

Archived—May 2023 Supplement

Judicial Council of California Civil Jury Instructions

CACI*

* Pronounced “Casey”

Supplement With New and Revised Instructions

As approved at
the Judicial Council’s Rules Committee April 2023 meeting
and the Judicial Council May 2023 Meeting



**Judicial Council of California
Advisory Committee on Civil Jury Instructions**

Hon. Adrienne M. Grover, Chair

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Preface to CACI Updates

This supplement to the 2023 edition of CACI includes a number of additions and changes to the instructions, which were first published in 2003. In providing these updates, the Judicial Council Advisory Committee on Civil Jury Instructions is fulfilling its charge to maintain CACI. The committee is also striving to add instructions in new areas of the law and to augment existing areas.

The impetus for the revisions came from several sources including CACI users who detected changes in the law or who simply sought to do a better job of explaining the law in plain English. Responding to feedback from users is consistent with the Advisory Committee's goal to act as a vehicle for maintaining CACI as the work product of the legal community. We hope that our hundreds of contributors view our role in the same way and that they will continue to support us.

May 2023

Hon. Adrienne M. Grover
Court of Appeal, Sixth District
Chair, Advisory Committee on Civil Jury Instructions

The Advisory Committee on Civil Jury Instructions welcomes comments. Send comments by email to: civiljuryinstructions@jud.ca.gov

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221. Conflicting Expert Testimony

If the expert witnesses disagreed with one another, you should weigh each opinion against the others. You should examine the reasons given for each opinion and the facts or other matters that each witness relied on. You may also compare the experts' qualifications.

New September 2003

Directions for Use

Unless the issue is one that can be resolved only with expert testimony, the jury should not be instructed that they must accept the entire testimony of the expert whose testimony appears to be entitled to greater weight. (*Santa Clara County Flood Control and Water Conservation Dist. v. Freitas* (1960) 177 Cal.App.2d 264, 268–269 [2 Cal.Rptr. 129].)

For an instruction on expert witnesses generally, see CACI No. 219, *Expert Witness Testimony*. For an instruction on hypothetical questions, see CACI No. 220, *Experts—Questions Containing Assumed Facts*.

Sources and Authority

- “[C]redibility of expert witnesses is a matter for the jury after proper instructions from the court.” (*Williams v. Volkswagenwerk Aktiengesellschaft* (1986) 180 Cal.App.3d 1244, 1265 [226 Cal.Rptr. 306].)
- “[W]e rely upon the rule of *Sargon* [*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747 [149 Cal.Rptr.3d 614, 288 P.3d 1237]] that although trial courts ‘have a substantial “gatekeeping” responsibility’ in evaluating proposed expert opinion, the gate tended is not a partisan checkpoint.” (*Davis v. Honeywell Internat. Inc.* (2016) 245 Cal.App.4th 477, 492 [199 Cal.Rptr.3d 583], internal citation omitted.)
- “Complex questions of medical causation are prone to uncertainty. . . . It is therefore imperative that the party without the burden of proof be allowed to suggest alternative causes, or the uncertainty of causation, to less than a reasonable medical probability. To withhold such information from the jury is to deprive it of relevant information in assessing whether the plaintiff has met its ultimate burden of persuasion. And, it would improperly transfer from the jury to the court the responsibility for resolving conflicts between competing expert opinions.” (*Kline v. Zimmer, Inc.* (2022) 79 Cal.App.5th 123, 133–134 [294 Cal.Rptr.3d 500], internal citation and footnote omitted.)

Secondary Sources

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CACI No. 221

7 Witkin, *California Procedure* (5th ed. 2008) *Trial*, § 307

48 *California Forms of Pleading and Practice*, Ch. 551, *Trial*, § 551.70 (Matthew Bender)

403. Standard of Care for Person with a Physical Disability

A person with a physical disability is required to use the amount of care that a reasonably careful person who has the same physical disability would use in the same situation.

New September 2003; Revised May 2023

Directions for Use

By “same” disability, this instruction is referring to the effect of the disability, not the cause.

Sources and Authority

- Liability of Person of “Unsound Mind.” Civil Code section 41.
- “[A] person [whose faculties are impaired] is bound to use that care which a person of ordinary prudence with faculties so impaired would use in the same circumstances.” (*Conjorsky v. Murray* (1955) 135 Cal.App.2d 478, 482 [287 P.2d 505].)
- “The jury was properly instructed that negligence is failure to use ordinary care and that ordinary care is that care which persons of ordinary prudence exercise in the management of their own affairs. A person with faculties impaired is held to the same degree of care and no higher. He is bound to use that care which a person of ordinary prudence with faculties so impaired would use in the same circumstances.” (*Jones v. Bayley* (1942) 49 Cal.App.2d 647, 654 [122 P.2d 293].)
- “We conclude sudden mental illness may not be posed as a defense to harmful conduct and that the harm caused by such individual’s behavior shall be judged on the objective reasonable person standard in the context of a negligence action as expressed in Civil Code section 41.” (*Bashi v. Wodarz* (1996) 45 Cal.App.4th 1314, 1323 [53 Cal.Rptr.2d 635].)
- Restatement Second of Torts, section 283B, provides: “Unless the actor is a child, his insanity or other mental deficiency does not relieve the actor from liability for conduct which does not conform to the standard of a reasonable man under like circumstances.”
- Restatement Second of Torts, section 283C, provides: “If the actor is ill or otherwise physically disabled, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like disability.”

Secondary Sources

California Tort Guide (Cont.Ed.Bar 3d ed.) § 1.21.2

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

425. “Gross Negligence” Explained

Gross negligence is the lack of any care or an extreme departure from what a reasonably careful person would do in the same situation to prevent harm to oneself or to others.

A person can be grossly negligent by acting or by failing to act.

New April 2008; Revised December 2015

Directions for Use

Give this instruction if a particular statute that is at issue in the case creates a distinction based on a standard of gross negligence. (See, e.g., Gov. Code, § 831.7(c)(1)(E) [immunity for public entity or employee to liability to participant in or spectator to hazardous recreational activity does not apply if act of gross negligence is proximate cause of injury].) Courts generally resort to this definition if gross negligence is at issue under a statute. (See, e.g., *Wood v. County of San Joaquin* (2003) 111 Cal.App.4th 960, 971 [4 Cal.Rptr.3d 340].)

Give this instruction with CACI No. 400, *Negligence—Essential Factual Elements*, but modify that instruction to refer to gross negligence.

This instruction may also be given if case law has created a distinction between gross and ordinary negligence. For example, under the doctrine of express assumption of risk, a signed waiver of liability may release liability for ordinary negligence only, not for gross negligence. (See *City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 777 [62 Cal.Rptr.3d 527, 161 P.3d 1095]; see also CACI No. 451, *Affirmative Defense—Contractual Assumption of Risk*.) Once the defendant establishes the validity and applicability of the release, the plaintiff must prove gross negligence by a preponderance of the evidence. (*Eriksson v. Nunnink* (2015) 233 Cal.App.4th 708, 732, 734 [183 Cal.Rptr.3d 234].) A lack of gross negligence can be found as a matter of law if the plaintiff’s showing is insufficient to suggest a triable issue of fact. (See *Grebing v. 24 Hour Fitness USA, Inc.* (2015) 234 Cal.App.4th 631, 638–639 [184 Cal.Rptr.3d 155]; cf. *Jimenez v. 24 Hour Fitness USA, Inc.* (2015) 237 Cal.App.4th 546, 555 [188 Cal.Rptr.3d 228] [whether conduct constitutes gross negligence is generally a question of fact, depending on the nature of the act and the surrounding circumstances shown by the evidence].)

Sources and Authority

- “ ‘Gross negligence’ long has been defined in California and other jurisdictions as either a ‘ “ ‘want of even scant care’ ” ’ or ‘ “ ‘an extreme departure from the ordinary standard of conduct.’ ” ’ ” (*City of Santa Barbara, supra*, 41 Cal.4th at p. 754, internal citations omitted.)
- “By contrast, ‘wanton’ or ‘reckless’ misconduct (or ‘ “willful and wanton negligence” ’) describes conduct by a person who may have no intent to cause

harm, but who intentionally performs an act so unreasonable and dangerous that he or she knows or should know it is highly probable that harm will result.” (*City of Santa Barbara, supra*, 41 Cal.4th at p. 754, fn. 4, internal citations omitted.)

- “California does not recognize a distinct cause of action for ‘gross negligence’ independent of a statutory basis.” (*Eriksson v. Nunnink* (2011) 191 Cal.App.4th 826, 856 [120 Cal.Rptr.3d 90].)
- “Gross negligence is pleaded by alleging the traditional elements of negligence: duty, breach, causation, and damages. However, to set forth a claim for ‘gross negligence’ the plaintiff must allege extreme conduct on the part of the defendant.” (*Rosencrans v. Dover Images, Ltd.* (2011) 192 Cal.App.4th 1072, 1082 [122 Cal.Rptr.3d 22], internal citation omitted.)
- “The theory that there are degrees of negligence has been generally criticized by legal writers, but a distinction has been made in this state between ordinary and gross negligence. Gross negligence has been said to mean the want of even scant care or an extreme departure from the ordinary standard of conduct.” (*Van Meter v. Bent Constr. Co.* (1956) 46 Cal.2d 588, 594 [297 P.2d 644], internal citation omitted.)
- “Numerous California cases have discussed the doctrine of gross negligence. Invariably these cases have turned upon an interpretation of a statute which has used the words ‘gross negligence’ in the text.” (*Cont’l Ins. Co. v. Am. Prot. Indus.* (1987) 197 Cal.App.3d 322, 329 [242 Cal.Rptr. 784].)
- “[I]n cases involving a waiver of liability for future negligence, courts have held that conduct that substantially or unreasonably increased the inherent risk of an activity or actively concealed a known risk could amount to gross negligence, which would not be barred by a release agreement. Evidence of conduct that evinces an extreme departure from manufacturer’s safety directions or an industry standard also could demonstrate gross negligence. Conversely, conduct demonstrating the failure to guard against, or warn of, a dangerous condition typically does not rise to the level of gross negligence.” (*Anderson v. Fitness Internat., LLC* (2016) 4 Cal.App.5th 867, 881 [208 Cal.Rptr.3d 792], internal citations omitted.)
- “[P]ublic policy generally precludes enforcement of an agreement that would remove an obligation to adhere to even a *minimal* standard of care. Applying that general rule here, we hold that an agreement purporting to release liability for future gross negligence committed against a developmentally disabled child who participates in a recreational camp designed for the needs of such children violates public policy and is unenforceable.” (*City of Santa Barbara, supra*, 41 Cal.4th at p. 777, original italics.)
- “‘Prosser on Torts (1941) page 260, also cited by the *Van Meter* court for its definition of gross negligence, reads as follows: “Gross Negligence. This is very great negligence, or the want of even scant care. It has been described as a failure to exercise even that care which a careless person would use. Many

courts, dissatisfied with a term so devoid of all real content, have interpreted it as requiring wilful misconduct, or recklessness, or such utter lack of all care as will be evidence of either—sometimes on the ground that this must have been the purpose of the legislature. But most courts have considered that ‘gross negligence’ falls short of a reckless disregard of consequences, and differs from ordinary negligence only in degree, and not in kind. *So far as it has any accepted meaning, it is merely an extreme departure from the ordinary standard of care.*” ’ ’ (Decker v. City of Imperial Beach (1989) 209 Cal.App.3d 349, 358 [257 Cal.Rptr. 356], original italics, internal citations omitted.)

- “In assessing where on the spectrum a particular negligent act falls, ‘ “[t]he amount of care demanded by the standard of reasonable conduct must be in proportion to the apparent risk. As the danger becomes greater, the actor is required to exercise caution commensurate with it.” ’ ’ (Hass v. RhodyCo Productions (2018) 26 Cal.App.5th 11, 32 [236 Cal.Rptr.3d 682].)
- “[A]lthough the existence of gross negligence is a matter generally for the trier of fact, it may be determined as a matter of law on summary judgment in an appropriate case.” (Joshi v. Fitness Internat., LLC (2022) 80 Cal.App.5th 814, 828 [295 Cal.Rptr.3d 572], internal citation omitted.)
- “The Legislature has enacted numerous statutes . . . which provide immunity to persons providing emergency assistance except when there is gross negligence. (See Bus. & Prof. Code, § 2727.5 [immunity for licensed nurse who in good faith renders emergency care at the scene of an emergency occurring outside the place and course of nurse’s employment unless the nurse is grossly negligent]; Bus. & Prof. Code, § 2395.5 [immunity for a licensed physician who serves on-call in a hospital emergency room who in good faith renders emergency obstetrical services unless the physician was grossly negligent, reckless, or committed willful misconduct]; Bus. & Prof. Code, § 2398 [immunity for licensed physician who in good faith and without compensation renders voluntary emergency medical assistance to a participant in a community college or high school athletic event for an injury suffered in the course of that event unless the physician was grossly negligent]; Bus. & Prof. Code, § 3706 [immunity for certified respiratory therapist who in good faith renders emergency care at the scene of an emergency occurring outside the place and course of employment unless the respiratory therapist was grossly negligent]; Bus. & Prof. Code, § 4840.6 [immunity for a registered animal health technician who in good faith renders emergency animal health care at the scene of an emergency unless the animal health technician was grossly negligent]; Civ. Code, § 1714.2 [immunity to a person who has completed a basic cardiopulmonary resuscitation course for cardiopulmonary resuscitation and emergency cardiac care who in good faith renders emergency cardiopulmonary resuscitation at the scene of an emergency unless the individual was grossly negligent]; Health & Saf. Code, § 1799.105 [immunity for poison control center personnel who in good faith provide emergency information and advice unless they are grossly negligent]; Health & Saf. Code, § 1799.106 [immunity for a firefighter, police officer or

other law enforcement officer who in good faith renders emergency medical services at the scene of an emergency unless the officer was grossly negligent]; Health & Saf. Code, § 1799.107 [immunity for public entity and emergency rescue personnel acting in good faith within the scope of their employment unless they were grossly negligent].”) (*Decker, supra*, 209 Cal.App.3d at pp. 356–357.)

- “The jury here was instructed: ‘It is the duty of one who undertakes to perform the services of a police officer or paramedic to have the knowledge and skills ordinarily possessed and to exercise the care and skill ordinarily used in like cases by police officers or paramedics in the same or similar locality and under similar circumstances. A failure to perform such duty is negligence. [para.] The standard to be applied in this case is gross negligence. The term gross negligence means the failure to provide even scant care or an extreme departure from the ordinary standard of conduct.’ ” (*Wright v. City of L.A.* (1990) 219 Cal.App.3d 318, 343 [268 Cal.Rptr. 309] [construing “gross negligence” under Health & Saf. Code, § 1799.106, which provides that a police officer or paramedic who renders emergency medical services at the scene of an emergency shall only be liable in civil damages for acts or omissions performed in a grossly negligent manner or not performed in good faith].)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1000

Advising and Defending Corporate Directors and Officers (Cont.Ed.Bar) § 3.13

1 Levy et al., California Torts, Ch. 1, *General Principles of Liability*, § 1.01 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, §§ 380.10, 380.171 (Matthew Bender)

512. Wrongful Birth—Essential Factual Elements

[*Name of plaintiff*] **claims that** [*name of defendant*] **was negligent because** [*name of defendant*] **failed to inform** [*him/her/nonbinary pronoun*] **of the risk that** [*he/she/nonbinary pronoun*] **would have a child with a** [*genetic impairment/disability*]. **To establish this claim,** [*name of plaintiff*] **must prove all of the following:**

- [1. That** [*name of defendant*] **negligently failed to** [*diagnose/ [or] warn*] [*name of plaintiff*] **of**] **the risk that** [*name of child*] **would be born with a** [*genetic impairment/disability*];

[*or*]

- [1. That** [*name of defendant*] **negligently failed to** [*perform appropriate tests/advise*] [*name of plaintiff*] **of tests**] **that would more likely than not have disclosed the risk that** [*name of child*] **would be born with a** [*genetic impairment/disability*];
- 2. That** [*name of child*] **was born with a** [*genetic impairment/disability*];
- 3. That if** [*name of plaintiff*] **had known of the** [*genetic impairment/disability*], [*insert name of mother*] **would not have conceived** [*name of child*] [*or would not have carried the fetus to term*]; **and**
- 4. That** [*name of defendant*]'s **negligence was a substantial factor in causing** [*name of plaintiff*] **to have to pay extraordinary expenses to care for** [*name of child*].

New September 2003; Revised April 2007, May 2023

Directions for Use

The general medical negligence instructions on the standard of care and causation (see CACI Nos. 500–502) may be used in conjunction with this instruction. Read also CACI No. 513, *Wrongful Life—Essential Factual Elements*, if the parents' cause of action for wrongful birth is joined with the child's cause of action for wrongful life.

In element 1, select the first option if the claim is that the defendant failed to diagnose or warn the plaintiff of a possible genetic impairment. Select the second option if the claim is that the defendant failed to order or advise of available genetic testing. In a testing case, there is no causation unless the chances that the test would disclose the impairment were at least 50 percent. (See *Simmons v. West Covina Medical Clinic* (1989) 212 Cal.App.3d 696, 702–703 [260 Cal.Rptr. 772].)

Sources and Authority

- “Claims for ‘wrongful life’ are essentially actions for malpractice based on negligent genetic counseling and testing.” (*Gami v. Mullikin Medical Center* (1993) 18 Cal.App.4th 870, 883 [22 Cal.Rptr.2d 819].)
- “[A]s in any medical malpractice action, the plaintiff must establish: ‘(1) the duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional’s negligence.’ ” (*Gami, supra*, 18 Cal.App.4th at p. 877.)
- “A mere 20 percent chance does not establish a ‘reasonably probable causal connection’ between defendants’ negligent failure to provide [a genetic] test and plaintiffs’ injuries. A less than 50-50 possibility that defendants’ omission caused the harm does not meet the requisite reasonable medical probability test of proximate cause.” (*Simmons, supra*, 212 Cal.App.3d at pp. 702–703.)
- “[W]e conclude that while a plaintiff-child in a wrongful life action may not recover general damages for being born impaired as opposed to not being born at all, the child—like his or her parents—may recover special damages for the extraordinary expenses necessary to treat the hereditary ailment.” (*Turpin v. Sortini* (1982) 31 Cal.3d 220, 239 [182 Cal.Rptr. 337, 643 P.2d 954].)
- “Although the parents and child cannot, of course, both recover for the same medical expenses, we believe it would be illogical and anomalous to permit only parents, and not the child, to recover for the cost of the child’s own medical care.” (*Turpin, supra*, 31 Cal.3d at p. 238.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1110–1118

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 9.22a, 9.23b

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, §§ 31.15, 31.50 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 415, *Physicians: Medical Malpractice*, § 415.17 (Matthew Bender)

513. Wrongful Life—Essential Factual Elements

[*Name of plaintiff*] **claims that** [*name of defendant*] **was negligent because** [*he/she/nonbinary pronoun*] **failed to inform** [*name of plaintiff*]'s **parents of the risk that** [*he/she/nonbinary pronoun*] **would be born with a** [genetic impairment/disability]. **To establish this claim,** [*name of plaintiff*] **must prove all of the following:**

1. **That** [*name of defendant*] **negligently failed to** [diagnose/ [or] warn [*name of plaintiff*]'s **parents of**] **the risk that** [*name of plaintiff*] **would be born with a** [genetic impairment/disability];]
[or]
1. **That** [*name of defendant*] **negligently failed to** [perform appropriate tests/advise [*name of plaintiff*]'s **parents of tests**] **that would more likely than not have disclosed the risk that** [*name of plaintiff*] **would be born with a** [genetic impairment/disability];]
2. **That** [*name of plaintiff*] **was born with a** [genetic impairment/disability];
3. **That if** [*name of plaintiff*]'s **parents had known of the risk of** [genetic impairment/disability], [*his/her/nonbinary pronoun*] **mother would not have conceived** [*him/her/nonbinary pronoun*] [or **would not have carried the fetus to term**]; **and**
4. **That** [*name of defendant*]'s **negligence was a substantial factor in causing** [*name of plaintiff*]'s **parents to have to pay extraordinary expenses for** [*name of plaintiff*].

New September 2003; Revised April 2007, April 2008, November 2019, May 2023

Directions for Use

The general medical negligence instructions on the standard of care and causation (see CACI Nos. 500–502) may be used in conjunction with this instruction. Read also CACI No. 512, *Wrongful Birth—Essential Factual Elements*, if the parents' cause of action for wrongful birth is joined with the child's cause of action for wrongful life.

In element 1, select the first option if the claim is that the defendant failed to diagnose or warn the plaintiff of a possible genetic impairment. Select the second option if the claim is that the defendant failed to order or advise of available genetic testing. In a testing case, there is no causation unless the chances that the test would disclose the impairment were at least 50 percent. (See *Simmons v. West Covina Medical Clinic* (1989) 212 Cal.App.3d 696, 702–703 [260 Cal.Rptr. 772].)

In order for this instruction to apply, the genetic impairment must result in a

physical or mental disability. This is implied by the fourth element in the instruction.

Sources and Authority

- No Wrongful Life Claim Against Parent. Civil Code section 43.6(a).
- “[I]t may be helpful to recognize that although the cause of action at issue has attracted a special name—‘wrongful life’—plaintiff’s basic contention is that her action is simply one form of the familiar medical or professional malpractice action. The gist of plaintiff’s claim is that she has suffered harm or damage as a result of defendants’ negligent performance of their professional tasks, and that, as a consequence, she is entitled to recover under generally applicable common law tort principles.” (*Turpin v. Sortini* (1982) 31 Cal.3d 220, 229 [182 Cal.Rptr. 337, 643 P.2d 954].)
- “Claims for ‘wrongful life’ are essentially actions for malpractice based on negligent genetic counseling and testing.” (*Gami v. Mullikin Medical Center* (1993) 18 Cal.App.4th 870, 883 [22 Cal.Rptr.2d 819].)
- “[W]e conclude that while a plaintiff-child in a wrongful life action may not recover general damages for being born impaired as opposed to not being born at all, the child—like his or her parents—may recover special damages for the extraordinary expenses necessary to treat the hereditary ailment.” (*Turpin, supra*, 31 Cal.3d at p. 239.)
- “There is no loss of earning capacity caused by the doctor in negligently permitting the child to be born with a genetic defect that precludes earning a living.” (*Andalon v. Superior Court* (1984) 162 Cal.App.3d 600, 614 [208 Cal.Rptr. 899].)
- “A mere 20 percent chance does not establish a ‘reasonably probable causal connection’ between defendants’ negligent failure to provide [a] test and plaintiffs’ injuries. A less than 50-50 possibility that defendants’ omission caused the harm does not meet the requisite reasonable medical probability test of proximate cause.” (*Simmons, supra*, 212 Cal.App.3d at pp. 702–703, internal citations omitted.)
- “Wrongful life claims are actions brought on behalf of children, while wrongful birth claims refer to actions brought by parents. California courts do recognize a wrongful life claim by an ‘impaired’ child for special damages (but not for general damages), when the physician’s negligence is the proximate cause of the child’s need for extraordinary medical care and training. No court, however, has expanded tort liability to include wrongful life claims by children born without any mental or physical impairment.” (*Alexandria S. v. Pac. Fertility Medical Ctr.* (1997) 55 Cal.App.4th 110, 122 [64 Cal.Rptr.2d 23], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1112–1118
 California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 9.22a, 9.23b

Archived—May 2023 Supplement

CACI No. 513

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, §§ 31.15, 31.50 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 415, *Physicians: Medical Malpractice*, § 415.17 (Matthew Bender)

610. Affirmative Defense—Statute of Limitations—Attorney Malpractice—One-Year Limit (Code Civ. Proc., § 340.6)

[Name of defendant] contends that [name of plaintiff]’s lawsuit was not filed within the time set by law. To succeed on this defense, [name of defendant] must prove that before [insert date one year before date of filing] [name of plaintiff] knew, or with reasonable diligence should have discovered, the facts of [name of defendant]’s alleged wrongful act or omission.

[If, however, [name of plaintiff] proves

[Choose one or more of the following three options:]

[that [he/she/nonbinary pronoun/it] did not sustain actual injury until on or after [insert date one year before date of filing][, /; or]]

[that on or after [insert date one year before date of filing] [name of defendant] continued to represent [name of plaintiff] regarding the specific subject matter in which the wrongful act or omission occurred[, /; or]]

[that on or after [insert date one year before date of filing] [he/she/nonbinary pronoun/it] was under a legal or physical disability that restricted [his/her/nonbinary pronoun/its] ability to file a lawsuit[, /;]]

the period within which [name of plaintiff] had to file the lawsuit is extended for the amount of time that [insert tolling provision, e.g., [name of defendant] continued to represent [name of plaintiff]].]

New April 2007; Revised April 2009, May 2020

Directions for Use

Use CACI No. 611, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—Four-Year Limit*, if the four-year limitation provision is at issue.

The court may need to define the term “actual injury” depending on the facts and circumstances of the particular case.

If no tolling provision from Code of Civil Procedure section 340.6 is at issue, read only through the end of the first paragraph. Read the rest of the instruction if there is a question of fact concerning a tolling provision. If so, the verdict form should ask the jury to find (1) the “discovery” date (the date on which the plaintiff discovered or knew of facts that would have caused a reasonable person to suspect that the person had suffered harm that was caused by someone’s wrongful conduct); (2) whether the tolling provision applies; and (3) if so, for what period of time. The court can then add the additional time to the discovery date and determine whether the action is timely.

Sources and Authority

- Statute of Limitation for Attorney Malpractice. Code of Civil Procedure section 340.6.
- Persons Under Disabilities. Code of Civil Procedure section 352.
- “Under section 340.6, the one-year limitations period commences when the plaintiff actually or constructively discovers the facts of the wrongful act or omission, but the period is tolled until the plaintiff sustains actual injury. That is to say, the statute of limitations will not run during the time the plaintiff cannot bring a cause of action for damages from professional negligence.” (*Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 751 [76 Cal.Rptr.2d 749, 958 P.2d 1062].)
- “Summary judgment was proper under section 340.6, subdivision (a)’s one-year limitations period only if the undisputed facts compel the conclusion that [plaintiff] was on inquiry notice of his claim more than one year before the complaint was filed. Inquiry notice exist where ‘the plaintiffs have reason to at least suspect that a type of wrongdoing has injured them.’ ‘ “A plaintiff need not be aware of the specific ‘facts’ necessary to establish the claim; that is a process contemplated by pretrial discovery. Once the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, she must decide whether to file suit or sit on her rights. So long as a suspicion exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her.” [Citation.]’ ” (*Genisman v. Carley* (2018) 29 Cal.App.5th 45, 50–51 [239 Cal.Rptr.3d 780], internal citation omitted.)
- “ “[S]ubjective suspicion is not required. If a person becomes aware of facts which would make a reasonably prudent person suspicious, he or she has a duty to investigate further and is charged with knowledge of matters which would have been revealed by such an investigation.” [Citation.]’ ” (*Genisman, supra*, 29 Cal.App.5th at p. 51.)
- “For purposes of section 340.6, ‘actual injury occurs when the plaintiff sustains any loss or injury legally cognizable as damages in a legal malpractice action based on the acts or omissions that the plaintiff alleged.’ While ‘nominal damages will not end the tolling of section 340.6’s limitations period,’ it is ‘the fact of damage, rather than the amount, [that] is the critical factor.’ ” (*Genisman, supra*, 29 Cal.App.5th at p. 52, internal citation omitted.)
- “Actual injury refers only to the legally cognizable damage necessary to assert the cause of action. There is no requirement that an adjudication or settlement must first confirm a causal nexus between the attorney’s error and the asserted injury. The determination of actual injury requires only a factual analysis of the claimed error and its consequences.” (*Truong v. Glasser* (2009) 181 Cal.App.4th 102, 113 [103 Cal.Rptr.3d 811].)
- “ [S]ection 340.6, subdivision (a)(1), will not toll the limitations period once the client can plead damages that could establish a cause of action for legal

malpractice.’ [T]he limitations period is not tolled after the plaintiff sustains actual injury [even] if the injury is, in some sense, remediable. [Citation.] Furthermore, the statutory scheme does not depend on the plaintiff’s recognizing actual injury. Actual injury must be noticeable, but the language of the tolling provision does not require that it be noticed.’ On the other hand, ‘the statute of limitations will not run during the time the plaintiff cannot bring a cause of action for damages from professional negligence’ because the plaintiff cannot allege actual injury resulted from an attorney’s malpractice.” (*Croucier v. Chavos* (2012) 207 Cal.App.4th 1138, 1148 [144 Cal.Rptr.3d 180], internal citations omitted.)

- “[A]ctual injury exists even if the client has yet to ‘sustain[] all, or even the greater part, of the damages occasioned by his attorney’s negligence’; even if the client will encounter ‘difficulty in proving damages’; and even if that damage might be mitigated or entirely eliminated in the future. [¶] However, ‘actual injury’ does not include ‘speculative and contingent injuries . . . that do not yet exist’” (*Shaoxing City Maolong Wuzhong Down Products, Ltd. v. Keehn & Associates, APC* (2015) 238 Cal.App.4th 1031, 1036 [190 Cal.Rptr.3d 90], internal citations omitted.)
- “[B]ecause ‘determining actual injury is predominately a factual inquiry’ to the extent a question remains on this point, the matter is properly resolved by the trier of fact” (*Callahan v. Gibson, Dunn & Crutcher LLP* (2011) 194 Cal.App.4th 557, 576 [125 Cal.Rptr.3d 120].)
- “[W]here, as here, the ‘material facts are undisputed, the trial court can resolve the matter [of actual injury] as a question of law in conformity with summary judgment principles.’” (*Shaoxing City Maolong Wuzhong Down Products, Ltd., supra*, 238 Cal.App.4th at pp. 1037–1038.)
- “[P]rior to the enactment of section 340.6 the running of the statute of limitations coincided with accrual of the plaintiff’s malpractice cause of action, including damages. By contrast, under the provisions of section 340.6, discovery of the negligent act or omission initiates the statutory period, and the absence of injury or damages serves as a tolling factor.” (*Adams v. Paul* (1995) 11 Cal.4th 583, 589, fn. 2 [46 Cal.Rptr.2d 594, 904 P.2d 1205], internal citations omitted.)
- “[A] defendant must prove the facts necessary to enjoy the benefit of a statute of limitations.” (*Samuels v. Mix* (1999) 22 Cal.4th 1, 10 [91 Cal.Rptr.2d 273, 989 P.2d 701], internal citations omitted.)
- “[D]efendant, if he is to avail himself of the statute’s one-year-from-discovery limitation defense, has the burden of proving, under the ‘traditional allocation of the burden of proof’ that plaintiff discovered or should have discovered the facts alleged to constitute defendant’s wrongdoing more than one year prior to filing this action.” (*Samuels, supra*, 22 Cal.4th at pp. 8–9, internal citations omitted.)
- “In ordinary tort and contract actions, the statute of limitations, it is true, begins to run upon the occurrence of the last element essential to the cause of action. The plaintiff’s ignorance of the cause of action, or of the identity of the

wrongdoer, does not toll the statute. In cases of professional malpractice, however, postponement of the period of limitations until discovery finds justification in the special nature of the relationship between the professional man and his client.” (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 187–188 [98 Cal.Rptr. 837, 491 P.2d 421], footnote omitted.)

- “We hold that a cause of action for legal malpractice does not accrue until the client discovers, or should discover, the facts establishing the elements of his cause of action.” (*Neel, supra*, 6 Cal.3d at p. 194.)
- “ ‘[W]here there is a professional relationship, the degree of diligence in ferreting out the negligence for the purpose of the statute of limitations is diminished. [Citation.]’ ” (*Stueve Bros. Farms, LLC v. Berger Kahn* (2013) 222 Cal.App.4th 303, 315 [166 Cal.Rptr.3d 116].)
- “If the allegedly negligent conduct does not cause damage, it generates no cause of action in tort. The mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm—not yet realized—does not suffice to create a cause of action for negligence. Hence, until the client suffers appreciable harm as a consequence of his attorney’s negligence, the client cannot establish a cause of action for malpractice.” (*Budd v. Nixen* (1971) 6 Cal.3d 195, 200 [98 Cal.Rptr. 849, 491 P.2d 433], internal citations omitted.)
- “A plaintiff who is aware of, and has been actually injured by, attorney malpractice in a matter need not file suit for malpractice while that attorney is still representing him on the same ‘specific subject matter.’ ” (*Shaoxing City Maolong Wuzhong Down Products, Ltd., supra*, 238 Cal.App.4th at p. 1038.)
- “The continuous representation tolling provision in section 340.6, subdivision (a)(2) ‘was adopted in order to “avoid the disruption of an attorney-client relationship by a lawsuit while enabling the attorney to correct or minimize an apparent error, and to prevent an attorney from defeating a malpractice cause of action by continuing to represent the client until the statutory period has expired.” ’ ” (*Kelly v. Orr* (2016) 243 Cal.App.4th 940, 950 [196 Cal.Rptr.3d 901].)
- “The mere existence of an attorney-client relationship does not trigger the continuous representation rule: ‘Instead, the statute’s tolling language addresses a particular phase of such a relationship-representation regarding a *specific subject matter*. Moreover, the limitations period is not tolled when an attorney’s subsequent role is only tangentially related to the legal representation the attorney provided to the plaintiff. Therefore, “[t]he *inquiry is not whether an attorney-client relationship still exists but when the representation of the specific matter terminated.*’ ” Tolling does not apply where there is a continuing relationship between the attorney and client ‘involving only unrelated matters.’ ” (*Lockton v. O’Rourke* (2010) 184 Cal.App.4th 1051, 1064 [109 Cal.Rptr.3d 392], original italics, internal citations omitted.)
- “[W]here a client hires a law firm to represent it, the provisions of section 340.6 apply to that firm; the term ‘attorney’ in section 340.6 may embrace the entire

partnership, law corporation, or other legal entity the client retains. [¶] That either an attorney or a firm may be the subject of an action does not support a reading under which representation by one attorney or firm might toll the limitations period as to another no longer affiliated attorney or firm. Rather, the text implies an action against a law firm is tolled so long as *that firm* continues representation, just as an action against an attorney is tolled so long as *that attorney* continues representation, but representation by one attorney or firm does not toll claims that may exist against a different, unaffiliated attorney or firm.” (*Beal Bank, SSB v. Arter & Hadden, LLP* (2007) 42 Cal.4th 503, 509 [66 Cal.Rptr.3d 52, 167 P.3d 666], original italics.)

- “[W]hen an attorney leaves a firm and takes a client with him or her, . . . the tolling in ongoing matters [does not] continue for claims against the former firm and partners.’ ” (*Stueve Bros. Farms, LLC, supra*, 222 Cal.App.4th at p. 314.)
- “‘Ordinarily, an attorney’s representation is not completed until the agreed tasks or events have occurred, the client consents to termination or a court grants an application by counsel for withdrawal.’ ‘The rule is that, for purposes of the statute of limitations, the attorney’s representation is concluded when the parties so agree, and that result does not depend upon formal termination, such as withdrawing as counsel of record.’ ‘Continuity of representation ultimately depends, not on the client’s subjective beliefs, but rather on evidence of an ongoing mutual relationship and of activities in furtherance of the relationship.’ ” (*Nielsen v. Beck* (2007) 157 Cal.App.4th 1041, 1049 [69 Cal.Rptr.3d 435], internal citations omitted.)
- “[A]n attorney may withdraw from representation within the meaning of the statute, ‘even absent a client’s consent.’ Such withdrawal ‘does not depend on whether the attorney has formally withdrawn from representation, such as by securing a court order granting permission to withdraw.’ “ “[I]n the event of an attorney’s unilateral withdrawal or abandonment of the client, the representation ends when the client actually has or reasonably should have no expectation that the attorney will provide further legal services. [Citations.] That may occur upon the attorney’s express notification to the client that the attorney will perform no further services.’ ” ” (*Wang v. Nesse* (2022) 81 Cal.App.5th 428, 440 [297 Cal.Rptr.3d 149], internal citations omitted.)
- “[T]he continuous representation tolling provision in section 340.6, subdivision (a)(2), applies to toll legal malpractice claims brought by successor trustees against attorneys who represented the predecessor trustee.” (*Kelly, supra*, 243 Cal.App.4th at p. 951.)
- “[A]bsent a statutory standard to determine when an attorney’s representation of a client regarding a specific subject matter ends, and consistent with the purposes of the continuing representation rule, we conclude that for purposes of . . . section 340.6, subdivision (a)(2), in the event of an attorney’s unilateral withdrawal or abandonment of the client, the representation ends *when the client actually has or reasonably should have no expectation that the attorney will provide further legal services.* . . . That may occur upon the attorney’s express

notification to the client that the attorney will perform no further services, or, if the attorney remains silent, may be inferred from the circumstances. *Absent actual notice to the client that the attorney will perform no further legal services or circumstances that reasonably should cause the client to so conclude*, a client should be entitled to rely on an attorney to perform the agreed services and should not be required to interrupt the attorney-client relationship by filing a malpractice complaint. *After a client has no reasonable expectation that the attorney will provide further legal services*, however, the client is no longer hindered by a potential disruption of the attorney-client relationship and no longer relies on the attorney’s continuing representation, so the tolling should end. To this extent and for these reasons, *we conclude that continuous representation should be viewed objectively from the client’s perspective*” (*Laclette v. Galindo* (2010) 184 Cal.App.4th 919, 928 [109 Cal.Rptr.3d 660], original italics.)

- “Continuity of representation ultimately depends, not on the client’s subjective beliefs, but rather on evidence of an ongoing *mutual* relationship and of activities in furtherance of the relationship.” (*GoTek Energy, Inc. v. SoCal IP Law Group, LLP* (2016) 3 Cal.App.5th 1240, 1248 [208 Cal.Rptr.3d 428], original italics.)
- “Section 340.6, subdivision (a), states that ‘in no event’ shall the prescriptive period be tolled except under those circumstances specified in the statute. Thus, the Legislature expressly intended to disallow tolling under any circumstances not enumerated in the statute.” (*Laird v. Blacker* (1992) 2 Cal.4th 606, 618 [7 Cal.Rptr.2d 550, 828 P.2d 691] [applying rule to one-year limitation period]; cf. *Belton v. Bowers Ambulance Serv.* (1999) 20 Cal.4th 928, 934 [86 Cal.Rptr.2d 107, 978 P.2d 591] [substantially similar language in Code Civ. Proc., § 340.5, applicable to medical malpractice, construed to apply only to three-year limitation period].)
- “[T]he fourth tolling provision of section 340.6, subdivision (a)—that is, the provision applicable to legal and physical disabilities—encompasses the circumstances set forth in section 351 [exception, where defendant is out of the state].” (*Jocer Enterprises, Inc. v. Price* (2010) 183 Cal.App.4th 559, 569 [107 Cal.Rptr.3d 539].)
- “[A] would-be plaintiff is ‘imprisoned on a criminal charge’ within the meaning of section 352.1 if he or she is serving a term of imprisonment in the state prison.” (*Austin v. Medicis* (2018) 21 Cal.App.5th 577, 597 [230 Cal.Rptr.3d 528].)
- “In light of the Legislature’s intent that section 340.6(a) cover more than claims for legal malpractice, the term ‘professional services’ is best understood to include nonlegal services governed by an attorney’s professional obligations.” (*Lee v. Hanley* (2015) 61 Cal.4th 1225, 1237 [191 Cal.Rptr.3d 536, 354 P.3d 334].)
- “For purposes of section 340.6(a), the question is not simply whether a claim

alleges misconduct that entails the violation of a professional obligation. Rather, the question is whether the claim, in order to succeed, necessarily depends on proof that an attorney violated a professional obligation as opposed to some generally applicable nonprofessional obligation.” (*Lee, supra*, 61 Cal.4th at p. 1238.)

- “*Lee* held that ‘section 340.6(a)’s time bar applies to claims whose merits necessarily depend on proof that an attorney violated a professional obligation in the course of providing professional services. In this context, a “professional obligation” is an obligation that an attorney has by virtue of being an attorney, such as fiduciary obligations, the obligation to perform competently, the obligation to perform the services contemplated in a legal services contract into which an attorney has entered, and the obligations embodied in the State Bar Rules of Professional Conduct.’ ” (*Foxen v. Carpenter* (2016) 6 Cal.App.5th 284, 292 [211 Cal.Rptr.3d 372].)
- “In sum, consistent with *Lee*, section 340.6(a) applies to malicious prosecution claims against attorneys who performed professional services in the underlying litigation.” (*Connelly v. Bornstein* (2019) 33 Cal.App.5th 783, 799 [245 Cal.Rptr.3d 452].)

Secondary Sources

3 Witkin, California Procedure (5th ed. 2008) Actions, §§ 679–702

3 Levy et al., California Torts, Ch. 32, *Liability of Attorneys*, § 32.60 (Matthew Bender)

7 California Forms of Pleading and Practice, Ch. 76, *Attorney Professional Liability*, §§ 76.170, 76.430 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.150 (Matthew Bender)

904. Duty of Common Carrier Toward Passengers With Illness or Disability

If a common carrier voluntarily accepts a person with an illness or a disability as a passenger and is aware of that person’s condition, it must use as much additional care as is reasonably necessary to ensure the passenger’s safety.

New September 2003; Revised May 2023

Sources and Authority

- “[I]f the company voluntarily accepts a person as a passenger, without an attendant, whose inability to care for himself is apparent or made known to its servants and renders special care and assistance necessary, the company is negligent if such assistance is not afforded. In such case it must exercise the degree of care commensurate with the responsibility which it has thus voluntarily assumed, and that care must be such as is reasonably necessary to insure the safety of the passenger, in view of his mental and physical condition. This is a duty required by law as well as the dictates of humanity.” (*McBride v. Atchison, Topeka & Santa Fe Ry. Co.* (1955) 44 Cal.2d 113, 119–120 [279 P.2d 966], internal citation omitted.)

Secondary Sources

- 2 Levy et al., California Torts, Ch. 23, *Carriers*, § 23.02[6] (Matthew Bender)
- 11 California Forms of Pleading and Practice, Ch. 109, *Carriers*, § 109.33[1] (Matthew Bender)
- 2A California Points and Authorities, Ch. 33, *Carriers* (Matthew Bender)
- California Civil Practice: Torts § 28:6 (Thomson Reuters)

**1010. Affirmative Defense—Recreation Immunity—Exceptions
(Civ. Code, § 846)**

[Name of defendant] is not responsible for [name of plaintiff]’s harm if [name of defendant] proves that [name of plaintiff]’s harm resulted from [his/her/nonbinary pronoun/name of person causing injury’s] entry on or use of [name of defendant]’s property for a recreational purpose. However, [name of defendant] may be still responsible for [name of plaintiff]’s harm if [name of plaintiff] proves that

[Choose one or more of the following three options:]

[[name of defendant] willfully or maliciously failed to protect others from or warn others about a dangerous [condition/use/structure/activity] on the property.]

[or]

[a charge or fee was paid to [name of defendant/the owner] for permission to enter the property for a recreational purpose.]

[or]

[[name of defendant] expressly invited [name of plaintiff] to enter the property.]

If you find that [name of plaintiff] has proven one or more of these three exceptions to immunity, then you must still decide whether [name of defendant] is liable in light of the other instructions that I will give you.

New September 2003; Revised October 2008, December 2014, May 2017, November 2017, May 2021, May 2023

Directions for Use

This instruction sets forth the statutory exceptions to recreational immunity. (See Civ. Code, § 846.) In the opening paragraph, if the plaintiff was not the recreational user of the property, insert the name of the person whose conduct on the property is alleged to have caused plaintiff’s injury. Immunity extends to injuries to persons who are neither on the property nor engaged in a recreational purpose if the injury was caused by a recreational user of the property. (See *Wang v. Nibbelink* (2016) 4 Cal.App.5th 1, 17 [208 Cal.Rptr.3d 461], disapproved on other grounds in *Hoffmann v. Young* (2022) 13 Cal.5th 1257, 1270, fn. 13 [297 Cal.Rptr.3d 607, 515 P.3d 635].)

Choose one or more of the optional exceptions according to the facts. Depending on the facts, the court could instruct that the activity involved was a “recreational purpose” as a matter of law. For a nonexhaustive list of “recreational purposes,” refer to Civil Code section 846.

Whether the term “willful or malicious failure” has a unique meaning under this

statute is not entirely clear. One court construing this statute has said that three elements must be present to raise a negligent act to the level of willful misconduct: (1) actual or constructive knowledge of the peril to be apprehended, (2) actual or constructive knowledge that injury is a probable, as opposed to a possible, result of the danger, and (3) conscious failure to act to avoid the peril. (See *New v. Consolidated Rock Products Co.* (1985) 171 Cal.App.3d 681, 689–690 [217 Cal.Rptr. 522].)

For the second exception involving payment of a fee, insert the name of the defendant if the defendant is the landowner. If the defendant is someone who is alleged to have created a dangerous condition on the property other than the landowner, select “the owner.” (See *Pacific Gas & Electric Co. v. Superior Court* (2017) 10 Cal.App.5th 563, 566 [216 Cal.Rptr.3d 426].)

For the third exception involving an express invitation onto the property, “a qualifying invitation under [Civil Code] section 846(d)(3) may be made by a landowner’s authorized agent who issued the invitation on the landowner’s behalf.” (*Hoffmann, supra*, 13 Cal.5th at pp. 1276–1277.) The plaintiff bears the burden of proving the invitation was made by a properly authorized agent or otherwise making “the showing that a nonlandowner’s invitation operates as an invitation by the landowner.” (*Id.* at pp. 1275, 1277, fn. 16.) In some cases, it may be necessary to modify the third exception to identify the person who extended the invitation on behalf of the defendant. California law, however, does not require a “direct, personal request” from the landowner to the injured entrant. (*Id.* at p. 1270, fn. 13.)

Sources and Authority

- Recreational Immunity. Civil Code section 846.
- “[A]n owner of . . . real property owes no duty of care to keep the premises safe for entry or use by others for recreational purposes or to give recreational users warning of hazards on the property, unless: (1) the landowner willfully or maliciously fails to guard or warn against a dangerous condition, use, structure or activity; (2) permission to enter for a recreational purpose is granted for a consideration; or (3) the landowner expressly invites rather than merely permits the user to come upon the premises.” (*Ornelas v. Randolph* (1993) 4 Cal.4th 1095, 1099–1100 [17 Cal.Rptr.2d 594, 847 P.2d 560].)
- “Generally, whether one has entered property for a recreational purpose within the meaning of the statute is a question of fact, to be determined through a consideration of the ‘totality of the facts and circumstances, including . . . the prior use of the land. While the plaintiff’s subjective intent will not be controlling, it is relevant to show purpose.’ ” (*Ornelas, supra*, 4 Cal.4th at p. 1102, internal citation omitted.)
- “To the extent plaintiff suggests that ‘jogging’ is not an activity with a recreational purpose because it is not specifically enumerated in section 846, subdivision (b), her suggestion is plainly without merit, as section 846, subdivision (b) is an illustrative, not exhaustive, list.” (*Rucker v. WINCAL, LLC* (2022) 74 Cal.App.5th 883, 889 [290 Cal.Rptr.3d 56].)

- “The phrase ‘interest in real property’ should not be given a narrow or technical interpretation that would frustrate the Legislature’s intention in passing and amending section 846.” (*Hubbard v. Brown* (1990) 50 Cal.3d 189, 196 [266 Cal.Rptr. 491, 785 P.2d 1183].)
- “[D]efendants’ status as business invitees of the landowner does not satisfy the prerequisite that the party seeking to invoke the immunity provisions of section 846 be ‘[a]n owner of any estate or any other interest in real property, whether possessory or nonpossessory.’ Although such invitee may be entitled to be present on the property during such time as the work is being performed, such presence does not convey any estate or interest in the property.” (*Jenson v. Kenneth I. Mullen, Consulting Engineers, Inc.* (1989) 211 Cal.App.3d 653, 658 [259 Cal.Rptr. 552].)
- “Subpart (c) of the third paragraph of section 846 is not limited to injuries to persons on the premises and therefore on its face encompasses persons off-premises such as [plaintiff] and her husband. It is not limited to injuries to recreational participants. Had the Legislature wanted to narrow the third paragraph’s immunity to injured recreational users, it could have done so, as it did in the first paragraph.” (*Wang, supra*, 4 Cal.App.5th at p. 17.)
- “The concept of willful misconduct has a well-established, well-defined meaning in California law. ‘Willful or wanton misconduct is intentional wrongful conduct, done either with a knowledge that serious injury to another will probably result, or with a wanton and reckless disregard of the possible results.’ ” (*New, supra*, 171 Cal.App.3d at p. 689, internal citations omitted.)
- “Clearly, consideration means some type of entrance fee or charge for permitting a person to use specially constructed facilities. There are many amusement facilities in government-owned parks that charge admission fees and a consideration in this or a similar context was intended.” (*Moore v. City of Torrance* (1979) 101 Cal.App.3d 66, 72 [166 Cal.Rptr. 192], disapproved of on other grounds in *Delta Farms Reclamation Dist. v. Superior Court* (1983) 33 Cal.3d 699, 707 [190 Cal.Rptr. 494, 660 P.2d 1168].)
- “We conclude that the consideration exception to recreational use immunity does apply to [defendant] even though [plaintiff]’s fee for recreational access to the campground was not paid to it We hold that the payment of consideration in exchange for permission to enter a premises for a recreational purpose abrogates the section 846 immunity of any nonpossessory interest holder who is potentially responsible for the plaintiff’s injuries, including a licensee or easement holder who possesses only a limited right to enter and use a premises on specified terms but no right to control third party access to the premises. The contrary interpretation urged by [defendant], making immunity contingent not on payment of consideration but its receipt, is supported neither by the statutory text nor the Legislature’s purpose in enacting section 846, which was to encourage free public access to property for recreational use. It also would lead to troubling, anomalous results we do not think the Legislature intended. At bottom, construing this exception as applying only to defendants who receive or benefit

from the consideration paid loses sight of the fact that recreational immunity is merely a tool. It is the Legislature’s chosen means, not an end unto itself.” (*Pacific Gas & Electric Co.*, *supra*, 10 Cal.App.5th at p. 566.)

- “A landowner must gain some immediate and reasonably direct advantage, usually in the form of an entrance fee, before the exception to immunity for consideration under section 846 comes into play.” (*Johnson, supra*, 21 Cal.App.4th at p. 317, disapproved on other grounds in *Hoffmann, supra*, 13 Cal.5th at p. 1270, fn. 13.)
- “The purpose of section 846 is to encourage landowners to permit people to use their property for recreational use without fear of reprisal in the form of lawsuits. The trial court should therefore construe the exceptions for consideration and express invitees narrowly. (*Johnson, supra*, 21 Cal.App.4th at p. 315, disapproved on other grounds in *Hoffmann, supra*, 13 Cal.5th at p. 1270, fn. 13.)
- “The language of section 846, item (c), which refers to ‘*any persons who are expressly invited rather than merely permitted to come upon the premises by the landowner*’ does not say a person must be invited for a *recreational* purpose. The exception instead defines a person who is ‘expressly invited’ by distinguishing this person from one who is ‘merely permitted’ to come onto the land.” (*Calhoon v. Lewis* (2000) 81 Cal.App.4th 108, 114 [96 Cal.Rptr.2d 394], original italics.)
- “Civil Code section 846’s liability shield does not extend to acts of vehicular negligence by a landowner or by the landowner’s employee while acting within the course of the employment. We base this conclusion on section 846’s plain language. The statutory phrase ‘keep the premises safe’ is an apt description of the property-based duties underlying premises liability, a liability category that does not include vehicular negligence. Furthermore, a broad construction of that statutory phrase would render superfluous another provision of section 846 shielding landowners from liability for failure to warn recreational users about hazardous conditions or activities on the land.” (*Klein v. United States of America* (2010) 50 Cal.4th 68, 72 [112 Cal.Rptr.3d 722, 235 P.3d 42].)
- “[W]e hold that a plaintiff may rely on the exception and impose liability if there is a showing that a landowner, or an agent acting on his or her behalf, extended an express invitation to come onto the property. (*Hoffmann, supra*, 13 Cal.5th at p. 1263.)
- “[T]he general rule of section 846(a) relieves a landowner of any duty to keep his or her premises safe for recreational users. Section 846(d)(3) creates an exception to the rule of section 846(a) for those persons who are expressly invited to come upon the premises by the landowner. Plaintiff seeks the shelter of this exception. Accordingly, she should bear the burden of persuasion on the point.” (*Hoffmann, supra*, 13 Cal.5th at p. 1275.)
- “[W]e do not foreclose other ways that a plaintiff might ‘make the showing that a nonlandowner’s invitation operates as an invitation by the landowner.’ Rather,

we ‘conclude that *one way* for a plaintiff invoking section 846(d)(3) to meet [the burden of showing the exception applies] would be to rely on agency principles.’ ” (*Hoffmann, supra*, 13 Cal.5th at p. 1277, fn. 16, original italics, second alteration original, internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1245–1253

1 Levy et al., California Torts, Ch. 15, *General Premises Liability*, § 15.22 (Matthew Bender)

11 California Real Estate Law and Practice, Ch. 381, *Tort Liability of Property Owners*, § 381.30 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 421, *Premises Liability*, §§ 421.20–421.23 (Matthew Bender)

17 California Points and Authorities, Ch. 178, *Premises Liability*, § 178.130 et seq. (Matthew Bender)

California Civil Practice: Torts § 16:34 (Thomson Reuters)

1100. Dangerous Condition on Public Property—Essential Factual Elements (Gov. Code, § 835)

[Name of plaintiff] **claims that [he/she/nonbinary pronoun] was harmed by a dangerous condition of [name of defendant]’s property. To establish this claim, [name of plaintiff] must prove all of the following:**

- 1. That [name of defendant] owned [or controlled] the property;**
- 2. That the property was in a dangerous condition at the time of the injury;**
- 3. That the dangerous condition created a reasonably foreseeable risk of the kind of injury that occurred;**
- 4. [That negligent or wrongful conduct of [name of defendant]’s employee acting within the scope of employment created the dangerous condition;]**

[or]

[That [name of defendant] had notice of the dangerous condition for a long enough time to have protected against it;]

- 5. That [name of plaintiff] was harmed; and**
- 6. That the dangerous condition was a substantial factor in causing [name of plaintiff]’s harm.**

New September 2003; Revised October 2008, December 2015, June 2016, May 2020

Directions for Use

For element 4, choose either or both options depending on whether liability is alleged under Government Code section 835(a), 835(b), or both.

See also CACI No. 1102, *Definition of “Dangerous Condition,”* and CACI No. 1103, *Notice.*

Sources and Authority

- Liability of Public Entity for Dangerous Condition of Property. Government Code section 835.
- Actual Notice. Government Code section 835.2(a).
- Constructive Notice. Government Code section 835.2(b).
- Definitions. Government Code section 830.
- “The Government Claims Act (§ 810 et seq.; the Act) ‘is a comprehensive statutory scheme that sets forth the liabilities and immunities of public entities and public employees for torts.’ Section 835 . . . prescribes the conditions under

which a public entity may be held liable for injuries caused by a dangerous condition of public property. Section 835 provides that a public entity may be held liable for such injuries ‘if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, [and] that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred.’ In addition, the plaintiff must establish that either: (a) ‘[a] negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition,’ or (b) ‘[t]he public entity had . . . notice of the dangerous condition . . . a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.’” (*Cordova v. City of Los Angeles* (2015) 61 Cal.4th 1099, 1104 [190 Cal.Rptr.3d 850, 353 P.3d 773], internal citations omitted.)

- “[A] public entity may be liable for a dangerous condition of public property even when the immediate cause of a plaintiff’s injury is a third party’s negligent or illegal act (such as a motorist’s negligent driving), if some physical characteristic of the property exposes its users to increased danger from third party negligence or criminality. Public entity liability lies under section 835 when some feature of the property increased or intensified the danger to users from third party conduct.” (*Castro v. City of Thousand Oaks* (2015) 239 Cal.App.4th 1451, 1457–1458 [192 Cal.Rptr.3d 376], internal citation omitted.)
- “Subdivisions (a) and (b) of section 835 obviously address two different types of cases. However, what distinguishes the two types of cases is not simply whether the public entity has notice of the dangerous condition. Instead, what distinguishes the two cases in practice is who created the dangerous condition. Because an entity must act through its employees, virtually all suits brought on account of dangerous conditions created by the entity will be brought under subdivision (a). In contrast, subdivision (b) can also support suits based on dangerous conditions not created by the entity or its employees.” (*Brown v. Poway Unified School Dist.* (1993) 4 Cal.4th 820, 836 [15 Cal.Rptr.2d 679, 843 P.2d 624].)
- “[T]he res ipsa loquitur presumption does not satisfy the requirements for holding a public entity liable under section 835, subdivision (a). Res ipsa loquitur requires the plaintiff to show only (1) that the accident was of a kind which ordinarily does not occur in the absence of negligence, (2) that the instrumentality of harm was within the defendant’s exclusive control, and (3) that the plaintiff did not voluntarily contribute to his or her own injuries. Subdivision (a), in contrast, requires the plaintiff to show that an employee of the public entity ‘created’ the dangerous condition; in view of the legislative history . . . , the term ‘created’ must be defined as the sort of involvement by an employee that would justify a presumption of notice on the entity’s part.” (*Brown, supra*, 4 Cal.4th at p. 836.)
- “Focusing on the language in *Pritchard, supra*, 178 Cal.App.2d at page 256, stating that where the public entity ‘has itself created the dangerous condition it

is *per se* culpable,’ plaintiff argues that the negligence that section 835, subdivision (a), refers to is not common law negligence, but something that exists *whenever* the public entity creates the dangerous condition of property. We disagree. If the Legislature had wanted to impose liability whenever a public entity created a dangerous condition, it would merely have required plaintiff to establish that an act or omission of an employee of the public entity within the scope of his employment created the dangerous condition. Instead, section 835, subdivision (a), requires the plaintiff to establish that a ‘*negligent or wrongful* act or omission of an employee of the public entity within the scope of his employment created the dangerous condition.’ (Italics added.) Plaintiff’s interpretation would transform the highly meaningful words ‘negligent or wrongful’ into meaningless surplusage, contrary to the rule of statutory interpretation that courts should avoid a construction that makes any word surplusage.” (*Metcalf v. County of San Joaquin* (2008) 42 Cal.4th 1121, 1135 [72 Cal.Rptr.3d 382, 176 P.2d 654], original italics, internal citation omitted.)

- “In order to recover under Government Code section 835, it is not necessary for plaintiff to prove a negligent act *and* notice; either negligence or notice will suffice.” (*Curtis v. State of California* (1982) 128 Cal.App.3d 668, 693 [180 Cal.Rptr. 843], original italics.)
- “A public entity may not be held liable under section 835 for a dangerous condition of property that it does not own or control.” (*Goddard v. Department of Fish & Wildlife* (2015) 243 Cal.App.4th 350, 359 [196 Cal.Rptr.3d 625].)
- “For liability to be imposed on a public entity for a dangerous condition of property, the entity must be in a position to protect against or warn of the hazard. Therefore, the crucial element is not ownership, but rather control.” (*Mamola v. State of California ex rel. Dept. of Transportation* (1979) 94 Cal.App.3d 781, 788 [156 Cal.Rptr. 614], internal citation omitted.)
- “Liability for injury caused by a dangerous condition of property has been imposed when an unreasonable risk of harm is created by a combination of defect in the property and acts of third parties. However, courts have consistently refused to characterize harmful third party conduct as a dangerous condition—absent some concurrent contributing defect in the property itself.” (*Hayes v. State of California* (1974) 11 Cal.3d 469, 472 [113 Cal.Rptr. 599, 521 P.2d 855], internal citations omitted.)
- “[P]laintiffs in this case must show that a dangerous condition of property—that is, a condition that creates a substantial risk of injury to the public—proximately caused the fatal injuries their decedents suffered as a result of the collision with [third party]’s car. But nothing in the statute requires plaintiffs to show that the allegedly dangerous condition also caused the third party conduct that precipitated the accident.” (*Cordova, supra*, 61 Cal.4th at p. 1106.)
- “Although generally a question of fact, a property defect is not a dangerous condition as a matter of law if the court determines, ‘viewing the evidence most favorably to the plaintiff, . . . that the risk created by the condition was of such

a minor, trivial or insignificant nature in view of the surrounding circumstances that no reasonable person would conclude that the condition created a substantial risk of injury’” (*Nunez v. City of Redondo Beach* (2022) 81 Cal.App.5th 749, 757 [297 Cal.Rptr.3d 461].)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 425–426

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 6-C, *Immunity From Liability*, ¶ 6:91 et seq. (The Rutter Group)

Haning et al., California Practice Guide: Personal Injury, Ch. 2(III)-D, Liability For “*Dangerous Conditions*” Of Public Property, ¶ 2:2785 et seq. (The Rutter Group)

2 California Government Tort Liability Practice (Cont.Ed.Bar 4th ed.) §§ 12.9–12.55

5 Levy et al., California Torts, Ch. 61, *Particular Liabilities and Immunities of Public Entities and Public Employees*, §§ 61.01–61.03 (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 464, *Public Entities and Officers: California Government Claims Act*, §§ 464.80–464.86 (Matthew Bender)

19A California Points and Authorities, Ch. 196, *Public Entities*, § 196.11 (Matthew Bender)

2101. Trespass to Chattels—Essential Factual Elements

[*Name of plaintiff*] **claims that** [*name of defendant*] **wrongfully trespassed on** [*his/her/nonbinary pronoun/its*] **personal property. To establish this claim, [*name of plaintiff*] must prove all of the following:**

1. **That** [*name of plaintiff*] **[owned/possessed/had a right to possess] a** [*insert item of personal property*];
2. **That** [*name of defendant*] **intentionally** [*insert one or more of the following:*]
[interfered with [*name of plaintiff*]**’s use or possession of the** [*insert item of personal property*];]
[*or*]
[damaged the [*insert item of personal property*];]
3. **That** [*name of plaintiff*] **did not consent;**
4. **That** [*name of plaintiff*] **was harmed; and**
5. **That** [*name of defendant*]**’s conduct was a substantial factor in causing** [*name of plaintiff*]**’s harm.**

New September 2003

Sources and Authority

- “Trespass to chattel, although seldom employed as a tort theory in California . . . , lies where an intentional interference with the possession of personal property has proximately caused injury. Prosser notes trespass to chattel has evolved considerably from its original common law application—concerning the asportation of another’s tangible property—to include even the unauthorized use of personal property: ‘Its chief importance now,’ according to Prosser, ‘is that there may be recovery . . . for interferences with the possession of chattels which are not sufficiently important to be classed as conversion, and so to compel the defendant to pay the full value of the thing with which he has interfered. Trespass to chattels survives today, in other words, largely as a little brother of conversion.’ ” (*Thrifty-Tel, Inc. v. Bezenek* (1996) 46 Cal.App.4th 1559, 1566–1567 [54 Cal.Rptr.2d 468], footnotes and internal citations omitted.)
- “Where the conduct complained of does not amount to a substantial interference with possession or the right thereto, but consists of intermeddling with or use of or damages to the personal property, the owner has a cause of action for trespass or case, and may recover only the actual damages suffered by reason of the impairment of the property or the loss of its use.” (*Zaslow v. Kroenert* (1946) 29 Cal.2d 541, 551 [176 P.2d 1], internal citations omitted.)

- “Though not amounting to conversion, the defendant’s interference must, to be actionable, have caused some injury to the chattel or to the plaintiff’s rights in it. Under California law, trespass to chattels “lies where an intentional interference with the possession of personal property *has proximately caused injury*.” In cases of interference with possession of personal property not amounting to conversion, “the owner has a cause of action for trespass or case, and *may recover only the actual damages suffered by reason of the impairment of the property or the loss of its use*.” . . .” (*Jamgotchian v. Slender* (2009) 170 Cal.App.4th 1384, 1400–1401 [89 Cal.Rptr.3d 122], original italics, internal citations omitted.)
- “It is well settled that a person having neither the possession nor the right to the possession of personal chattels, cannot maintain trespass or trover for an injury done to the property.” (*Triscony v. Orr* (1875) 49 Cal. 612, 617, internal citations omitted.)
- “[A] plaintiff alleging trespass to chattels based on unauthorized access to a computer system must allege damage or disruption to that computer system.” (*Casillas v. Berkshire Hathaway Homestate Ins. Co.* (2022) 79 Cal.App.5th 755, 764 [294 Cal.Rptr.3d 841].)
- “[W]e uphold both the economic and emotional distress damages plaintiffs recovered for trespass to personal property arising from [defendant]’s act of intentionally striking [plaintiff’s dog] with a bat.” (*Plotnik v. Meihaus* (2012) 208 Cal.App.4th 1590, 1608 [146 Cal.Rptr.3d 585].)
- Restatement Second of Torts, section 218, provides:

“One who commits a trespass to a chattel is subject to liability to the possessor of the chattel if, but only if,

 - (a) he dispossesses the other of the chattel, or
 - (b) the chattel is impaired as to its condition, quality, or value, or
 - (c) the possessor is deprived of the use of the chattel for a substantial time, or
 - (d) bodily harm is caused to the possessor, or harm is caused to some person or thing in which the possessor has a legally protected interest.”
- Restatement Second of Torts, section 222, comment (a), states: “Normally any dispossession is so clearly a serious interference with the right of control that it amounts to a conversion; and it is frequently said that any dispossession is a conversion. There may, however, be minor and unimportant dispossessions, such as taking another man’s hat by mistake and returning it within two minutes upon discovery of the mistake, which do not seriously interfere with the other’s right of control, and so do not amount to conversion. In such a case the remedy of the action of trespass remains, and will allow recovery of damages for the interference with the possession.”

Secondary Sources

Archived—May 2023 Supplement

CACI No. 2101

Ahart, California Practice Guide: Enforcing Judgments & Debts, Ch. 2-C, *Tort Liability*, ¶ 2:427.4 et seq. (The Rutter Group)

1 Levy et al., California Torts, Ch. 16, *Landlord-Tenant Tort Liabilities*, §§ 16.07, 40.43 (Matthew Bender)

48 California Forms of Pleading and Practice, Ch. 550, *Trespass*, § 550.13 (Matthew Bender)

22 California Points and Authorities, Ch. 225, *Trespass*, §§ 225.260–225.262 (Matthew Bender)

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

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

- 1. That *[name of defendant]* was *[an employer/[other covered entity]]*;**
- 2. That *[name of plaintiff]* *[was an employee of [name of defendant]/ applied to [name of defendant] for a job/[describe other covered relationship to defendant]]*;**
- 3. *[That [name of defendant] [discharged/refused to hire/[other adverse employment action]] [name of plaintiff];]***
[or]
[That [name of defendant] subjected [name of plaintiff] to an adverse employment action;]
[or]
[That [name of plaintiff] was constructively discharged;]
- 4. That *[name of plaintiff]*'s *[protected status—for example, race, gender, or age]* was a **substantial motivating reason for** *[name of defendant]*'s **[decision to [discharge/refuse to hire/[other adverse employment action]] [name of plaintiff]/conduct]**;**
- 5. That *[name of plaintiff]* was harmed; and**
- 6. That *[name of defendant]*'s conduct was a substantial factor in causing *[name of plaintiff]*'s harm.**

New September 2003; Revised April 2009, June 2011, June 2012, June 2013, May 2020

Directions for Use

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

If element 1 is given, the court may need to instruct the jury on the statutory

definition of “employer” under the FEHA. Other covered entities under the FEHA include labor organizations, employment agencies, and apprenticeship training programs. (See Gov. Code, § 12940(a)–(d).)

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

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

Element 4 requires that discrimination based on a protected classification be a substantial motivating reason for the adverse action. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; see also CACI No. 2507, “*Substantial Motivating Reason*” Explained.) Modify element 4 if plaintiff was not actually a member of the protected class, but alleges discrimination because the plaintiff 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).)

For damages instructions, see applicable instructions on tort damages.

Sources and Authority

- Discrimination Prohibited Under Fair Employment and Housing Act. Government Code section 12940(a).
- Perception and Association. Government Code section 12926(o).
- “Race,” “Protective Hairstyles,” and “Reproductive Health Decisionmaking.” Government Code section 12926(w), (x), (y).
- “[C]onceptually the theory of ‘[disparate] treatment’ . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin.” (*Mixon v. Fair Employment and Housing Com.* (1987) 192 Cal.App.3d 1306, 1317 [237 Cal.Rptr. 884], quoting *Teamsters v. United States* (1977) 431 U.S. 324, 335–336, fn. 15 [97 S.Ct. 1843, 52 L.Ed.2d 396].)
- “California has adopted the three-stage burden-shifting test for discrimination claims set forth in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 [93 S.Ct. 1817, 36 L.Ed. 2d 668]. ‘This so-called *McDonnell Douglas* test reflects the principle that direct evidence of intentional discrimination is rare, and that such claims must usually be proved circumstantially. Thus, by successive steps of increasingly narrow focus, the test allows discrimination to be inferred from facts that create a reasonable likelihood of bias and are not satisfactorily

explained.’ ” (*Sandell v. Taylor-Listug, Inc.* (2010) 188 Cal.App.4th 297, 307 [115 Cal.Rptr.3d 453], internal citations omitted.)

- “The *McDonnell Douglas* framework was designed as ‘an analytical tool for use by the trial judge in applying the law, not a concept to be understood and applied by the jury in the factfinding process.’ ” (*Abed v. Western Dental Services, Inc.* (2018) 23 Cal.App.5th 726, 737 [233 Cal.Rptr.3d 242].)
- “At trial, the *McDonnell Douglas* test places on the plaintiff the initial burden to establish a prima facie case of discrimination. This step is designed to eliminate at the outset the most patently meritless claims, as where the plaintiff is not a member of the protected class or was clearly unqualified, or where the job he sought was withdrawn and never filled. While the plaintiff’s prima facie burden is ‘not onerous’, he must at least show “‘actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were ‘based on a [prohibited] discriminatory criterion’” ’ ” (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354–355 [100 Cal.Rptr.2d 352, 8 P.3d 1089], internal citations omitted.)
- “If, at trial, the plaintiff establishes a prima facie case, a presumption of discrimination arises. This presumption, though ‘rebuttable,’ is ‘legally mandatory.’ Thus, in a trial, ‘[i]f the trier of fact believes the plaintiff’s evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.’ [¶] Accordingly, at this trial stage, the burden shifts to the employer to rebut the presumption by producing admissible evidence, sufficient to ‘raise[] a genuine issue of fact’ and to ‘justify a judgment for the [employer],’ that its action was taken for a legitimate, nondiscriminatory reason. [¶] If the employer sustains this burden, the presumption of discrimination disappears. The plaintiff must then have the opportunity to attack the employer’s proffered reasons as pretexts for discrimination, or to offer any other evidence of discriminatory motive. In an appropriate case, evidence of dishonest reasons, considered together with the elements of the prima facie case, may permit a finding of prohibited bias. The ultimate burden of persuasion on the issue of actual discrimination remains with the plaintiff.” (*Guz, supra*, 24 Cal.4th at pp. 355–356, internal citations omitted.)
- “The trial court decides the first two stages of the *McDonnell Douglas* test as questions of law. If the plaintiff and defendant satisfy their respective burdens, the presumption of discrimination disappears and the question whether the defendant unlawfully discriminated against the plaintiff is submitted to the jury to decide whether it believes the defendant’s or the plaintiff’s explanation.” (*Swanson v. Morongo Unified School Dist.* (2014) 232 Cal.App.4th 954, 965 [181 Cal.Rptr.3d 553].)
- “We conclude that where a plaintiff establishes a prima facie case of discrimination based on a failure to interview her for open positions, the employer must do more than produce evidence that the hiring authorities did not know why she was not interviewed. Nor is it enough for the employer, in a writ petition or on appeal, to cobble together after-the-fact *possible* nondiscriminatory

reasons. While the stage-two burden of production is not onerous, the employer must clearly state the *actual* nondiscriminatory reason for the challenged conduct.” (*Dept. of Corrections & Rehabilitation v. State Personnel Bd.* (2022) 74 Cal.App.5th 908, 930 [290 Cal.Rptr.3d 70], original italics.)

- “To succeed on a disparate treatment claim at trial, the plaintiff has the initial burden of establishing a prima facie case of discrimination, to wit, a set of circumstances that, if unexplained, permit an inference that it is more likely than not the employer intentionally treated the employee less favorably than others on prohibited grounds. Based on the inherent difficulties of showing intentional discrimination, courts have generally adopted a multifactor test to determine if a plaintiff was subject to disparate treatment. The plaintiff must generally show that: he or she was a member of a protected class; was qualified for the position he sought; suffered an adverse employment action, and there were circumstances suggesting that the employer acted with a discriminatory motive. [¶] On a defense motion for summary judgment against a disparate treatment claim, the defendant must show either that one of these elements cannot be established or that there were one or more legitimate, nondiscriminatory reasons underlying the adverse employment action.” (*Jones v. Department of Corrections* (2007) 152 Cal.App.4th 1367, 1379 [62 Cal.Rptr.3d 200], internal citations omitted.)
- “Although ‘[t]he specific elements of a prima facie case may vary depending on the particular facts,’ the plaintiff in a failure-to-hire case ‘[g]enerally . . . must provide evidence that (1) he [or she] was a member of a protected class, (2) he [or she] was qualified for the position he [or she] sought . . . , (3) he [or she] suffered an adverse employment action, such as . . . denial of an available job, and (4) some other circumstance suggests discriminatory motive,’ such as that the position remained open and the employer continued to solicit applications for it.” (*Abed, supra*, 23 Cal.App.5th at p. 736.)
- “Although we recognize that in most cases, a plaintiff who did not apply for a position will be unable to prove a claim of discriminatory failure to hire, a job application is not an *element* of the claim.” (*Abed, supra*, 23 Cal.App.5th at p. 740, original italics.)
- “Employers who lie about the existence of open positions are not immune from liability under the FEHA simply because they are effective in keeping protected persons from applying.” (*Abed, supra*, 23 Cal.App.5th at p. 741.)
- “[Defendant] still could shift the burden to [plaintiff] by presenting admissible evidence showing a legitimate, nondiscriminatory reason for terminating her. ‘It is the employer’s honest belief in the stated reasons for firing an employee and not the objective truth or falsity of the underlying facts that is at issue in a discrimination case.’ . . . ‘[I]f nondiscriminatory, [the employer’s] true reasons need not necessarily have been wise or correct. . . . While the objective soundness of an employer’s proffered reasons supports their credibility . . . , the ultimate issue is simply whether the employer acted with *a motive to discriminate illegally*. Thus, “legitimate” reasons . . . in this context are reasons that are *facially unrelated to prohibited bias*, and which, if true, would thus

preclude a finding of *discrimination*. . . .” (*Wills v. Superior Court* (2011) 195 Cal.App.4th 143, 170–171 [125 Cal.Rptr.3d 1], original italics, internal citations omitted.)

- “[W]e hold that a residency program’s claim that it terminated a resident for academic reasons is not entitled to deference. . . . [T]he jury should be instructed to evaluate, without deference, whether the program terminated the resident for a genuine academic reason or because of an impermissible reason such as retaliation or the resident’s gender.” (*Khoiny v. Dignity Health* (2022) 76 Cal.App.5th 390, 404 [291 Cal.Rptr.3d 496].)
- “The burden therefore shifted to [plaintiff] to present evidence showing the [defendant] engaged in intentional discrimination. To meet her burden, [plaintiff] had to present evidence showing (1) the [defendant]’s stated reason for not renewing her contract was untrue or pretextual; (2) the [defendant] acted with a discriminatory animus in not renewing her contract; or (3) a combination of the two.” (*Swanson, supra*, 232 Cal.App.4th at p. 966.)
- “Evidence that an employer’s proffered reasons were pretextual does not necessarily establish that the employer intentionally discriminated: ‘ “[I]t is not enough . . . to disbelieve the employer; the factfinder must believe the plaintiff’s explanation of intentional discrimination.’ ”’ However, evidence of pretext is important: ‘ “[A] plaintiff’s prima facie case, combined with sufficient evidence to find that the employer’s asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.” ’ ” (*Diego v. City of Los Angeles* (2017) 15 Cal.App.5th 338, 350–351 [223 Cal.Rptr.3d 173], internal citations omitted.)
- “While a complainant need not prove that [discriminatory] animus was the sole motivation behind a challenged action, he must prove by a preponderance of the evidence that there was a ‘causal connection’ between the employee’s protected status and the adverse employment decision.” (*Mixon, supra*, 192 Cal.App.3d at p. 1319.)
- “Requiring the plaintiff to show that discrimination was a *substantial* motivating factor, rather than simply *a* motivating factor, more effectively ensures that liability will not be imposed based on evidence of mere thoughts or passing statements unrelated to the disputed employment decision. At the same time, . . . proof that discrimination was a *substantial* factor in an employment decision triggers the deterrent purpose of the FEHA and thus exposes the employer to liability, even if other factors would have led the employer to make the same decision at the time.” (*Harris, supra*, 56 Cal.4th at p. 232, original italics.)
- “We do not suggest that discrimination must be alone sufficient to bring about an employment decision in order to constitute a substantial motivating factor. But it is important to recognize that discrimination can be serious, consequential, and even by itself determinative of an employment decision without also being a “but for” cause.” (*Harris, supra*, 56 Cal.4th at p. 229.)

- “In cases involving a comparison of the plaintiff’s qualifications and those of the successful candidate, we must assume that a reasonable juror who might disagree with the employer’s decision, but would find the question close, would not usually infer discrimination on the basis of a comparison of qualifications alone. In a close case, a reasonable juror would usually assume that the employer is more capable of assessing the significance of small differences in the qualifications of the candidates, or that the employer simply made a judgment call. [Citation.] But this does not mean that a reasonable juror would in every case defer to the employer’s assessment. If that were so, no job discrimination case could ever go to trial. If a factfinder can conclude that a reasonable employer would have found the plaintiff to be *significantly better* qualified for the job, but this employer did not, the factfinder can legitimately infer that the employer consciously selected a less-qualified candidate—something that employers do not usually do, unless some other strong consideration, such as discrimination, enters into the picture.” (*Reeves v. MV Transportation, Inc.* (2010) 186 Cal.App.4th 666, 674–675 [111 Cal.Rptr.3d 896], original italics.)
- “While not all cases hold that ‘the disparity in candidates’ qualifications “must be so apparent as to jump off the page and slap us in the face to support a finding of pretext”’ the precedents do consistently require that the disparity be substantial to support an inference of discrimination.” (*Reeves, supra*, 186 Cal.App.4th at p. 675, internal citation omitted.)
- “In no way did the Court of Appeal in *Reeves* overturn the long-standing rule that comparator evidence is relevant and admissible where the plaintiff and the comparator are similarly situated in all relevant respects and the comparator is treated more favorably. Rather, it held that in a job hiring case, and in the context of a summary judgment motion, a plaintiff’s weak comparator evidence ‘alone’ is insufficient to show pretext.” (*Gupta v. Trustees of California State University* (2019) 40 Cal.App.5th 510, 521 [253 Cal.Rptr.3d 277].)
- “[Defendant] contends that a trial court must assess the relative strength and nature of the evidence presented on summary judgment in determining if the plaintiff has ‘created only a weak issue of fact.’ However, [defendant] overlooks that a review of all of the evidence is essential to that assessment. The stray remarks doctrine, as advocated by [defendant], goes further. It allows a court to weigh and assess the remarks in isolation, and to disregard the potentially damaging nature of discriminatory remarks simply because they are made by ‘nondecisionmakers, or [made] by decisionmakers unrelated to the decisional process.’ [Defendant] also argues that ambiguous remarks are stray, irrelevant, prejudicial, and inadmissible. However, ‘the task of disambiguating ambiguous utterances is for trial, not for summary judgment.’ Determining the weight of discriminatory or ambiguous remarks is a role reserved for the jury. The stray remarks doctrine allows the trial court to remove this role from the jury.” (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 540–541 [113 Cal.Rptr.3d 327, 235 P.3d 988], internal citations omitted; see Gov. Code, § 12923(c) [Legislature affirms

the decision in *Reid v. Google, Inc.* in its rejection of the “stray remarks doctrine”].)

- “[D]iscriminatory remarks can be relevant in determining whether intentional discrimination occurred: ‘Although stray remarks may not have strong probative value when viewed in isolation, they may corroborate direct evidence of discrimination or gain significance in conjunction with other circumstantial evidence. Certainly, who made the comments, when they were made in relation to the adverse employment decision, and in what context they were made are all factors that should be considered’” (*Husman v. Toyota Motor Credit Corp.* (2017) 12 Cal.App.5th 1168, 1190–1191 [220 Cal.Rptr.3d 42].)
- “Discrimination on the basis of an employee’s foreign accent is a sufficient basis for finding national origin discrimination.” (*Galvan v. Dameron Hospital Assn.* (2019) 37 Cal.App.5th 549, 562 [250 Cal.Rptr.3d 16].)
- “Because of the similarity between state and federal employment discrimination laws, California courts look to pertinent federal precedent when applying our own statutes.” (*Guz, supra*, 24 Cal.4th at p. 354.)
- “We have held ‘that, in a civil action under the FEHA, all relief generally available in noncontractual actions . . . may be obtained.’ This includes injunctive relief.” (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 132 [87 Cal.Rptr.2d 132, 980 P.2d 846], internal citations omitted.)
- “The FEHA does not itself authorize punitive damages. It is, however, settled that California’s punitive damages statute, Civil Code section 3294, applies to actions brought under the FEHA” (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1147–1148 [74 Cal.Rptr.2d 510], internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, § 1025 et seq.

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair Employment And Housing Act*, ¶¶ 7:194, 7:200–7:201, 7:356, 7:391–7:392 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.44–2.82

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, §§ 43.01, 43.10 (Matthew Bender)

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

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

**2508. Failure to File Timely Administrative Complaint—Plaintiff
Alleges Continuing Violation (Gov. Code, § 12960(e))**

[Name of defendant] contends that [name of plaintiff]’s lawsuit may not proceed because [name of plaintiff] did not timely file a complaint with the California Civil Rights Department (CRD). A complaint is timely if it was filed within three years of the date on which [name of defendant]’s alleged unlawful practice occurred.

[Name of plaintiff] filed a complaint with the CRD on [date]. [Name of plaintiff] may recover for acts of alleged [specify the unlawful practice, e.g., harassment] that occurred before [insert date three years before the CRD complaint was filed], only if [he/she/nonbinary pronoun] proves all of the following:

- 1. That [name of defendant]’s [e.g., harassment] that occurred before [insert date three years before the CRD complaint was filed] was similar or related to the conduct that occurred on or after that date;**
- 2. That the conduct was reasonably frequent; and**
- 3. That the conduct had not yet become permanent before that date. “Permanent” in this context means that the conduct has stopped, [name of plaintiff] has resigned, or [name of defendant]’s statements and actions would make it clear to a reasonable employee that any further efforts to resolve the issue internally would be futile.**

New June 2010; Revised December 2011, June 2015, May 2019, May 2020, May 2023

Directions for Use

Give this instruction if the plaintiff relies on the continuing violation doctrine in order to avoid the bar of the limitation period of three years within which to file an administrative complaint. (See Gov. Code, § 12960(e).) Although the continuing violation doctrine is labeled an equitable exception, it may involve triable issues of fact. (See *Dominguez v. Washington Mutual Bank* (2008) 168 Cal.App.4th 714, 723–724 [85 Cal.Rptr.3d 705].)

If the case involves multiple claims of FEHA violations, replace “lawsuit” in the opening sentence with reference to the particular claim or claims to which the continuing violation rule may apply.

In the second paragraph, insert the date on which the administrative complaint was filed and the dates on which both sides allege that the complaint requirement was triggered. The verdict form should ask the jury to specify the date that it finds that the requirement accrued. If there are multiple claims with different continuing

violation dates, repeat this paragraph for each claim.

The plaintiff has the burden to plead and prove timely exhaustion of administrative remedies, such as filing a sufficient complaint with the CRD. (*Kim v. Konad USA Distribution, Inc.* (2014) 226 Cal.App.4th 1336, 1345 [172 Cal.Rptr.3d 686].) (Use “Department of Fair Employment and Housing” or “DFEH” as appropriate if the case was filed before the agency’s name change.) This burden of proof extends to any excuse or justification for the failure to timely file, such as the continuing violation exception. (*Jumaane v. City of Los Angeles* (2015) 241 Cal.App.4th 1390, 1402 [194 Cal.Rptr.3d 689].)

Sources and Authority

- Administrative Complaint for FEHA Violation. Government Code section 12960.
- “At a jury trial, the facts are presented and the jury must decide whether there was a continuing course of unlawful conduct based on the law as stated in CACI No. 2508.” (*Jumaane, supra*, 241 Cal.App.4th at p. 1401.)
- “Under the FEHA, the employee must exhaust the administrative remedy provided by the statute by filing a complaint with the Department of Fair Employment and Housing (Department) and must obtain from the Department a notice of right to sue in order to be entitled to file a civil action in court based on violations of the FEHA. The timely filing of an administrative complaint is a prerequisite to the bringing of a civil action for damages under the FEHA. As for the applicable limitation period, the FEHA provides that no complaint for any violation of its provisions may be filed with the Department ‘after the expiration of one year from the date upon which the alleged *unlawful practice* or refusal to cooperate *occurred*,’ with an exception for delayed discovery not relevant here.” (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 63 [105 Cal.Rptr.2d 652], original italics, internal citations omitted.)
- “[I]t is ‘plaintiff’s burden to plead and prove timely exhaustion of administrative remedies, such as filing a sufficient complaint with [CRD, formerly known as DFEH] and obtaining a right-to-sue letter.’ ” (*Kim, supra*, 226 Cal.App.4th at p. 1345.)
- “[W]hen defendant has asserted the statute of limitation defense, plaintiff has the burden of proof to show his or her claims are timely under the continuing violation doctrine.” (*Jumaane, supra*, 241 Cal.App.4th at p. 1402.)
- “Under the continuing violation doctrine, a plaintiff may recover for unlawful acts occurring outside the limitations period if they continued into that period. The continuing violation doctrine requires proof that (1) the defendant’s actions inside and outside the limitations period are sufficiently similar in kind; (2) those actions occurred with sufficient frequency; and (3) those actions have not acquired a degree of permanence.” (*Wassmann v. South Orange County Community College Dist.* (2018) 24 Cal.App.5th 825, 850–851 [234 Cal.Rptr.3d 712], internal citations omitted.)

- “‘[P]ermanence’ in the context of an ongoing process of accommodation of disability, or ongoing disability harassment, should properly be understood to mean the following: that an employer’s statements and actions make clear to a reasonable employee that any further efforts at informal conciliation to obtain reasonable accommodation or end harassment will be futile. [¶] Thus, when an employer engages in a continuing course of unlawful conduct under the FEHA by refusing reasonable accommodation of a disabled employee or engaging in disability harassment, and this course of conduct does not constitute a constructive discharge, the statute of limitations begins to run, not necessarily when the employee first believes that his or her rights may have been violated, but rather, either when the course of conduct is brought to an end, as by the employer’s cessation of such conduct or by the employee’s resignation, or when the employee is on notice that further efforts to end the unlawful conduct will be in vain. Accordingly, an employer who is confronted with an employee seeking accommodation of disability or relief from disability harassment may assert control over its legal relationship with the employee either by accommodating the employee’s requests, or by making clear to the employee in a definitive manner that it will not be granting any such requests, thereby commencing the running of the statute of limitations.” (*Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 823–824 [111 Cal.Rptr.2d 87, 29 P.3d 175], internal citations omitted.)
- “[T]he *Richards* court interpreted section 12960 to mean that when a continuing pattern of wrongful conduct occurs partly in the statutory period and partly outside the statutory period, the limitations period begins to accrue once an employee is on notice of the violation of his or her rights and on notice that ‘litigation, not informal conciliation, is the only alternative for the vindication of his or her rights.’ ” (*Acuna v. San Diego Gas & Electric Co.* (2013) 217 Cal.App.4th 1402, 1412 [159 Cal.Rptr.3d 749].)
- “A continuing violation may be established by demonstrating ‘a company wide policy or practice’ or ‘a series of related acts against a single individual.’ ‘The continuing violation theory generally has been applied in the context of a continuing policy and practice of discrimination on a company-wide basis; a plaintiff who shows that a policy and practice operated at least in part within the limitation period satisfies the filing requirements. “[A] systematic policy of discrimination is actionable even if some or all of the events evidencing its inception occurred prior to the limitations period. The reason is that the continuing system of discrimination operates against the employee and violates his or her rights up to a point in time that falls within the applicable limitations period. Such continuing violations are most likely to occur in the matter of placements or promotions.” ’ The plaintiff must demonstrate that at least one act occurred within the filing period and that ‘the harassment is “more than the occurrence of isolated or sporadic acts of intentional discrimination.” . . . The relevant distinction is between the occurrence of isolated, intermittent acts of discrimination and a persistent, on-going pattern.’ ” (*Morgan, supra*, 88

Cal.App.4th at p. 64, internal citations omitted.)

- “[A] continuing violation claim will likely fail if the plaintiff knew, or through the exercise of reasonable diligence would have known, [the plaintiff] was being discriminated against at the time the earlier events occurred.” (*Morgan, supra*, 88 Cal.App.4th at p. 65.)
- “The Supreme Court has extended the continuing violation doctrine to retaliation claims. And the doctrine also applies to racial harassment claims. Indeed, as we observed in *Morgan v. Regents of University of California, supra*, 88 Cal.App.4th 52, 65: ‘Cases alleging a hostile work environment due to racial or sexual harassment are often found to come within the continuing violations framework.’ ” (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 270 [100 Cal.Rptr.3d 296], internal citations omitted.)

Secondary Sources

8 Witkin, *Summary of California Law* (11th ed. 2017) Constitutional Law, § 1065

3 Witkin, *California Procedure* (5th ed. 2008) Actions, § 611

Chin et al., *California Practice Guide: Employment Litigation*, Ch. 7-A, *Title VII And The California Fair Employment And Housing Act*, ¶¶ 7:561.1, 7:975 (The Rutter Group)

Chin et al., *California Practice Guide: Employment Litigation*, Ch. 16-A, *Failure To Exhaust Administrative Remedies*, ¶ 16:85 (The Rutter Group)

3 Wilcox, *California Employment Law*, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[4] (Matthew Bender)

11 *California Forms of Pleading and Practice*, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.51[1] (Matthew Bender)

10 *California Points and Authorities*, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, § 100.59 (Matthew Bender)

2540. Disability Discrimination—Disparate Treatment—Essential Factual Elements

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

1. **That** *[name of defendant]* **was** *[an employer/[other covered entity]]*;
2. **That** *[name of plaintiff]* **[was an employee of [name of defendant]/ applied to [name of defendant] for a job/[describe other covered relationship to defendant]]**;
3. **That** *[name of defendant]* **knew that** *[name of plaintiff]* **had [a history of having] [a]** *[e.g., physical condition]* **[that limited [insert major life activity]]**;
4. **That** *[name of plaintiff]* **was able to perform the essential job duties of** *[his/her/nonbinary pronoun]* **[current position/the position for which [he/she/nonbinary pronoun] applied], either with or without reasonable accommodation for** *[his/her/nonbinary pronoun]* *[e.g., condition]*;
5. **[That** *[name of defendant]* **[discharged/refused to hire/[other adverse employment action]]** *[name of plaintiff]*;
[or]
[That *[name of defendant]* **subjected** *[name of plaintiff]* **to an adverse employment action;**
[or]
[That *[name of plaintiff]* **was constructively discharged;**
6. **That** *[name of plaintiff]*'s **[history of [a]]** *[e.g., physical condition]* **was a substantial motivating reason for** *[name of defendant]*'s **[decision to [discharge/refuse to hire/[other adverse employment action]]** *[name of plaintiff]/conduct*;
7. **That** *[name of plaintiff]* **was harmed; and**
8. **That** *[name of defendant]*'s **conduct was a substantial factor in causing** *[name of plaintiff]*'s **harm.**

[Name of plaintiff] **does not need to prove that** *[name of defendant]* **held any ill will or animosity toward** *[him/her/nonbinary pronoun]* **personally because** *[he/she/nonbinary pronoun]* **was [perceived to be] disabled. [On the other hand, if you find that** *[name of defendant]* **did hold ill will or**

animosity toward [name of plaintiff] because [he/she/nonbinary pronoun] was [perceived to be] disabled, you may consider this fact, along with all the other evidence, in determining whether [name of plaintiff]’s [history of [a]] [e.g., physical condition] was a substantial motivating reason for [name of defendant]’s [decision to [discharge/refuse to hire/[other adverse employment action]] [name of plaintiff]/conduct].

New September 2003; Revised June 2006, December 2007, April 2009, December 2009, June 2010, June 2012, June 2013, December 2014, December 2016, May 2019, May 2020

Directions for Use

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

In the introductory paragraph and in elements 3 and 6, select the bracketed language on “history” of disability if the claim of discrimination is based on a history of disability rather than a current actual disability.

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

This instruction is for use by both an employee and a job applicant. Select the appropriate options in elements 2, 5, and 6 depending on the plaintiff’s status.

Modify elements 3 and 6 if the plaintiff was not actually disabled or had a history of disability, but alleges discrimination because the plaintiff was perceived to be disabled. (See Gov. Code, § 12926(o); see also Gov. Code, § 12926(j)(4), (m)(4) [mental and physical disability include being regarded or treated as disabled by the employer].) This can be done with language in element 3 that the employer “treated [name of plaintiff] as if [he/she/nonbinary pronoun] . . .” and with language in element 6 “That [name of employer]’s belief that . . .”

If the plaintiff alleges discrimination on the basis of the plaintiff’s association with someone who was or was perceived to be disabled, give CACI No. 2547, *Disability-Based Associational Discrimination—Essential Factual Elements*. (See *Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal.App.4th 635, 655–660 [163 Cal.Rptr.3d 392] [claim for “disability based associational discrimination” adequately pled].)

If medical-condition discrimination as defined by statute (see Gov. Code, § 12926(i)) is alleged, omit “that limited [insert major life activity]” in element 3. (Compare

Gov. Code, § 12926(i) with Gov. Code, § 12926(j), (m) [no requirement that medical condition limit major life activity].)

Regarding element 4, it is now settled that the ability to perform the essential duties of the job, with or without reasonable accommodation, is an element of the plaintiff's burden of proof. (See *Green v. State of California* (2007) 42 Cal.4th 254, 257–258 [64 Cal.Rptr.3d 390, 165 P.3d 118].)

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

Element 6 requires that the disability be a substantial motivating reason for the adverse action. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; see also CACI No. 2507, "*Substantial Motivating Reason*" Explained.)

Give the optional sentence in the last paragraph if there is evidence that the defendant harbored personal animus against the plaintiff because of the plaintiff's disability.

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

Sources and Authority

- Disability Discrimination Prohibited Under Fair Employment and Housing Act. Government Code section 12940(a).
- Inability to Perform Essential Job Duties. Government Code section 12940(a)(1).
- "Medical Condition" Defined. Government Code section 12926(i).
- "Mental Disability" Defined. Government Code section 12926(j).
- "Physical Disability" Defined. Government Code section 12926(m).
- Perception of Disability and Association With Person Who Has or Is Perceived to Have Disability Protected. Government Code section 12926(o).
- "Substantial" Limitation Not Required. Government Code section 12926.1(c).
- "[T]he plaintiff initially has the burden to establish a prima facie case of discrimination. The plaintiff can meet this burden by presenting evidence that demonstrates, even circumstantially or by inference, that he or she (1) suffered from a disability, or was regarded as suffering from a disability; (2) could perform the essential duties of the job with or without reasonable accommodations, and (3) was subjected to an adverse employment action because of the disability or perceived disability. To establish a prima facie case,

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

- “The distinction between cases involving *direct evidence* of the employer’s motive for the adverse employment action and cases where there is only *circumstantial evidence* of the employer’s discriminatory motive is critical to the outcome of this appeal. There is a vast body of case law that addresses proving discriminatory intent in cases where there was no direct evidence that the adverse employment action taken by the employer was motivated by race, religion, national origin, age or sex. In such cases, proof of discriminatory motive is governed by the three-stage burden-shifting test established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 [93 S.Ct. 1817, 36 L.Ed.2d 668].” (*Wallace v. County of Stanislaus* (2016) 245 Cal.App.4th 109, 123 [199 Cal.Rptr.3d 462], original italics, footnote and internal citations omitted.)
- “The three-stage framework and the many principles adopted to guide its application do not apply in discrimination cases where, like here, the plaintiff presents direct evidence of the employer’s motivation for the adverse employment action. In many types of discrimination cases, courts state that direct evidence of intentional discrimination is rare, but disability discrimination cases often involve direct evidence of the role of the employee’s actual or perceived *disability* in the employer’s decision to implement an adverse employment action. Instead of litigating the employer’s reasons for the action, the parties’ disputes in disability cases focus on whether the employee was able to perform essential job functions, whether there were reasonable accommodations that would have allowed the employee to perform those functions, and whether a reasonable accommodation would have imposed an undue hardship on the employer. To summarize, courts and practitioners should not automatically apply principles related to the *McDonnell Douglas* test to disability discrimination cases. Rather, they should examine the critical threshold issue and determine whether there is direct evidence that the motive for the employer’s conduct was related to the employee’s physical or mental condition.” (*Wallace, supra*, 245 Cal.App.4th at p. 123, original italics, footnote and internal citations omitted; cf. *Moore v. Regents of University of California* (2016) 248 Cal.App.4th 216, 234 fn. 3 [206 Cal.Rptr.3d 841] [case did not present so-called “typical” disability discrimination case, as described in *Wallace*, in that the parties disputed the employer’s reasons for terminating plaintiff’s employment].)
- “If the employee meets this [prima facie] burden, it is then incumbent on the

employer to show that it had a legitimate, nondiscriminatory reason for its employment decision. When this showing is made, the burden shifts back to the employee to produce substantial evidence that employer’s given reason was either ‘untrue or pretextual,’ or that the employer acted with discriminatory animus, in order to raise an inference of discrimination.” (*Furtado v. State Personnel Bd.* (2013) 212 Cal.App.4th 729, 744 [151 Cal.Rptr.3d 292], internal citations omitted.)

- “Although the same statutory language that prohibits disability discrimination also prohibits discrimination based on race, age, sex, and other factors, we conclude that disability discrimination claims are fundamentally different from the discrimination claims based on the other factors listed in section 12940, subdivision (a). These differences arise because (1) additional statutory provisions apply to disability discrimination claims, (2) the Legislature made separate findings and declarations about protections given to disabled persons, and (3) discrimination cases involving race, religion, national origin, age and sex, often involve pretexts for the adverse employment action—an issue about motivation that appears less frequently in disability discrimination cases.” (*Wallace, supra*, 245 Cal.App.4th at p. 122.)
- “[Defendant] argues that, because [it] hired plaintiffs as recruit officers, they must show they were able to perform the essential functions of a police recruit in order to be qualified individuals entitled to protection under FEHA. [Defendant] argues that plaintiffs cannot satisfy their burden of proof under FEHA because they failed to show that they could perform those essential functions. [¶] Plaintiffs do not directly respond to [defendant]’s argument. Instead, they contend that the relevant question is whether they could perform the essential functions of the positions to which they sought reassignment. Plaintiffs’ argument improperly conflates the legal standards for their claim under section 12940, subdivision (a), for discrimination, and their claim under section 12940, subdivision (m), for failure to make reasonable accommodation, including reassignment. In connection with a discrimination claim under section 12940, subdivision (a), the court considers whether a plaintiff could perform the essential functions of the job held—or for job applicants, the job desired—with or without reasonable accommodation.” (*Atkins v. City of Los Angeles* (2017) 8 Cal.App.5th 696, 716–717 [214 Cal.Rptr.3d 113].)
- “Summary adjudication of the section 12940(a) claim . . . turns on . . . whether [plaintiff] could perform the essential functions of the relevant job with or without accommodation. [Plaintiff] does not dispute that she was unable to perform the essential functions of her *former* position as a clothes fitter with or without accommodation. Under federal law, however, when an employee seeks accommodation by being reassigned to a vacant position in the company, the employee satisfies the ‘qualified individual with a disability’ requirement by showing he or she can perform the essential functions of the *vacant position* with or without accommodation. The position must exist and be vacant, and the employer need not promote the disabled employee. We apply the same rule here.

To prevail on summary adjudication of the section 12940(a) claim, [defendant] must show there is no triable issue of fact about [plaintiff]’s ability, with or without accommodation, to perform the essential functions of an available vacant position that would not be a promotion.” (*Nadaf-Rahrov v. The Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 965 [83 Cal.Rptr.3d 190], original italics, internal citations omitted.)

- “To establish a prima facie case of mental disability discrimination under FEHA, a plaintiff must show the following elements: (1) She suffers from a mental disability; (2) she is otherwise qualified to do the job with or without reasonable accommodation; and (3) she was subjected to an adverse employment action because of the disability.” (*Higgins-Williams v. Sutter Medical Foundation* (2015) 237 Cal.App.4th 78, 84 [187 Cal.Rptr.3d 745].)
- “At most, [plaintiff] alleges only that he anticipated becoming disabled for some time after the organ donation. This is insufficient. [Plaintiff] cannot pursue a cause of action for discrimination under FEHA on the basis of his ‘actual’ physical disability in the absence of factual allegations that he was in fact, physically disabled.” (*Rope, supra*, 220 Cal.App.4th at p. 659.)
- “[Defendant] asserts the statute’s ‘regarded as’ protection is limited to persons who are denied or who lose jobs based on an employer’s reliance on the ‘myths, fears or stereotypes’ frequently associated with disabilities. . . . However, the statutory language does not expressly restrict FEHA’s protections to the narrow class to whom [defendant] would limit its coverage. To impose such a restriction would exclude from protection a large group of individuals, like [plaintiff], with more mundane long-term medical conditions, the significance of which is exacerbated by an employer’s failure to reasonably accommodate. Both the policy and language of the statute offer protection to a person who is not actually disabled, but is wrongly perceived to be. The statute’s plain language leads to the conclusion that the ‘regarded as’ definition casts a broader net and protects *any* individual ‘regarded’ or ‘treated’ by an employer ‘as having, or having had, any physical condition that makes achievement of a major life activity difficult’ or may do so in the future. We agree most individuals who sue exclusively under this definitional prong likely are and will continue to be victims of an employer’s ‘mistaken’ perception, based on an unfounded fear or stereotypical assumption. Nevertheless, FEHA’s protection is nowhere expressly premised on such a factual showing, and we decline the invitation to import such a requirement.” (*Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 53 [43 Cal.Rptr.3d 874], original italics, internal citations omitted.)
- “[T]he purpose of the ‘regarded-as’ prong is to protect individuals rejected from a job because of the ‘myths, fears and stereotypes’ associated with disabilities. In other words, to find a perceived disability, the perception must stem from a false idea about the existence of or the limiting effect of a disability.” (*Diffey v. Riverside County Sheriff’s Dept.* (2000) 84 Cal.App.4th 1031, 1037 [101 Cal.Rptr.2d 353], internal citation omitted.)
- “We say on this record that [defendant] took action against [plaintiff] based on

concerns or fear about his possible future disability. The relevant FEHA definition of an individual regarded as disabled applies only to those who suffer certain specified physical disabilities or those who have a condition with ‘no present disabling effect’ but which ‘may become a physical disability . . .’ According to the pleadings, [defendant] fired [plaintiff] to avoid accommodating him because of his association with his physically disabled sister. That is not a basis for liability under the ‘regarded as’ disabled standard.” (*Rope, supra*, 220 Cal.App.4th at p. 659, internal citations omitted.)

- “[A]n employer “knows an employee has a disability when the employee tells the employer about his condition, or when the employer otherwise becomes aware of the condition, such as through a third party or by observation. The employer need only know the underlying facts, not the legal significance of those facts.” ’ ” (*Soria v. Univision Radio Los Angeles, Inc.* (2016) 5 Cal.App.5th 570, 592 [210 Cal.Rptr.3d 59].)
- “ ‘An adverse employment decision cannot be made “because of” a disability, when the disability is not known to the employer. Thus, in order to prove [a discrimination] claim, a plaintiff must prove the employer had knowledge of the employee’s disability when the adverse employment decision was made. . . . While knowledge of the disability can be inferred from the circumstances, knowledge will only be imputed to the employer when the fact of disability is the only reasonable interpretation of the known facts. “Vague or conclusory statements revealing an unspecified incapacity are not sufficient to put an employer on notice of its obligations . . .” . . . ’ ” (*Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1008 [93 Cal.Rptr.3d 338].)
- “[W]e interpret FEHA as authorizing an employer to distinguish between disability-caused misconduct and the disability itself in the narrow context of threats or violence against coworkers. If employers are not permitted to make this distinction, they are caught on the horns of a dilemma. They may not discriminate against an employee based on a disability but, at the same time, must provide all employees with a safe work environment free from threats and violence.” (*Wills v. Superior Court* (2011) 195 Cal.App.4th 143, 166 [125 Cal.Rptr.3d 1], internal citations omitted.)
- “Requiring the plaintiff to show that discrimination was a *substantial* motivating factor, rather than simply *a* motivating factor, more effectively ensures that liability will not be imposed based on evidence of mere thoughts or passing statements unrelated to the disputed employment decision. At the same time, . . . proof that discrimination was a *substantial* factor in an employment decision triggers the deterrent purpose of the FEHA and thus exposes the employer to liability, even if other factors would have led the employer to make the same decision at the time.” (*Harris, supra*, 56 Cal.4th at p. 232, original italics.)
- “We do not suggest that discrimination must be alone sufficient to bring about an employment decision in order to constitute a substantial motivating factor. But it is important to recognize that discrimination can be serious, consequential, and

even by itself determinative of an employment decision without also being a ‘but for’ cause.” (*Harris, supra*, 56 Cal.4th at p. 229.)

- “We note that the court in *Harris* discussed the employer’s motivation and the link between the employer’s consideration of the plaintiff’s physical condition and the adverse employment action without using the terms ‘animus,’ ‘animosity,’ or ‘ill will.’ The absence of a discussion of these terms necessarily implies an employer can violate section 12940, subdivision (a) by taking an adverse employment action against an employee “because of” the employee’s physical disability even if the employer harbored no animosity or ill will against the employee or the class of persons with that disability.” (*Wallace, supra*, 245 Cal.App.4th at p. 128.)
- “Based on *Harris*, we conclude that an employer has treated an employee differently ‘because of’ a disability when the disability is a substantial motivating reason for the employer’s decision to subject the [employee] to an adverse employment action. This conclusion resolves how the jury should have been instructed on [defendant]’s motivation or intent in connection with the disability discrimination claim.” (*Wallace, supra*, 245 Cal.App.4th at p. 128.)
- “We conclude that where, as here, an employee is found to be able to safely perform the essential duties of the job, a plaintiff alleging disability discrimination can establish the requisite employer intent to discriminate by proving (1) the employer knew that plaintiff had a physical condition that limited a major life activity, or perceived him to have such a condition, and (2) the plaintiff’s actual or perceived physical condition was a substantial motivating reason for the defendant’s decision to subject the plaintiff to an adverse employment action. . . . [T]his conclusion is based on (1) the interpretation of section 12940’s term ‘because of’ adopted in *Harris*; (2) our discussion of the meaning of the statutory phrase ‘to discriminate against’; and (3) the guidance provided by the current versions of CACI Nos. 2540 and 2507. [¶] Therefore, the jury instruction that [plaintiff] was required to prove that [defendant] ‘regarded or treated [him] as having a disability in order to discriminate’ was erroneous.” (*Wallace, supra*, 245 Cal.App.4th at p. 129.)
- “The word ‘animus’ is ambiguous because it can be interpreted narrowly to mean ‘ill will’ or ‘animosity’ or can be interpreted broadly to mean ‘intention.’ In this case, it appears [defendant] uses ‘animus’ to mean something more than the intent described by the substantial-motivating-reason test adopted in *Harris*.” (*Wallace, supra*, 245 Cal.App.4th at p. 130, fn. 14, internal citation omitted.)
- “‘[W]eight may qualify as a protected “handicap” or “disability” within the meaning of the FEHA if medical evidence demonstrates that it results from a physiological condition affecting one or more of the basic bodily systems and limits a major life activity.’ . . . ‘[A]n individual who asserts a violation of the FEHA on the basis of his or her weight must adduce evidence of a physiological, systemic basis for the condition.’ ” (*Cornell v. Berkeley Tennis Club* (2017) 18 Cal.App.5th 908, 928 [227 Cal.Rptr.3d 286].)
- “Being unable to work during pregnancy is a disability for the purposes of

section 12940.” (*Sanchez v. Swissport, Inc.* (2013) 213 Cal.App.4th 1331, 1340 [153 Cal.Rptr.3d 367].)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 1049–1051

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

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

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

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

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

**2541. Disability Discrimination—Reasonable
Accommodation—Essential Factual Elements (Gov. Code,
§ 12940(m))**

[Name of plaintiff] **claims that** *[name of defendant]* **failed to reasonably accommodate** *[his/her/nonbinary pronoun]* *[select term to describe basis of limitations, e.g., physical condition]*. **To establish this claim,** *[name of plaintiff]* **must prove all of the following:**

1. **That** *[name of defendant]* **was** *[an employer/[other covered entity]]*;
2. **That** *[name of plaintiff]* **[was an employee of** *[name of defendant]* **/** **applied to** *[name of defendant]* **for a job/[describe other covered relationship to defendant]]**;
3. **That** *[[name of plaintiff] had/[name of defendant] treated* *[name of plaintiff]* **as if** *[he/she/nonbinary pronoun]* **had]** **[a]** *[e.g., physical condition]* **[that limited** *[insert major life activity]]*;
4. **That** *[name of defendant]* **knew of** *[name of plaintiff]'s* *[e.g., physical condition]* **[that limited** *[insert major life activity]]*;
5. **That** *[name of plaintiff]* **was able to perform the essential duties of** *[[his/her/nonbinary pronoun] current position or a vacant alternative position to which* *[he/she/nonbinary pronoun]* **could have been reassigned/the position for which** *[he/she/nonbinary pronoun]* **applied]** **with reasonable accommodation for** *[his/her/nonbinary pronoun]* *[e.g., physical condition]*;
6. **That** *[name of defendant]* **failed to provide reasonable accommodation for** *[name of plaintiff]'s* *[e.g., physical condition]*;
7. **That** *[name of plaintiff]* **was harmed; and**
8. **That** *[name of defendant]'s failure to provide reasonable accommodation was a substantial factor in causing* *[name of plaintiff]'s harm.*

[In determining whether *[name of plaintiff]'s* *[e.g., physical condition]* **limits** *[insert major life activity]*, **you must consider the** *[e.g., physical condition]* **[in its unmedicated state/without assistive devices/[describe mitigating measures]].]**

New September 2003; Revised April 2007, December 2007, April 2009, December 2009, June 2010, December 2011, June 2012, June 2013, May 2019, May 2023

Directions for Use

Select a term to use throughout to describe the source of the plaintiff's limitations. It

may be a statutory term such as “physical disability,” “mental disability,” or “medical condition.” (See Gov. Code, § 12940(a).) Or it may be a general term such as “condition,” “disease,” or “disorder.” Or it may be a specific health condition such as “diabetes.”

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

This instruction is for use by both an employee and a job applicant. Select the appropriate options in elements 2 and 5 depending on the plaintiff’s status.

If medical-condition discrimination as defined by statute (see Gov. Code, § 12926(i)) is alleged, omit “that limited [*insert major life activity*]” in elements 3 and 4 and do not include the last paragraph. (Compare Gov. Code, § 12926(i) with Gov. Code, § 12926(j), (m) [no requirement that medical condition limit major life activity].)

In a case of perceived disability, include “[*name of defendant*] treated [*name of plaintiff*] as if [*he/she/nonbinary pronoun*] had” in element 3, and delete optional element 4. (See Gov. Code, § 12926(j)(4), (m)(4) [mental and physical disability include being regarded or treated as disabled by the employer].) In a case of actual disability, include “[*name of plaintiff*] had” in element 3, and give element 4.

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

The California Supreme Court has held that under Government Code section 12940(a), the plaintiff is required to prove that he or she has the ability to perform the essential duties of the job with or without reasonable accommodation. (See *Green v. State of California* (2007) 42 Cal.4th 254, 260 [64 Cal.Rptr.3d 390, 165 P.3d 118].) While the court left open the question of whether the same rule should apply to cases under Government Code section 12940(m) (see *id.* at p. 265), appellate courts have subsequently placed the burden on the employee to prove that he or she would be able to perform the job duties with reasonable accommodation (see element 5). (See *Cuiellette v. City of Los Angeles* (2011) 194 Cal.App.4th 757, 766 [123 Cal.Rptr.3d 562]; *Nadaf-Rahrov v. The Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 973–979 [83 Cal.Rptr.3d 190].)

There may still be an unresolved issue if the employee claims that the employer failed to provide the employee with other suitable job positions that the employee might be able to perform with reasonable accommodation. The rule has been that the employer has an affirmative duty to make known to the employee other suitable job opportunities and to determine whether the employee is interested in, and qualified for, those positions, if the employer can do so without undue hardship or if the employer offers similar assistance or benefit to any other employees or has a policy of offering such assistance or benefit to any other employees. (*Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 950–951 [62 Cal.Rptr.2d 142];

see also *Furtado v. State Personnel Bd.* (2013) 212 Cal.App.4th 729, 745 [151 Cal.Rptr.3d 292]; *Claudio v. Regents of the University of California* (2005) 134 Cal.App.4th 224, 243 [35 Cal.Rptr.3d 837]; *Hanson v. Lucky Stores* (1999) 74 Cal.App.4th 215, 226 [87 Cal.Rptr.2d 487].) In contrast, other courts have said that it is the employee’s burden to prove that a reasonable accommodation could have been made, i.e., that the employee was qualified for a position in light of the potential accommodation. (See *Nadaf-Rahrov, supra*, 166 Cal.App.4th at p. 978; see also *Cuiellette, supra*, 194 Cal.App.4th at p. 767 [plaintiff proves he or she is a qualified individual by establishing that he or she can perform the essential functions of the position to which reassignment is sought].) The question of whether the employee has to present evidence of other suitable job descriptions and prove that a vacancy existed for a position that the employee could do with reasonable accommodation may not be fully resolved.

No element has been included that requires the plaintiff to specifically request reasonable accommodation. Unlike Government Code section 12940(n) on the interactive process (see CACI No. 2546, *Disability Discrimination—Reasonable Accommodation—Failure to Engage in Interactive Process*), section 12940(m) does not specifically require that the employee request reasonable accommodation; it requires only that the employer know of the disability. (See *Prilliman, supra*, 53 Cal.App.4th at pp. 950–951.)

Sources and Authority

- Reasonable Accommodation Required. Government Code section 12940(m).
- “Reasonable Accommodation” Explained. Government Code section 12926(p).
- “Medical Condition” Defined. Government Code section 12926(i).
- “Mental Disability” Defined. Government Code section 12926(j).
- “Physical Disability” Defined. Government Code section 12926(m).
- “Substantial” Limitation Not Required. Government Code section 12926.1(c).
- “There are three elements to a failure to accommodate action: ‘(1) the plaintiff has a disability covered by the FEHA; (2) the plaintiff is a qualified individual (i.e., he or she can perform the essential functions of the position); and (3) the employer failed to reasonably accommodate the plaintiff’s disability. [Citation.]’ ” (*Hernandez v. Rancho Santiago Cmty. College Dist.* (2018) 22 Cal.App.5th 1187, 1193–1194 [232 Cal.Rptr.3d 349].)
- “Under the FEHA, ‘reasonable accommodation’ means ‘a modification or adjustment to the workplace that enables the employee to perform the essential functions of the job held or desired.’ ” (*Cuiellette, supra*, 194 Cal.App.4th at p. 766.)
- “Reasonable accommodations include ‘[j]ob restructuring, part-time or modified work schedules, *reassignment to a vacant position*, . . . and other similar accommodations for individuals with disabilities.’ ” (*Swanson v. Morongo Unified School Dist.* (2014) 232 Cal.App.4th 954, 968 [181 Cal.Rptr.3d 553], original italics.)

- “The examples of reasonable accommodations in the relevant statutes and regulations include reallocating nonessential functions or modifying how or when an employee performs an essential function, but not eliminating essential functions altogether. FEHA does not obligate the employer to accommodate the employee by excusing him or her from the performance of essential functions.” (*Nealy v. City of Santa Monica* (2015) 234 Cal.App.4th 359, 375 [184 Cal.Rptr.3d 9].)
- “A term of leave from work can be a reasonable accommodation under FEHA, and, therefore, a request for leave can be considered to be a request for accommodation under FEHA.” (*Moore v. Regents of University of California* (2016) 248 Cal.App.4th 216, 243 [206 Cal.Rptr.3d 841], internal citation omitted.)
- “Failure to accommodate claims are not subject to the *McDonnell Douglas* burden-shifting framework.” (*Cornell v. Berkeley Tennis Club* (2017) 18 Cal.App.5th 908, 926 [227 Cal.Rptr.3d 286].)
- “The question now arises whether it is the employees’ burden to prove that a reasonable accommodation could have been made, i.e., that they were qualified for a position in light of the potential accommodation, or the employers’ burden to prove that no reasonable accommodation was available, i.e., that the employees were not qualified for any position because no reasonable accommodation was available. [¶¶] Applying *Green’s* burden of proof analysis to section 12940(m), we conclude that the burden of proving ability to perform the essential functions of a job with accommodation should be placed on the plaintiff under this statute as well. First, . . . an employee’s ability to perform the essential functions of a job is a prerequisite to liability under section 12940(m). Second, the Legislature modeled section 12940(m) on the federal reasonable accommodation requirement (adopting almost verbatim the federal statutory definition of ‘reasonable accommodation’ by way of example). Had the Legislature intended the employer to bear the burden of proving ability to perform the essential functions of the job, contrary to the federal allocation of the burden of proof, . . . it could have expressly provided for that result, but it did not. Finally, general evidentiary principles support allocating the burden of proof on this issue to the plaintiff.” (*Nadaf-Rahrov, supra*, 166 Cal.App.4th at pp. 977–978, internal citations omitted.)
- “ ‘If the employee cannot be accommodated in his or her existing position and the requested accommodation is reassignment, an employer must make affirmative efforts to determine whether a position is available. [Citation.] A reassignment, however, is not required if “there is no vacant position for which the employee is qualified.” [Citations.] “The responsibility to reassign a disabled employee who cannot otherwise be accommodated does ‘not require creating a new job, moving another employee, promoting the disabled employee or violating another employee’s rights’ [Citations.] “What is required is the ‘duty to reassign a disabled employee if an already funded, vacant position at the

same level exists.’ [Citations.]” [Citations.]’ ” (*Furtado, supra*, 212 Cal.App.4th at p. 745.)

- “[A]n employee’s probationary status does not, in and of itself, deprive an employee of the protections of FEHA, including a reasonable reassignment. The statute does not distinguish between the types of reasonable accommodations an employer may have to provide to employees on probation or in training and those an employer may have to provide to other employees. We decline to read into FEHA a limitation on an employee’s eligibility for reassignment based on an employee’s training or probationary status. Instead, the trier of fact should consider whether an employee is on probation or in training in determining whether a particular reassignment is comparable in pay and status to the employee’s original position.” (*Atkins v. City of Los Angeles* (2017) 8 Cal.App.5th 696, 724 [214 Cal.Rptr.3d 113], internal citations omitted.)
- “[A] disabled employee seeking reassignment to a vacant position ‘is entitled to preferential consideration.’ ” (*Swanson, supra*, 232 Cal.App.4th at p. 970.)
- “ ‘Generally, “[t]he employee bears the burden of giving the employer notice of the disability.’ ” An employer, in other words, has no affirmative duty to investigate whether an employee’s illness might qualify as a disability. “ ‘[T]he employee can’t expect the employer to read his mind and know he secretly wanted a particular accommodation and sue the employer for not providing it. Nor is an employer ordinarily liable for failing to accommodate a disability of which it had no knowledge.’ ” ” (*Featherstone v. Southern California Permanente Medical Group* (2017) 10 Cal.App.5th 1150, 1167 [217 Cal.Rptr.3d 258], internal citations omitted.)
- “ “[A]n employer “knows an employee has a disability when the employee tells the employer about his condition, or when the employer otherwise becomes aware of the condition, such as through a third party or by observation.” ’ . . . [¶] ‘While knowledge of the disability can be inferred from the circumstances, knowledge will only be imputed to the employer when the fact of disability is the *only* reasonable interpretation of the known facts. “Vague or conclusory statements revealing an unspecified incapacity are not sufficient to put an employer on notice of its obligations under the [FEHA].” ’ ” (*Featherstone, supra*, 10 Cal.App.5th at p. 1167, internal citations omitted.)
- “In other words, so long as the employer is aware of the employee’s condition, there is no requirement that the employer be aware that the condition is considered a disability under the FEHA. By the same token, it is insufficient to tell the employer merely that one is disabled or requires an accommodation.” (*Cornell, supra*, 18 Cal.App.5th at p. 938, internal citation omitted.)
- “ “ “ ‘This notice then triggers the employer’s burden to take “positive steps” to accommodate the employee’s limitations. . . . [¶] . . . The employee, of course, retains a duty to cooperate with the employer’s efforts by explaining [his or her] disability and qualifications. [Citation.] Reasonable accommodation thus envisions an exchange between employer and employee where each seeks and

shares information to achieve the best match between the [employee’s] capabilities and available positions.’ ” ” ” (*Soria v. Univision Radio Los Angeles, Inc.* (2016) 5 Cal.App.5th 570, 598 [210 Cal.Rptr.3d 59].)

- “Employers must make reasonable accommodations to the disability of an individual unless the employer can demonstrate that doing so would impose an ‘undue hardship.’ ” (*Prilliman, supra*, 53 Cal.App.4th at p. 947.)
- “ ‘Ordinarily the reasonableness of an accommodation is an issue for the jury.’ ” (*Prilliman, supra*, 53 Cal.App.4th at p. 954, internal citation omitted.)
- “[T]he duty of an employer to provide reasonable accommodation for an employee with a disability is broader under the FEHA than under the ADA.” (*Bagatti, supra*, 97 Cal.App.4th at p. 362.)
- “[A]n employer is relieved of the duty to reassign a disabled employee whose limitations cannot be reasonably accommodated in his or her current job only if reassignment would impose an ‘undue hardship’ on its operations” (*Atkins, supra*, 8 Cal.App.5th at p. 721.)
- “The question whether plaintiffs could perform the essential functions of a position to which they sought reassignment is relevant to a claim for failure to accommodate under section 12940, subdivision (m)” (*Atkins, supra*, 8 Cal.App.5th at p. 717.)
- “On these issues, which are novel to California and on which the federal courts are divided, we conclude that employers must reasonably accommodate individuals falling within any of FEHA’s statutorily defined ‘disabilities,’ including those ‘regarded as’ disabled, and must engage in an informal, interactive process to determine any effective accommodations.” (*Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 55 [43 Cal.Rptr.3d 874].)
- “While a claim of failure to accommodate is independent of a cause of action for failure to engage in an interactive dialogue, each necessarily implicates the other.” (*Moore, supra*, 248 Cal.App.4th at p. 242.)
- “[A] pretextual termination of a perceived-as-disabled employee’s employment in lieu of providing reasonable accommodation or engaging in the interactive process does not provide an employer a reprieve from claims for failure to accommodate and failure to engage in the interactive process.” (*Moore, supra*, 248 Cal.App.4th at p. 244.)
- “Appellant also stated a viable claim under section 12940, subdivision (m), which mandates that an employer provide reasonable accommodations for the known physical disability of an employee. She alleged that she was unable to work during her pregnancy, that she was denied reasonable accommodations for her pregnancy-related disability and terminated, and that the requested accommodations would not have imposed an undue hardship on [defendant]. A finite leave of greater than four months may be a reasonable accommodation for a known disability under the FEHA.” (*Sanchez v. Swissport, Inc.* (2013) 213 Cal.App.4th 1331, 1341 [153 Cal.Rptr.3d 367].)

- “To the extent [plaintiff] claims the [defendant] had a duty to await a vacant position to arise, he is incorrect. A finite leave of absence may be a reasonable accommodation to allow an employee time to recover, but FEHA does not require the employer to provide an indefinite leave of absence to await possible future vacancies.” (*Nealy, supra*, 234 Cal.App.4th at pp. 377–378.)
- “While ‘a finite leave can be a reasonable accommodation under FEHA, provided it is likely that at the end of the leave, the employee would be able to perform . . . her duties,’ a finite leave is not a reasonable accommodation when the leave leads directly to termination of employment because the employee’s performance could not be evaluated while she was on the leave.” (*Hernandez, supra*, 22 Cal.App.5th at p. 1194.)

Secondary Sources

- 10 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, § 977
Chin et al., California Practice Guide: Employment Litigation, Ch. 9-C, *California Fair Employment And Housing Act (FEHA)*, ¶¶ 9:2250–9:2285, 9:2345–9:2347 (The Rutter Group)
- 1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, § 2.79
- 2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.32[2][c], 41.51[3] (Matthew Bender)
- 11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.22, 115.35, 115.92 (Matthew Bender)
- California Civil Practice: Employment Litigation § 2:50 (Thomson Reuters)

2548. Disability Discrimination—Refusal to Make Reasonable Accommodation in Housing (Gov. Code, § 12927(c)(1))

[Name of plaintiff] claims that [name of defendant] refused to reasonably accommodate [his/her/nonbinary pronoun] [select term to describe basis of limitations, e.g., physical disability] as necessary to afford [him/her/nonbinary pronoun] an equal opportunity to use and enjoy a dwelling. To establish this claim, [name of plaintiff] must prove all of the following:

- 1. That [name of defendant] was the [specify defendant’s source of authority to provide housing, e.g., owner] of [a/an] [specify nature of housing at issue, e.g., apartment building];**
- 2. That [name of plaintiff] [sought to rent/was living in/[specify other efforts to obtain housing]] the [e.g., apartment];**
- 3. That [name of plaintiff] had [a history of having] [a] [e.g., physical disability] [that limited [insert major life activity]];**
- 4. That [name of defendant] knew of, or should have known of, [name of plaintiff]’s disability;**
- 5. That in order to afford [name of plaintiff] an equal opportunity to use and enjoy the [e.g., apartment], it was necessary to [specify accommodation required];**
- 6. That it was reasonable to [specify accommodation];**
- 7. That [name of defendant] refused to make this accommodation.**

New May 2017; Revised May 2020

Directions for Use

This instruction is for use in a case alleging discrimination in housing based on a failure to reasonably accommodate a disability. Under the Fair Employment and Housing Act, “discrimination” includes the “refusal to make reasonable accommodations in rules, policies, practices, or services when these accommodations may be necessary to afford a disabled person equal opportunity to use and enjoy a dwelling.” (Gov. Code, § 12927(c)(1).)

In the introductory paragraph, select a term to describe the source of the plaintiff’s limitations. It may be a statutory term such as “physical disability,” “mental disability,” or “medical condition.” (See Gov. Code, § 12940(a).) Or it may be a general term such as “condition,” “disease,” or “disorder.” Or it may be a specific health condition such as “diabetes.” Use the term in element 3.

In element 2, if the plaintiff encountered a barrier before actually submitting an

application, such as discovering a policy that would make it impossible to live in the unit, specify what the plaintiff did to obtain the housing.

In element 3, select the bracketed language on “history” of disability if the claim of discrimination is based on a history of disability rather than a current actual disability.

Modify element 3 if the plaintiff was not actually disabled or had a history of disability, but alleges denial of accommodation because the plaintiff was perceived to be disabled or associated with someone who has, or is perceived to have, a disability. (See Gov. Code, § 12926(o); see also Gov. Code, § 12926(j)(4), (m)(4) [mental and physical disability include being regarded or treated as disabled by the employer].)

In element 5, explain the accommodation in rules, policies, practices that is alleged to be needed.

Sources and Authority

- “Discrimination” Defined Regarding Housing Disability Accommodations. Government Code section 12927(c)(1).
- “Disability” Defined for Housing Discrimination. Government Code section 12955.3.
- “Housing” Defined. Government Code section 12927(d).
- “ ‘FEHA in the housing area is thus intended to conform to the general requirements of federal law in the area and may provide greater protection against discrimination.’ In other words, the FHA provides a minimum level of protection that FEHA may exceed. Courts often look to cases construing the FHA, the Rehabilitation Act of 1973, and the Americans with Disabilities Act of 1990 when interpreting FEHA.” (*Auburn Woods I Homeowners Assn. v. Fair Employment & Housing Com.* (2004) 121 Cal.App.4th 1578, 1591 [18 Cal.Rptr.3d 669], internal citations omitted.)
- “[T]he basic principles applicable in employment cases should also apply in the housing context.” (*Brown v. Smith* (1997) 55 Cal.App.4th 767, 782 [64 Cal.Rptr.2d 301].)
- “In order to establish discrimination based on a refusal to provide reasonable accommodations, a party must establish that he or she (1) suffers from a disability as defined in FEHA, (2) the discriminating party knew of, or should have known of, the disability, (3) accommodation is necessary to afford an equal opportunity to use and enjoy the dwelling, and (4) the discriminating party refused to make this accommodation.” (*Auburn Woods I Homeowners Assn.*, *supra*, 121 Cal.App.4th at p.1592.)
- “FEHA prohibits, as unlawful discrimination, a ‘refusal to make reasonable accommodations in rules, policies, practices, or services when these accommodations may be necessary to afford a disabled person equal opportunity to use and enjoy a dwelling.’ ‘In order to establish discrimination based on a

refusal to provide reasonable accommodations, a party must establish that he or she (1) suffers from a disability as defined in FEHA, (2) the discriminating party knew of, or should have known of, the disability, (3) accommodation is necessary to afford an equal opportunity to use and enjoy the dwelling, and (4) the discriminating party refused to make this accommodation.’ ” (*Roman v. BRE Properties, Inc.* (2015) 237 Cal.App.4th 1040, 1051 [188 Cal.Rptr.3d 537], internal citation omitted.)

- “We note that, currently, section 12955.3 explicitly states that ‘disability’ includes ‘any physical or mental disability as defined in Section 12926.’ That statute in turn defines ‘mental disability’ to include “any mental or psychological disorder or condition . . . that limits a major life activity’, that is, ‘makes the achievement of the major life activity difficult.’ ‘Major life activities’ is to be broadly construed, and includes ‘physical, mental, and social activities and working.’ ” (*Auburn Woods I Homeowners Assn., supra*, 121 Cal.App.4th at p. 1592, internal citations omitted.)
- “ ‘If a landlord is skeptical of a tenant’s alleged disability or the landlord’s ability to provide an accommodation, it is incumbent upon the landlord to request documentation or open a dialogue.’ This obligation to ‘open a dialogue’ with a party requesting a reasonable accommodation is part of an interactive process in which each party seeks and shares information.” (*Auburn Woods I Homeowners Assn., supra*, 121 Cal.App.4th at p. 1598, internal citation omitted.)
- “This evidence established the requisite causal link between the [defendant]’s no-pets policy and the interference with the [plaintiffs]’ use and enjoyment of their condominium.” (*Auburn Woods I Homeowners Assn., supra*, 121 Cal.App.4th at p. 1593.)
- “When the reasons for a delay in offering a reasonable accommodation are subject to dispute, the matter is left for the trier of fact to resolve. The administrative law judge properly characterized this lengthy delay as a refusal to provide reasonable accommodation.” (*Auburn Woods I Homeowners Assn., supra*, 121 Cal.App.4th at p. 1599, internal citation omitted.)
- “We reiterate that the FEHC did not rule that companion pets are always a reasonable accommodation for individuals with mental disabilities. Each inquiry is fact specific and requires a case-by-case determination.” (*Auburn Woods I Homeowners Assn., supra*, 121 Cal.App.4th at p. 1593.)

Secondary Sources

Joint Statement of the Department of Housing and Urban Development and the Department of Justice, Reasonable Accommodations Under the Fair Housing Act (May 17, 2004), www.justice.gov/sites/default/files/crt/legacy/2010/12/14/joint_statement_ra.pdf

8 Witkin, *Summary of California Law* (11th ed. 2017) Constitutional Law, §§ 1073–1076

7 California Real Estate Law and Practice, Ch. 214, *Government Regulation and Enforcement*, § 214.41 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 117, *Civil Rights: Housing Discrimination*, § 117.14 (Matthew Bender)

2600. Violation of CFRA Rights—Essential Factual Elements

[Name of plaintiff] **claims that** *[name of defendant]* **[refused to grant [him/her/nonbinary pronoun] [family care/medical] leave] [refused to return [him/her/nonbinary pronoun] to the same or a comparable job when [his/her/nonbinary pronoun] [family care/medical] leave ended] [other violation of CFRA rights]. 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] leave *[insert one of the following:]***

[for the birth of *[name of plaintiff]*'s child or bonding with the child;]

[for the placement of a child with *[name of plaintiff]* for adoption or foster care;]

[to care for *[name of plaintiff]*'s [child/parent/spouse/domestic partner/grandparent/grandchild/sibling] who had a serious health condition;]

[to care for an individual designated by *[name of plaintiff]* [who is a blood relative/whose association to *[name of plaintiff]* is equivalent to a family relationship] who had a serious health condition;]

[for *[name of plaintiff]*'s own serious health condition that made [him/her/nonbinary pronoun] unable to perform the functions of [his/her/nonbinary pronoun] job with *[name of defendant]*;]

[for *[specify qualifying military exigency related to covered active duty or call to covered active duty of a spouse, domestic partner, child, or parent, e.g., [name of plaintiff]'s spouse's upcoming military deployment on short notice]*;]

- 3. That *[name of plaintiff]* provided reasonable notice to *[name of defendant]* of [his/her/nonbinary pronoun] need for [family care/medical] leave, including its expected timing and length. [If *[name of defendant]* notified [his/her/nonbinary pronoun/its] employees that 30 days' advance notice was required before the leave was to begin, then *[name of plaintiff]* must show that [he/she/nonbinary pronoun] gave that notice or, if 30 days' notice was not reasonably possible under the circumstances, that [he/she/nonbinary pronoun] gave notice as soon as possible];**

4. That *[name of defendant]* **refused to grant *[name of plaintiff]*'s request for [family care/medical] leave/refused to return *[name of plaintiff]* to the same or a comparable job when [his/her/nonbinary pronoun] [family care/medical] leave ended/other violation of CFRA rights**;
5. That *[name of plaintiff]* **was harmed; and**
6. That *[name of defendant]*'s **[decision/conduct] was a substantial factor in causing *[name of plaintiff]*'s harm.**

New September 2003; Revised October 2008, May 2021, May 2023

Directions for Use

This instruction is intended for use when an employee claims violation of the CFRA (Gov. Code, § 12945.1 et seq.). In addition to a qualifying employer's refusal to grant CFRA leave, CFRA violations include failure to provide benefits as required by CFRA and loss of seniority.

In the fourth bracketed option of element 2, if the plaintiff's relationship or association with the designated individual is contested, select either a blood relative or an associated person, or both, as applicable. (Gov. Code, § 12945.2(b)(2).) Omit both options if the plaintiff's relationship or association with the designated individual is not contested.

The second-to-last bracketed option in element 2 does not include leave taken for disability on account of pregnancy, childbirth, or related medical conditions. (Gov. Code, § 12945.2(b)(5)(C).) If there is a dispute concerning the existence of a "serious health condition," the court must instruct the jury as to the meaning of this term. (See Gov. Code, § 12945.2(b)(13).) If there is no dispute concerning the relevant individual's condition qualifying as a "serious health condition," it is appropriate for the judge to instruct the jury that the condition qualifies as a "serious health condition."

The last bracketed option in element 2 requires a qualifying exigency for military family leave related to the covered active duty or call to covered active duty of the employee's spouse, domestic partner, child, or parent in the Armed Forces of the United States. That phrase is defined in the Unemployment Insurance Code. (See Unemp. Ins. Code, § 3302.2.)

Give the bracketed sentence under element 3 only if the facts involve an expected birth, placement for adoption, or planned medical treatment, and there is evidence that the employer required 30 days' advance notice of leave. (See Cal. Code Regs., tit. 2, § 11091(a)(2).)

Sources and Authority

- California Family Rights Act. Government Code section 12945.2.
- "Designated Person" Defined. Government Code section 12945.2(b)(2).

- “Employer” Defined. Government Code section 12945.2(b)(4).
- “Parent” Defined. Government Code section 12945.2(b)(11) (Assem. Bill 1033; Stats. 2021, ch. 327) [adding parent-in-law to the definition of parent].
- “Serious Health Condition” Defined. Government Code section 12945.2(b)(13).
- “An employee who takes CFRA leave is guaranteed that taking such leave will not result in a loss of job security or other adverse employment actions. Upon an employee’s timely return from CFRA leave, an employer must generally restore the employee to the same or a comparable position. An employer is not required to reinstate an employee who cannot perform her job duties after the expiration of a protected medical leave.” (*Rogers v. County of Los Angeles* (2011) 198 Cal.App.4th 480, 487 [130 Cal.Rptr.3d 350], footnote and internal citations omitted, superseded on other grounds by statute.)
- “A CFRA interference claim ‘consists of the following elements: (1) the employee’s entitlement to CFRA leave rights; and (2) the employer’s interference with or denial of those rights.’ ” (*Soria v. Univision Radio Los Angeles, Inc.* (2016) 5 Cal.App.5th 570, 601 [210 Cal.Rptr.3d 59].)
- “[C]ourts have distinguished between two theories of recovery under the CFRA and the FMLA. ‘Interference’ claims prevent employers from wrongly interfering with employees’ approved leaves of absence, and ‘retaliation’ or ‘discrimination’ claims prevent employers from terminating or otherwise taking action against employees because they exercise those rights.” (*Richey v. AutoNation, Inc.* (2015) 60 Cal.4th 909, 920 [182 Cal. Rptr. 3d 644, 341 P.3d 438].)
- “An interference claim under CFRA does not invoke the burden shifting analysis of the *McDonnell Douglas* test. Rather, such a claim requires only that the employer deny the employee’s entitlement to CFRA-qualifying leave. A CFRA interference claim ‘consists of the following elements: (1) the employee’s entitlement to CFRA leave rights; and (2) the employer’s interference with or denial of those rights.’ ” (*Moore v. Regents of University of California* (2016) 248 Cal.App.4th 216, 250 [206 Cal.Rptr.3d 841], internal citations omitted.)
- “The right to reinstatement is unwaivable but not unlimited.” (*Richey, supra*, 60 Cal.4th at p. 919.)
- “It is not enough that [plaintiff’s] mother had a serious health condition. [Plaintiff’s] participation to provide care for her mother had to be ‘warranted’ during a ‘period of treatment or supervision’ ” (*Pang v. Beverly Hospital, Inc.* (2000) 79 Cal.App.4th 986, 995 [94 Cal.Rptr.2d 643], internal citation and footnote omitted.)
- “[T]he relevant inquiry is whether a serious health condition made [plaintiff] unable to do her job at defendant’s hospital, not her ability to do her essential job functions ‘generally’” (*Lonicki v. Sutter Health Central* (2008) 43 Cal.4th 201, 214 [74 Cal.Rptr.3d 570, 180 P.3d 321].)

Secondary Sources

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

1061

Chin et al., California Practice Guide: Employment Litigation, Ch. 12-A, *Overview Of Key Statutes*, ¶ 12:32 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 12-B, *Family And Medical Leave Act (FMLA)/California Family Rights Act (CFRA)*, ¶¶ 12:146, 12:390, 12:421, 12:857, 12:1201, 12:1300 (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*, §§ 8.25[2], 8.30[1], [2], 8.31[2], 8.32 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.32[6][a], [b] (Matthew Bender)

California Civil Practice: Employment Litigation § 5:40 (Thomson Reuters)

2601. Eligibility

To show that [he/she/nonbinary pronoun] was eligible for [family care/medical] leave, [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 defendant] directly employed five or more employees for a wage or salary;
3. That at the time [name of plaintiff] [requested/began] leave, [he/she/nonbinary pronoun] had more than 12 months of service with [name of defendant] and had worked at least 1,250 hours for [name of defendant] during the previous 12 months; and
4. That at the time [name of plaintiff] [requested/began] leave [name of plaintiff] had taken no more than 12 weeks of family care or medical leave in the 12-month period [define period].

New September 2003; Revised June 2011, May 2021

Directions for Use

The CFRA applies to employers who directly employ five or more employees (and to the state and any political or civil subdivision of the state and cities of any size). (Gov. Code, § 12945.2(b)(4).) Include element 2 only if there is a factual dispute about the number of people the defendant directly employed for a wage or salary.

Sources and Authority

- Right to Family Care and Medical Leave. Government Code section 12945.2(a).

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation, Ch. 12-A, *Overview of Key Leave Laws*, ¶ 12:32 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 12-B, *Family and Medical Leave Act (FMLA)/California Family Rights Act (CFRA)*, ¶¶ 12:87, 12:125, 12:390, 12:421, 12:1201, 12:1300 (The Rutter Group)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.32[6][c] (Matthew Bender)

2603. “Comparable Job” Explained

“Comparable job” means a job that is the same or close to the employee’s former job in responsibilities, duties, pay, benefits, working conditions, and schedule. It must be at the same location or a similar geographic location.

New September 2003; Revised May 2021

Directions for Use

Give this instruction only if comparable job is an issue under the plaintiff’s CFRA claim.

Sources and Authority

- Comparable Position. Government Code section 12945.2(b)(6).
- Comparable Position. Cal. Code Regs., tit. 2, § 11087(g).
- “[W]hile we will accord great weight and respect to the [Fair Employment and Housing Commission]’s regulations that apply to the necessity for leave, along with any applicable federal FMLA regulations that the Commission incorporated by reference, we still retain ultimate responsibility for construing [CFRA].” (*Pang v. Beverly Hospital, Inc.* (2000) 79 Cal.App.4th 986, 994–995 [94 Cal.Rptr.2d 643].)

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation, Ch. 12-B, *Family and Medical Leave Act (FMLA)/California Family Rights Act (CFRA)*, ¶¶ 12:1138–12:1139, 12:1150, 12:1154–12:1156 (The Rutter Group)

1 Wilcox, California Employment Law, Ch. 8, *Leaves of Absence*, §§ 8.30, 8.31 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.32[6][h] (Matthew Bender)

2610. Affirmative Defense—No Certification From Health Care Provider

[Name of defendant] claims that [he/she/nonbinary pronoun/it] denied [name of plaintiff]’s request for leave because [he/she/nonbinary pronoun] did not provide a health care provider’s certification of [his/her/nonbinary pronoun] need for leave. To succeed, [name of defendant] must prove both of the following:

- 1. That [name of defendant] told [name of plaintiff] in writing that [he/she/nonbinary pronoun/it] required written certification from [name of plaintiff]’s health care provider to [grant/extend] leave; and**
- 2. That [name of plaintiff] did not provide [name of defendant] with the required certification from a health care provider [within the time set by [name of defendant] or as soon as reasonably possible].**

New September 2003

Directions for Use

The time set by the defendant described in element 2 must be at least 15 days.

Sources and Authority

- Certification of Health Care Provider. Government Code section 12945.2(j).
- Certification of Health Care Provider: Child Care. Government Code section 12945.2(i).
- Certification of Health Care Provider: Return to Work. Government Code section 12945.2(j)(4).
- “Health Care Provider” Defined. Government Code section 12945.2(b)(10).
- Notice and Certification. Cal. Code Regs., tit. 2, § 11088(b).

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, § 1058
Chin et al., California Practice Guide: Employment Litigation, Ch. 12-B, *Family and Medical Leave Act (FMLA)/California Family Rights Act (CFRA)*, ¶¶ 12:311, 12:880, 12:883–12:884, 12:905, 12:915 (The Rutter Group)

1 Wilcox, California Employment Law, Ch. 8, *Leaves of Absence*, § 8.26 (Matthew Bender)

2611. Affirmative Defense—Fitness for Duty Statement

[Name of defendant] claims that [he/she/nonbinary pronoun/it] refused to return [name of plaintiff] to work because [he/she/nonbinary pronoun] did not provide a written statement from [his/her/nonbinary pronoun] health-care provider that [he/she/nonbinary pronoun] was fit to return to work. To succeed, [name of defendant] must prove both of the following:

- 1. That [name of defendant] has a uniformly applied practice or policy that requires employees on leave because of their own serious health condition to provide a written statement from their health-care provider that they are able to return to work; and**
 - 2. That [name of plaintiff] did not provide [name of defendant] with a written statement from [his/her/nonbinary pronoun] health-care provider of [his/her/nonbinary pronoun] fitness to return to work.**
-

New September 2003

Sources and Authority

- Certification on Health Care Provider: Child Care. Government Code section 12945.2(i).
- Certification of Health Care Provider: Return to Work. Government Code section 12945.2(j)(4).
- “Health Care Provider” Defined. Government Code section 12945.2(b)(10).
- Notice and Certification. Cal. Code Regs., tit. 2, § 11088(b).

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation, Ch. 12-B, *Family and Medical Leave Act (FMLA)/California Family Rights Act (CFRA)*, ¶¶ 12:311, 12:880, 12:884, 12:915 (The Rutter Group)

1 Wilcox, California Employment Law, Ch. 8, *Leaves of Absence*, § 8.28 (Matthew Bender)

2704. Waiting-Time Penalty for Nonpayment of Wages (Lab. Code, §§ 203, 218)

[Name of plaintiff] claims that [he/she/nonbinary pronoun] is entitled to recover a penalty based on [name of defendant]’s failure to pay [his/her/nonbinary pronoun] [wages/insert other claim] when due after [name of plaintiff]’s employment ended. [Name of defendant] was required to pay [name of plaintiff] all wages owed [on the date that/within 72 hours of the date that] [name of plaintiff]’s employment ended.

You must decide whether [name of plaintiff] has proved [he/she/nonbinary pronoun] is entitled to recover a penalty. I will decide the amount of the penalty, if any, to be imposed. To recover this penalty, [name of plaintiff] must prove both of the following:

- 1. That [name of plaintiff]’s employment with [name of defendant] ended; and**
- 2. That [name of defendant] willfully failed to pay [name of plaintiff] all wages when due.**

The term “willfully” means only that the employer intentionally failed or refused to pay the wages. It does not imply a need for any additional bad motive.

[Name of plaintiff] must also prove the following:

- 1. [Name of plaintiff]’s daily wage rate at the time [his/her/nonbinary pronoun] employment with [name of defendant] ended; and**
- 2. [The date on which [name of defendant] finally paid [name of plaintiff] all wages due/That [name of defendant] never paid [name of plaintiff] all wages].**

[The term “wages” includes all amounts for labor performed by an employee, whether the amount is calculated by time, task, piece, commission, or some other method.]

New September 2003; Revised June 2005, May 2019, May 2020, November 2021

Directions for Use

The first part of this instruction sets forth the elements required to obtain a waiting time penalty under Labor Code section 203. The second part is intended to instruct the jury on the facts required to assist the court in calculating the amount of waiting time penalties. Some or all of these facts may be stipulated, in which case they may be omitted from the instruction. Select between the factual scenarios in element 2 of the second part: the employer eventually paid all wages due or the employer never paid the wages due.

The court must determine when final wages are due based on the circumstances of the case and applicable law. (See Lab. Code, §§ 201, 202.) Final wages are generally due on the day an employee is discharged by the employer (Lab. Code, § 201(a)), but are not due for 72 hours if an employee quits without notice. (Lab. Code, § 202(a).)

If there is a factual dispute, for example, whether plaintiff gave advance notice of the intention to quit, or whether payment of final wages by mail was authorized by plaintiff, the court may be required to give further instruction to the jury.

The definition of “wages” may be deleted if it is included in other instructions.

Sources and Authority

- Wages of Discharged Employee Due Immediately. Labor Code section 201.
- Wages of Employee on Quitting. Labor Code section 202.
- Willful Failure to Pay Wages of Discharged Employee. Labor Code section 203.
- Right of Action for Unpaid Wages. Labor Code section 218.
- “Wages” Defined. Labor Code section 200.
- Payment for Accrued Vacation of Terminated Employee. Labor Code section 227.3.
- Wages Partially in Dispute. Labor Code section 206(a).
- Exemption for Certain Governmental Employers. Labor Code section 220(b).
- “Labor Code section 203 empowers a court to award ‘an employee who is discharged or who quits’ a penalty equal to up to 30 days’ worth of the employee’s wages ‘[i]f an employer *willfully* fails to pay’ the employee *his* full wages immediately (if discharged) or within 72 hours (if he or she quits). It is called a waiting time penalty because it is awarded for effectively making the employee wait for his or her final paycheck. A waiting time penalty may be awarded when the final paycheck is for less than the applicable wage—whether it be the minimum wage, a prevailing wage, or a living wage.” (*Diaz v. Grill Concepts Services, Inc.* (2018) 23 Cal.App.5th 859, 867 [233 Cal.Rptr.3d 524], original italics, internal citations omitted.)
- “‘[T]he public policy in favor of full and prompt payment of an employee’s earned wages is fundamental and well established . . .’ and the failure to timely pay wages injures not only the employee, but the public at large as well. We have also recognized that sections 201, 202, and 203 play an important role in vindicating this public policy. To that end, the Legislature adopted the penalty provision as a disincentive for employers to pay final wages late. It goes without saying that a longer statute of limitations for section 203 penalties provides additional incentive to encourage employers to pay final wages in a prompt manner, thus furthering the public policy.” (*Pineda v. Bank of America, N.A.* (2010) 50 Cal.4th 1389, 1400 [117 Cal.Rptr.3d 377, 241 P.3d 870], internal citations omitted.)
- “‘The plain purpose of [Labor Code] sections 201 and 203 is to compel the

immediate payment of earned wages upon a discharge.’ The prompt payment of an employee’s earned wages is a fundamental public policy of this state.” (*Kao v. Holiday* (2017) 12 Cal.App.5th 947, 962 [219 Cal.Rptr.3d 580], internal citation omitted.)

- “The statutory policy favoring prompt payment of wages applies to employees who retire, as well as those who quit for other reasons.” (*McLean v. State* (2016) 1 Cal.5th 615, 626–627 [206 Cal.Rptr.3d 545, 377 P.3d 796].)
- “[M]issed-break premium pay constitutes wages for purposes of Labor Code section 203, and so waiting time penalties are available under that statute if the premium pay is not timely paid.” (*Naranjo v. Spectrum Security Services, Inc.* (2022) 13 Cal.5th 93, 117 [293 Cal.Rptr.3d 599, 509 P.3d 956].)
- “[A]n employer may not delay payment for several days until the next regular pay period. Unpaid wages are due *immediately* upon discharge. This requirement is strictly applied and may not be ‘undercut’ by company payroll practices or ‘any industry habit or custom to the contrary.’ ” (*Kao, supra*, 12 Cal.App.5th at p. 962, original italics, internal citation omitted.)
- “ “[T]o be at fault within the meaning of [section 203], the employer’s refusal to pay need not be based on a deliberate evil purpose to defraud workmen of wages which the employer knows to be due. As used in section 203, ‘willful’ merely means that the employer intentionally failed or refused to perform an act which was required to be done.” . . . ’ ” (*Gonzalez v. Downtown LA Motors, LP* (2013) 215 Cal.App.4th 36, 54 [155 Cal.Rptr.3d 18].)
- “In civil cases the word ‘willful’ as ordinarily used in courts of law, does not necessarily imply anything blameable, 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.” (*Nishiki v. Danko Meredith, P.C.* (2018) 25 Cal.App.5th 883, 891 [236 Cal.Rptr.3d 626].)
- “[A]n employer’s reasonable, good faith belief that wages are not owed may negate a finding of willfulness.” (*Choate v. Celite Corp.* (2013) 215 Cal.App.4th 1460, 1468 [155 Cal.Rptr.3d 915].)
- “A ‘good faith dispute’ that any wages are due occurs when an employer presents a defense, based in law or fact which, if successful, would preclude any recover[y] on the part of the employee. The fact that a defense is ultimately unsuccessful will not preclude a finding that a good faith dispute did exist.” (*Kao, supra*, 12 Cal.App.5th at p. 963.)
- “A ‘good faith dispute’ excludes defenses that ‘are unsupported by any evidence, are unreasonable, or are presented in bad faith.’ Any of the three precludes a defense from being a good faith dispute. Thus, [defendant]’s good faith does not cure the objective unreasonableness of its challenge or the lack of evidence to support it.” (*Diaz, supra*, 23 Cal.App.5th at pp. 873–874, original italics, internal citations omitted.)

- “A proper reading of section 203 mandates a penalty equivalent to the employee’s daily wages for each day he or she remained unpaid up to a total of 30 days. . . . [¶] [T]he critical computation required by section 203 is the calculation of a daily wage rate, which can then be multiplied by the number of days of nonpayment, up to 30 days.” (*Mamika v. Barca* (1998) 68 Cal.App.4th 487, 493 [80 Cal.Rptr.2d 175].)
- “ ‘A tender of the wages due at the time of the discharge, if properly made and in the proper amount, terminates the further accumulation of penalty, but it does not preclude the employee from recovering the penalty already accrued.’ ” (*Oppenheimer v. Sunkist Growers, Inc.* (1957) 153 Cal.App.2d Supp. 897, 899 [315 P.2d 116], citation omitted.)
- “[Plaintiff] fails to distinguish between a request for statutory penalties provided by the Labor Code for employer wage-and-hour violations, which were recoverable directly by employees well before the Act became part of the Labor Code, and a demand for ‘civil penalties,’ previously enforceable only by the state’s labor law enforcement agencies. An example of the former is section 203, which obligates an employer that willfully fails to pay wages due an employee who is discharged or quits to pay the employee, in addition to the unpaid wages, a penalty equal to the employee’s daily wages for each day, not exceeding 30 days, that the wages are unpaid.” (*Caliber Bodyworks, Inc. v. Superior Court* (2005) 134 Cal.App.4th 365, 377–378 [36 Cal.Rptr.3d 31].)
- “In light of the unambiguous statutory language, as well as the practical difficulties that would arise under defendant’s interpretation, we conclude there is but one reasonable construction: section 203(b) contains a single, three-year limitations period governing all actions for section 203 penalties irrespective of whether an employee’s claim for penalties is accompanied by a claim for unpaid final wages.” (*Pineda, supra*, 50 Cal.4th at p. 1398.)

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 437–439

Chin et al., California Practice Guide: Employment Litigation, Ch. 1-A, *Introduction—Background*, ¶ 1:22 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-B, *Compensation—Coverage and Exemptions—In General*, ¶ 11:121 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-D, *Compensation—Payment of Wages*, ¶¶ 11:456, 11:470.1, 11:510, 11:513–11:515 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-J, *Compensation—Enforcing California Laws Regulating Employee Compensation*, ¶¶ 11:1458–11:1459, 11:1461–11:1461.1 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 17-B, *Remedies—Contract Damages*, ¶ 17:148 (The Rutter Group)

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1 Wilcox, California Employment Law, Ch. 5, *Administrative and Judicial Remedies Under Wage and Hour Laws*, § 5.40 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes*, §§ 250.16[2][d], 250.30 et seq. (Matthew Bender)

California Civil Practice: Employment Litigation, §§ 4:67, 4:74 (Thomson Reuters)

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

[Name of plaintiff] **claims that [he/she/nonbinary pronoun] was 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] working for [name of defendant];**
 - 2. That [name of plaintiff] was performing substantially similar work as the other person[s], considering the overall combination of skill, effort, and responsibility required; and**
 - 3. That [name of plaintiff] was working under similar working conditions as the other person[s].**
-

New May 2018; Revised January 2019, November 2019, May 2020

Directions for Use

The California Equal Pay Act prohibits paying employees at lower wage rates than rates paid to employees of the opposite sex or a different race or ethnicity for substantially similar work. (Lab. Code, § 1197.5(a), (b).) An employee receiving less than the wage to which the employee 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 is no requirement that an employee show discriminatory intent as an element of the claim. (*Green v. Par Pools, Inc.* (2003) 111 Cal.App.4th 620, 622–625, 629 [3 Cal.Rptr.3d 844].)

This instruction presents singular and plural options for the comparator, the employee or employees whose pay and work are being compared to the plaintiff's to establish a violation of the Equal Pay Act. The statute refers to *employees* of the opposite sex or different race or ethnicity. There is language in cases, however, that suggests that a single comparator (e.g., one woman to one man) is sufficient. (See *Hall v. County of Los Angeles* (2007) 148 Cal.App.4th 318, 324 [55 Cal.Rptr.3d 732] [plaintiff had to show that she is paid lower wages than *a male comparator*, italics added]; *Green, supra*, 111 Cal.App.4th at p. 628 [plaintiff in a section 1197.5 action must first show that the employer paid *a male employee* more than a female employee for equal work, italics added].) No California case has expressly so held, however.

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

No. 2741, *Affirmative Defense—Different Pay Justified*, and CACI No. 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].)
- “To prove a prima facie case of wage discrimination, ‘a plaintiff must establish that, based on gender, the employer pays different wages to employees doing substantially similar work under substantially similar conditions. [Footnote omitted.]’ ‘If that prima facie showing is made, the burden shifts to the employer to prove the disparity is permitted by one of the EPA’s [four] statutory exceptions—[such as,] that the disparity is based on a factor other than sex.’ But a plaintiff must show ‘not only that she [was] paid lower wages than a male comparator for equal work, but that she has selected the proper comparator.’ ‘The [EPA] does not prohibit variations in wages; it prohibits *discriminatory* variations in wages. . . . [Accordingly,] “a comparison to a specifically chosen employee should be scrutinized closely to determine its usefulness.” ’ ” (*Allen v. Staples, Inc.* (2022) 84 Cal.App.5th 188, 194 [299 Cal.Rptr.3d 779], original italics, internal citations omitted.)
- “[T]he plaintiff in a section 1197.5 action must first show that the employer paid a male employee more than a female employee ‘ “for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.” ’ ” (*Green, supra*, 111 Cal.App.4th at p. 628.)

Secondary Sources

3 Witkin, *Summary of California Law* (11th ed. 2017) Agency and Employment, §§ 355 et seq., 430, 431

Chin et al., *California Practice Guide: Employment Litigation*, Ch. 11-G, *Compensation—Wage Discrimination*, ¶ 11:1075 et seq. (The Rutter Group)

3 Wilcox, *California Employment Law*, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.02 (Matthew Bender)

21 *California Forms of Pleading and Practice*, Ch. 250, *Employment Law: Wage and Hour Disputes*, § 250.14 (Matthew Bender)

Archived—May 2023 Supplement

VF-2708. Meal Break Violations—Employer Records Showing Noncompliance (Lab. Code, §§ 226.7, 512)

We answer the questions submitted to us as follows:

1. Did [*name of plaintiff*] work for [*name of defendant*] for one or more workdays for a period lasting longer than five hours?

_____ 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. Do [*name of defendant*]'s records show any missed meal breaks, meal breaks of less than 30 minutes, or meal breaks taken too late in a workday?

_____ 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. How many meal breaks do the records show as missed, less than 30 minutes, or taken too late in a workday?

_____ meal breaks

Answer question 4.

4. For each meal break included in your answer to question 3, did [*name of defendant*] prove [*he/she/nonbinary pronoun/it*] provided a meal break that complies with the law?

_____ Yes _____ No

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

5. Considering by workday the meal breaks determined in question 3, for how many workdays did [*name of defendant*] fail to prove that [*he/she/nonbinary pronoun/it*] provided meal breaks that comply with the law?

_____ workdays

Answer question 6.

6. For the workdays determined in question 5, what is the amount of pay owed?

\$ _____

Signed: _____
Presiding Juror

Dated: _____

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

New May 2023

Directions for Use

This verdict form is based on CACI No. 2765, *Meal Break Violations—Introduction*, and CACI No. 2766B, *Meal Break Violations—Rebuttable Presumption—Employer Records*. Use this verdict form if the plaintiff’s meal break claims involve the rebuttable presumption of a violation based on an employer’s records showing missed meal breaks, meal breaks of less than 30 minutes, or meal breaks taken too late in a workday. See also verdict form CACI No. VF-2707, *Meal Break Violations*.

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 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*.

If the jury is asked to determine prejudgment interest for any meal or rest break violations (*Naranjo v. Spectrum Security Services, Inc.* (2022) 13 Cal.5th 93, 121–122 [293 Cal.Rptr.3d 599, 509 P.3d 956]), this verdict form may be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-2709. Meal Break Violations—Inaccurate or Missing Employer Records (Lab. Code, §§ 226.7, 512)

We answer the questions submitted to us as follows:

1. Did [*name of plaintiff*] work for [*name of defendant*] for one or more workdays for a period lasting longer than five hours?

_____ 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*] keep [accurate] records of the start and end times for meal breaks?

_____ Yes _____ No

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

3. For how many meal breaks were [accurate] records of the start and end times for meal breaks not kept?

_____ meal breaks

Answer question 4.

4. For each meal break included in your answer to question 3, did [*name of defendant*] prove [he/she/nonbinary pronoun/it] provided a meal break that complies with the law?

_____ Yes _____ No

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

5. Considering by workday the meal breaks determined in question 3, for how many workdays did [*name of defendant*] fail to prove that [he/she/nonbinary pronoun/it] provided meal breaks that comply with the law?

_____ workdays

Answer question 6.

6. For the workdays determined in question 5, what is the amount of pay owed?

\$ _____

Signed: _____

Presiding Juror

Dated: _____

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

New May 2023

Directions for Use

This verdict form is based on CACI No. 2765, *Meal Break Violations—Introduction*, and CACI No. 2766B, *Meal Break Violations—Rebuttable Presumption—Employer Records*. Use this verdict form if the plaintiff’s meal break claims involve the rebuttable presumption of a violation based on an employer’s inaccurate or missing records. If only missing records are at issue, omit “accurate” from questions 2 and 3. See also verdict form CACI No. VF-2707, *Meal Break Violations*.

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 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*.

If the jury is asked to determine prejudgment interest for any meal or rest break violations (*Naranjo v. Spectrum Security Services, Inc.* (2022) 13 Cal.5th 93, 121–122 [293 Cal.Rptr.3d 599, 509 P.3d 956]), this verdict form may be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

3103. Neglect—Essential Factual Elements (Welf. & Inst. Code, § 15610.57)

[Name of plaintiff] **claims that** *[he/she/nonbinary pronoun/[name of decedent]]* **was neglected by** *[[name of individual defendant]/ [and] [name of employer defendant]]* **in violation of the Elder Abuse and Dependent Adult Civil Protection Act. To establish this claim, [name of plaintiff] must prove all of the following:**

- 1. That** *[[name of individual defendant]/[name of employer defendant]]*'s employee had a substantial caretaking or custodial relationship with *[name of plaintiff/decedent]*, involving ongoing responsibility for *[his/her/nonbinary pronoun]* basic needs, which an able-bodied and fully competent adult would ordinarily be capable of managing without assistance;
- 2. That** *[name of plaintiff/decedent]* was **[65 years of age or older/a dependent adult]** while *[he/she/nonbinary pronoun]* was in *[[name of individual defendant]]*'s/*[name of employer defendant]]*'s employee's] care or custody;
- 3. That** *[[name of individual defendant]/[name of employer defendant]]*'s employee] failed to use the degree of care that a reasonable person in the same situation would have used in providing for *[name of plaintiff/decedent]]*'s basic needs, including *[insert one or more of the following:]*
[assisting in personal hygiene or in the provision of food, clothing, or shelter;]
[providing medical care for physical and mental health needs;]
[protecting [name of plaintiff/decedent] from health and safety hazards;]
[preventing malnutrition or dehydration;]
[insert other grounds for neglect;]
- 4. That** *[name of plaintiff/decedent]* was harmed; and
- 5. That** *[[name of individual defendant]]*'s/*[name of employer defendant]]*'s employee's] conduct was a substantial factor in causing *[name of plaintiff/decedent]]*'s harm.

Directions for Use

This instruction may be given in cases brought under the Elder Abuse and Dependent Adult Civil Protection Act (the Act) by the victim of elder neglect, or by the survivors of the victim. If the victim is the plaintiff and is seeking damages for pain and suffering, see CACI No. 3905A, *Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damage)*, in the Damages series.

If the plaintiff seeks the enhanced remedies of attorney fees and costs, and in the case of a wrongful death, the decedent’s pain and suffering, give CACI No. 3104, *Neglect—Enhanced Remedies Sought*, in addition to this instruction. (See *Welf. & Inst. Code*, § 15657.)

If the individual responsible for the neglect is a defendant in the case, use “[name of individual defendant]” throughout. If only the individual’s employer is a defendant, use “[name of employer defendant]’s employee” throughout.

If the plaintiff is seeking enhanced remedies against the individual’s employer, also give either CACI No. 3102A, *Employer Liability for Enhanced Remedies—Both Individual and Employer Defendants*, or CACI No. 3102B, *Employer Liability for Enhanced Remedies—Employer Defendant Only*. To recover damages against the employer under a theory of vicarious liability, see instructions in the Vicarious Responsibility series (CACI No. 3700 et seq.).

The Act does not extend to cases involving professional negligence against health-care providers as defined by the California Medical Injury Compensation Reform Act of 1975 (MICRA) unless the professional had a substantial caretaking or custodial relationship with the elder or dependent adult patient, involving ongoing responsibility for one or more basic needs. (*Winn v. Pioneer Medical Group, Inc.* (2016) 63 Cal.4th 148, 152 [202 Cal.Rptr.3d 447, 370 P.3d 1011]; see *Welf. & Inst. Code*, § 15657.2; *Civ. Code*, § 3333.2(c)(2).)

The instructions in this series are not intended to cover every circumstance in which a plaintiff may bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

Sources and Authority

- “Elder Abuse” Defined. *Welfare and Institutions Code* section 15610.07.
- “Dependent Adult” Defined. *Welfare and Institutions Code* section 15610.23.
- “Elder” Defined. *Welfare and Institutions Code* section 15610.27.
- “Neglect” Defined. *Welfare and Institutions Code* section 15610.57.
- Claims for Professional Negligence Excluded. *Welfare and Institutions Code* section 15657.2.
- “It is true that statutory elder abuse includes ‘neglect as defined in Section 15610.57,’ which in turn includes negligent failure of an elder custodian ‘to provide medical care for [the elder’s] physical and mental health needs.’ . . . ‘[N]eglect’ within the meaning of *Welfare and Institutions Code* section 15610.57 covers an area of misconduct distinct from ‘professional negligence.’

As used in the Act, neglect refers not to the substandard performance of medical services but, rather, to the ‘failure of those responsible for attending to the basic needs and comforts of elderly or dependent adults, regardless of their professional standing, to carry out their custodial obligations.’ Thus, the statutory definition of ‘neglect’ speaks not of the *undertaking* of medical services, but of the failure to *provide* medical care.” (*Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 783 [11 Cal.Rptr.3d 222, 86 P.3d 290], original italics, internal citations omitted.)

- “The Elder Abuse Act does not ‘apply *whenever* a doctor treats any elderly patient. Reading the act in such a manner would radically transform medical malpractice liability relative to the existing scheme.’ ” (*Alexander v. Scripps Memorial Hospital La Jolla* (2018) 23 Cal.App.5th 206, 223 [232 Cal.Rptr.3d 733], original italics.)
- “We granted review to consider whether a claim of neglect under the Elder Abuse Act requires a caretaking or custodial relationship—where a person has assumed significant responsibility for attending to one or more of those basic needs of the elder or dependent adult that an able-bodied and fully competent adult would ordinarily be capable of managing without assistance. Taking account of the statutory text, structure, and legislative history of the Elder Abuse Act, we conclude that it does.” (*Winn, supra*, 63 Cal.4th at p. 155.)
- “[T]he Act does not apply unless the defendant health care provider had a substantial caretaking or custodial relationship, involving ongoing responsibility for one or more basic needs, with the elder patient. It is the nature of the elder or dependent adult’s relationship with the defendant—not the defendant’s professional standing—that makes the defendant potentially liable for neglect.” (*Winn, supra*, 63 Cal.4th at p. 152.)
- “It must be determined, on a case-by-case basis, whether the specific responsibilities assumed by a defendant were sufficient to give rise to a substantial caretaking or custodial relationship. The fact that [another caregiver] provided for a large number of decedent’s basic needs does not, in itself, serve to insulate defendants from liability under the Elder Abuse Act if the services they provided were sufficient to give rise to a substantial caretaking or custodial relationship.” (*Oroville Hospital v. Superior Court* (2022) 74 Cal.App.5th 382, 405 [289 Cal.Rptr.3d 430].)
- “[E]ven where statutory definitions of ‘dependent adult’ or ‘care custodian’ are satisfied, ‘[i]t must be determined, on a case-by-case basis, whether the specific responsibilities assumed by a defendant were sufficient to give rise to a substantial caretaking or custodial relationship.’ ” (*Kruthanooch v. Glendale Adventist Medical Center* (2022) 83 Cal.App.5th 1109, 1131 [299 Cal.Rptr.3d 908], internal citation omitted.)
- “The Act seems premised on the idea that certain situations place elders and dependent adults at heightened risk of harm, and heightened remedies relative to conventional tort remedies are appropriate as a consequence. Blurring the

distinction between neglect under the Act and conduct actionable under ordinary tort remedies—even in the absence of a care or custody relationship—risks undermining the Act’s central premise. Accordingly, plaintiffs alleging professional negligence may seek certain tort remedies, though not the heightened remedies available under the Elder Abuse Act.” (*Winn, supra*, 63 Cal.4th at p. 159, internal citation omitted.)

- “‘[I]t is the defendant’s relationship with an elder or a dependent adult—not the defendant’s professional standing or expertise—that makes the defendant potentially liable for neglect.’ For these reasons, *Winn* better supports the conclusion that the majority of [defendant]’s interactions with decedent were custodial. [Defendant] has cited no authority allowing or even encouraging a court to assess care and custody status on a task-by-task basis, and the *Winn* court’s focus on the extent of dependence by a patient on a health care provider rather than on the nature of the particular activities that comprised the patient-provider relationship counsels against adopting such an approach.” (*Stewart v. Superior Court* (2017) 16 Cal.App.5th 87, 103–104 [224 Cal.Rptr.3d 219].)
- “The purpose of the [Elder Abuse Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect.” (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33 [82 Cal.Rptr.2d 610, 971 P.2d 986].)
- “Neglect includes the failure to assist in personal hygiene, or in the provision of food, clothing, or shelter; the failure to provide medical care for physical and mental health needs; the failure to protect from health and safety hazards; and the failure to prevent malnutrition or dehydration.” (*Avila v. Southern California Specialty Care, Inc.* (2018) 20 Cal.App.5th 835, 843 [230 Cal.Rptr.3d 42].)
- “[T]he statutory definition of neglect set forth in the first sentence of Welfare and Institutions Code section 15610.57 is substantially the same as the ordinary definition of neglect.” (*Conservatorship of Gregory v. Beverly Enterprises, Inc.* (2000) 80 Cal.App.4th 514, 521 [95 Cal.Rptr.2d 336].)
- “[N]eglect as a form of abuse under the Elder Abuse Act refers ‘to the failure of those responsible for attending to the basic needs and comforts of elderly or dependent adults, regardless of their professional standing, to carry out their custodial obligations.’” (*Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, 404 [129 Cal.Rptr.3d 895].)
- “It seems to us, then, that respecting the patient’s right to consent or object to surgery is a necessary component of ‘provid[ing] medical care for physical and mental health needs.’ Conversely, depriving a patient of the right to consent to surgery could constitute a failure to provide a necessary component of what we think of as ‘medical care.’” (*Stewart, supra*, 16 Cal.App.5th at p. 107, internal citation omitted.)
- “[A] violation of staffing regulations here may provide a basis for finding neglect. Such a violation might constitute a negligent failure to exercise the care that a similarly situated reasonable person would exercise, or it might constitute

a failure to protect from health and safety hazards . . . The former is the definition of neglect under the Act, and the latter is just one nonexclusive example of neglect under the Act.” (*Fenimore v. Regents of University of California* (2016) 245 Cal.App.4th 1339, 1348–1349 [200 Cal.Rptr.3d 345].)

- “Disagreements between physicians and the patient or surrogate about the type of care being provided does not give rise to an elder abuse cause of action.” (*Alexander, supra*, 23 Cal.App.5th at p. 223.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1865–1871

California Elder Law Litigation (Cont.Ed.Bar 2003) §§ 2.70–2.71

3 Levy et al., California Torts, Ch. 31 *Liability of Physicians and Other Medical Practitioners*, § 31.50[4][d] (Matthew Bender)

1 California Forms of Pleading and Practice, Ch. 5, *Abuse of Minors and Elderly*, § 5.33[3] (Matthew Bender)

3200. Failure to Repurchase or Replace Consumer Good After Reasonable Number of Repair Opportunities—Essential Factual Elements (Civ. Code, § 1793.2(d))

[Name of plaintiff] **claims that** *[he/she/nonbinary pronoun]* **was harmed by** *[name of defendant]*'s **failure to repurchase or replace** *[a/an]* *[consumer good]* **after a reasonable number of repair opportunities. To establish this claim, *[name of plaintiff]* must prove all of the following:**

1. **That *[name of plaintiff]* bought *[a/an]* *[consumer good]* *[from/distributed by/manufactured by]* *[name of defendant]*;**
2. **That *[name of defendant]* gave *[name of plaintiff]* a warranty by *[insert at least one of the following:]*
*[making a written statement that *[describe alleged express warranty]*];* *[or]*
*[showing *[him/her/nonbinary pronoun]* a sample or model of the *[consumer good]* and representing, by words or conduct, that *[his/her/nonbinary pronoun]* *[consumer good]* would match the quality of the sample or model];***
3. **That the *[consumer good]* *[insert at least one of the following:]*
[did not perform as stated for the time specified]; *[or]*
*[did not match the quality [of the *[sample/model]*]]* *[or]* *[as set forth in the written statement];***
4. ***[That *[name of plaintiff]* delivered the *[consumer good]* to *[name of defendant]* or its authorized repair facilities for repair;*
[or]
*[That *[name of plaintiff]* notified *[name of defendant]* in writing of the need for repair because *[he/she/nonbinary pronoun]* reasonably could not deliver the *[consumer good]* to *[name of defendant]* or its authorized repair facilities because of the *[size and weight/method of attachment/method of installation]* *[or]* *[the nature of the defect]* of the *[consumer good]*];* *[and]***
5. **That *[name of defendant]* or its representative failed to repair the *[consumer good]* to match the *[written statement/represented quality]* after a reasonable number of opportunities; *[and]***
6. ***[That *[name of defendant]* did not replace the *[consumer good]* or reimburse *[name of plaintiff]* an amount of money equal to the purchase price of the *[consumer good]*, less the value of its use by *[name of plaintiff]* before discovering the defect[s].]***

[A written statement need not include the words “warranty” or “guarantee,” but if those words are used, a warranty is created. It is also not necessary for [name of defendant] to have specifically intended to create a warranty. A warranty is not created if [name of defendant] simply stated the value of the [consumer good] or gave an opinion about the [consumer good]. General statements concerning customer satisfaction do not create a warranty.]

New September 2003; Revised April 2007, December 2007, December 2011

Directions for Use

An instruction on the definition of “consumer good” may be necessary if that issue is disputed. Civil Code section 1791(a) provides: “ ‘Consumer goods’ means any new product or part thereof that is used, bought, or leased for use primarily for personal, family, or household purposes, except for clothing and consumables. ‘Consumer goods’ shall include new and used assistive devices sold at retail.”

Select the alternative in element 4 that is appropriate to the facts of the case.

Regarding element 4, if the plaintiff claims that the consumer goods could not be delivered for repair, the judge should decide whether written notice of nonconformity is required. The statute, Civil Code section 1793.2(c), is unclear on this point.

Depending on the circumstances of the case, further instruction on element 6 may be needed to clarify how the jury should calculate “the value of its use” during the time before discovery of the defect.

If remedies are sought under the California Uniform Commercial Code, the plaintiff may be required to prove reasonable notification within a reasonable time. (Cal. U. Com. Code, § 2607(3).) If the court determines that proof is necessary, add the following element to this instruction:

That [name of plaintiff] took reasonable steps to notify [name of defendant] within a reasonable time that the [consumer good] [did not match the quality [of the [sample/model]]/as set forth in the written statement];

See also CACI No. 1243, *Notification/Reasonable Time*.

If appropriate to the facts, add: “It is not necessary for [name of plaintiff] to prove the cause of a defect in the [consumer good].” The Song-Beverly Consumer Warranty Act does not require a consumer to prove the cause of the defect or failure, only that the consumer good “did not conform to the express warranty.” (See *Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1102, fn. 8 [109 Cal.Rptr.2d 583].)

In addition to sales of consumer goods, the Consumer Warranty Act applies to leases. (Civ. Code, §§ 1791(g)–(i), 1795.4.) This instruction may be modified for use in cases involving an express warranty in a lease of consumer goods.

See also CACI No. 3202, “*Repair Opportunities*” Explained.

Sources and Authority

- Song-Beverly Consumer Warranty Act: Right of Action. Civil Code section 1794(a).
- “Express Warranty” Defined. Civil Code section 1791.2.
- Express Warranty Made by Someone Other Than Manufacturer. Civil Code section 1795.
- Replacement or Reimbursement After Reasonable Number of Repair Attempts. Civil Code section 1793.2(d).
- Extension of Warranty. Civil Code section 1793.1(a)(2).
- Buyer’s Delivery of Nonconforming Goods. Civil Code section 1793.2(c).
- Distributor or Seller of Used Consumer Goods. Civil Code section 1795.5.
- Song-Beverly Does Not Preempt Commercial Code. Civil Code section 1790.3.
- Extension of Warranty Period for Repairs. Civil Code section 1793.1(a)(2).
- Tolling of Warranty Period for Nonconforming Goods. Civil Code section 1795.6.
- “ ‘The Song-Beverly Act is a remedial statute designed to protect consumers who have purchased products covered by an express warranty One of the most significant protections afforded by the act is . . . that “if the manufacturer or its representative in this state does not service or repair the goods to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either replace the goods or reimburse the buyer in an amount equal to the purchase price paid by the buyer” . . .’ In providing these remedies, the Legislature has not required that the consumer maintain possession of the goods at all times. All that is necessary is that the consumer afford the manufacturer a reasonable number of attempts to repair the goods to conform to the applicable express warranties.” (*Martinez v. Kia Motors America, Inc.* (2011) 193 Cal.App.4th 187, 191 [122 Cal.Rptr.3d 497], internal citation omitted.)
- “Broadly speaking, the Act regulates warranty terms; imposes service and repair obligations on manufacturers, distributors and retailers who make express warranties; requires disclosure of specified information in express warranties; and broadens a buyer’s remedies to include costs, attorney fees and civil penalties [¶] [T]he purpose of the Act has been to provide broad relief to purchasers of consumer goods with respect to warranties.” (*National R.V., Inc. v. Foreman* (1995) 34 Cal.App.4th 1072, 1080 [40 Cal.Rptr.2d 672].)
- “[S]ection 1793.2, subdivision (d)(2), differs from section 1793.2, subdivision (d)(1), in that it gives the new motor vehicle consumer the right to elect restitution in lieu of replacement; provides specific procedures for the motor vehicle manufacturer to follow in the case of replacement and in the case of restitution; and sets forth rules for offsetting the amount attributed to the

consumer’s use of the motor vehicle. These ‘Lemon Law’ provisions clearly provide greater consumer protections to those who purchase new motor vehicles than are afforded under the general provisions of the Act to those who purchase other consumer goods under warranty.” (*National R.V., Inc., supra*, 34 Cal.App.4th at p.1079, internal citations and footnotes omitted.)

- “[I]t is reasonable to conclude that all of the section 1780, subdivision (a) remedies, save for injunctive relief, are encompassed within section 1782, subdivision (b)’s reference to an ‘action for damages . . . under Section 1780.’ [¶] While it is true that damages and restitution are different remedies, serving different purposes, section 1780, subdivision (a)’s use of the broader term ‘any damage’ followed by the narrower term ‘actual damages’ within the list of specific potential remedies suggests that the CLRA takes a more expansive view of what constitutes ‘damages’ pursuant to its terms.” (*DeNike v. Mathew Enterprise, Inc.* (2022) 76 Cal.App.5th 371, 379–380 [291 Cal.Rptr.3d 480].)
- “The legislative history of [Civil Code section 1793.2] demonstrates beyond any question that . . . a differentiation between manufacturer and local representative is unwarranted.” (*Ibrahim v. Ford Motor Co.* (1989) 214 Cal.App.3d 878, 888 [263 Cal.Rptr. 64].)

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Sales, §§ 52, 57, 321–334
 1 California UCC Sales and Leases (Cont.Ed.Bar) Warranties, §§ 3.4, 3.8, 3.15, 3.87
 2 California UCC Sales and Leases (Cont.Ed.Bar) Prelitigation Remedies, § 17.70
 2 California UCC Sales and Leases (Cont.Ed.Bar) Litigation Remedies, § 18.25
 2 California UCC Sales and Leases (Cont.Ed.Bar) Leasing of Goods, § 19.38
 8 California Forms of Pleading and Practice, Ch. 91, *Automobiles: Actions Involving Defects and Repairs*, § 91.15 (Matthew Bender)
 20 California Points and Authorities, Ch. 206, *Sales*, § 206.100 et seq. (Matthew Bender)
 California Civil Practice: Business Litigation §§ 53:1, 53:3–53:4, 53:10–53:11, 53:14–53:17, 53:22–53:23, 53:26–53:27 (Thomson Reuters)

3210. Breach of Implied Warranty of Merchantability—Essential Factual Elements

[Name of plaintiff] **claims that the** *[consumer good]* **did not have the quality that a buyer would reasonably expect. This is known as “breach of an implied warranty.” To establish this claim, *[name of plaintiff]* must prove all of the following:**

- 1. That *[name of plaintiff]* bought a[n] *[consumer good]* [from/manufactured by] *[name of defendant]*;**
- 2. That at the time of purchase *[name of defendant]* was in the business of [selling *[consumer goods]* to retail buyers/manufacturing *[consumer goods]*];**
- 3. That the *[consumer good]* [insert one or more of the following:]**
[was not of the same quality as those generally acceptable in the trade;] [or]
[was not fit for the ordinary purposes for which the goods are used;] [or]
[was not adequately contained, packaged, and labeled;] [or]
[did not measure up to the promises or facts stated on the container or label;]
- 4. That *[name of plaintiff]* was harmed; and**
- 5. That *[name of defendant]*’s breach of the implied warranty was a substantial factor in causing *[name of plaintiff]*’s harm.**

New September 2003; Revised December 2005, December 2014, November 2018

Directions for Use

If remedies are sought under the California Uniform Commercial Code, the plaintiff may be required to prove reasonable notification within a reasonable time. (Cal. U. Com. Code, § 2607(3).) If the court determines that proof of notice is necessary, add the following element to this instruction:

That *[name of plaintiff]* took reasonable steps to notify *[name of defendant]* within a reasonable time that the *[consumer good]* did not have the quality that a buyer would reasonably expect;

See also CACI No. 1243, *Notification/Reasonable Time*. Instructions on damages and causation may be necessary in actions brought under the California Uniform Commercial Code.

In addition to sales of consumer goods, the Consumer Warranty Act applies to

leases. (See Civ. Code, §§ 1791(g)–(i), 1795.4.) This instruction may be modified for use in cases involving the implied warranty of merchantability in a lease of consumer goods.

Sources and Authority

- Buyer’s Action for Breach of Implied Warranties. Civil Code section 1794(a).
- Damages. Civil Code section 1794(b).
- Implied Warranties. Civil Code section 1791.1(a).
- Duration of Implied Warranties. Civil Code section 1791.1(c).
- Remedies. Civil Code section 1791.1(d).
- Implied Warranty of Merchantability. Civil Code section 1792.
- Damages for Breach; Accepted Goods. California Uniform Commercial Code section 2714.
- “As defined in the Song-Beverly Consumer Warranty Act, ‘an implied warranty of merchantability guarantees that ‘consumer goods meet each of the following: [¶] (1) Pass without objection in the trade under the contract description. [¶] (2) Are fit for the ordinary purposes for which such goods are used. [¶] (3) Are adequately contained, packaged, and labeled. [¶] (4) Conform to the promises or affirmations of fact made on the container or label.’ Unlike an express warranty, ‘the implied warranty of merchantability arises by operation of law’ and ‘provides for a minimum level of quality.’ ‘The California Uniform Commercial Code separates implied warranties into two categories. An implied warranty that the goods “shall be merchantable” and “fit for the ordinary purposes” is contained in California Uniform Commercial Code section 2314. Whereas an implied warranty that the goods shall be fit for a particular purpose is contained in section 2315. [¶] Thus, there exists in every contract for the sale of goods by a merchant a warranty that the goods shall be merchantable. The core test of merchantability is fitness for the ordinary purpose for which such goods are used. (§ 2314.)’ ” (*Isip v. Mercedes-Benz USA, LLC* (2007) 155 Cal.App.4th 19, 26–27 [65 Cal.Rptr.3d 695], internal citations omitted.)
- “Here the alleged wrongdoing is a breach of the implied warranty of merchantability imposed by the Song-Beverly Consumer Warranty Act. Under the circumstances of this case, which involves the sale of a used automobile, the element of wrongdoing is established by pleading and proving (1) the plaintiff bought a used automobile from the defendant, (2) at the time of purchase, the defendant was in the business of selling automobiles to retail buyers, (3) the defendant made express warranties with respect to the used automobile, and (4) the automobile was not fit for ordinary purposes for which the goods are used. Generally, ‘[t]he core test of merchantability is fitness for the ordinary purpose for which such goods are used.’ ” (*Gutierrez v. Carmax Auto Superstores California* (2018) 19 Cal.App.5th 1234, 1246 [248 Cal.Rptr.3d 61] [citing this instruction], internal citations omitted.)
- “[T]he buyer of consumer goods must plead he or she was injured or damaged

by the alleged breach of the implied warranty of merchantability.” (*Gutierrez, supra*, 19 Cal.App.5th at p. 1247.)

- “Unless specific disclaimer methods are followed, an implied warranty of merchantability accompanies every retail sale of consumer goods in the state.” (*Music Acceptance Corp. v. Lofing* (1995) 32 Cal.App.4th 610, 619 [39 Cal.Rptr.2d 159].)
- The implied warranty of merchantability “does not ‘impose a general requirement that goods precisely fulfill the expectation of the buyer. Instead, it provides for a minimum level of quality.’ ” (*American Suzuki Motor Corp. v. Superior Court* (1995) 37 Cal.App.4th 1291, 1295–1296 [44 Cal.Rptr.2d 526], internal citation omitted.)
- “The [Song Beverly] act provides for both express and implied warranties, and while under a manufacturer’s express warranty the buyer must allow for a reasonable number of repair attempts within 30 days before seeking rescission, that is not the case for the implied warranty of merchantability’s bulwark against fundamental defects.” (*Brand v. Hyundai Motor America* (2014) 226 Cal.App.4th 1538, 1545 [173 Cal.Rptr.3d 454].)
- “The Song-Beverly Act incorporates the provisions of [California Uniform Commercial Code] sections 2314 and 2315. It ‘supplements, rather than supersedes, the provisions of the California Uniform Commercial Code’ by broadening a consumer’s remedies to include costs, attorney’s fees, and civil penalties.” (*American Suzuki Motor Corp., supra*, 37 Cal.App.4th at p. 1295, fn. 2, internal citation omitted.)
- “The implied warranty of merchantability may be breached by a latent defect undiscoverable at the time of sale. Indeed, ‘[u]ndisclosed latent defects . . . are the very evil that the implied warranty of merchantability was designed to remedy.’ In the case of a latent defect, a product is rendered unmerchantable, and the warranty of merchantability is breached, by the existence of the unseen defect, not by its subsequent discovery.” (*Mexia v. Rinker Boat Co., Inc.* (2009) 174 Cal.App.4th 1297, 1304–1305 [95 Cal.Rptr.3d 285], internal citations omitted.)
- “[Defendant] suggests the ‘implied warranty of merchantability can be breached only if the vehicle manifests a defect that is so basic it renders the vehicle unfit for its ordinary purpose of providing transportation.’ As the trial court correctly recognized, however, a merchantable vehicle under the statute requires more than the mere capability of ‘just getting from point “A” to point “B.” ’ ” (*Brand, supra*, 226 Cal.App.4th at p. 1546.)
- “[A]llegations showing an alleged defect that created a substantial safety hazard would sufficiently allege the vehicle was not ‘fit for the ordinary purposes for which such goods are used’ and, thus, breached the implied warranty of merchantability.” (*Gutierrez, supra*, 19 Cal.App.5th at pp. 1247–1248.)
- “We recognize that ‘an important consideration under the implied warranty is

consumer safety.’ However, ‘vehicle safety is [not] the sole or dispositive criterion in implied warranty cases, which may turn on other facts.’ ” (*DeNike v. Mathew Enterprise, Inc.* (2022) 76 Cal.App.5th 371, 384–385 [291 Cal.Rptr.3d 480].)

- “The notice requirement of [former Civil Code] section 1769 . . . is not an appropriate one for the court to adopt in actions by injured consumers against manufacturers with whom they have not dealt. ‘As between the immediate parties to the sale [the notice requirement] is a sound commercial rule, designed to protect the seller against unduly delayed claims for damages. As applied to personal injuries, and notice to a remote seller, it becomes a booby-trap for the unwary.’ ” (*Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 61 [27 Cal.Rptr. 697, 377 P.2d 897], internal citations omitted.)

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Sales, §§ 71, 72

1 California UCC Sales & Leases (Cont.Ed.Bar) Warranties, §§ 3.21–3.23, 3.25–3.26

2 California UCC Sales & Leases (Cont.Ed.Bar) Leasing of Goods, §§ 19.31–19.32
California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.31[2][a] (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 502, Sales: *Warranties*, § 502.51 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales*, § 206.106 (Matthew Bender)

California Civil Practice: Business Litigation §§ 53:5–53:7 (Thomson Reuters)

**3714. Ostensible Agency—Physician-Hospital
Relationship—Essential Factual Elements**

[Name of plaintiff] **claims that [he/she/nonbinary pronoun] was harmed by [name of physician]’s [insert tort theory, e.g., negligence].**

[Name of plaintiff] **also claims that [name of hospital] is responsible for the harm because [name of physician] was acting as its agent/employee/[insert other relationship]] when the incident occurred.**

If you find that [name of physician]’s [insert tort theory] harmed [name of plaintiff], then you must decide whether [name of hospital] is responsible for the harm. [Name of hospital] is responsible if [name of plaintiff] proves both of the following:

- 1. That [name of hospital] held itself out to the public as a provider of care; and**
- 2. That [name of plaintiff] looked to [name of hospital] for services, rather than selecting [name of physician] for services.**

A hospital holds itself out to the public as a provider of care unless the hospital gives notice to a patient that a physician is not an [agent/employee] of the hospital. However, the notice may not be adequate if a patient in need of medical care cannot be expected to understand or act on the information provided. You must take into consideration [name of plaintiff]’s condition at the time and decide whether any notice provided was adequate to give a reasonable person in [name of plaintiff]’s condition notice of the disclaimer.

New November 2021; Revised May 2022

Directions for Use

Use this instruction only if a patient claims that a hospital defendant is responsible for a physician’s negligence or other wrongful conduct as an ostensible agent.

Sources and Authority

- Agency Is Actual or Ostensible. Civil Code section 2298.
- “Ostensible Agency” Defined. Civil Code section 2300.
- “Ostensible Authority” Defined. Civil Code section 2317.
- When Principal is Bound by Ostensible Agent. Civil Code section 2334.
- “Where a patient seeks to hold a hospital liable for the negligence of a physician, the doctrine of ostensible agency is now commonly expressed as having two elements: ‘(1) conduct by the hospital that would cause a reasonable person to believe that the physician was an agent of the hospital, and (2) reliance

on that apparent agency relationship by the plaintiff.’ Generally, the first element is satisfied ‘when the hospital “holds itself out” to the public as a provider of care,’ ‘unless it gave the patient contrary notice.’ Nonetheless, a hospital’s ‘contrary notice’ may be insufficient ‘to avoid liability in an emergency room context, where an injured patient in need of immediate medical care cannot be expected to understand or act upon that information.’ Reliance upon an apparent agency is demonstrated ‘when the plaintiff “looks to” the hospital for services, rather than to an individual physician.’ Ultimately, ‘there is really only one relevant factual issue: whether the patient had reason to know that the physician was not an agent of the hospital. As noted above, hospitals are generally deemed to have held themselves out as the provider of services unless they gave the patient contrary notice, and the patient is generally presumed to have looked to the hospital for care unless he or she was treated by his or her personal physician. Thus, unless the patient had some reason to know of the true relationship between the hospital and the physician—i.e., because the hospital gave the patient actual notice or because the patient was treated by his or her personal physician—ostensible agency is readily inferred.’ ” (*Markow v. Rosner* (2016) 3 Cal.App.5th 1027, 1038 [208 Cal.Rptr.3d 363], internal citations omitted.)

- “It is well established in California that a hospital may be liable for the negligence of physicians on the staff, unless the hospital has clearly notified the patient that the treating physicians are not hospital employees and there is no reason to believe the patient was unable to understand or act on the information. This rule is founded on the theory of ostensible agency.” (*Wicks v. Antelope Valley Healthcare Dist.* (2020) 49 Cal.App.5th 866, 882 [263 Cal.Rptr.3d 397].)
- “[T]he adequacy of the notice is only one of the many fact questions that arise under ostensible agency. The jury must also determine whether the patient entrusted herself to the hospital, whether the hospital selected the doctor, and whether the patient reasonably believed the doctor was an agent of the hospital.” (*Whitlow v. Rideout Memorial Hospital* (2015) 237 Cal.App.4th 631, 641 [188 Cal.Rptr.3d 246].)
- “Effectively, all a patient needs to show is that he or she sought treatment at the hospital, which is precisely what plaintiff alleged in this case. Unless the evidence conclusively indicates that the patient should have known that the treating physician was not the hospital’s agent, such as when the patient is treated by his or her personal physician, the issue of ostensible agency must be left to the trier of fact.” (*Mejia v. Community Hospital of San Bernardino* (2002) 99 Cal.App.4th 1448, 1458 [122 Cal.Rptr.2d 233].)
- “Neither *Mejia*, *Whitlow*, nor *Markow* is factually on point with this case. Yet all three opinions inform our decision in this case. They rest on the same principle of California law, that although a hospital may not control, direct or supervise physicians on its staff, a hospital may be liable for their negligence on an ostensible agency theory, unless (1) the hospital gave the patient actual notice that the treating physicians are not hospital employees, and (2) there is no reason

to believe the patient was unable to understand or act on the information, or (3) the patient was treated by his or her personal physician and knew or should have known the true relationship between the hospital and physician.” (*Wicks, supra*, 49 Cal.App.5th at p. 884; see *Franklin v. Santa Barbara Cottage Hospital* (2022) 82 Cal.App.5th 395, 405 [297 Cal.Rptr.3d 850].)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, § 105

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.45 (Matthew Bender)

29 California Forms of Pleading and Practice, Ch. 295, *Hospitals*, § 295.13 et seq. (Matthew Bender)

**3948. Punitive Damages—Individual and Corporate Defendants
(Corporate Liability Based on Acts of Named
Individual)—Bifurcated Trial (First Phase)**

If you decide that [*name of individual defendant*]’s conduct caused [*name of plaintiff*] harm, you must decide whether that conduct justifies an award of punitive damages against [*name of individual defendant*] and, if so, against [*name of corporate defendant*]. The amount, if any, of punitive damages will be an issue decided later.

You may award punitive damages against [*name of individual defendant*] only if [*name of plaintiff*] proves by clear and convincing evidence that [*name of individual defendant*] engaged in that conduct with malice, oppression, or fraud.

“Malice” means that a defendant acted with intent to cause injury or that a defendant’s conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A defendant acts with knowing disregard when the defendant is aware of the probable dangerous consequences of the defendant’s conduct and deliberately fails to avoid those consequences.

“Oppression” means that a defendant’s conduct was despicable and subjected [*name of plaintiff*] to cruel and unjust hardship in knowing disregard of [*his/her/nonbinary pronoun*] rights.

“Despicable conduct” is conduct that is so vile, base, or contemptible that it would be looked down on and despised by reasonable people.

“Fraud” means that a defendant intentionally misrepresented or concealed a material fact and did so intending to harm [*name of plaintiff*].

You may also award punitive damages against [*name of corporate defendant*] based on [*name of individual*]’s conduct if [*name of plaintiff*] proves [one of] the following by clear and convincing evidence:

1. [That [*name of individual defendant*] was an officer, a director, or a managing agent of [*name of corporate defendant*] who was acting on behalf of [*name of corporate defendant*] at the time of the conduct constituting malice, oppression, or fraud; [or]]
2. [That an officer, a director, or a managing agent of [*name of corporate defendant*] had advance knowledge of the unfitness of [*name of individual defendant*] and employed [*him/her/nonbinary pronoun*] with a knowing disregard of the rights or safety of others; [or]]
3. [That [*name of individual defendant*]’s conduct constituting malice,

oppression, or fraud was authorized by an officer, a director, or a managing agent of [name of corporate defendant]; [or]]

4. [That an officer, a director, or a managing agent of [name of corporate defendant] knew of [name of individual defendant]’s conduct constituting malice, oppression, or fraud and adopted or approved that conduct after it occurred.]

An employee is a “managing agent” if the employee exercises substantial independent authority and judgment in corporate decisionmaking such that the employee’s decisions ultimately determine corporate policy.

New September 2003; Revised April 2004, December 2005, May 2020

Directions for Use

Use CACI No. 3949, *Punitive Damages—Individual and Corporate Defendants (Corporate Liability Based on Acts of Named Individual)—Bifurcated Trial (Second Phase)*, for the second phase of a bifurcated trial.

This instruction is intended to apply to cases where punitive damages are sought against both an individual person and a corporate defendant. When damages are sought only against a corporate defendant, use CACI No. 3944, *Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee—Bifurcated Trial (First Phase)*, or CACI No. 3946, *Punitive Damages—Entity Defendant—Bifurcated Trial (First Phase)*. When damages are sought against individual defendants, use CACI No. 3941, *Punitive Damages—Individual Defendant—Bifurcated Trial (First Phase)*.

For an instruction explaining “clear and convincing evidence,” see CACI No. 201, *Highly Probable—Clear and Convincing Proof*.

If any of the alternative grounds for seeking punitive damages are inapplicable to the facts of the case, they may be omitted.

See CACI No. 3940, *Punitive Damages—Individual Defendant—Trial Not Bifurcated*, for additional sources and authority.

In an appropriate case, the jury may be instructed that a false promise or a suggestion of a fact known to be false may constitute a misrepresentation as the word “misrepresentation” is used in the instruction’s definition of “fraud.”

Sources and Authority

- When Punitive Damages Permitted. Civil Code section 3294.
- Deferral of Financial Condition Evidence to Second Stage. Civil Code section 3295(d).
- “[E]vidence of ratification of [agent’s] actions by [defendant] and any other findings made under Civil Code section 3294, subdivision (b), must be made by clear and convincing evidence.” (*Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 Cal.App.4th 1640, 1644 [3 Cal.Rptr.3d 258].)

- “[Section 3295(d)] affects the order of proof at trial, precluding the admission of evidence of defendants’ financial condition until after the jury has returned a verdict for plaintiffs awarding actual damages and found that one or more defendants were guilty of ‘oppression, fraud or malice,’ in accordance with Civil Code section 3294.” (*City of El Monte v. Superior Court* (1994) 29 Cal.App.4th 272, 274–275 [34 Cal.Rptr.2d 490], internal citations omitted.)
- “Evidence of the defendant’s financial condition is a prerequisite to an award of punitive damages. In order to protect defendants from the premature disclosure of their financial position when punitive damages are sought, the Legislature enacted Civil Code section 3295.” (*City of El Monte, supra*, 29 Cal.App.4th at p. 276, internal citations omitted.)
- “[C]ourts have held it is reversible error to try the punitive damages issue to a new jury after the jury which found liability has been excused.” (*Rivera v. Sassoon* (1995) 39 Cal.App.4th 1045, 1048 [46 Cal.Rptr.2d 144], internal citations omitted.)
- “Under the statute, ‘malice does not require actual intent to harm. [Citation.] Conscious disregard for the safety of another may be sufficient where the defendant is aware of the probable dangerous consequences of his or her conduct and he or she willfully fails to avoid such consequences. [Citation.] Malice may be proved either expressly through direct evidence or by implication through indirect evidence from which the jury draws inferences. [Citation.]’ ” (*Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1299 [164 Cal.Rptr.3d 112].)
- “Used in its ordinary sense, the adjective ‘despicable’ is a powerful term that refers to circumstances that are ‘base,’ ‘vile,’ or ‘contemptible.’ As amended to include this word, the statute plainly indicates that absent an intent to injure the plaintiff, ‘malice’ requires more than a ‘willful and conscious’ disregard of the plaintiffs’ interests. The additional component of ‘despicable conduct’ must be found.” (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 725 [34 Cal.Rptr.2d 898, 882 P.2d 894], internal citations omitted.)
- “[T]o support an award of punitive damages, the evidence must allow a reasonable person to conclude it is highly probable that an officer, director, or managing agent of defendant was “ ‘aware of the probable dangerous consequences’ ” of his conduct in connection with the company’s distribution of its [product] to [plaintiff], and “ ‘willfully fail[ed] to avoid’ ” those consequences.” (*McNeal v. Whittaker, Clark & Daniels, Inc.* (2022) 80 Cal.App.5th 853, 873 [296 Cal.Rptr.3d 394].)
- “Section 3294 is no longer silent on who may be responsible for imputing punitive damages to a corporate employer. For corporate punitive damages liability, section 3294, subdivision (b), requires that the wrongful act giving rise to the exemplary damages be committed by an ‘officer, director, or managing agent.’ ” (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572 [88 Cal.Rptr.2d 19, 981 P.2d 944].)
- “[I]n performing, ratifying, or approving the malicious conduct, the agent must

be acting *as the organization's representative*, not in some other capacity.” (*College Hospital, supra*, 8 Cal.4th at p. 723, original italics.)

- “[T]he concept [of managing agent] assumes that such individual was acting in a corporate or employment capacity when the conduct giving rise to the punitive damages claim against the employer occurred.” (*College Hospital, supra*, 8 Cal.4th at p. 723.)
- “No purpose would be served by punishing the employer for an employee’s conduct that is wholly unrelated to its business or to the employee’s duties therein.” (*College Hospital, supra*, 8 Cal.4th at pp. 723–724.)
- “[T]he determination of whether certain employees are managing agents ‘does not necessarily hinge on their ‘level’ in the corporate hierarchy. Rather, the critical inquiry is the degree of discretion the employees possess in making decisions’ ” (*Powerhouse Motorsports Group, Inc. v. Yamaha Motor Corp., U.S.A.* (2013) 221 Cal.App.4th 867, 886 [164 Cal.Rptr.3d 811].)
- “Although it is generally true . . . that an employee’s hierarchy in a corporation is not necessarily determinative of his or her status as a managing agent of a corporation, evidence showing an employee’s hierarchy and job duties, responsibilities, and authority may be sufficient, absent conclusive proof to the contrary, to support a reasonable inference by a trier of fact that the employee is a managing agent of a corporation.” (*Davis v. Kiewit Pacific Co.* (2013) 220 Cal.App.4th 358, 370 [162 Cal.Rptr.3d 805].)
- “[W]e conclude the Legislature intended the term ‘managing agent’ to include only those corporate employees who exercise substantial independent authority and judgment in their corporate decision making so that their decisions ultimately determine corporate policy. The scope of a corporate employee’s discretion and authority under our test is therefore a question of fact for decision on a case-by-case basis.” (*White, supra*, 21 Cal.4th at pp. 566–567.)
- “In order to demonstrate that an employee is a true managing agent under section 3294, subdivision (b), a plaintiff seeking punitive damages would have to show that the employee exercised substantial discretionary authority over significant aspects of a corporation’s business.” (*White, supra*, 21 Cal.4th at p. 577.)
- “[C]orporate policy’ is the general principles which guide a corporation, or rules intended to be followed consistently over time in corporate operations. A ‘managing agent’ is one with substantial authority over decisions that set these general principles and rules.” (*Cruz v. Homebase* (2000) 83 Cal.App.4th 160, 167–168 [99 Cal.Rptr.2d 435].)
- “The key inquiry thus concerns the employee’s authority to change or establish corporate policy. The fact that an employee has a supervisory position with the power to terminate employees under his or her control does not, by itself, render the employee a managing agent. Nor does the fact that an employee supervises a large number of employees necessarily establish that status.” (*CRST, Inc. v.*

Superior Court (2017) 11 Cal.App.5th 1255, 1273 [218 Cal.Rptr.3d 664].)

- “[R]atification’ is the ‘[c]onfirmation and acceptance of a previous act.’ A corporation cannot confirm and accept that which it does not actually know about.” (*Cruz, supra*, 83 Cal.App.4th at p. 168.)
- “For purposes of determining an employer’s liability for punitive damages, ratification generally occurs where, under the particular circumstances, the employer demonstrates an intent to adopt or approve oppressive, fraudulent, or malicious behavior by an employee in the performance of his job duties.” (*College Hospital, supra*, 8 Cal.4th at p. 726.)
- “Corporate ratification in the punitive damages context requires actual knowledge of the conduct and its outrageous nature.” (*College Hospital, supra*, 8 Cal.4th at p. 726.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1752–1756

California Tort Damages (Cont.Ed.Bar) Punitive Damages, §§ 14.13–14.14, 14.23

4 Levy et al., California Torts, Ch. 54, *Punitive Damages*, §§ 54.07, 54.24[4][d]
(Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.51[17]
(Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort*, § 64.24 et seq.
(Matthew Bender)

4562. Payment for Construction Services Rendered—Essential Factual Elements (Bus. & Prof. Code, § 7031(a), (e))

[Name of plaintiff] **claims that** *[name of defendant]* **owes** *[name of plaintiff]* **money for construction services rendered. To establish this claim, *[name of plaintiff]* must prove all of the following:**

- 1. That *[name of defendant]* [[engaged/hired]/ [or] contracted with] *[name of plaintiff]* to *[specify contractor services]*;**
- 2. That *[name of plaintiff]* had at all times during the performance of construction services a valid contractor’s license;**
- 3. That *[name of plaintiff]* performed these services;**
- 4. That *[name of defendant]* has not paid *[name of plaintiff]* for the construction services that *[name of plaintiff]* provided; and**
- 5. The amount of money *[name of defendant]* owes *[name of plaintiff]* for the construction services provided.**

New May 2021

Directions for Use

Give this instruction in a case in which the plaintiff-contractor seeks to recover compensation owed for services performed for which a license is required. (Bus. & Prof. Code, § 7031(a).)

For element 2, licensure requirements may be satisfied by substantial compliance with the licensure requirements. (Bus. & Prof. Code, § 7031(e).) If the court has determined the defendant’s substantial compliance, modify element 2 accordingly, and instruct the jury that the court has made the determination.

When licensure or proper licensure is controverted, the burden of proof to establish licensure or proper licensure is on the contractor. (Bus. & Prof. Code, § 7031(d).) Proof must be made by producing a verified certificate of licensure from the Contractors State License Board.

For a case involving recovery of payment for services provided by an allegedly unlicensed contractor, give CACI No. 4560, *Recovery of Payments to Unlicensed Contractor—Essential Factual Elements*.

Sources and Authority

- Proof of Licensure. Business and Professions Code section 7031(d).
- “Contractor” Defined. Business and Professions Code section 7026.
- “[Contractor] has not alleged one contract, but rather a series of agreements for each separate task that it was asked to perform. It may therefore seek compensation under those alleged agreements that apply to tasks for which no

license was required.” (*Phoenix Mechanical Pipeline, Inc. v. Space Exploration Technologies Corp.* (2017) 12 Cal.App.5th 842, 853 [219 Cal.Rptr.3d 775].)

- “Section 7031, subdivision (e) states an exception to the license requirement of subdivision (a). Subdivision (e) provides in part: ‘[T]he court may determine that there has been substantial compliance with licensure requirements under this section if it is shown at an evidentiary hearing that the person who engaged in the business or acted in the capacity of a contractor (1) had been duly licensed as a contractor in this state prior to the performance of the act or contract, (2) acted reasonably and in good faith to maintain proper licensure, and (3) acted promptly and in good faith to remedy the failure to comply with the licensure requirements upon learning of the failure.’ ” (*C. W. Johnson & Sons, Inc. v. Carpenter* (2020) 53 Cal.App.5th 165, 169 [265 Cal.Rptr.3d 895].)
- “[S]ection 7031 bars even a licensed general contractor in California from bringing an action for compensation for an act or contract performed by an unlicensed subcontractor where a license is required.” (*Kim v. TWA Construction, Inc.* (2022) 78 Cal.App.5th 808, 831 [294 Cal.Rptr.3d 140].)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, § 491

California Civil Practice: Real Property Litigation §§ 10:26–10:38 (Thomson Reuters)

12 California Real Estate Law and Practice, Ch. 430, *Licensing of Contractors*, § 430.70 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, § 104.83 (Matthew Bender)

5 California Points and Authorities, Ch. 50A, *Contracts: Performance, Breach, and Defenses*, § 50A.52 et seq. (Matthew Bender)

29 California Legal Forms, Ch. 88, *Licensing of Contractors*, § 88.18 (Matthew Bender)

Miller & Starr, California Real Estate 4th §§ 32:68–32:84

4602. Affirmative Defense—Same Decision (Gov. Code, § 8547.8(e))

If [name of plaintiff] proves that [his/her/nonbinary pronoun] [making a protected disclosure/refusing an illegal order] was a contributing factor to [his/her/nonbinary pronoun] [discharge/specify other adverse action], [name of defendant] is not liable if [he/she/nonbinary pronoun/it] proves by clear and convincing evidence that [he/she/nonbinary pronoun/it] would have discharged [name of plaintiff] anyway at that time, for legitimate, independent reasons.

New December 2014; Renumbered from CACI No. 2443 and Revised June 2015

Directions for Use

Give this instruction in a so-called same-decision or mixed-motive case under the California Whistleblower Protection Act. (See Gov. Code, § 8547 et seq.; CACI No. 4601, *Protected Disclosure by State Employee—California Whistleblower Protection Act—Essential Factual Elements*.) A mixed-motive case is one in which there is evidence of both a retaliatory reason and a legitimate reason for the adverse action. Even if the jury finds that the retaliatory reason was a contributing factor, the employer may avoid liability if it can prove by clear and convincing evidence that it would have made the same decision anyway for a legitimate reason. (Gov. Code, § 8547.8(e).)

Select “refusing an illegal order” if the court has allowed the case to proceed based on that basis. The affirmative defense statute includes refusing an illegal order as protected activity along with making a protected disclosure. The statute that creates the plaintiff’s cause of action does not expressly mention refusing an illegal order. (Compare Gov. Code, § 8547.8(e) with Gov. Code, § 8547.2(c).) See the Directions for Use to CACI No. 4601.

Sources and Authority

- California Whistleblower Protection Act. Government Code section 8547 et seq.
- Same-Decision Affirmative Defense. Government Code section 8547.8(e).
- “Guided by *Lawson* [*v. PPG Architectural Finishes, Inc.* (2022) 12 Cal.5th 703 [289 Cal.Rptr.3d 572, 503 P.3d 659]] and applying its reasoning, we conclude that Government Code section 8547.10, subdivision (e), rather than *McDonnell Douglas*, provides the relevant framework for analyzing claims under Government Code section 8547.10.” (*Scheer v. Regents of University of California* (2022) 76 Cal.App.5th 904, 916 [291 Cal.Rptr.3d 822].)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 302–307A

Chin et al., California Practice Guide: Employment Litigation, Ch. 5(II)-B, *Retaliation Under Other Whistleblower Statutes*, ¶ 5:1790 et seq. (The Rutter Group)

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

11 California Forms of Pleading and Practice, Ch. 118, *Civil Service*, § 118.56 (Matthew Bender)

3 California Points and Authorities, Ch. 36, *Civil Service*, § 36.40 (Matthew Bender)

4603. Whistleblower Protection—Essential Factual Elements (Lab. Code, § 1102.5)

[Name of plaintiff] **claims that** *[name of defendant]* **[discharged/[other adverse employment action]] [him/her/nonbinary pronoun] in retaliation for [his/her/nonbinary pronoun] [disclosure of information of/refusal to participate in] an unlawful act. To establish this claim, [name of plaintiff] must prove all of the following are more likely true than not true:**

- 1. That** *[name of defendant]* **was** *[name of plaintiff]*'s **employer;**
- 2. [That** *[name of plaintiff]* **disclosed/[name of defendant] believed that** *[name of plaintiff]* **[had disclosed/might disclose]] to a [government agency/law enforcement agency/person with authority over** *[name of plaintiff]***/ [or] an employee with authority to investigate, discover, or correct legal [violations/noncompliance]] that** *[specify information disclosed];]*

[or]

[That *[name of plaintiff]* **[provided information to/testified before] a public body that was conducting an investigation, hearing, or inquiry;]**

[or]

[That *[name of plaintiff]* **refused to** *[specify activity in which plaintiff refused to participate];]*

- 3. [That** *[name of plaintiff]* **had reasonable cause to believe that the information disclosed [a violation of a [state/federal] statute/[a violation of/noncompliance with] a [local/state/federal] rule or regulation];]**

[or]

[That *[name of plaintiff]* **had reasonable cause to believe that the [information provided to/testimony before] the public body disclosed [a violation of a [state/federal] statute/[a violation of/noncompliance with] a [local/state/federal] rule or regulation];]**

[or]

[That *[name of plaintiff]*'s **participation in** *[specify activity]* **would result in [a violation of a [state/federal] statute/[a violation of/noncompliance with] a [local/state/federal] rule or regulation];]**

- 4. That** *[name of defendant]* **[discharged/[other adverse employment action]]** *[name of plaintiff];]*

- 5. That** *[name of plaintiff]*'s **[disclosure of information/refusal to**

[specify]/[name of defendant]’s belief that [name of plaintiff] [had disclosed/might disclose] information] was a contributing factor in [name of defendant]’s decision to [discharge/[other adverse employment action]] [name of plaintiff];

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

A “contributing factor” is any factor, which alone or in connection with other factors, tends to affect the outcome of a decision. A contributing factor can be proved even when other legitimate factors also contributed to the employer’s decision.

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

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

[A disclosure is protected even though disclosing the information may be part of [name of plaintiff]’s job duties.]

New December 2012; Revised June 2013, December 2013; Revoked June 2014; Restored and Revised December 2014; Renumbered from CACI No. 2730 and Revised June 2015; Revised June 2016, November 2019, May 2020, December 2022, May 2023

Directions for Use

The whistleblower protection statute of the Labor Code prohibits retaliation against an employee who, or whose family member, discloses information about, or refuses to participate in, an illegal activity. (Lab. Code, § 1102.5(b), (c), (h).) Liability may be predicated on retaliation by “any person acting on behalf of the employer.” (Lab. Code, § 1102.5(a)–(d).) Select any of the optional paragraphs as appropriate to the facts of the case. For claims under Labor Code section 1102.5(c), the plaintiff must show that the activity in question actually would result in a violation of or noncompliance with a statute, rule, or regulation, which is a legal determination that the court is required to make. (*Nejadian v. County of Los Angeles* (2019) 40 Cal.App.5th 703, 719 [253 Cal.Rptr.3d 404].)

Modifications to the instruction may be required if liability is predicated on an agency theory and the agent is also a defendant. Modifications will also be required if the retaliation is against an employee whose family member engaged in the protected activity.

Select the first option for elements 2 and 3 for claims based on actual disclosure of information or a belief that plaintiff disclosed or might disclose information. (Cf. *Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal.App.4th 635, 648–649 [163 Cal.Rptr.3d 392] [under prior version of statute, no liability for anticipatory or preemptive retaliation based on fear that plaintiff might file a complaint in the future].) Select the second options for providing information to or testifying before a public body conducting an investigation, hearing, or inquiry. Select the third options for refusal to participate in an unlawful activity, and instruct the jury that the court has made the determination that the specified activity would have been unlawful.

It has been held that a report of publicly known facts is not a protected disclosure. (*Mize-Kurzman v. Marin Community College Dist.* (2012) 202 Cal.App.4th 832, 858 [136 Cal.Rptr.3d 259].) Another court, however, has held that protection is not necessarily limited to the first public employee to report unlawful acts to the employer. (*Hager v. County of Los Angeles* (2014) 228 Cal.App.4th 1538, 1548–1553 [176 Cal.Rptr.3d 268], disapproved on other grounds by *Lawson v. PPG Architectural Finishes, Inc.* (2022) 12 Cal.5th 703, 718 [289 Cal.Rptr.3d 572, 503 P.3d 659]; see Lab. Code, § 1102.5(b), (e).)

“Adverse employment action” is viewed the same as it is under the Fair Employment and Housing Act. (*Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal.App.4th 1378, 1387 [37 Cal.Rptr.3d 113], disapproved on other grounds by *Lawson, supra*, 12 Cal.5th at p. 718; see CACI No. 2505, *Retaliation—Essential Factual Elements*.) Element 4 may be modified to allege constructive discharge or adverse acts that might not be obviously prejudicial. See CACI No. 2509, “Adverse Employment Action” Explained, and CACI No. 2510, “Constructive Discharge” Explained, for instructions that may be adapted for use with this instruction.

The employee must demonstrate by a preponderance of evidence that a protected activity was a contributing factor in the adverse action against the employee. (*Lawson, supra*, 12 Cal.5th at p. 718.) The employer may then attempt to prove by clear and convincing evidence that the action would have been taken anyway for legitimate, independent reasons even if the employee had not engaged in the protected activities. (See Lab. Code, § 1102.6; CACI No. 4604, *Affirmative Defense—Same Decision*.)

Sources and Authority

- Retaliation Against Whistleblower Prohibited. Labor Code section 1102.5.
- “[W]e now clarify that section 1102.6, and not *McDonnell Douglas*, supplies the applicable framework for litigating and adjudicating section 1102.5 whistleblower claims.” (*Lawson, supra*, 12 Cal.5th at p. 712.)
- “By its terms, section 1102.6 describes the applicable substantive standards and burdens of proof for both parties in a section 1102.5 retaliation case: First, it must be ‘demonstrated by a preponderance of the evidence’ that the employee’s protected whistleblowing was a ‘contributing factor’ to an adverse employment

action. Then, once the employee has made that necessary threshold showing, the employer bears ‘the burden of proof to demonstrate by clear and convincing evidence’ that the alleged adverse employment action would have occurred ‘for legitimate, independent reasons’ even if the employee had not engaged in protected whistleblowing activities.” (*Lawson, supra*, 12 Cal.5th at p. 712, internal citation omitted.)

- “In order to prove a claim under section 1102.5(b), the plaintiff must establish a prima facie case of retaliation. It is well-established that such a prima facie case includes proof of the plaintiff’s employment status.” (*Bennett v. Rancho California Water Dist.* (2019) 35 Cal.App.5th 908, 921 [248 Cal.Rptr.3d 21], internal citations omitted.)
- “To prove a claim of retaliation under this statute, the plaintiff ‘must demonstrate that he or she has been subjected to an adverse employment action that materially affects the terms, conditions, or privileges of employment.’ ‘Minor or relatively trivial adverse actions by employers or fellow employees that, from an objective perspective, are reasonably likely to do no more than anger or upset an employee do not materially affect the terms or conditions of employment.’ This requirement “ ‘guards against both “judicial micromanagement of business practices” [citation] and frivolous suits over insignificant slights.’ ” (*Francis v. City of Los Angeles* (2022) 81 Cal.App.5th 532, 540–541 [297 Cal.Rptr.3d 362], internal citations omitted.)
- “[T]he purpose of . . . section 1102.5(b) ‘is to “encourag[e] workplace whistleblowers to report unlawful acts without fearing retaliation.” ’ ” (*Diego v. Pilgrim United Church of Christ* (2014) 231 Cal.App.4th 913, 923 [180 Cal.Rptr.3d 359].)
- “Once it is determined that the activity would result in a violation or noncompliance with a statute, rule, or regulation, the jury must then determine whether the plaintiff refused to participate in that activity and, if so, whether that refusal was a contributing factor in the defendant’s decision to impose an adverse employment action on the plaintiff.” (*Nejadian, supra*, 40 Cal.App.5th at p. 719.)
- “As a general proposition, we conclude the court could properly craft instructions in conformity with law developed in federal cases interpreting the federal whistleblower statute. As the court acknowledged, it was not bound by such federal interpretations. Nevertheless, the court could properly conclude that the jury required guidance as to what did and did not constitute ‘disclosing information’ or a ‘protected disclosure’ under the California statutes.” (*Mize-Kurzman, supra*, 202 Cal.App.4th at p. 847.)
- “The court erred in failing to distinguish between the disclosure of policies that plaintiff believed to be unwise, wasteful, gross misconduct or the like, which are subject to the [debatable differences of opinion concerning policy matters] limitation, and the disclosure of policies that plaintiff reasonably believed violated federal or state statutes, rules, or regulations, which are not subject to

this limitation, even if these policies were also claimed to be unwise, wasteful or to constitute gross misconduct.” (*Mize-Kurzman, supra*, 202 Cal.App.4th at pp. 852–853.)

- “[I]t is not the *motive* of the asserted whistleblower, but the nature of the communication that determines whether it is covered.” (*Mize-Kurzman, supra*, 202 Cal.App.4th at p. 852, original italics.)
- “[I]f we interpret section 1102.5 to require an employee to go to a different public agency or directly to a law enforcement agency before he or she can be assured of protection from retaliation, we would be encouraging public employees who suspected wrongdoing to do nothing at all. Under the scenario envisioned by the [defendant], if the employee reports his or her suspicions to the agency, . . . , he or she will have to suffer any retaliatory conduct with no legal recourse. If the employee reports suspicions to an outside agency or law enforcement personnel, he or she risks subjecting the agency to negative publicity and loss of public support which could ensue without regard to whether the charges prove to be true. At the same time, a serious rift in the employment relationship will have occurred because the employee did not go through official channels within the agency which was prepared to investigate the charges. We see no reason to interpret the statute to create such anomalous results.” (*Gardenhire v. Housing Authority* (2000) 85 Cal.App.4th 236, 243 [101 Cal.Rptr.2d 893].)
- “Labor Code section 1102.5, subdivision (b) protects employee reports of unlawful activity by third parties such as contractors and employees, as well [as] unlawful activity by an employer. In support of our conclusion, we note that an employer may have a financial motive to suppress reports of illegal conduct by employees and contractors that reflect poorly on that employer.” (*McVeigh v. Recology San Francisco* (2013) 213 Cal.App.4th 443, 471 [152 Cal.Rptr.3d 595], internal citation omitted.)
- “We are persuaded that [instructing the jury that reporting publicly known facts is not a protected disclosure] was a proper limitation on what constitutes disclosure protected by California law.” (*Mize-Kurzman, supra*, 202 Cal.App.4th at p. 858.)
- “The report of ‘publicly known’ information or ‘already known’ information is distinct from a rule in which only the first employee to report or disclose unlawful conduct is entitled to protection from whistleblower retaliation.” (*Hager, supra*, 228 Cal.App.4th at p. 1552, disapproved on other grounds in *Lawson, supra*, 12 Cal.5th at p. 718.)
- “Protection only to the first employee to disclose unlawful acts would defeat the legislative purpose of protecting workplace whistleblowers, as employees would not come forward to report unlawful conduct for fear that someone else already had done so. The ‘first report’ rule would discourage whistleblowing. Thus, the [defendant]’s interpretation is a disincentive to report unlawful conduct. We see no such reason to interpret the statute in a manner that would contradict the

purpose of the statute.” (*Hager, supra*, 228 Cal.App.4th at p. 1550, disapproved on other grounds in *Lawson, supra*, 12 Cal.5th at p. 718.)

- “Matters such as transferring employees, writing up employees, and counseling employees are personnel matters. ‘To exalt these exclusively internal personnel disclosures with whistleblower status would create all sorts of mischief. Most damagingly, it would thrust the judiciary into micromanaging employment practices and create a legion of undeserving protected “whistleblowers” arising from the routine workings and communications of the job site. . . .’” (*Mueller v. County of Los Angeles* (2009) 176 Cal.App.4th 809, 822 [98 Cal.Rptr.3d 281].)
- “ ‘A wrongful termination action is viable where the employee alleges he [or she] was terminated for reporting illegal activity which could cause harm, not only to the interests of the employer but also to the public.’ ‘An action brought under the whistleblower statute is inherently such an action.’ To preclude a whistleblower from revealing improper conduct by the government based on confidentiality would frustrate the legislative intent underlying the whistleblower statutes. For reasons of public policy, actions against a public entity for claims of discharge from or termination of employment grounded on a whistleblower claim are not barred by governmental immunity.” (*Whitehall v. County of San Bernardino* (2017) 17 Cal.App.5th 352, 365 [225 Cal.Rptr.3d 321], internal citations omitted.)
- “Although [the plaintiff] did not expressly state in his disclosures that he believed the County was violating or not complying with a specific state or federal law, Labor Code section 1102.5, subdivision (b), does not require such an express statement. It requires only that an employee disclose information and that the employee reasonably believe the information discloses unlawful activity.” (*Ross v. County of Riverside* (2019) 36 Cal.App.5th 580, 592–593 [248 Cal.Rptr.3d 696].)
- “Section 1102.6 requires whistleblower plaintiffs to show that retaliation was a ‘contributing factor’ in their termination, demotion, or other adverse action. This means plaintiffs may satisfy their burden of proving unlawful retaliation even when other, legitimate factors also contributed to the adverse action.” (*Lawson, supra*, 12 Cal.5th at 713–714.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 302, 373, 374

Chin et al., California Practice Guide: Employment Litigation, Ch. 5(II)-A, *Retaliation Under Title VII and FEHA*, ¶ 5:1538 (The Rutter Group)

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

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.12, 249.15 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful*

Archived—May 2023 Supplement
CACI No. 4603

Termination and Discipline, §§ 100.42, 100.48, 100.60–100.61A (Matthew Bender)

4604. Affirmative Defense—Same Decision (Lab. Code, § 1102.6)

If [name of plaintiff] proves that [his/her/nonbinary pronoun] [disclosure of information of/refusal to participate in] an unlawful act was a contributing factor to [his/her/nonbinary pronoun] [discharge/[other adverse employment action]], [name of defendant] is not liable if [he/she/nonbinary pronoun/it] proves by clear and convincing evidence that [he/she/nonbinary pronoun/it] would have [discharged/[other adverse employment action]] [name of plaintiff] anyway at that time for legitimate, independent reasons.

New December 2013; Renumbered from CACI No. 2731 and Revised June 2015, December 2022

Directions for Use

Give this instruction in a so-called mixed-motive case under the whistleblower protection statute of the Labor Code. (See Lab. Code, § 1102.5; CACI No. 4603, *Whistleblower Protection—Essential Factual Elements*.) A mixed-motive case is one in which there is evidence of both a retaliatory and a legitimate reason for the adverse action. Even if the jury finds that the retaliatory reason was a contributing factor, the employer may avoid liability if it can prove by clear and convincing evidence that it would have made the same decision anyway for a legitimate reason. (Lab. Code, § 1102.6.) For an instruction on the clear and convincing standard of proof, see CACI No. 201, *Highly Probable—Clear and Convincing Proof*.

Sources and Authority

- Same-Decision Affirmative Defense. Labor Code section 1102.6.
- “[W]e now clarify that section 1102.6, and not *McDonnell Douglas*, supplies the applicable framework for litigating and adjudicating section 1102.5 whistleblower claims.” (*Lawson v. PPG Architectural Finishes, Inc.* (2022) 12 Cal.5th 703, 712 [289 Cal.Rptr.3d 572, 503 P.3d 659].)
- “By its terms, section 1102.6 describes the applicable substantive standards and burdens of proof for both parties in a section 1102.5 retaliation case: First, it must be ‘demonstrated by a preponderance of the evidence’ that the employee’s protected whistleblowing was a ‘contributing factor’ to an adverse employment action. Then, once the employee has made that necessary threshold showing, the employer bears ‘the burden of proof to demonstrate by clear and convincing evidence’ that the alleged adverse employment action would have occurred ‘for legitimate, independent reasons’ even if the employee had not engaged in protected whistleblowing activities.” (*Lawson, supra*, 12 Cal.5th at p. 712, internal citation omitted.)
- “It is not enough . . . that an employer shows it had a legitimate, nondiscriminatory reason for the adverse employment action. Were that the

standard, then an employer could satisfy its burden simply by showing it had one legitimate reason for its action, even if several illegitimate reasons principally motivated its decision. But that is not the applicable standard here. Under section 1102.6, the employer must instead show ‘the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in activities protected by Section 1102.5.’” (*Vatalaro v. County of Sacramento* (2022) 79 Cal.App.5th 367, 379 [294 Cal.Rptr.3d 389], internal citation omitted.)

- “[Plaintiff] points to Labor Code section 1102.6, which requires the employer to prove a same-decision defense by clear and convincing evidence when a plaintiff has proven by a preponderance of the evidence that the employer’s violation of the whistleblower statute was a ‘contributing factor’ to the contested employment decision. Yet the inclusion of the clear and convincing evidence language in one statute does not suggest that the Legislature intended the same standard to apply to other statutes implicating the same-decision defense.” (*Harris v. City of Santa Monica* (2013) 56 Cal. 4th 203, 239 [152 Cal.Rptr.3d 392, 294 P.3d 49]; internal citation omitted.)
- “[W]hen we refer to a same-decision showing, we mean proof that the employer, in the absence of any discrimination, would have made the same decision *at the time it made its actual decision.*” (*Harris, supra*, 56 Cal.4th at p. 224, original italics.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 373, 374

Chin et al., California Practice Guide: Employment Litigation, Ch. 5(II)-A, *Retaliation Under Title VII and FEHA*, ¶ 5:1538 (The Rutter Group)

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

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, § 100.60 (Matthew Bender)

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

4700. Consumers Legal Remedies Act—Essential Factual Elements (Civ. Code, § 1770)

[Name of plaintiff] claims that [name of defendant] engaged in unfair methods of competition and unfair or deceptive acts or practices in a transaction that resulted, or was intended to result, in the sale or lease of goods or services to a consumer, and that [name of plaintiff] was harmed by [name of defendant]’s violation. To establish this claim, [name of plaintiff] must prove all of the following:

- 1. That [name of plaintiff] acquired, or sought to acquire, by purchase or lease, [specify product or service] for personal, family, or household purposes;**
- 2. That [name of defendant] [specify one or more prohibited practices from Civ. Code, § 1770(a), e.g., represented that [product or service] had characteristics, uses, or benefits that it did not have];**
- 3. That [name of plaintiff] was harmed; and**
- 4. That [name of plaintiff]’s harm resulted from [name of defendant]’s conduct.**

[[Name of plaintiff]’s harm resulted from [name of defendant]’s conduct if [name of plaintiff] relied on [name of defendant]’s representation. To prove reliance, [name of plaintiff] need only prove that the representation was a substantial factor in [his/her/nonbinary pronoun] decision.

[He/She/Nonbinary pronoun] does not need to prove that it was the primary factor or the only factor in the decision.

If [name of defendant]’s representation of fact was material, reliance may be inferred. A fact is material if a reasonable consumer would consider it important in deciding whether to buy or lease the [goods/services].]

New November 2017

Directions for Use

Give this instruction for a claim under the Consumers Legal Remedies Act (CLRA). The CLRA prohibits 27 distinct unfair methods of competition and unfair or deceptive acts or practices with regard to consumer transactions. (See Civ. Code, § 1770(a).) In element 2, insert the prohibited practice or practices at issue in the case.

The last two optional paragraphs address the plaintiff’s reliance on the defendant’s conduct. CLRA claims not sounding in fraud do not require reliance. (See, e.g., Civ. Code, § 1770(a)(19) [inserting an unconscionable provision in a contract].) Give these paragraphs in a case sounding in fraud.

Many of the prohibited practices involve a misrepresentation made by the defendant. (See, e.g., Civ. Code, § 1770(a)(4) [using deceptive representations or designations of geographic origin in connection with goods or services].) In a misrepresentation claim, the plaintiff must have relied on the information given. (*Nelson v. Pearson Ford Co.* (2010) 186 Cal.App.4th 983, 1022 [112 Cal.Rptr.3d 607], disapproved of on other grounds in *Raceway Ford Cases* (2016) 2 Cal.5th 161, 180 [211 Cal.Rptr.3d 244, 385 P.3d 397].) An element of reliance is that the information must have been material (or important). (*Collins v. eMachines, Inc.* (2011) 202 Cal.App.4th 249, 256 [134 Cal.Rptr.3d 588].)

Other prohibited practices involve a failure to disclose information. (See *Gutierrez v. Carmax Auto Superstores California* (2018) 19 Cal.App.5th 1234, 1258 [248 Cal.Rptr.3d 61]; see, e.g., Civ. Code, § 1770(a)(9) [advertising goods or services with intent not to sell them as advertised].) Reliance in concealment cases is best expressed in terms that the plaintiff would have behaved differently had the true facts been known. (See *Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1093 [23 Cal.Rptr.2d 101, 858 P.2d 568].) The next-to-last paragraph may be modified to express reliance in this manner. (See CACI No. 1907, *Reliance*.)

The CLRA provides for class actions. (See Civ. Code, § 1781.) In a class action, this instruction should be modified to state that only the named plaintiff’s reliance on the defendant’s representation must be proved. Class-wide reliance does not require a showing of actual reliance on the part of every class member. Rather, if all class members have been exposed to the same material misrepresentations, class-wide reliance will be inferred, unless rebutted by the defendant. (*Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 814–815 [94 Cal.Rptr. 796, 484 P.2d 964]; *Occidental Land, Inc. v. Superior Court* (1976) 18 Cal.3d 355, 362–363 [134 Cal.Rptr. 388, 556 P.2d 750]; *Massachusetts Mut. Life Ins. Co. v. Superior Court* (2002) 97 Cal.App.4th 1282, 1293 [119 Cal.Rptr.2d 190].) In class cases then, exposure and materiality are the only facts that need to be established to justify class-wide relief. Those determinations are a part of the class certification analysis and will, therefore, be within the purview of the court.

Sources and Authority

- Consumers Legal Remedies Act: Prohibited Practices. Civil Code section 1770(a).
- Consumers Legal Remedies Act: Private Cause of Action. Civil Code section 1780(a).
- “The CLRA makes unlawful, in Civil Code section 1770, subdivision (a) . . . various “unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer.” The CLRA proscribes 27 specific acts or practices.” (*Rubenstein v. The Gap, Inc.* (2017) 14 Cal.App.5th 870, 880–881 [222 Cal.Rptr.3d 397], internal citation omitted.)
- “The Legislature enacted the CLRA ‘to protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures

to secure such protection.’ ” (*Valdez v. Seidner-Miller, Inc.* (2019) 33 Cal.App.5th 600, 609 [245 Cal.Rptr.3d 268].)

- “ ‘Whether a practice is deceptive, fraudulent, or unfair is generally a question of fact which requires “consideration and weighing of evidence from both sides” and which usually cannot be made on demurrer.’ ” (*Brady v. Bayer Corp.* (2018) 26 Cal.App.5th 1156, 1164 [237 Cal.Rptr.3d 683].)
- “The CLRA is set forth in Civil Code section 1750 et seq. . . . [U]nder the CLRA a consumer may recover actual damages, punitive damages and attorney fees. However, relief under the CLRA is limited to ‘[a]ny consumer who suffers any damage *as a result* of the use or employment by any person of a method, act, or practice’ unlawful under the act. As [defendant] argues, this limitation on relief requires that plaintiffs in a CLRA action show not only that a defendant’s conduct was deceptive but that the deception caused them harm.” (*Massachusetts Mutual Life Ins. Co., supra*, 97 Cal.App.4th at p. 1292, original italics, internal citations omitted.)
- “[T]he CLRA does not require lost injury or property, but does require damage and causation. ‘Under Civil Code section 1780, subdivision (a), CLRA actions may be brought “only by a consumer ‘who suffers any damage as a result of the use or employment’ of a proscribed method, act, or practice. . . . Accordingly, ‘plaintiffs in a CLRA action [must] show not only that a defendant’s conduct was deceptive but that the deception caused them harm.’ ” ’ ” (*Veera v. Banana Republic, LLC* (2016) 6 Cal.App.5th 907, 916, fn. 3 [211 Cal.Rptr.3d 769].)
- “ ‘To have standing to assert a claim under the CLRA, a plaintiff must have “suffer[ed] any damage as a result of the . . . practice declared to be unlawful.” ’ Our Supreme Court has interpreted the CLRA’s ‘any damage’ requirement broadly, concluding that the ‘phrase . . . is not synonymous with “actual damages,” which generally refers to pecuniary damages.’ Rather, the consumer must merely ‘experience some [kind of] damage,’ or ‘some type of increased costs’ as a result of the unlawful practice.” (*Hansen v. Newegg.com Americas, Inc.* (2018) 25 Cal.App.5th 714, 724 [236 Cal.Rptr.3d 61], internal citations omitted.)
- “This language does not create an automatic award of statutory damages upon proof of an unlawful act.” (*Moran v. Prime Healthcare Management, Inc.* (2016) 3 Cal.App.5th 1131, 1152 [208 Cal.Rptr.3d 303].)
- “[Civil Code section 1761(e)] provides a broad definition of ‘transaction’ as ‘an agreement between a consumer and any other person, whether or not the agreement is a contract enforceable by action, and includes the making of, and the performance pursuant to, that agreement.’ ” (*Wang v. Massey Chevrolet* (2002) 97 Cal.App.4th 856, 869 [118 Cal.Rptr.2d 770].)
- “ ‘While a plaintiff must show that the misrepresentation was an immediate cause of the injury-producing conduct, the plaintiff need not demonstrate it was the only cause. “ ‘It is not . . . necessary that [the plaintiff’s] reliance upon the truth of the fraudulent misrepresentation be the sole or even the predominant or

decisive factor in influencing his conduct. . . . It is enough that the representation has played a substantial part, and so has been a substantial factor, in influencing his decision.’ [Citation.]” ’ In other words, it is enough if a plaintiff shows that ‘ “in [the] absence [of the misrepresentation] the plaintiff ‘in all reasonable probability’ would not have engaged in the injury-producing conduct.’ [Citation.]” ’ (*Veera, supra*, 6 Cal.App.5th at p. 919, internal citations omitted.)

- “Under the CLRA, plaintiffs must show actual reliance on the misrepresentation and harm.” (*Nelson, supra*, 186 Cal.App.4th at p. 1022.)
- “[T]he failure to disclose *material* facts may be actionable under the CLRA in certain situations. For purposes of the CLRA, ‘a fact is “material” if a reasonable consumer would deem it important in determining how to act in the transaction at issue.’ The concept of materiality is related to the issue of causation. A causal link between the deceptive practice and damage to the plaintiff is a necessary element of a CLRA cause of action. A misrepresentation or an omission of fact is material only if the plaintiff relied on it—that is, the plaintiff would not have acted as he or she did without the misrepresentation or the omission of fact.” (*Torres v. Adventist Health System/West* (2022) 77 Cal.App.5th 500, 513 [292 Cal.Rptr.3d 557], original italics, internal citations omitted.)
- “[M]ateriality usually is a question of fact. In certain cases, a court can determine the factual misrepresentation or omission is so obviously unimportant that the jury could not reasonably find that a reasonable person would have been influence (*sic*) by it.” (*Gutierrez, supra*, 19 Cal.App.5th at p. 1262, internal citations omitted.)
- “If a claim of misleading labeling runs counter to ordinary common sense or the obvious nature of the product, the claim is fit for disposition at the demurrer stage of the litigation.” (*Brady, supra*, 26 Cal.App.5th at p. 1165.)
- “In the CLRA context, a fact is deemed ‘material,’ and obligates an exclusively knowledgeable defendant to disclose it, if a ‘ “reasonable [consumer]” ’ would deem it important in determining how to act in the transaction at issue.” (*Collins, supra*, 202 Cal.App.4th at p. 256.)
- “If the undisclosed assessment was material, an inference of reliance as to the entire class would arise, subject to any rebuttal evidence [defendant] might offer.” (*Massachusetts Mutual Life Ins. Co., supra*, 97 Cal.App.4th at p. 1295.)
- “[U]nless the advertisement targets a particular disadvantaged or vulnerable group, it is judged by the effect it would have on a reasonable consumer.” (*Consumer Advocates v. Echostar Satellite Corp.* (2003) 113 Cal.App.4th 1351, 1360 [8 Cal.Rptr.3d 22].)
- “In California . . . product mislabeling claims are generally evaluated using a ‘reasonable consumer’ standard, as distinct from an ‘unwary consumer’ or a ‘suspicious consumer’ standard.” (*Brady, supra*, 26 Cal.App.5th at p. 1174.)

- “Not every omission or nondisclosure of fact is actionable. Consequently, we must adopt a test identifying which omissions or nondisclosures fall within the scope of the CLRA. Stating that test in general terms, we conclude an omission is actionable under the CLRA if the omitted fact is (1) ‘contrary to a [material] representation actually made by the defendant’ or (2) is ‘a fact the defendant was obliged to disclose.’ ” (*Gutierrez, supra*, 19 Cal.App.5th at p. 1258.)
- “[T]here is no independent duty to disclose [safety] concerns. Rather, a duty to disclose material safety concerns ‘can be actionable in four situations: (1) when the defendant is in a fiduciary relationship with the plaintiff; (2) when the defendant had exclusive knowledge of material facts not known to the plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; or (4) when the defendant makes partial representations but also suppresses some material fact.’ ” (*Gutierrez, supra*, 19 Cal.App.5th at p. 1260.)
- “Under the CLRA, even if representations and advertisements are true, they may still be deceptive because ‘ “[a] perfectly true statement couched in such a manner that it is likely to mislead or deceive the consumer, such as by failure to disclose other relevant information, is actionable.” [Citation.] ’ ” (*Jones, supra*, 237 Cal.App.4th Supp. at p. 11.)
- “Defendants next allege that plaintiffs cannot sue them for violating the CLRA because their debt collection efforts do not involve ‘goods or services.’ The CLRA prohibits ‘unfair methods of competition and unfair or deceptive acts or practices.’ This includes the inaccurate ‘represent[ation] that a transaction confers or involves rights, remedies, or obligations which it does not have or involve’ However, this proscription only applies with respect to ‘transaction[s] intended to result or which result[] in the sale or lease of goods or services to [a] consumer’ The CLRA defines ‘goods’ as ‘tangible chattels bought or leased for use primarily for personal, family, or household purposes’, and ‘services’ as ‘work, labor, and services for other than a commercial or business use, including services furnished in connection with the sale or repair of goods.’ ” (*Alborzian v. JPMorgan Chase Bank, N.A.* (2015) 235 Cal.App.4th 29, 39–40 [185 Cal.Rptr.3d 84], internal citations omitted [mortgage loan is neither a good nor a service].)
- “[A] ‘reasonable correction offer prevent[s] [the plaintiff] from maintaining a cause of action for damages under the CLRA, but [does] not prevent [the plaintiff] from pursuing remedies based on other statutory violations or common law causes of action based on conduct under those laws.’ ” (*Valdez, supra*, 33 Cal.App.5th at p. 612.)

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Sales, § 298 et seq.

Gaab & Reese, California Practice Guide: Civil Procedure Before Trial Claims & Defenses, Ch.1 4(II)-B, *Elements of Claim*, ¶ 14:315 et seq. (The Rutter Group)

Cabraser, California Class Actions and Coordinated Proceedings, Ch. 4, *California’s Consumer Legal Remedies Act*, § 4.01 et seq. (Matthew Bender)

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44 California Forms of Pleading and Practice, Ch. 504, *Sales: Consumers Legal Remedies Act*, § 504.12 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 1, *Determining the Applicable Law*, 1.33