factor or factors that the employer asserts as justification.

If the catchall factor d is selected, the jury must also be instructed with CACI No. 2742, *Bona Fide Factor Other Than Sex, Race, or Ethnicity*, which establishes what bona fide factors other than sex, race, or ethnicity justify a pay differential. (See Lab. Code, § 1197.5(a)(1), (b)(1).)

Sources and Authority

- Factors Justifying Pay Differential. Labor Code section 1197.5(a)(1), (b)(1).
- “The California statute is nearly identical to the federal Equal Pay Act of 1963. (29 U.S.C. § 206(d)(1).) Accordingly, in the absence of California authority, it is appropriate to rely on federal authorities construing the federal statute: ‘Although state and federal antidiscrimination laws

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“differ in some particulars, their objectives are identical, and California courts have relied upon federal law to interpret analogous provisions of the state statute.” ’ ’ (*Green v. Par Pools, Inc.* (2003) 111 Cal.App.4th 620, 623 [3 Cal.Rptr.3d 844].)

- “The [Federal Equal Pay] Act also establishes four exceptions -- three specific and one a general catchall provision -- where different payment to employees of opposite sexes ‘is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.’ ” (*Corning Glass Works, supra*, 417 U.S. at p. 196.)

Secondary Sources

Draft—Not Approved by Judicial Council

2742. Bona Fide Factor Other Than Sex, Race, or Ethnicity

[Name of defendant] claims that [specify bona fide factor other than sex, race, or ethnicity] is a legitimate factor other than [sex/race/ethnicity] that justifies paying [name of plaintiff] at a wage rate that is less than the rate paid to employees of [the opposite sex/another race/another ethnicity].

[Specify factor] is a factor that justifies the pay differential only if [name of defendant] proves all of the following:

- 1. That the factor is not based on or derived from a [sex/race/ethnicity]-based differential in compensation;**
- 2. That the factor is job related with respect to [name of plaintiff]’s position; and**
- 3. That the factor is consistent with a business necessity.**

A “business necessity” means an overriding legitimate business purpose such that the factor effectively fulfills the business purpose it is supposed to serve.

[Name of defendant] is in violation, however, if [name of plaintiff] proves that an alternative business practice exists that would serve the same business purpose without producing the pay differential.

New May 2018

Directions for Use

This instruction must be given along with CACI No. 2741, *Affirmative Defense—Different Pay Justified*, if 2741 factor d of element 1 is chosen: a bona fide factor other than sex, race, or ethnicity, such as education, training or experience. This factor applies only if the employer demonstrates that the factor is not based on or derived from a sex, race, or ethnicity-based differential in compensation, is job related with respect to the position in question, and is consistent with a business necessity. “Business necessity” means an overriding legitimate business purpose such that the factor effectively fulfills the business purpose it is supposed to serve. This defense does not apply if the employee demonstrates that an alternative business practice exists that would serve the same business purpose without producing the wage differential. (See Lab. Code, § 1197.5(a)(1)(D), (b)(1)(D).)

Sources and Authority

- Bona Fide Factor Other Than Sex, Race, or Ethnicity. Labor Code section 1197.5(a)(1)(D), (b)(1)(D).
- “[D]efendant provided sufficient evidence to establish that [male employee]’s experience justified his employment at a substantially greater wage rate than [plaintiff]. Defendant therefore established that business reasons other than sex led to the wage differential.” (*Green v. Par Pools, Inc.* (2003) 111 Cal.App.4th 620, 632 [3 Cal.Rptr.3d 844].)

Secondary Sources

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2743. Equal Pay Act—Retaliation—Essential Factual Elements (Lab. Code, § 1197.5(k))

[Name of plaintiff] **claims that** *[name of defendant]* **retaliated against [him/her] for [pursuing/assisting another in the enforcement of] [his/her] right to equal pay regardless of [sex/race/ethnicity]. To establish this claim, [name of plaintiff] must prove all of the following:**

1. **That** *[name of plaintiff]* *[specify acts taken by plaintiff to enforce or assist in the enforcement of the right to equal pay];*
 2. **That** *[name of defendant]* **[discharged/[other adverse employment action]]** *[name of plaintiff];*
 3. **That** *[name of plaintiff]*'s **[pursuit of/assisting in the enforcement of another's right to equal pay was a substantial motivating reason for** *[name of defendant]*'s **[discharging/[other adverse employment action]]** *[name of plaintiff];*
 4. **That** *[name of plaintiff]* **was harmed; and**
 5. **That** *[name of defendant]*'s **retaliatory conduct was a substantial factor in causing** *[name of plaintiff]*'s **harm.**
-

New May 2018

Directions for Use

Use this instruction in cases of alleged retaliation against an employee under the Equal Pay Act. The act prohibits adverse employment actions against an employee who has taken steps to enforce the equal pay requirements of the act. Also, the employer cannot prohibit an employee from disclosing his or her own wages, discussing the wages of others, inquiring about another employee's wages, or aiding or encouraging any other employee to exercise his or her rights. (Lab. Code, § 1197.5(k)(1).) An employee who has been retaliated against may bring a civil action for reinstatement, reimbursement for lost wages and work benefits, interest, and equitable relief. (Lab. Code, § 1197.5(k)(2).)

Note that there are two causation elements. First there must be a causal connection between the employee's pursuit of equal pay and the adverse employment action (element 3). Second, the employee must have suffered harm because of the employer's retaliatory acts (element 5).

Element 3 uses the term "substantial motivating reason" to express both intent and causation between the employee's pursuit of equal pay 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) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; CACI No. 2507, "*Substantial Motivating Reason*" Explained.) Whether this standard applies to the Equal Pay Act retaliation cases has not been addressed by the courts.

Draft—Not Approved by Judicial Council**Sources and Authority**

- Retaliation Prohibited Under Equal Pay Act. Labor Code section 1197.5(k).

Secondary Sources

Draft—Not Approved by Judicial Council

2800. Employer’s Affirmative Defense—Injury Covered by Workers’ Compensation

[Name of defendant] claims that ~~he/she/it is not responsible for any harm that [name of plaintiff] may have suffered because~~ [name of plaintiff] ~~he/she~~ was [name of defendant]’s employee and therefore can only recover under California’s Workers’ Compensation Act. To succeed on this defense, [name of defendant] must prove all of the following:

1. That [name of plaintiff] was [name of defendant]’s employee;
2. That [name of defendant] [had workers’ compensation insurance [covering [name of plaintiff] at the time of injury]/was self-insured for workers’ compensation claims [at the time of [name of plaintiff]’s injury]]; ~~and~~
3. That [name of plaintiff]’s injury occurred while [he/she] was working, or performing a task for or related to the work [name of defendant] hired [him/her] to do; and
4. That this [task/work] was a contributing cause of the injury.

Any person performing services for another, other than as an independent contractor, is presumed to be an employee.

New September 2003; Revised October 2004, May 2018

Directions for Use

This instruction is intended for use if the plaintiff is suing a defendant claiming to be the plaintiff’s employer. This instruction is not intended for use if the plaintiff is suing under an exception to the workers’ compensation exclusivity rule.

Element 3 expresses the requirement that the employee be acting in the course of employment at the time of injury. Element 4 expresses what is referred to as “industrial causation;” that the work was a contributing cause of the injury. The two requirements are different, and both must be proved. (See *Lee v. West Kern Water Dist.* (2016) 5 Cal.App.5th 606, 625 [210 Cal.Rptr.3d 362].) For an instruction asserting that element 3 does not apply, see CACI No. 2805, *Employee Not Within Course of Employment—Employer Conduct Unrelated to Employment.*

For other instructions regarding employment status, such as special employment and independent contractors, see instructions in the Vicarious Responsibility series (CACI Nos. 3700–3726). These instructions may need to be modified to fit this context.

Labor Code section 3351 defines “employee” for purposes of workers compensation. Labor Code section 3352 sets forth exceptions. ~~Note that t~~This instruction should not be given if the plaintiff/employee has been determined to fall within a statutory exception. ~~For exceptions to Labor Code section 3351, see Labor Code section 3352.~~

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If appropriate to the facts of the case, see instructions on the going-and-coming rule in the Vicarious Responsibility series. These instructions may need to be modified to fit this context.

Sources and Authority

- Exclusive Remedy. Labor Code section 3602(a).
- Conditions of Compensation. Labor Code section 3600(a).
- If Conditions of Compensation Not Met. Labor Code section 3602(c).
- “Employee” Defined. Labor Code section 3351.
- Presumption of Employment Status. Labor Code section 3357.
- Failure to Secure Payment of Compensation. Labor Code section 3706.
- “[T]he basis for the exclusivity rule in workers’ compensation law is the ‘presumed “compensation bargain,” pursuant to which the employer assumes liability for industrial personal injury or death without regard to fault in exchange for limitations on the amount of that liability. The employee is afforded relatively swift and certain payment of benefits to cure or relieve the effects of industrial injury without having to prove fault but, in exchange, gives up the wider range of damages potentially available in tort.’ ” (*Fermino v. Fedco, Inc.* (1994) 7 Cal.4th 701, 708 [30 Cal.Rptr.2d 18, 872 P.2d 559], internal citation omitted.)
- “Because an employer faced with a civil complaint seeking to enforce a common law remedy which does not state facts indicating coverage by the act bears the burden of pleading and proving ‘that the (act) is a bar to the employee’s ordinary remedy,’ we believe that the burden includes a showing by the employer-defendant, through appropriate pleading and proof, that he had ‘secured the payment of compensation’ in accordance with the provisions of the act.” (*Doney v. Tambouratgis* (1979) 23 Cal.3d 91, 98, fn. 8 [151 Cal.Rptr. 347, 587 P.2d 1160], internal citations omitted.)
- “A defendant need not plead and prove that it has purchased workers’ compensation insurance where the plaintiff alleges facts that otherwise bring the case within the exclusive province of workers’ compensation law, and no facts presented in the pleadings or at trial negate the workers’ compensation law’s application or the employer’s insurance coverage.” (*Gibbs v. American Airlines, Inc.* (1999) 74 Cal.App.4th 1, 14 [87 Cal.Rptr.2d 554], internal citations omitted.)
- “[T]he fact that an employee has received workers’ compensation benefits from some source does not bar the employee’s civil action against an uninsured employer. Instead, ‘[t]he price that must be paid by each employer for immunity from tort liability is the purchase of a workers’ compensation policy [and where the employer chooses] not to pay that price ... it should not be immune from liability.’ ” (*Huffman v. City of Poway* (2000) 84 Cal.App.4th 975, 987 [101 Cal.Rptr.2d 325], internal citations omitted.)

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- “Under the Workers’ Compensation Act, employees are automatically entitled to recover benefits for injuries ‘arising out of and in the course of the employment.’ ‘When the conditions of compensation exist, recovery under the workers’ compensation scheme “is the exclusive remedy against an employer for injury or death of an employee.” ’ ” (*Piscitelli v. Friedenber*g (2001) 87 Cal.App.4th 953, 986 [105 Cal.Rptr.2d 88], internal citations omitted.)
- “Unlike many other states, in California workers’ compensation provides the exclusive remedy for at least some intentional torts committed by an employer. *Fermino* described a ‘tripartite system for classifying injuries arising in the course of employment. First, there are injuries caused by employer negligence or without employer fault that are compensated at the normal rate under the workers’ compensation system. Second, there are injuries caused by ordinary employer conduct that intentionally, knowingly or recklessly harms an employee, for which the employee may be entitled to extra compensation under section 4553. Third, there are certain types of intentional employer conduct which bring the employer beyond the boundaries of the compensation bargain, for which a civil action may be brought.’ ” (*Gunnell v. Metrocolor Laboratories, Inc.* (2001) 92 Cal.App.4th 710, 723 [112 Cal.Rptr.2d 195], internal citations omitted.)
- “It has long been established in this jurisdiction that, generally speaking, a defendant in a civil action who claims to be one of that class of persons protected from an action at law by the provisions of the Workers’ Compensation Act bears the burden of pleading and proving, as an affirmative defense to the action, the existence of the conditions of compensation set forth in the statute which are necessary to its application.” (*Doney, supra*, 23 Cal.3d at p. 96, internal citations and footnote omitted.)
- “California courts have held worker’s compensation proceedings to be the exclusive remedy for certain third party claims deemed collateral to or derivative of the employee’s injury. Courts have held that the exclusive jurisdiction provisions bar civil actions against employers by nondependent parents of an employee for the employee’s wrongful death, by an employee’s spouse for loss of the employee’s services or consortium, and for emotional distress suffered by a spouse in witnessing the employee’s injuries.” (*Snyder v. Michael’s Stores, Inc.* (1997) 16 Cal.4th 991, 997 [68 Cal.Rptr.2d 476, 945 P.2d 781], internal citations omitted.)
- “ ‘An employer-employee relationship must exist in order to bring the ... Act into effect. (§ 3600)’ However, the coverage of the Act extends beyond those who have entered into ‘traditional contract[s] of hire.’ [S]ection 3351 provides broadly that for the purpose of the ... Act, “ ‘Employee’ means every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written’ ” Given this ‘section’s explicit use of the disjunctive,’ a contract of hire is not ‘a prerequisite’ to the existence of an employment relationship. Moreover, under section 3357, ‘[a]ny person rendering service for another, other than as an independent contractor, or unless expressly excluded ... , is presumed to be an employee.’ ” (*Arriaga v. County of Alameda* (1995) 9 Cal.4th 1055, 1060–1061 [40 Cal.Rptr.2d 116, 892 P.2d 150], internal citations omitted.)
- “Given these broad statutory contours, we believe that an ‘employment’ relationship sufficient to bring the act into play cannot be determined simply from technical contractual or common law conceptions of employment but must instead be resolved by reference to the history and fundamental purposes underlying the Workmen’s Compensation Act.” (*Laeng v. Workmen’s Comp. Appeals Bd.*

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(1972) 6 Cal.3d 771, 777 [100 Cal.Rptr. 377, 494 P.2d 1], internal citations omitted.)

- “[C]ourts generally are more exacting in requiring proof of an employment relationship when such a relationship is asserted as a defense by the employer to a common law action.” (*Spradlin v. Cox* (1988) 201 Cal.App.3d 799, 808 [247 Cal.Rptr. 347], internal citation omitted.)
- “The question of whether a person is an employee may be one of fact, of mixed law and fact, or of law only. Where the facts are undisputed, the question is one of law, and the Court of Appeal may independently review those facts to determine the correct answer.” (*Barragan v. Workers’ Comp. Appeals Bd.* (1987) 195 Cal.App.3d 637, 642 [240 Cal.Rptr. 811], internal citations omitted.)
- “An employee may have more than one employer for purposes of workers’ compensation, and, in situations of dual employers, the second or ‘special’ employer may enjoy the same immunity from a common law negligence action on account of an industrial injury as does the first or ‘general’ employer. Identifying and analyzing such situations ‘is one of the most ancient and complex questions of law in not only compensation but tort law.’ ” (*Santa Cruz Poultry, Inc. v. Superior Court* (1987) 194 Cal.App.3d 575, 578 [239 Cal.Rptr. 578], internal citation omitted.)
- “In determining whether an employee is covered within the compensation system and thus entitled to recover compensation benefits, the ‘definitional reach of these covered employment relationships is very broad.’ A covered employee is ‘every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written.’ ‘Any person rendering service for another, other than as an independent contractor, or unless expressly excluded herein, is presumed to be an employee.’ ... [T]hese provisions mandate a broad and generous interpretation in favor of inclusion in the system. Necessarily the other side of that coin is a presumption against the availability of a tort action where an employment relation exists. One result cannot exist without the other. Further, this result does not depend upon ‘informed consent,’ but rather on the parties’ legal status. ... [W]here the facts of employment are not disputed, the existence of a covered relationship is a question of law.” (*Santa Cruz Poultry, Inc., supra*, 194 Cal.App.3d at pp. 583-584, internal citations omitted.)
- “ ‘The requirement of ... section 3600 is twofold. On the one hand, the injury must occur “in the course of the employment.” This concept “ordinarily refers to the time, place, and circumstances under which the injury occurs.” Thus “ ‘[a]n employee is in the “course of his employment” when he does those reasonable things which his contract with his employment expressly or impliedly permits him to do.’ ” And, ipso facto, an employee acts within the course of his employment when “ ‘performing a duty imposed upon him by his employer and one necessary to perform before the terms of the contract [are] mutually satisfied.’ ” ’ [¶] ‘On the other hand, the statute requires that an injury “arise out of” the employment. ... It has long been settled that for an injury to “arise out of the employment” it must “occur by reason of a condition or incident of [the] employment” That is, the employment and the injury must be linked in some causal fashion.’ ” (*LaTourette v. Workers’ Comp. Appeals Bd.* (1998) 17 Cal.4th 644, 651 [72 Cal.Rptr.2d 217, 951 P.2d 1184], internal citations and footnote omitted.)
- “The requirements that an injury arise out of employment or be proximately caused by employment are sometimes referred to together as the requirement of industrial causation. It is a looser concept of

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causation than the concept of proximate cause employed in tort law. In general, the industrial causation requirement is satisfied ‘if the connection between work and the injury [is] a contributing cause of the injury’ ” (*Lee v. West Kern Water Dist.* (2016) 5 Cal.App.5th 606, 624 [210 Cal.Rptr.3d 362], internal citation omitted.)

- “For our purposes here, it is important that ‘arising out of’ and ‘in the course of’ are two separate requirements. Even if it is conceded that an employee was injured while performing job tasks in the workplace during working hours, the exclusivity rule applies only if it also is shown that the work was a contributing cause of the injury.” (*Lee, supra*, 5 Cal.App.5th at p. 625.)
- “The jury could properly make this finding [that conduct was not within scope of employment] by applying special instruction No. 5, the instruction stating that an employer's conduct falls outside the workers' compensation scheme when an employer steps outside of its proper role or engages in conduct unrelated to the employment. This instruction stated the doctrine of *Fermino* correctly.” (*Lee, supra*, 5 Cal.App.5th at pp. 628–629.)
- “The concept of ‘scope of employment’ in tort is more restrictive than the phrase ‘arising out of and in the course of employment,’ used in workers’ compensation.” (*Tognazzini v. San Luis Coastal Unified School Dist.* (2001) 86 Cal.App.4th 1053, 1057 [103 Cal.Rptr.2d 790], internal citations omitted.)
- “Whether an employee’s injury arose out of and in the course of her employment is generally a question of fact to be determined in light of the circumstances of the particular case. However, where the facts are undisputed, resolution of the question becomes a matter of law.” (*Wright v. Beverly Fabrics, Inc.* (2002) 95 Cal.App.4th 346, 353 [115 Cal.Rptr.2d 503], internal citations omitted.)
- “Injuries sustained while an employee is performing tasks within his or her employment contract but outside normal work hours are within the course of employment. The rationale is that the employee is still acting in furtherance of the employer’s business.” (*Wright, supra*, 95 Cal.App.4th at p. 354.)

Secondary Sources

2 Witkin, Summary of California Law (10th ed. 2005) Workers’ Compensation, §§ 20, 24–26, 31, 34, 39–42

Chin et al., California Practice Guide: Employment Litigation (The Rutter Group) ¶¶ 3:515, 12:192, 15:507, 15:509, 15:523.2, 15:523.10, 15:526.1, 15:556, 15:573, 15:580, 15:591

1 Hanna, California Law of Employee Injuries and Workers’ Compensation (2d ed.) Ch. 4, §§ 4.03–4.06 (Matthew Bender)

1 Herlick, California Workers’ Compensation Law (6th ed.), Ch. 10, *The Injury*, § 10.09 (Matthew Bender)

1 California Employment Law, Ch. 20, *Liability for Work-Related Injuries*, § 20.10 (Matthew Bender)

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1 Levy et al., California Torts, Ch. 10, *Effect of Workers' Compensation Law*, §§ 10.02, 10.03[3], 10.10
(Matthew Bender)

51 California Forms of Pleading and Practice, Ch. 577, *Workers' Compensation*, §§ 577.310, 577.530
(Matthew Bender)

23 California Points and Authorities, Ch. 239, *Workers' Compensation Exclusive Remedy Doctrine*
(Matthew Bender)

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3244. Civil Penalty—Willful Violation (Civ. Code, § 1794(c))

[Name of plaintiff] claims that [name of defendant]’s failure to [describe violation of Song-Beverly Consumer Warranty Act, e.g., repurchase or replace the vehicle after a reasonable number of repair opportunities] was willful and therefore asks that you impose a civil penalty against [name of defendant]. A civil penalty is an award of money in addition to a plaintiff’s damages. The purpose of this civil penalty is to punish a defendant or discourage [him/her/it] from committing ~~such~~ violations in the future.

If [name of plaintiff] has proved that [name of defendant]’s failure was willful, you may impose a civil penalty against [him/her/it]. The penalty may be in any amount you find appropriate, up to a maximum of two times the amount of [name of plaintiff]’s actual damages.

“Willful” means that [name of defendant] knew of [his/her/its] legal obligations and intentionally declined to follow them~~what [he/she/it] was doing and intended to do it~~. However, a violation is not willful you may not impose a civil penalty if you find that [name of defendant] believed reasonably and in good faith believed that the facts did not require [describe ~~facts negating~~ statutory obligation, e.g., repurchasing or replacing the vehicle].

~~The penalty may be in any amount you find appropriate, up to a maximum of two times the amount of [name of plaintiff]’s actual damages.~~

New September 2003; Revised February 2005, December 2005, December 2011, May 2018

Directions for Use

This instruction is intended for use when the plaintiff requests a civil penalty under Civil Code section 1794(c). In the opening paragraph, set forth all claims for which a civil penalty is sought.

Depending on the nature of the claim at issue, factors that the jury may consider in determining willfulness may be added. (See, e.g., *Jensen v. BMW of North America, Inc.* (1995) 35 Cal.App.4th 112, 136 [41 Cal.Rptr.2d 295] [among factors to be considered by the jury are whether (1) the manufacturer knew the vehicle had not been repaired within a reasonable period or after a reasonable number of attempts, and (2) whether the manufacturer had a written policy on the requirement to repair or replace].)

Sources and Authority

- Civil Penalty for Willful Violation. Civil Code section 1794(c).
- “[I]f the trier of fact finds the defendant willfully violated its legal obligations to plaintiff, it has discretion under [Civil Code section 1794,] subdivision (c) to award a penalty against the defendant. Subdivision (c) applies to suits concerning any type of ‘consumer goods,’ as that term is defined in section 1791 of the Act.” (*Suman v. Superior Court* (1995) 39 Cal.App.4th 1309, 1315 [46 Cal.Rptr.2d 507].)

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- “Whether a manufacturer willfully violated its obligation to repair the car or refund the purchase price is a factual question for the jury that will not be disturbed on appeal if supported by substantial evidence.” (*Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1104 [109 Cal.Rptr.2d 583].)
- “ ‘In civil cases, the word “willful,” as ordinarily used in courts of law, does not necessarily imply anything blamable, or any malice or wrong toward the other party, or perverseness or moral delinquency, but merely that the thing done or omitted to be done was done or omitted intentionally. It amounts to nothing more than this: That the person knows what he is doing, intends to do what he is doing, and is a free agent.’ ” (*Ibrahim v. Ford Motor Co.* (1989) 214 Cal.App.3d 878, 894 [263 Cal.Rptr. 64], internal citations omitted.)
- “In regard to the willful requirement of Civil Code section 1794, subdivision (c), a civil penalty may be awarded if the jury determines that the manufacturer ‘knew of its obligations but intentionally declined to fulfill them. There is no requirement of blame, malice or moral delinquency. However, ‘. . . a violation is not willful if the defendant's failure to replace or refund was the result of a good faith and reasonable belief the facts imposing the statutory obligation were not present.’ ” (*Schreidel v. American Honda Motor Co.* (1995) 34 Cal.App.4th 1242, 1249-1250 [40 Cal.Rptr.2d 576], internal citations omitted; see also *Bishop v. Hyundai Motor Am.* (1996) 44 Cal.App.4th 750, 759 [52 Cal.Rptr.2d 134] [defendant agreed that jury was properly instructed with this language].)
- “[A] violation . . . is not willful if the defendant’s failure to replace or refund was the result of a good faith and reasonable belief the facts imposing the statutory obligation were not present. This might be the case, for example, if the manufacturer reasonably believed the product *did* conform to the warranty, or a reasonable number of repair attempts had not been made, or the buyer desired further repair rather than replacement or refund. [¶] Our interpretation of section 1794(c) is consistent with the general policy against imposing forfeitures or penalties against parties for their good faith, reasonable actions. Unlike a standard requiring the plaintiff to prove the defendant *actually knew* of its obligation to refund or replace, which would allow manufacturers to escape the penalty by deliberately remaining ignorant of the facts, the interpretation we espouse will not vitiate the intended deterrent effect of the penalty. And unlike a simple equation of willfulness with volition, which would render ‘willful’ virtually all cases of refusal to replace or refund, our interpretation preserves the Act’s distinction between willful and nonwillful violations. Accordingly, ‘[a] decision made without the use of reasonably available information germane to that decision is not a reasonable, good faith decision.’ ” (*Lukather v. General Motors, LLC* (2010) 181 Cal.App.4th 1041, 1051 [104 Cal.Rptr.3d 853], original italics, internal citation omitted.)
- “[Defendant] was entitled to an instruction informing the jury its failure to refund or replace was not willful if it reasonably and in good faith believed the facts did not call for refund or replacement. Such an instruction would have given the jury legal guidance on the principal issue before it in determining whether a civil penalty could be awarded.” (*Kwan v. Mercedes Benz of N. Am.* (1994) 23 Cal.App.4th 174, 186–187 [28 Cal.Rptr.2d 371].)
- “There is evidence [defendant] was aware that numerous efforts to find and fix the oil leak had been unsuccessful, which is evidence a jury may consider on the question of willfulness. Additionally, the

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jury could conclude that [defendant]’s policy, which requires a part be replaced or adjusted before [defendant] deems it a repair attempt but excludes from repair attempts any visit during which a mechanic searches for but is unable to locate the source of the problem, is unreasonable and not a good faith effort to honor its statutory obligations to repurchase defective cars. Finally, there was evidence that [defendant] adopted internal policies that erected hidden obstacles to the ability of an unwary consumer to obtain redress under the Act. This latter evidence would permit a jury to infer that [defendant] impedes and resists efforts by a consumer to force [defendant] to repurchase a defective car, regardless of the presence of an unrepairable defect, and that [defendant]’s decision to reject [plaintiff]’s demand was made pursuant to [defendant]’s policies rather than to its good faith and reasonable belief the car did not have an unrepairable defect covered by the warranty or that a reasonable number of attempts to effect a repair had not yet occurred.” (*Oregel, supra*, 90 Cal.App.4th at pp. 1104–1105, internal citations omitted.)

- “[T]he penalty under section 1794(c), like other civil penalties, is imposed as punishment or deterrence of the defendant, rather than to compensate the plaintiff. In this, it is akin to punitive damages. Neither punishment nor deterrence is ordinarily called for if the defendant's actions proceeded from an honest mistake or a sincere and reasonable difference of factual evaluation. As our Supreme Court recently observed, ‘. . . courts refuse to impose civil penalties against a party who acted with a good faith and reasonable belief in the legality of his or her actions.’” (*Kwan, supra*, ~~↖ Mercedes Benz of N. Am. (1994)~~ 23 Cal.App.4th at pp.174, 184–185 [~~28 Cal.Rptr.2d 371~~].)

Secondary Sources

4 Witkin, Summary of California Law (10th ed. 2005) Sales, §§ 321–324

1 California UCC Sales & Leases (Cont.Ed.Bar) Warranties, § 3.90

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.30 (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*, § 502.53[1][b] (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales*, § 206.129 (Matthew Bender)

5 California Civil Practice: Business Litigation § 53:32 (Thomson Reuters)

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4010. Limiting Instruction—Expert Testimony

~~Revoked May 2018. See *People v. Sanchez* (2016) 63 Cal.4th 665, 684 [204 Cal.Rptr.3d 102, 374 P.3d 320] and *Conservatorship of K.W.* (2017) 13 Cal.App.5th 1274, 1281 [221 Cal.Rptr.3d 622].~~

~~You have heard testimony by an expert witness regarding reports and statements from hospital staff and other persons who have come into contact with [name of respondent]. This testimony was admitted for the limited purpose of establishing the basis for the opinion expressed by the testifying expert. You may consider those reports and statements to help you examine the basis of the expert's opinion. You may not use the reports and statements as independent proof of respondent's mental condition or [his/her] ability to provide for food, clothing, or shelter.~~

~~New June 2005~~

~~Sources and Authority~~

- ~~• Limited Admissibility of Evidence. Evidence Code section 355.~~
- ~~• “A psychiatrist is permitted to testify on a person’s mental capacities and can rely on hearsay including statements made by the patient or by third persons.” (*Conservatorship of Torres* (1986) 180 Cal.App.3d 1159, 1163 [226 Cal.Rptr. 142].)~~
- ~~• “When records are admitted ... a limiting instruction need not be given, *sua sponte*, but must be given upon request of counsel.” (*Conservatorship of Buchanan* (1978) 78 Cal.App.3d 281, 288 [144 Cal.Rptr. 241], internal citation omitted, disapproved on other grounds in *Conservatorship of Early* (1983) 35 Cal.3d 244, 255 [197 Cal.Rptr. 539, 673 P.2d 209].)~~

~~Secondary Sources~~

~~3 Witkin, California Procedure (5th ed. 2008) Actions, § 102~~

~~32 California Forms of Pleading and Practice, Ch. 361A, *Mental Health and Mental Disabilities: Judicial Commitment, Health Services, and Civil Rights*, § 361A.43 (Matthew Bender)~~

Draft—Not Approved by Judicial Council

4208. Affirmative Defense—Statute of Limitations—Actual and Constructive Fraud (Civ. Code, § 3439.09(a), (b))

[Name of defendant] contends that [name of plaintiff]'s lawsuit was not filed within the time set by law.

[[With respect to [name of plaintiff]'s claim of actual intent to hinder, delay, or defraud,] [To/to] succeed on this defense, [name of defendant] must prove that [name of plaintiff] filed [his/her/its] lawsuit later than four years after the [transfer was made/obligation was incurred] [or, if later than four years, no later than one year after the [transfer/obligation] was or could reasonably have been discovered by [name of plaintiff]]. ~~But in any event, the lawsuit must have been filed within seven years after the [transfer was made/the obligation was incurred].~~]

[[With respect to [name of plaintiff]'s claim of constructive fraud,] [To/to] succeed on this defense, [name of defendant] must prove that [name of plaintiff] filed [his/her/its] lawsuit later than four years after the [transfer was made/obligation was incurred].]

New June 2006; Revised December 2007, June 2016, May 2018

Directions for Use

This instruction provides an affirmative defense for failure to file within the statute of limitations. (See Civ. Code, § 3439.09(a), (b).) Read the first bracketed paragraph regarding delayed discovery in cases involving actual intent to hinder, delay, or defraud. (See Civ. Code, § 3439.04(a)(1); CACI No. 4200.) Read the second in cases involving constructive fraud. (See Civ. Code, §§ 3439.04(a)(2), 3439.05; CACI Nos. 4202, 4203.) Read the first bracketed phrases in those paragraphs if the plaintiff has brought both actual and constructive fraud claims.

*This instruction may not be modified for use for the seven-year period under Civil Code section 3439.09(c). (See *PGA West Residential Assn., Inc. v. Hulven Internat., Inc.* (2017) 14 Cal.App.5th 156, 178–185 [221 Cal.Rptr.3d 353] [Civil Code section 3439.09(c) is a statute of repose, not a statute of limitations].)*

Sources and Authority

- Statute of Limitations. Civil Code section 3439.09.
- “[T]he UFTA is not the exclusive remedy by which fraudulent conveyances and transfers may be attacked. They may also be attacked by, as it were, a common law action. If and as such an action is brought, the applicable statute of limitations is section 338 (d) and, more importantly, the cause of action accrues not when the fraudulent transfer occurs but when the judgment against the debtor is secured (or maybe even later, depending upon the belated discovery issue).” (*Macedo v. Bosio* (2001) 86 Cal.App.4th 1044, 1051 [104 Cal.Rptr.2d 1].)

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- “In the context of the scheme of law of which section 3934.09 is a part, where an alleged fraudulent transfer occurs while an action seeking to establish the underlying liability is pending, and where a judgment establishing the liability later becomes final, we construe the four-year limitation period, i.e., the language, ‘four years after the transfer was made or the obligation was incurred,’ ” to accommodate a tolling until the underlying liability becomes fixed by a final judgment.” (*Cortez v. Vogt* (1997) 52 Cal.App.4th 917, 920 [60 Cal.Rptr.2d 841].)
- “Cal. Civ. Code § 3439.09(a) and (b) are statutes of limitation requiring a plaintiff to file a fraudulent transfer action within four years of the transfer or, for an intentional fraud, within one year after the transfer was or could reasonably have been discovered.” (*PGA West Residential Assn., Inc., supra*, 14 Cal.App.5th at p. 179.)
- “However, ‘even if belated discovery can be pleaded and proven’ with respect to the statute of limitations applicable to common law remedies for fraudulent transfers, ‘in any event the maximum elapsed time for a suit under either the UFTA or otherwise is seven years after the transfer. [Citation.]’ This conclusion logically follows from the language of section 3439.09(c). ‘[B]y its use of the term “[n]otwithstanding any other provision of law,” the Legislature clearly meant to provide an overarching, all-embracing maximum time period to attack a fraudulent transfer, no matter whether brought under the UFTA or otherwise.’ ” (*PGA West Residential Assn., Inc., supra*, 14 Cal.App.5th at pp. 170–171, internal citation omitted.)

Secondary Sources

Ahart, California Practice Guide: Enforcing Judgments & Debts, Ch. 3-C, *Prejudgment Collection—Prelawsuit Considerations*, ¶ 3:351 et seq. (The Rutter Group)

23 California Forms of Pleading and Practice, Ch. 270, *Fraudulent Conveyances*, §§ 270.49, 270.50 (Matthew Bender)

Draft—Not Approved by Judicial Council

4605. Whistleblower Protection—Health or Safety Complaint—Essential Factual Elements (Lab. Code, § 6310)

[Name of plaintiff] claims that [name of defendant] [discharged/[other adverse employment action]] [him/her] in retaliation for [his/her] [specify, e.g., complaint to the Division of Occupational Safety and Health regarding unsafe working conditions]. 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], on [his/her] own behalf or on behalf of others, [select one or more of the following options:]]**

[made [an oral/a written] complaint to [specify to whom complaint was directed, e.g., the Division of Occupational Safety and Health] regarding [unsafe/unhealthy] working conditions;]

[or]

[[initiated a proceeding/caused a proceeding to be initiated] relating to [his/her [or] another person's] rights to workplace health or safety;]

[or]

[[testified/was about to testify] in a proceeding related to [his/her [or] another person's] rights to workplace health or safety;]

[or]

[exercised [his/her [or] another person's] rights to workplace health or safety;]

[or]

[participated in a workplace health and safety committee;]

[or]

[reported a work-related fatality, injury or illness;]

[or]

[requested access to occupational injury or illness reports and records;]

[or]

[exercised [specify other right(s) protected by the federal Occupational Safety and Health Act;]

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3. **That** *[name of defendant]* **[discharged/[other adverse employment action]]** *[name of plaintiff]*;
4. **That** *[name of plaintiff]*'s *[specify]* **was a substantial motivating reason for** *[name of defendant]*'s **decision to [discharge/[other adverse employment action]]** *[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.**

New December 2015; Revised December 2016, May 2018

Directions for Use

Use this instruction for a whistleblower claim under Labor Code section 6310 for employer retaliation for an employee's, or an employee's family member's, complaint or other protected activity about health or safety conditions. Select the appropriate statutorily protected activity in element 2 and summarize it in the introductory paragraph. (See Lab. Code, § 6310(a), (c).)

With regard to the first option in element 2, the complaint must have been made to (1) the Division of Occupational Safety and Health, (2) to another governmental agencies having statutory responsibility for or assisting the division with reference to employee safety or health, (3) to the employer, or (4) to the employee's representative. (Lab. Code, § 6310(a)(1).)

The statute requires that the employee's complaint be "bona fide." (See Lab. Code, § 6310(b).) There appears to be a split of authority as to whether "bona fide" means that there must be an actual health or safety violation or only that the employee have a good-faith belief that there are violations. (See *Touchstone Television Productions v. Superior Court* (2012) 208 Cal.App.4th 676, 682, fn. 5 [145 Cal.Rptr.3d 766].) The instruction should be modified if the court decides to instruct one way or the other on the meaning of "bona fide."

Note that element 4 uses the term "substantial motivating reason" to express both intent and causation between the employee's protected conduct and the defendant's adverse action. "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) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; CACI No. 2507, "*Substantial Motivating Reason*" Explained.) Whether the FEHA standard applies under Labor Code section 6310 has not been addressed by the courts. There is authority for a "but for" causation standard instead of "substantial motivating reason." (See *Touchstone Television Productions, supra*, 208 Cal.App.4th at pp. 681–682.)

Sources and Authority

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- Whistleblower Protection for Report of Health or Safety Violation. Labor Code section 6310.
- “Division” Defined. Labor Code section 6302(d).
- “[Plaintiff]’s action is brought under section 6310, subdivision (a)(1), which prohibits an employer from discriminating against an employee who makes ‘any oral or written complaint.’ Subdivision (b) provides that ‘[a]ny employee who is discharged, threatened with discharge, demoted, suspended, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because the employee has made a bona fide oral or written complaint to ... his or her employer ... of unsafe working conditions, or work practices ... shall be entitled to reinstatement and reimbursement for lost wages and work benefits caused by the acts of the employer.’ ” (*Sheridan v. Touchstone Television Productions, LLC* (2015) 241 Cal.App.4th 508, 512 [193 Cal.Rptr.3d 811].)
- “[T]he plaintiff did not lack a remedy: she could sue under section 6310, subdivision (b) which permits ‘an action for damages if the employee is discharged, threatened with discharge, or discriminated against by his or her employer because of the employee’s complaints about unsafe work conditions. Here, it is alleged that [the defendant] discriminated against [the plaintiff] by not renewing her employment contract. *To prevail on the claim, she must prove that, but for her complaints about unsafe work conditions, [the defendant] would have renewed the employment contract. Damages, however, are limited to “lost wages and work benefits caused by the acts of the employer.”*’ ” (*Touchstone Television Productions, supra*, 208 Cal.App.4th at pp. 681–682, original italics.)
- “The voicing of a fear about one’s safety in the workplace does not necessarily constitute a complaint about unsafe working conditions under Labor Code section 6310. [Plaintiff]’s declaration shows only that she became frightened for her safety as a result of her unfortunate experience ... and expressed her fear to [defendant]; it is not evidence that the ... office where she worked was actually unsafe within the meaning of Labor Code sections 6310 and 6402. Hence, [plaintiff]’s declaration fails to raise a triable issue of fact as to whether she was terminated for complaining to [defendant] about unsafe working conditions in violation of Labor Code section 6310.” (*Muller v. Auto. Club of So. Cal.* (1998) 61 Cal.App.4th 431, 452 [71 Cal.Rptr.2d 573], disapproved on other grounds in *Colmenares v. Braemar Country Club, Inc.* (2003) 29 Cal.4th 1019, 1031, fn. 6 [130 Cal.Rptr.2d 662, 63 P.3d 220].)
- “Citing *Muller v. Automobile Club of So. California* (1998) 61 Cal.App.4th 431, 452 [71 Cal.Rptr.2d 573], defendants assert plaintiff’s causes of action based on section 6310 must fail because an essential element of a section 6310 violation is that the workplace must actually be unsafe. We first note that the *Muller* court cites no authority for this assertion. It appears to contradict Justice Grodin’s pronouncement that ‘... an employee is protected against discharge or discrimination for complaining in good faith about working conditions or practices which he reasonably believes to be unsafe, whether or not there exists at the time of the complaint an OSHA standard or order which is being violated.’ We agree that an employee must be protected against discharge for a good faith complaint about working conditions which he believes to be unsafe.” (*Cabesuela v. Browning-Ferris Indus.* (1998) 68 Cal.App.4th 101, 109 [80 Cal.Rptr.2d 60], internal citation omitted.)

Draft—Not Approved by Judicial Council*Secondary Sources*

3 Witkin, Summary of California Law (10th ed. 2010) Agency, § 370

2 Wilcox, California Employment Law, Ch. 21, *Occupational Health and Safety Regulation*, § 21.20 (Matthew Bender)

3 California Torts, Ch. 40A, *Wrongful Termination*, § 40A.30 (Matthew Bender)

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

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, § 100.42 et seq. (Matthew Bender)

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4800. False Claims Act—Essential Factual Elements (Gov. Code, § 12651)

The California False Claims Act allows a public entity to recover damages from any person or entity that knowingly presents a false claim for payment or approval. [[Name of plaintiff] is an individual who brings this action on behalf of [name of public entity].] [Name of public entity] is a public entity.

[Name of plaintiff] claims that [name of defendant] presented a false claim to [it/[name of public entity]] for payment or approval. To establish this claim, [name of plaintiff] must prove all of the following:

- 1. That [name of defendant] knowingly presented or caused to be presented a false or fraudulent claim to [name of public entity] for payment or approval;**
- 2. That the claim was false or fraudulent in that [specify reason, e.g., [name of defendant] did not actually perform the work for which payment or approval was sought]; and**
- 3. That [name of defendant]'s false or fraudulent claim was material to [name of public entity]'s decision to pay out money to [name of defendant].**

"Knowingly" means that with respect to information about the claim, [name of defendant]

- (A) had actual knowledge that the information was false; or**
- (B) acted in deliberate ignorance of the truth or falsity of the information; or**
- (C) acted in reckless disregard of the truth or falsity of the information.**

Proof of specific intent to defraud is not required.

“Material” means that the claim had a natural tendency to influence, or was capable of influencing, the payment or receipt of [money/property/services] on the claim.

New May 2018

Directions for Use

An action under the False Claims Act (Gov. Code, § 12650 et seq.) may be brought by the attorney general if state funds are involved, the public entity that claims to have paid out money on a false claim, or by a private person acting as a “qui tam” plaintiff on behalf of the state or public entity. (Gov. Code, § 12650(a)–(c).) Give the optional next-to-last sentence of the opening paragraph if the plaintiff is an individual bringing the action qui tam.

The False Claims Act lists eight prohibited acts that violate the statute. (See Gov. Code, § 12651(a).) Element 1 sets out the first and most common of the prohibited acts; the knowing presentation of a false

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claim. (See Gov. Code, § 12650(a)(1).) Modify element 1 if a different prohibited act is at issue.

For an instruction on retaliation against an employee for bringing a false claim action, see CACI No. 4600, *False Claims Act: Whistleblower Protection—Essential Factual Elements*.

Sources and Authority

- California False Claims Act. Government Code section 12650 et seq.
- “In 1987, the California Legislature enacted the False Claims Act, patterned on a similar federal statutory scheme, to supplement governmental efforts to identify and prosecute fraudulent claims made against state and local governmental entities. As relevant here, the False Claims Act permits the recovery of civil penalties and treble damages from any person who ‘[k]nowingly presents or causes to be presented [to the state or any political subdivision] . . . a false claim for payment or approval.’ To be liable under the False Claims Act, a person must have actual knowledge of the information, act in deliberate ignorance of the truth or falsity of the information, and/or act in reckless disregard of the truth or falsity of the information.” (§ 12650, subd. (b)(2).) (*Rothschild v. Tyco Internat. (US), Inc.* (2000) 83 Cal.App.4th 488, 494-495 [99 Cal.Rptr.2d 721], internal citations omitted.)
- “The Legislature designed the CFCA ‘to prevent fraud on the public treasury,’ and it ‘should be given the broadest possible construction consistent with that purpose.’ ” (*San Francisco Unified School Dist. ex rel. Contreras v. Laidlaw Transit, Inc.* (2010) 182 Cal.App.4th 438, 446 [106 Cal.Rptr.3d 84].)
- “Since there are no pattern instructions for CFCA claims, the trial court gave instructions taken from the language of the statute. Quoting Government Code section 12651, the trial court explained that a person would be liable for damages under the CFCA if the person ‘(1) Knowingly presents or causes to be presented to an officer or employee of the City, a false claim for payment or approval. [¶] (2) Knowingly makes, uses, or causes to be made or used a false record or statement to get a false claim paid or approved by the City.’ The instructions defined ‘person,’ ‘knowingly,’ and ‘claim’ using the language of Government Code section 12650, but did not define the word ‘false.’ Indeed, ‘false’ is not defined in the statute.” (*Thompson Pacific Construction, Inc. v. City of Sunnyvale* (2007) 155 Cal.App.4th 525, 546 [66 Cal.Rptr.3d 175].)
- “We agree with City that the word ‘false’ has no special meaning and that [claimant]’s concern is really related to the mental state necessary for liability under the CFCA, an element that was adequately explained in the instructions that were given.” (*Thompson Pacific, supra*, 155 Cal.App.4th at p. 547.)
- “Our conclusion that the allegations in the Complaint are sufficient to withstand a demurrer does not mean that every breach of a contract term that is in some sense ‘material’ necessarily satisfies the materiality requirement for a CFCA claim. That is, a false implied certification relating to a ‘material’ contract term may not always be ‘material’ to the government’s decision to pay a contractor. Materiality is a mixed question of law and fact, and a showing in a motion for summary judgment or at trial that the alleged breach would not have affected the payment

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decision will defeat a CFCA claim.” (*San Francisco Unified School Dist. ex rel. Contreras, supra*, 182 Cal.App.4th at p. 456, internal citation omitted.)

Secondary Sources

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4801. Implied Certification of Compliance With All Contractual Provisions—Essential Factual Elements

Under the California False Claims Act, when [a/an] [*specify defendant's status, e.g., vendor*] submits a claim to a public entity for payment on a contract, [he/she/it] impliedly certifies that [he/she/it] has complied with all of the requirements of the contract, not just those relevant to the claim presented. [[*Name of plaintiff*] is an individual who brings this action on behalf of [*name of public entity*].] [*Name of public entity*] is a public entity.

[*Name of plaintiff*] claims that [*name of defendant*] presented a false claim to [it/*name of public entity*] for payment or approval by falsely certifying by implication that it had complied with the requirements of the contract. To establish this claim, [*name of plaintiff*] must prove all of the following:

- 1. That [*name of defendant*] had not complied with [*specify contractual terms alleged to have been breached*] when it presented a claim for payment to [*name of public entity*].**
- 2. That when [*name of defendant*] submitted its claims for payment, [he/she/it] knowingly failed to disclose that [he/she/it] had not complied with all of the terms of the contract; and**
- 3. That [*name of defendant*]'s failure to comply with all the terms of the contract was material to [*name of public entity*]'s decision to make the requested payment to [*name of defendant*].**

"Knowingly" means that with respect to the claim, [*name of defendant*]

(A) had actual knowledge that [he/she/it] had failed to disclose [his/her/its] noncompliance; or

(B) acted in deliberate ignorance of the truth or falsity of whether [he/she/it] had failed to disclose [his/her/its] noncompliance; or

(C) acted in reckless disregard of the truth or falsity of whether [he/she/it] had failed to disclose [his/her/its] noncompliance.

Proof of specific intent to defraud is not required.

A failure to comply with all the terms of the contract is “material” if it had a natural tendency to influence, or was capable of influencing, the payment or receipt of [money/property/services] on the claim.

New May 2018

Directions for Use

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“Under the California False Claims Act, a vendor impliedly certifies compliance with its express contractual requirements when it bills a public agency for providing goods or services. A False Claims Act action may be based on allegations that the implied certification was false and had a natural tendency to influence the public agency’s decision to pay for the goods or services.” (*San Francisco Unified School Dist. ex rel. Contreras v. Laidlaw Transit, Inc.* (2010) 182 Cal.App.4th 438, 441 [106 Cal.Rptr.3d 84].)

The vendor must have made the claim knowing that it had failed to disclose noncompliance with all of the terms of the contract. (See *San Francisco Unified School Dist. ex rel. Contreras, supra*, 182 Cal.App.4th at pp. 452-453 [contractor must have the requisite knowledge, rendering the failure to disclose the contractual noncompliance fraudulent]; see also *Rothschild v. Tyco Internat. (US), Inc.* (2000) 83 Cal.App.4th 488, 494-495 [99 Cal.Rptr.2d 721].) While the breach must be material as defined, it does not have to involve the particular contractual provision on which payment is sought. (See *San Francisco Unified School Dist. ex rel. Contreras, supra*, 182 Cal.App.4th at pp. 442–444 [bus company provided school district with student transportation, but did so with buses that did not meet the contractually and legally required safety requirements].)

Sources and Authority

- “Under the CFCA, a vendor impliedly certifies compliance with its express contractual requirements when it bills a public agency for providing goods or services. Allegations that the implied certification was false and had a natural tendency to influence the public agency’s decision to pay for the goods or services are sufficient to survive a demurrer.” (*San Francisco Unified School Dist. ex rel. Contreras, supra*, 182 Cal.App.4th at p. 441.)
- “[Defendant] initially argues its claims for payment were not false, because there was no literally false information on the face of the invoices, which identify the routes driven and the charges arising from each route. However, [defendant] ultimately concedes that a section 12651, subdivision (a)(1) false claim need not contain an expressly false statement to be actionable.” (*San Francisco Unified School Dist. ex rel. Contreras, supra*, 182 Cal.App.4th at p. 448.)
- “[A]n alleged falsity satisfies the materiality requirement where it has the ‘ “ ‘natural tendency to influence agency action or is capable of influencing agency action.’ ” [Citation.]’ ” (*San Francisco Unified School Dist. ex rel. Contreras, supra*, 182 Cal.App.4th at p. 454.)
- “Plaintiffs further allege that [defendant]’s invoices impliedly certified compliance with the material terms of the Contract, that the terms violated were material, and that the District was unaware of the falsity of [defendant]’s implied certification, resulting in a loss of District funds. Plaintiffs’ allegations are adequate to survive a demurrer. Under the case law discussed above, [defendant]’s implied certification that it had satisfactorily performed its material obligations under the Contract, including provisions designed to protect the health and safety of the student population, had a ‘ “ ‘natural tendency’ ’ ’ to cause the District to make payments it would not have made had it been aware of [defendant]’s noncompliance.” (*San Francisco Unified School Dist. ex rel. Contreras, supra*, 182 Cal.App.4th at p. 455, internal citation omitted.)
- “Our conclusion that the allegations in the Complaint are sufficient to withstand a demurrer does

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not mean that every breach of a contract term that is in some sense ‘material’ necessarily satisfies the materiality requirement for a CFCA claim. That is, a false implied certification relating to a ‘material’ contract term may not always be ‘material’ to the government’s decision to pay a contractor. Materiality is a mixed question of law and fact, and a showing in a motion for summary judgment or at trial that the alleged breach would not have affected the payment decision will defeat a CFCA claim.” (*San Francisco Unified School Dist. ex rel. Contreras, supra*, 182 Cal.App.4th at p. 456, internal citation omitted.)

Secondary Sources

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5022. Introduction to General Verdict Form

I will give you [a] general verdict form[s]. The form[s] ask[s] you to find either in favor of [name of plaintiff] or [name of defendant]. [It also asks you to answer [an] additional question[s] regarding [specify, e.g., the right to punitive damages]. I have already instructed you on the law that you are to refer to in making your determination[s].

At least nine of you must agree on your decision [and in answering the additional question[s]]. [If there is more than one question on the verdict form, as long as nine of you agree on your answers to each question, the same nine do not have to agree on each answer.]

In reaching your verdict [and answering the additional question[s]], you should consider whether the party with the burden of proof has proved all of the necessary facts in support of each element of [his/her/its] claim or defense. You should review the elements addressed in the other instructions that I have given you and determine if at least nine of you agree that each element has been proven by the evidence received in the trial. The same nine do not have to agree on each element.

New May 2018

Directions for Use

If a general verdict will be used, this instruction may be given to guide the jury on how to go about reaching a verdict. With a general verdict, there is a danger that the jury will shortcut the deliberative process of carefully looking at each element of each claim or defense and simply vote for the plaintiff or for the defendant. This instruction directs the jury to approach its task as if a special verdict were being used, and questions on each element of each claim or defense had to be answered.

This instruction is also designed to lessen the possibility that the “paradox of shifting majorities” will happen. This paradox occurs when the same jury analyzing the same evidence would find liability with a special verdict, but not with a general verdict. The possibility arises because the law is that while each element must be agreed to by nine jurors, it does not have to be the same nine for each element. A juror who votes no on one question but is in a minority of three or less must continue to deliberate and vote on all of the remaining questions. (See *Juarez v. Superior Court* (1982) 31 Cal.3d 759, 768–769 [183 Cal.Rptr. 852; 647 P.2d 128]; CACI No. 5012, *Introduction to Special-Verdict Form*.)

If for example, the vote on element 3 is 9-3 yes with jurors 10-12 voting no, and the vote on element 4 is 11-1 yes with juror 1 voting no, there will be liability with a special verdict because each element has received nine yes votes. But if a general verdict is used, there would be no liability because only 8 jurors have found true every element of the claim. The California Supreme Court has found this result to be proper. (See *Juarez, supra*, 31 Cal.3d at p. 768.) If the jury votes on each element of each claim or defense even though a general verdict is being used, it is more likely to find nine votes for each element, even though it may be a different nine each time.

Sources and Authority

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- “[I]f nine identical jurors agree that a party is negligent and that such negligence is the proximate cause of the other party's injuries, special verdicts apportioning damages are valid so long as they command the votes of any nine jurors. To hold otherwise would be to prohibit jurors who dissent on the question of a party's liability from participation in the important remaining issue of allocating responsibility among the parties, a result that would deny all parties the right to a jury of 12 persons deliberating on all issues.” (*Juarez, supra*, 31 Cal.3d at p. 768.)
- “To determine whether a general verdict is supported by the evidence it is necessary to ascertain the issues embraced within the verdict and measure the sufficiency of the evidence as related to those issues. For this purpose reference may be had to the pleadings, the pretrial order and the charge to the jury. A general verdict implies a finding of every fact essential to its validity which is supported by the evidence. Where several issues responsive to different theories of law are presented to the jury and the evidence is sufficient to support facts sustaining the verdict under one of those theories, it will be upheld even though the evidence is insufficient to support facts sustaining it under any other theory.” (*Owens v. Pyeatt* (1967) 248 Cal.App.2d 840, 844 [57 Cal.Rptr. 100].)
- “Implicit in [general] verdicts is the presumption that ‘all material facts in issue as to which substantial evidence was received were determined in a manner consistent and in conformance with the verdict.’ ” (*Coorough v. De Lay* (1959) 171 Cal.App.2d 41, 45 [339 P.2d 963].)
- “A general verdict imports a finding in favor of the winning party on all the averments of his pleading material to his recovery.” (*Behr v. County of Santa Cruz* (1959) 172 Cal.App.2d 697, 712 [342 P.2d 987].)

Secondary Sources