CHAPTER XVI

EMPLOYMENT DISCRIMINATION

In the landmark decision of Brown v. Board of Education, the United States Supreme Court held that separate but equal educational facilities violated the Equal Protection clause of the Fourteenth Amendment of the United States Constitution.[1] The United States Supreme Court later held that the Equal Protection clause was aimed at all official actions, not just those of the State Legislature and the court held racial classifications to be "inherently suspect" and subject to "strict scrutiny."[2] Under this constitutional test, racially biased assignments can be justified only by proof that they are required by a compelling state interest and involve the least restrictive means of achieving that interest.[3]

The Equal Protection clause of the Fourteenth Amendment has been applied to state action and the actions of school districts are indisputably state actions.[4] The Constitution is silent on judicial enforcement powers in segregation cases and the courts have fashioned a variety of remedies such as affirmative action, racial ratios, goals and quotas, attendance zone and district boundary changes, and bussing to non-neighborhood schools in cases involving school segregation.[5]

DISCRIMINATION BASED ON RACE

A. Historical Background

In the area of employment discrimination, the courts have relied upon federal statutes. These federal statutes set forth federal rights and remedies and include the post-civil war statutes and the Civil Rights Act of 1964.[6] Federal anti-discrimination statutes have withstood constitutional challenge. The courts have held that the Constitution empowers Congress to enact anti-discrimination laws in order to promote commerce, the national welfare and to enforce the Fourteenth Amendment.[7]

Following the Civil War in 1866 and 1870, Congress enacted two statutes primarily to secure black citizens the same property and contract rights as enjoyed by white citizens and to remove the last vestiges of slavery.[8] In subsequent years, the United States Supreme Court expanded the meaning of these statutes to include minority groups other than blacks.[9] Section 1981 states:

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[1] Brown v. Board of Education, 349 U.S. 294, 75 S.Ct. 753 (1954).
[2] Columbus Board of Education v. Penick, 443 U.S. 449, 99 S.Ct. 2941 (1979).
[3] Dayton Board of Education v. Brinkman, 433 U.S. 406, 97 S.Ct. 2766 (1977).
[4] School District of Omaha v. United States, 433 U.S. 667, 97 S.Ct. 2905 (1977).
[5] See, Swan v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 91 S.Ct. 1267 (1971).
[6] 42 U.S.C. Sections 1981-1988, 42 U.S.C. Sections 2000(d), 2000(e).
[7] Fitzpatrick v. Bitzer, 427 U.S. 445, 96 S.Ct. 2666 (1976).
[8] Tillman v. Wheaton-Haven Recreation Association, 410 U.S. 431, 93 S.Ct. 1090 (1973).
[9] Shaare Tefila Congregation v. Cobb, 107 S.Ct. 2019 (1987); St. Francis College v. Al-Khazraji, 107 S.Ct. 2022, Ed.Law Rep. 1165 (1987).

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefits of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."[10]

Section 1982 states:

> "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."[11]

To constitute a violation of either of these statutes, discrimination must be found to be purposeful. The employer who intentionally discriminates against an employee is in violation of Section 1981.[12]

Another broad federal statute prohibits any person from discriminating against a citizen of the United States or other person under color of state law.[13] Section 1983 states:

> "Every person, who under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress. . . ."[14]

B. The 1964 Civil Rights Act

To further protect individual's rights, Congress passed the Civil Rights Act of 1964.[15] Title VI of the Civil Rights Act of 1964, Section 601 states:

> "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[16]

[10] 42 U.S.C. Section 1981.
[11] 42 U.S.C. Section 1982.
[12] General Building Contractors Association v. Pennsylvania, 458 U.S. 375, 102 S.Ct. 3141 (1982).
[13] 42 U.S.C. Section 1983.
[14] 42 U.S.C. Section 1983.
[15] 42 U.S.C. Section 2000 et seq.
[16] 42 U.S.C. Section 2000(d).

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of an individual's race, color, religion, sex or national origin.[17] Sections 702 and 703 of Title VII of the Civil Rights Act of 1964 state in part:

> "(a) It shall be an unlawful employment practice for an employer –
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> "(1) to fail or refuse to hire or to discharge any individual, otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
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> "(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."[18]

Title VII applies to state and local governmental agencies, including school districts.[19]

Generally, in cases where a school district or other governmental agency adopts a classification by race or sex, the classification itself is presumptively unlawful unless justified by statutory exception.[20] When the discrimination arises from an action under facially neutral laws, regulations or policies, the Supreme Court has promulgated different orders of proof for the two types of discrimination that can result. In the disparate treatment cases, the plaintiff must show that the defendant acted with intentional discrimination against a particular individual or individuals. In claims involving disparate impact cases, the plaintiff must show that a pattern or practice discriminated against a minority class.

For the plaintiff to prevail in a disparate treatment case, proof of discriminatory motive is critical. In disparate impact cases, proof of discriminatory motive is not required.[21] In both types of cases, once a plaintiff has established a prima facie case of discrimination, the burden shifts to the defendant to rebut the case, either by showing a non-discriminatory motive for its treatment of the plaintiff or, in a disparate impact case, by showing any non-discriminatory motive for its action.[22] The plaintiff then has to show that the facts offered in rebuttal were merely a pretext for discrimination.[23]

In Vance v. Ball State University,[24] the United States Supreme Court held that an employee is a supervisor for purposes of vicarious liability under Title VII of the 1964 Civil

[17] 42 U.S.C. Section 2000(e).
[18] 42 U.S.C. Section 2000(e)-2.
[19] Hazelwood School District v. United States, 433 U.S. 299, 97 S.Ct. 2736 (1977).
[20] Los Angeles Department of Water and Power v. Manhart, 435 U.S. 702, 98 S.Ct. 1370 (1978).
[21] Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089 (1981).
[22] Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849 (1971).
[23] McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817 (1973).
[24] 133 S.Ct. _2434 (2013).

Rights Act if he or she is empowered by the employer to take tangible employment actions against the victim. A coworker who allegedly harassed an employee was not a supervisor under Title VII.

The Supreme Court noted that the question of who qualifies as a supervisor was left open in previous cases.[25] Under Title VII, an employer's liability for harassment depends on the status of the harasser. If the harassing employee is the victim's coworker, the employer is liable only if the employer was negligent in controlling working conditions. In cases in which the harasser is a supervisor, if the supervisor's harassment culminates in a tangible employment action, the employer is strictly liable. However, if no tangible employment action is taken, the employer may escape liability by establishing as an affirmative defense that the employer exercised reasonable care to prevent and correct any harassing behavior and that the plaintiff unreasonably failed to take advantage of the preventive or corrective opportunities that the employer provided. Under this framework, the court held that whether a harasser is a supervisor or simply a coworker could determine the outcome. The court stated:

> "We hold that an employee is a 'supervisor' for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim. . . ."[26]

C. Retaliation Claims Under the 1964 Civil Rights Act

In Burlington Northern and Santa Fe Railway Company v. White,[27] the United States Supreme Court ruled that the anti-retaliation provisions of Title VII of the Civil Rights Act of 1964 prohibit employers from engaging in actions that a reasonable employee would find materially adverse, including conduct that would dissuade a reasonable worker from making or supporting a charge of discrimination.

Title VII of the Civil Rights Act of 1964 forbids employment discrimination against any individual based on that individual's race, color, religion, sex, or national origin.[28] The Act includes an anti-retaliation provision that forbids an employer from discriminating against an employee or job applicant because that individual opposed any practice made unlawful by Title VII, or made a charge, testified, assisted, or participated in a Title VII proceeding or investigation.[29]

The Courts of Appeals have come to different conclusions about how to interpret the Act's anti-retaliation provisions. The United States Supreme Court agreed to hear the case in order to resolve the differing opinions and concluded that the anti-retaliation provision does not confine the actions and harms it forbids to actions that are related to employment or that occur at the workplace. The United States Supreme Court stated:

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[25] See, Burlington Industries Inc. v. Ellerth, 524 U.S. 742, 118 S.Ct. 2257 (1998); Faragher v. Boca Raton, 524 U.S. 775, 118 S.Ct. 2275 (1998).
[26] 133 S.Ct. 2434, 2454 (2013).
[27] 548 U.S. 53, 126 S.Ct. 2405 (2006).
[28] 42 U.S.C. Section 2000e-2(a).
[29] 42 U.S.C. Section 2000e-3(a).

> "We conclude that the anti-retaliation provision does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace. We also conclude that the provision covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant. In the present context, that means that the employers' actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination."[30]

The underlying case involved supervisors at Burlington Northern and Santa Fe Railway Company and Sheila White, the only woman working in a particular department at Burlington's Tennessee yard. In June 1997, Burlington hired White as a "track laborer." The job involved removing and replacing track components, transporting track material, cutting brush, and clearing litter and cargo spillage from the right of way. White was subsequently assigned to operate the forklift (considered to be a more desirable position) when another employee took other employment. While performing these tasks, White complained to Burlington officials that her immediate supervisor had repeatedly told her that women should not be working in her department. White complained that her supervisor made insulting and inappropriate remarks to her in front of her male colleagues. After an internal investigation, Burlington suspended the supervisor for ten days and ordered him to attend sexual harassment training sessions.[31]

On September 28, 1997, the company told White about her supervisor's discipline and at the same time told White that she was being removed from forklift duty and assigned to perform only standard track laborer tasks, a less desirable position. The company explained that the reassignment reflected co-workers' complaints that a more senior male employee should have the forklift operator position.[32]

On October 10, 1997, White filed a complaint with the Equal Employment Opportunity Commission (EEOC). White claimed that the reassignment of her duties amounted to unlawful gender-based discrimination and retaliation for having filed an earlier complaint against her supervisor. White was later suspended without pay for 37 days and filed an additional retaliation charge with the EEOC based on the suspension.[33]

After exhausting her administrative remedies, White filed a civil rights employment discrimination action in federal court. The jury found in White's favor and awarded her forty-three thousand five hundred dollars ($43,500) in compensatory damages, including three thousand two hundred and fifty dollars ($3,250) in medical expenses.[34]

The United States Supreme Court broadly interpreted the anti-retaliation provision in Title VII of the Civil Rights Act and affirmed the jury's award. The Court rejected the company's argument that the statute requires a link between the challenged retaliatory action and

[30] 126 S.Ct. 2405, 2409 (2006)
[31] Id. at 2409-10.
[32] Ibid.
[33] Ibid.
[34] Ibid.

the terms, conditions, or status of employment. The Court held that the anti-retaliation provision contained broader language and therefore Congress must have intended that the differences in the language meant that the anti-retaliation provision was to be interpreted broadly. The Court noted that employers can effectively retaliate against an employee by taking actions not directly related to their employment or by causing them harm outside the workplace, and if the anti-retaliation language was narrowly construed, many forms of retaliation would not be deterred.[35]

In Crawford v. Metropolitan Government of Nashville,[36] the U.S. Supreme Court held that an employee who provides information as part of an internal discrimination investigation is protected from retaliation under Title VII of the Civil Rights Act of 1964, even if he or she did not file the complaint.

The plaintiff, Ms. Crawford, had not filed a complaint of sexual harassment with her employer. However, her employer initiated a sexual harassment investigation because of rumors concerning the behavior of Ms. Crawford's supervisor. Ms. Crawford provided information concerning the supervisor's unwelcome sexual conduct when she was questioned by the employee relations director as part of the investigation. Ms. Crawford was subsequently fired, allegedly for embezzlement.

Ms. Crawford sued her employer under Title VII contending that she was retaliated against for opposing discrimination and participating in the internal investigation. Although the lower courts had held that one must file a complaint in order to "oppose" discrimination, the Supreme Court held that Ms. Crawford's statements to the employee relations director was sufficient.[37]

This decision makes it clear that Title VII protects employees who provide information during an internal discrimination investigation. Employers should be cautious in taking any adverse job action against individuals who participate in discrimination investigations and should take such action only if there is a legitimate, business reason for the action and the employer can establish that the action would have been taken notwithstanding the employee's involvement in the investigation.

D. Section 1983 Liability – Historical Background

Under Section 1983,[38] the federal courts have become the guarantor of basic federal rights against state power. Private citizens have a unique federal remedy to redress deprivation of their rights against violations based on claimed authority of state law.[39] The provisions of Section 1983 have been applied to the acts or omissions of school district employees who act under authority of state law.[40] The provisions of Section 1983 also create a federal cause of action to

[35] Id. at 2412-15.
[36] 555 U.S. 271, 129 S.Ct. 846 (2009).
[37] Id. at 274.
[38] 42 U.S.C. Section 1983.
[39] Mitchum v. Foster, 407 U.S. 225, 92 S.Ct. 2151 (1972).
[40] Monnell v. Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018 (1978).

remedy deprivations of substantive rights secured by the Constitution and laws of the United States.[41]

Section 1983 of Title 42 of the United States Code was originally enacted by Congress as Section 1 of the Ku Klux Klan Act of April 20, 1871. Its purpose was to enforce the provisions of the Fourteenth Amendment to the United States Constitution.[42] The Act is also known as the Civil Rights Act of 1871. Section 1983 states in part:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ."

Section 1983's primary objective was to provide a means to enforce the provisions of the Fourteenth Amendment. Proponents of the bill argued that the states had no process by which persons could obtain redress for violations of constitutionally guaranteed rights and that federal legislation was the means by which these rights could be enforced.[43] Although the activities of the Klu Klux Klan were the primary evil that the bill was designed to remedy, the bill was not directed solely against the Klan and its members, but also against those persons who, in representing a state, were unable or unwilling to enforce a state law. Thus the bill was intended to protect not only the rights of African Americans who had recently been freed from slavery, but also the rights of all citizens against state sponsored infringement of constitutional rights.[44]

For many years after its passage, few lawsuits were filed under Section 1983. However, beginning in the 1960's, Section 1983 was frequently relied upon to redress a number of issues.

E. Section 1983 Liability – Local Agencies

In Monroe v. Pape,[45] the United States Supreme Court ruled that officials of a governmental body may be sued under Section 1983. In Monroe, the police searched the wrong house without a search warrant. Even though narcotics were found in the house, the search was deemed to be improper and the individuals arrested in the house were released. The individuals then brought suit in federal court pursuant to Section 1983 alleging that the City of Chicago and the individual police officers had violated their rights against unreasonable search and seizure under the Fourth Amendment. The lower courts dismissed the suit. The United States Supreme Court reversed. The court went on to hold that the phrase "under color of" included acts of an official acting under color of state authority. [46]

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[41] Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999 (1971).
[42] Ch. 22, 17 Stat.13 (42nd Cong., 1st Sess.). See, also, Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 476 (1961).
[43] Cong. Globe, 42nd Cong., 1st Sess., 374-376 (1871) (Remarks of Congressman Lowe).
[44] Cong. Globe, 42nd Cong., 1st Sess., 335, 374-376.
[45] 365 U.S. 167, 81 S.Ct. 473 (1961).
[46] Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473 (1961).

To successfully prevail in an action under Section 1983, the courts have held that plaintiffs must allege and prove two essential elements. First, plaintiffs must show that the alleged conduct occurred under color of state law. Second, plaintiffs must show that the conduct deprived plaintiffs of rights, privileges, or immunities secured by the United States Constitution or a federal statute.[47]

In Monell v. Department of Social Services,[48] the United States Supreme Court held that a city is a person for purposes of Section 1983. However, a state is not a "person" for purposes of Section 1983.[49] In addition, state officials sued in their official capacities for damages or other retroactive relief are not persons for purposes of Section 1983.[50] However, the court noted that a plaintiff may sue a state official for injunctive relief because that is prospective relief.[51] While a state official may not be sued in their official capacity, the United States Supreme Court has held that state officials and local officials may be sued in their "personal" capacity where the suit seeks to impose individual, personal liability on the government officer for actions taken under color of state law with the badge of state authority.[52]

A plaintiff who brings an action under Section 1983 for violation of rights secured by the Fourteenth Amendment must establish that the violation resulted from state action and, thus, meets the statutory requirement of under "color of state law."[53] Independent contractors and other individuals who willfully participate in a joint activity with a state or a local agency may meet the requirements of acting under color of state law.[54]

Under Section 1983, a plaintiff must show that the challenged acts occurred under a governmental policy, custom or usage. In Adickes v. S.H. Kress & Co.,[55] the United States Supreme Court held that custom, for purposes of Section 1983, must have the force of law by virtue of the persistent practices of state officials. A political subdivision of the state may have a custom with force of law, even if that custom is not applied statewide.[56]

Plaintiffs may bring an action under Section 1983 if their rights privileges or immunities secured by federal statutory law were violated.[57] In Maine v. Thiboutot, the plaintiffs claimed that the State of Maine had deprived them of welfare benefits to which they were entitled under the federal Social Security Act. The Supreme Court rejected Maine's argument that the phrase secured by the constitution and laws in Section 1983 was limited to civil rights or equal protection laws. The Supreme Court held that the Section 1983 broadly included violations of federal statutory law as well as federal constitutional law.[58]

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[47] Treatise on Constitutional Law, Section 19.16 (1999), pg. 64.
[48] 436 U.S. 658, 98 S.Ct. 2018 (1978).
[49] Will v. Michigan Department of State Police, 491 U.S. 58, 109 S.Ct. 2304 (1989).
[50] Id. at 70.
[51] Id. at 70, note 10.
[52] Hafer v. Melo, 502 U.S. 21, 112 S.Ct. 358 (1991).
[53] Lugar v. Edmondson Oil Company, 457 U.S. 922, 935, note 18, 102 S.Ct. 2744, 2753, note 18 (1982).
[54] West v. Atkins, 487 U.S. 42, 108 S.Ct. 2250 (1988); Adickes v. S.H. Kress & Co., 398 U.S. 144, 152-90 S.Ct. 1598, 1605 (1970).
[55] 398 U.S. 144, 90 S.Ct. 1598 (1970).
[56] Id. at 171.
[57] Maine v. Thiboutot, 448 U.S. 1, 100 S.Ct. 2502 (1980).
[58] Id. at 4.

Certain officials are immune from liability under Section 1983. For example, judges acting in their judicial role and legislators acting in their legislative role are absolutely immune from liability for damages under Section 1983.[59] The courts have also recognized a qualified immunity defense under Section 1983. The scope of qualified immunity includes most state and local officials.[60]

F. Section 1983 Liability – Qualified Immunity

In Wood v. Strickand,[61] the United States Supreme Court held that school board members were entitled to qualified immunity. The court held that if the official knew or reasonably should have known that the action taken would violate the constitutional rights of the plaintiffs or if the official took the action with the malicious intention to cause a deprivation of constitutional rights or injury to the plaintiff, then the official could be held liable under Section 1983. In determining whether qualified immunity applies, the courts must look to currently applicable law and determine whether the law was clearly established at the time the action in question occurred, and if so, the public official must show that because of extraordinary circumstances, he or she did not know, nor reasonably should have known, of the relevant standard.

In Wood v. Strickland, the school board members failed to give a due process hearing to students accused of mixing an alcoholic beverage with other liquid and serving it at a school function. The court found that the school board's disposition of the matter did not constitute a hearing and that the school board's expulsion of the students did not comply with clearly established law, and therefore, the student's rights were denied and the school board members could be held liable under Section 1983.[62]

In Wood v. Strickland, a lawsuit was filed against members of the school board and two school administrators under Section 1983, claiming that their federal constitutional rights to due process were infringed under color of state law by their expulsion from the school district on the grounds of their violation of a school regulation prohibiting the use or possession of intoxicating beverages at school or school activities. The compliant, as amended, sought compensatory and punitive damages, injunctive relief to resume school attendance, an injunction preventing the school district from imposing any sanctions as a result of the expulsion, an injunction restraining enforcement of the challenged regulations, as well as declaratory relief as to the constitutional invalidity of the regulation, and the expungement of any record of the student's expulsion.[63]

At the time of the expulsion, the students were sixteen years old and in the tenth grade. The students agreed to "spike" the punch at a school activity with malt liquor. They bought two ten ounce bottles and mixed it into the punch and the punch was served at the meeting without apparent effect.[64]

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[59] Pierson v. Ray, 386 U.S. 547, 87 S.Ct. 1213 (1967); Tenney v. Brandhove, 341 U.S. 367, 71 S.Ct. 283 (1951).
[60] Wood v. Strickland, 420 U.S. 308, 95 S.Ct. 92 (1975).
[61] 420 U.S. 308 (1975).
[62] Ibid.
[63] Id. at 310.
[64] Id. at 311.

Ten days later the teacher in charge of the extracurricular activity heard something about the spiking of the punch and questioned the students involved. The students admitted their involvement to the teacher and then later admitted their involvement to the principal. The principal then suspended them from school for a two week period. At the first board meeting, the teacher and the principal recommended leniency. However, the superintendent of schools received a phone call from the teacher's husband, also a teacher at the high school, who reported that he had heard that one of the girls involved had been in a fight that evening at a basketball game. The superintendent informed the board members of the news but did not mention the name of the girl involved. The teacher and the principal then withdrew their recommendations of leniency and the members of the board voted to expel the girls from school for the remainder of the semester, a period of approximately three months.[65]

The board subsequently agreed to hold another meeting on the matter two weeks later. The girls, their parents and their legal counsel attended the second meeting. The girls admitted mixing the malt liquor into the punch with the intent of "spiking" it but asked the board to forego its rule punishing such violations by such substantial suspensions. Neither the teacher nor the principal were present at the meeting. The board voted not to change its policy and expelled the girls for the remainder of the semester.[66]

The court, in Wood v. Strickland, reviewed prior cases with respect to the scope of immunity protecting various types of governmental officials from liability for damages under Section 1983. The court noted that school board members function at different times in the nature of legislators and adjudicators in the school disciplinary process. The court noted that school boards are often faced with instances of civil disorder and confronted with student behavior causing or threatening disruption and that school board members have an obvious need for prompt action and decisions must be made in reliance on factual information supplied by others.[67]

The court noted that liability for damages for every action which is found subsequently to have been in violation of a student's constitutional rights and to have caused injury would unfairly impose upon school officials the burden of mistakes made in good faith in the course of exercising their discretion. The court noted that school board members must judge whether there has been a violation of school regulations and the appropriate sanctions for those violations. Denying any measure of immunity in these circumstances would not contribute to principled and fearless decision-making but to intimidation.[68] The court stated:

> "The imposition of monetary costs for mistakes which were not unreasonable in light of all the circumstances would undoubtedly deter even the most conscientious school decision maker from exercising his judgment independently, forcefully, and in a manner best serving the long-term interest of the school and the students. The most capable candidates for school board positions might be deterred from seeking office if heavy burdens

[65] Id. at 311-312.
[66] Id. at 312-313.
[67] Id. at 319.
[68] Id. at 319.

> upon their private resources from monetary liability were a likely prospect during their tenure."[69]

For these reasons, the United States Supreme Court felt that school officials including school board members and employees should be entitled to qualified immunity for action taken in the good faith fulfillment of their responsibilities and within the bounds of reason under all the circumstances.[70]

The court stated:

> "Implicit in the idea that officials have some immunity – absolute or qualified – for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all."[71]

The court noted that a school official must be acting sincerely and with a belief that he or she is doing right to receive immunity. However, an act that violates a student's constitutional rights cannot be justified by ignorance or disregard of settled, indisputable law on the part of one entrusted with the supervision of students' daily lives.[72] The Supreme Court concluded:

> "Therefore, in the specific context of school discipline, we hold that a school board member is not immune from liability for damages under Section 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student. That is not to say that school board members are 'charged with predicting the future course of constitutional law.' . . . A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith."[73]

The court went on to state that the regulation which used the term intoxicating beverage should not be required to be linked to the definition in state criminal statutes which might require a higher alcohol content. The court ruled that the lower courts could rely on the intent of the school board members who passed the regulation. The court reversed a Court of Appeals

[69] Id. at 319-320.
[70] Id. at 321.
[71] Id. at 321.
[72] Id. at 321.
[73] Id. at 322.

conclusion that the school board's interpretation of its own regulation was not reasonable and should be linked to the state criminal statute.[74] The Supreme Court stated:

> "But Section 1983 does not extend the right to relitigate in federal court evidentiary questions arising in school disciplinary proceeding or the proper construction of school regulations. The system of public education that has evolved in this Nation relies necessarily upon the discretion and judgment of school administrators and school board members and Section 1983 was not intended to be a vehicle for federal court correction of errors in the exercise of that discretion which do not rise to the level of violations of specific constitutional guarantees."[75]

The Supreme Court sent the matter back to the lower courts to determine whether the students had been denied procedural due process at the first school board meeting and whether the school district had cured the initial procedural deficiencies at the second board meeting based on the principles set forth in its decision.[76]

G. Section 1983 – Burden of Pleading Qualified Immunity and Established Rights

In Gomez v. Toledo,[77] the Supreme Court held that the defendant has the burden of pleading qualified immunity. The Supreme Court held that the defendant would know whether there are underlying facts which would support a qualified immunity defense. Therefore, it is reasonable to require the defendant to plead the defense of qualified immunity.[78]

In Davis v. Scherer,[79] the United States Supreme Court analyzed the issue of clearly established rights. The Supreme Court held that if, at the time of employee's conduct and the termination of his employment, there was no clearly established due process right that was violated, when the plaintiff was discharged without a pre-termination hearing, then it was not unreasonable under Fourteenth Amendment due process principles for the Florida Department of Highway Safety and Motor Vehicles to conclude that the employee had been provided with the fundamentals of due process. The court held that a plaintiff who seeks damages for violation of constitutional or statutory rights may overcome defendant officials' qualified immunity only by showing that those rights were clearly established at the time of the conduct at issue.[80]

In Davis, the employee was employed by the Florida Highway Patrol as a radio teletype operator and asked for permission from his employer to work as well for the local county sheriff as a reserve deputy. To avoid conflicts of interest, the Florida Highway Patrol required that all proposed outside employment of patrol members must be approved by the Department. Initially, the employee was granted permission to accept the part time work but a month later the

[74] Id. at 325-326.
[75] Id. at 326.
[76] Id. at 327.
[77] 446 U.S. 635, S.Ct. 1920 (1980).
[78] Id. at 641.
[79] 468 U.S. 183, 104 S.Ct. 3012 (1984).
[80] Ibid.

permission was revoked. The employee continued to work at the second job despite the revocation of permission, explaining that he had invested too much money in uniforms to give up his part time work.

The court noted that under its previous decision in Harlow v. Fitzgerald,[81] state and local officials are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. The court noted that state and local officials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision.[82]

The court noted, "Neither federal nor state officials lose their immunity by violating the clear command of a statute or regulation – of federal or of state law – unless that statute or regulation provides the basis for the cause of action sued upon."[83] The court stated:

> "We acknowledge of course that officials should conform their conduct to applicable statutes and regulations . . . Appellee's submission, if adopted, would disrupt the balance that our cases strike between the interests in vindication of citizen's constitutional rights and in public officials' effective performance of their duties. The qualified immunity doctrine recognizes that officials can act without fear of harassing litigation only if they reasonably can anticipate when their conduct may give rise to liability for damages and only if unjustified lawsuits are quickly terminated . . . Yet, under appellee's submission, officials would be liable in an indeterminate amount for violation of any constitutional right – one that was not clearly defined or perhaps not even foreshadowed at the time of the alleged violation – merely because their official conduct also violated some statute or regulation."[84]

In essence, the United States Supreme Court said that not every violation of a federal or state statute or regulation would give rise to liability for damages under Section 1983. The court went on to state:

> "Nor is it always fair, or sound policy, to demand official compliance with statute and regulation on paying of money damages. Such officials as police officers or prison wardens, to say nothing of higher level executives who enjoy only qualified immunity, routinely make close decisions in the exercise of the broad authority that necessarily is delegated to them. These officials are subject to plethora of rules, 'often so voluminous, ambiguous and contradictory, and in such flux that officials can

[81] 457 U.S. 800, 102 S.Ct. 2727 (1982).
[82] Id. at 191-194.
[83] Id. at 194, note 12.
[84] Id. at 194-195.

> only comply with or enforce them selectively.' In these circumstances, officials should not err always on the side of caution."[85]

The court concluded that a plaintiff who seeks damages for violation of constitutional or statutory rights may overcome the official's qualified immunity only by showing that those rights were clearly established at the time of the conduct at issue.[86]

In Carey v. Piphus,[87] the United States Supreme Court held that students could sue for damages under Section 1983 for a deprivation of their rights. In Carey, the students alleged that they had been suspended from school without due process of law. The court held that in order to recover substantial damages, the students must prove that they were actually deprived of a right, and since there was no proof of actual injury, the students were awarded $1.00 in damages each.

In Carey, students were suspended for twenty days for violating school rules against the use of drugs. The students claimed that they had not been smoking marijuana but were suspended over their protests. Despite the ruling of Goss v. Lopez, which held that an evidentiary hearing for suspensions in excess of ten days must be held, the school board suspended the students for twenty days without such hearings.[88]

Another student was suspended for twenty days for wearing an earring to school. The school district instituted a no earring policy to reduce gang violence.[89]

The federal district court ruled in favor of the students and ordered their reinstatement. The district court held that both students had been suspended without procedural due process and held that the school district was not entitled to qualified immunity from damages because they should have known that a suspension in excess of ten days without an adjudicative hearing or expulsion hearing would violate procedural due process.[90]

The Supreme Court granted a hearing to consider whether, in an action under Section 1983 for the deprivation of procedural due process, a plaintiff must prove that he or she was actually injured by the deprivation before they may recover substantial "nonpunitive" damages.[91] The court held that rights, constitutional and otherwise, do not exist in a vacuum. Their purpose is to protect persons from injuries to particular interests and their contours are shaped by the interests they protect.[92] The court looked to the common law of torts and compensatory damages and was concerned that in some circumstances an award of damages for injuries caused by the suspensions would constitute a windfall rather than compensation.[93]

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[85] Id. at 196.
[86] Id. at 197.
[87] 435 U.S. 247 (1978).
[88] Id. at 249.
[89] Id. at 250.
[90] Id. at 251.
[91] Id. at 253.
[92] Id. at 254.
[93] Id. at 260.

The court rejected the students' argument that damages should be presumed in cases involving deprivation of procedural due process.[94] The court held that students must show actual injury to recover compensatory damages but that if there was a violation of their procedural due process rights, they were entitled to nominal damages.[95] The court stated:

> "By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed; but at the same time, it remains true to the principle that substantial damages should be awarded only to compensate actual injury or, in the case of exemplary or punitive damages, to deter or punish malicious deprivations of rights."[96]

The Supreme Court has held that punitive damages are available under Section 1983.[97] The court held that a jury could assess punitive damages in a 1983 action if the plaintiff showed that the defendant's conduct was motivated by evil motive or intent or that the defendant's conduct involved reckless or callous indifference to the federally protected rights of others.[98]

Equitable relief, including injunctive relief, is available under Section 1983.[99] In addition, Congress enacted the Civil Rights Attorneys Fees Awards Act of 1976 to authorize the award of attorney's fees under Section 1983.[100]

Under Section 1983, school district employees may be sued in their personal or individual capacity. Under these circumstances, an employee or board member of a school district may be found to be individually liable even though the school district may not be. The plaintiff must show that the individual employee or school board member violated a clearly established law and that the individual exhibited a callous indifference for the rights of the plaintiff.[101] In Davis v. Scherer,[102] the Supreme Court held that:

> "Officials are shielded from liability for civil damages insofar as their conduct does not violate the clearly established statutory or constitutional rights of which a reasonable person would have known."[103]

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[94] Id. at 262-263.
[95] Id. at 266.
[96] Id. at 266.
[97] Smith v. Wade, 461 U.S. 30, 103 S.Ct. 1625 (1983).
[98] Id. at 56.
[99] See Millikin v. Bradley, 418 U.S. 717, 94 S.Ct. 3112 (1974).
[100] 42 U.S.C. Section 1988.
[101] Mitchell v. Forsyth, 472 U.S. 511, 105 S. Ct. 2806 (1985).
[102] 468 U.S. 183, 104 S.Ct. 3012 (1984).
[103] Id. at 191.

H. Section 1983 – Personal Liability

In Hafer v. Melo,[104] the Supreme Court held that state officers may be personally liable for damages under Section 1983 based upon actions taken in their official capacities. The court held that the state officer's potential liability is not limited to acts under color of state law that are outside their authority or not essential to operation of state government, but also extends to acts within their authority and necessary to performance of governmental functions and Eleventh Amendment immunity does not erect barriers against suits to impose individual and personal liability on state officers under Section 1983. A similar rule would apply to local officials.

In Hafer, the United States Supreme Court rejected the argument that the language of Section 1983 does not authorize suits against state officers for damages arising from official acts. In 1988, Barbara Hafer sought election to the post of Auditor General of Pennsylvania. During the campaign, Hafer publicly promised to fire all employees on a list of twenty one employees given to her by the United States Attorney, James West. Hafer won the election and shortly after becoming Auditor General, she dismissed eighteen employees, including James Melo, on the basis that they "bought" their jobs. Melo and seven other terminated employees sued Hafer and West in federal district court. They asserted state and federal claims, including a claim under Section 1983 and sought monetary damages. Another group of employees who lost their jobs filed suit as well and alleged that Hafer discharged them because of their affiliation with the Democratic Party and support for her opponent in the 1988 election. The district court consolidated the two actions and dismissed all their claims.[105]

The Court of Appeals for the Third Circuit reversed the district court's decision. The Court of Appeals held that while Hafer's power to hire and fire derived from her position as Auditor General, it said, a suit for damages based on the exercise of this authority could be brought against Hafer in a personal capacity because Hafer acted under color of state law. The Court of Appeals held that respondents could maintain a Section 1983 individual capacity suit against her.

The United States Supreme Court agreed to hear an appeal and sought to clarify the confusion about the distinction between personal capacity and official capacity lawsuits under Section 1983. The court held that official capacity lawsuits generally represent only another way of pleading an action against an entity of which an officer is an agent. Therefore, the court treats suits against state officials in their official capacity as suits against the state or local agency. When officials sued in this capacity in federal court die or leave office, their successors automatically assume their roles in the litigation. In official capacity suits, since it is the governmental entity and not the named official, the entity's policy or custom must have played a part in the violation of federal law. For the same reason, the only immunities available to the defendant in an official capacity action are those that the governmental entity possesses.[106]

Personal capacity suits, on the other hand, seek to impose individual or personal liability upon a governmental officer for actions taken under color of state law. To establish personal

[104] 502 U.S. 21, 112 S.Ct. 358 (1991).
[105] Id. at 23.
[106] Id. at 25.

liability in a Section 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right. While the plaintiff in a personal capacity lawsuit need not establish a connection to governmental policy or custom, officials sued in their personal capacities, unlike those sued in their official capacities, may assert personal immunity defenses such as objectively reasonable reliance on existing law.[107]

State or local officers sued in their personal capacity come to court as individuals. A government official in the role of personal capacity defendant thus fits within the statutory term of person in Section 1983.[108]

The court rejected Hafer's argument that she should not be personally liable for any actions taken in her official capacity. The court concluded that only a very limited class of officials, including the President of the United States, legislators carrying out their legislative functions, and judges carrying out their judicial functions require complete protection from suit. The court held that state executive officials are not entitled to absolute immunity for their official actions and held that qualified immunity attaches to administrative employment decisions, even if the same official has absolute immunity when performing other functions.[109]

The court also held that Eleventh Amendment immunity does not apply to suits to impose individual and personal liability on state officials under Section 1983. The court went on to state:

> "To be sure, imposing personal liability on state officers may hamper their performance of public duties. But such concerns are properly addressed within the framework of our personal immunity jurisprudence . . .
>
> "We hold that state officials, sued in their individual capacities are 'persons' within the meaning of Section 1983. The Eleventh Amendment does not bar such suits, nor are state officers absolutely immune from personal liability under Section 1983 solely by virtue of the 'official' nature of their acts."[110]

DISCRIMINATION BASED ON SEX

A. The 1964 Civil Rights Act and Title IX

Patterned closely after Title VI of the Civil Rights Act of 1964 is Title IX of the Education Amendments of 1972.[111] Title IX provides:

> "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be

[107] Ibid.
[108] Id. at 26.
[109] Id. at 27-29.
[110] Id. at 31.
[111] 20 U.S.C. Section 1681(a).

> subjected to discrimination under any education program or activity receiving Federal financial assistance. . . ."[112]

The United States Supreme Court held that Title IX applies to institutions whose students receive aid directly from federal agencies even though the agencies themselves refuse any direct federal aid and do not participate in student aid programs. However, Title IX is enforceable only by the cutoff of federal aid to the affected program.[113] Congress has amended Title IX to broaden the impact of the violation of Title IX.[114] Title IX has been applied to school sports and there have been a number of court decisions on the exclusion of one sex from a given sport. Where separate teams for the same or comparable sports are provided, the courts have split along several lines depending on whether the sport in question is deemed a non-contact sport or a contact sport. When contact sports are involved, the courts have upheld separate teams.[115] However, the courts are split on many of the issues involved with sports and therefore, the law is still unclear.

In Trop v. Sony Pictures Entertainment, Inc.[116] the Court of Appeal held that a plaintiff must show that the employer had knowledge of her pregnancy in order to establish a prima facie case of discrimination based on sex under state law.

The plaintiff was terminated from her position as an assistant to a movie producer and director. The employee was pregnant at the time of her termination and alleged that she was terminated due to her pregnancy. The plaintiff alleged that the movie producer made statements to the plaintiff in the months prior to her termination that demonstrated that the movie producer did not want an employee who was pregnant. However, the record before the court established that the employer had no knowledge of the plaintiff's pregnancy at the time the employee was terminated and that the employer terminated the employee for poor job performance.

The court granted the employer's motion for summary judgment on the basis that the employer did not have knowledge of the employee's pregnancy.

B. Sexual Harassment – Basic Elements

Under both federal and state law, sexual harassment is a prohibited form of sex discrimination.[117] In Meritor Savings Bank v. Vinson,[118] the United States Supreme Court held that sexual harassment which creates a hostile, oppressive and offensive working environment constitutes sex discrimination in violation of Title VII of the Civil Rights Act of 1964.[119]

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[112] 20 U.S.C. Section 1681(a).
[113] Grove City College v. Bell, 465 U.S. 555, 104 S.Ct. 1211 (1984).
[114] 20 U.S.C. Section 1681(a).
[115] Force v. Pierce City R-VI School District, 570 F.Supp. 1020 (W.D. Mo. 1983); Clark v. Arizona Interscholastic Association, 695 F.2d (9th Cir. 1983).
[116] 129 Cal.App.4th 1133, 29 Cal.Rptr.3d 144 (2005).
[117] 42 U.S.C. Section 2000e-2 (Title VII); 20 U.S.C. Section 1681 et seq. (Title IX); Government Code section 12940; Education Code section 212.5; Title 2 California Code of Regulations, sections 7291.1 and 7287.6.
[118] 447 U.S. 54 (1986).
[119] 42 U.S.C. Section 2000(e)-2.

The Equal Employment Opportunity Commission (EEOC), which is the federal agency charged with enforcing Title VII of the Civil Rights Act of 1964 defines sexual harassment as follows:

> "Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment."[120]

Hostile or offensive working environment sexual harassment occurs when an employer creates, condones, or permits a hostile, intimidating, or offensive work environment to exist due to unwanted or unwelcome sexual conduct in the workplace. Hostile or offensive working environment sexual harassment does not necessarily result in any tangible or economic employment benefits being lost. Employers may be liable when this type of harassment occurs in the workplace, not just for the actions of their managers or supervisors, but also for the actions of co-workers, visitors, or even independent contractors. In a hostile work environment sexual harassment claim, the sexual conduct must be sufficiently severe or pervasive so as to alter the conditions of the victim's employment and thereby create an abusive working environment.[121] In evaluating a hostile work environment sexual harassment claim, the EEOC considers the following factors:

1. Whether the conduct was verbal or physical, or both;

2. How frequently it occurred;

3. Whether the conduct was hostile and patently offensive;

4. Whether the alleged harasser was a co-worker or a supervisor;

5. Whether others joined in perpetuating the harassment; and

6. Whether the harassment was directed at more than one individual.

C. Sexual Harassment - Damages

The United States Supreme Court in Franklin v. Gwinnett County Public Schools,[122] held that a student may recover damages for sexual harassment by a school district employee under

[120] 29 C.F.R. Section 1604.11(a) (1980).
[121] See, Meritor Savings Bank v. Vinson, 447 U.S. 54 (1986).
[122] 112 S.Ct. 1028, 72 Ed.Law Rep. 32 (1992).

Title IX.[123] Therefore, districts should be aware that the prohibitions against sexual harassment apply to students as well as employees.

D. Sexual Harassment – Sufficient Action to Remedy Harassment

In Intlekofer v. Turnage,[124] the Court of Appeals held that an employer could be held liable under federal law for failing to sufficiently discipline an employee who was sexually harassing another employee. Ms. Intlekofer filed 16 reports with her employer, the Veterans Administration (VA), regarding her co-worker's touching, personal suggestions and constant pressure to resume their previous intimate relationship. Supervisors met with the co-worker, Cortez, and orally warned him to stop. A complaint was filed with the EEOC and, although the VA followed 3 of the 4 recommendations of the EEOC, the harassment continued. The VA continued to orally warn Cortez but took no more severe disciplinary steps.

The Court of Appeals held that the VA did not respond to the complaints in a manner likely to put a stop to Cortez's unlawful behavior. The VA should have taken more severe disciplinary measures against Cortez, once it learned that he was continuing his harassing behavior towards Ms. Intlekofer. The Court of Appeals held that remedial actions taken by an employer must be reasonably calculated to end the harassment; thus, the appropriateness of the remedy depends on the seriousness of the offense, the employer's ability to stop the harassment, and the likelihood that the remedy will end the harassment.

E. Sexual Harassment – Protection of Both Genders

In Oncale v. Sundowner Offshore Services, Inc.,[125] the United States Supreme Court held that the prohibition against discrimination because of sex protects men as well as women. The Court also held that nothing in Title VII necessarily bars a claim of discrimination because of sex merely because the plaintiff and the defendant are of the same sex. The Court ruled that there was no justification in the statutory language or previous court decisions for a categorical rule excluding same-sex harassment claims from the coverage of Title VII.

In Oncale, the Court reiterated that Title VII does not reach innocuous differences in the way men and women routinely interact with members of the same sex and of the opposite sex. The prohibition of harassment on the basis of sex requires that the harassing conduct be severe or pervasive.[126]

The court held that the severity of harassment in a same sex case should be judged from the perspective of a reasonable person in the plaintiff's position considering all of the circumstances. In same sex harassment cases, that inquiry will require careful consideration of the social context in which particular behavior occurs and is experienced by the victim.[127]

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[123] 20 U.S.C. Section 1681(a).
[124] 973 F.2d 773 (9th Cir. 1992).
[125] 118 S.Ct. 998, 523 U.S. 75 (1998).
[126] Id. at 1002.
[127] Id. at 1002-1003.

The Court concluded by stating:

> "The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. Common sense, and an appropriate sensitivity to social context will enable courts and juries to distinguish between simple teasing or rough housing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive."[128]

F. Sexual Harassment – School District Liability

In Gebser v. Lago Vista Independent School District,[129] a high school student in the Lago Vista Independent School District had a sexual relationship with one of her teachers. The two had sexual intercourse on a number of occasions.

The student never reported the relationship to school officials. In January, 1993, a police officer discovered the teacher and the student engaging in sexual intercourse and arrested the teacher. The Lago Vista School District terminated his employment and his teaching credential was subsequently revoked. During this time period, the district had not promulgated or distributed an official grievance procedure for lodging sexual harassment complaints nor had it issued a formal anti-harassment policy.[130]

The Court held that under Title IX, a damages remedy will not lie against a school district, unless a school district official, who at a minimum had authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf, had actual knowledge of discrimination and failed to respond adequately. The Court stated that individual school employees could still be sued under 42 U.S.C. Section 1983 for Title IX violations and that their decision did not affect any right of recovery under state law against school districts and employees.[131] The Court held that the school official's response must amount to deliberate indifference to discrimination. The basis for this standard was that Title IX's administrative enforcement scheme presupposes that an official who is advised of a Title IX violation refuses to take action to bring the recipient into compliance.[132]

G. Sexual Harassment – Employer Liability

In Faragher v. City of Boca Raton,[133] the Supreme Court held that an employer is subject to vicarious liability for actionable hostile environment created by a supervisor with authority over the employee. The employer defense created by the Court is comprised of two elements,

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[128] Id. at 1003.
[129] 118 S.Ct. 1989, 524 U.S. 274 (1998).
[130] Id. at 1993.
[131] Id. at 1999.
[132] Id. at 1999-2000.
[133] 118 S.Ct. 2275, 524 U.S. 775 (1998).

(1) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (2) that the plaintiff-employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm. In Faragher, the Court emphatically stated, "No affirmative defense is available, . . . when the supervisor's harassment culminates in a tangible employment action such as discharge, demotion or undesirable reassignment."[134]

The Court reached a similar conclusion in Burlington Industries, Inc. v. Ellerth,[135] in which it also held that an employer is subject to vicarious liability to an injured employee for a hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. No affirmative defense is available to an employer when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.[136]

The California Supreme Court in Miller v. Department of Corrections[137] ruled that widespread and pervasive sexual favoritism in the workplace that creates a hostile work environment violates state law prohibiting sexual harassment. The California Supreme Court held that widespread sexual favoritism can send a demeaning message to female employees that they are viewed by management as "playthings" or that to be promoted in the workplace women must engage in sexual conduct with their supervisors or management, and that this conduct, if widespread and pervasive, violates state law.

The case had been dismissed by the trial court and the Court of Appeal. However, the California Supreme Court held that based on the alleged facts, there was a sufficient basis for going to trial and reversed the matter and sent it back to the lower court.[138]

The allegations were that the chief deputy warden of the facility was having sexual affairs with three female subordinates. The allegations were that these three female subordinates received promotions and other employment benefits as a result of their relationship, and that two of the subordinates used the relationship to abuse and mistreat other employees. The allegations were that the chief deputy warden refused to intervene when the two subordinates abused other employees, and that the refusal was based on their personal relationship.[139]

The California Supreme Court noted that the Department of Corrections had completed an internal investigation and that the chief deputy warden retired, that one subordinate was transferred and demoted, and another subordinate resigned with disciplinary proceedings pending. The California Supreme Court concluded:

> "Following the guidance of the EEOC, and also employing standards adopted in our prior cases, we believe that an employee may establish an actionable claim of sexual harassment under the

[134] Id. at 2292-93.
[135] 118 S.Ct. 2257, 524 U.S. 742 (1998).
[136] Id. at 2270-2271.
[137] Miller v. Department of Corrections, 36 Cal.4th 446, (2005).
[138] Id. at 451
[139] Id. at 452-453.

> FEHA by demonstrating that widespread sexual favoritism was severe or pervasive enough to alter his or her working conditions and create a hostile working environment."[140]

The plaintiffs in the case alleged that they were treated unfairly, passed over for promotions, and were subjected to abusive behavior by the subordinates having an affair with the chief deputy warden and that this created a hostile working environment for them.[141]

As a result of this decision, districts should make sure that they have a work environment that is free of such pervasive sexual favoritism. If districts receive complaints that consensual sexual relationships among employees are creating a hostile work environment, the district should investigate the matter thoroughly and consult with legal counsel.

H. Limits on Anti-Harassment Policies

Districts must balance the goal of prohibiting harassment with the Free Speech protections of the First Amendment. Policies that go too far and prohibit speech protected by the First Amendment may be held to be unconstitutional by the courts.

In Saxe v. State College Area School District,[142] the Third Circuit Court of Appeals held that a school district's anti-harassment policy violated the First Amendment free speech rights of students. The Court of Appeals found that the policy prohibited a substantial amount of speech that would not have constituted actionable harassment under either federal or state law. The Court of Appeals determined that the policy was unconstitutionally overbroad because the policy prohibited a substantial amount of non-vulgar student speech and the policy's restrictions were not necessary to prevent substantial disruption or material interference with the work of the school or the rights of other students.[143]

In August 1999, the school district adopted an anti-harassment policy. The purpose of the policy was to provide all students with a safe, secure, and nurturing school environment. The policy indicated that disrespect among members of the school community is unacceptable behavior which threatens to disrupt the school environment and well-being of the individual. The policy defines harassment as verbal or physical conduct based on one's actual or perceived race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics, and which has the purpose or effect of substantially interfering with a student's educational performance or creating an intimidating, hostile, or offensive environment.[144]

This policy gives examples of the harassment which includes demeaning comments or behaviors, slurs, mimicking, name-calling, graffiti, innuendo, gestures, stalking, threatening or bullying. The policy defines various types of prohibited harassment including "other

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[140] Id. at 466.
[141] Id. at 467.
[142] 240 F.3d 200, 140 Ed.Law Rep. 946 (3rd Cir. 2001). Judge Samuel Alito wrote the opinion of the court.
[143] Id. at 202.
[144] Id. at 202.

harassment" on the basis of characteristics such as "clothing, physical appearance, social skills, peer group, intellect, educational program, hobbies, or values.[145]

The Court of Appeals noted that non-expressive, physically harassing conduct is entirely outside the scope of the Free Speech Clause. The court also noted that the Free Speech Clause protects a wide variety of speech that listeners may consider deeply offensive, including statements that impugn another's race or national origin or that denigrate religious beliefs. When laws against harassment attempt to regulate oral or written expression on such topics, the Court of Appeals found that however detestable the views expressed may be, First Amendment rights are implicated.[146] The court noted that the bedrock principle underlying the First Amendment is that government may not prohibit the expression of an idea simply because society finds the idea offensive or disagreeable.[147]

The Court of Appeals pointed out that the school district policy prohibited harassment based on personal characteristics that are not protected under federal law (e.g., the policy includes personal characteristics such as clothing, appearance, hobbies, values and social skills). The court noted that insofar as the policy attempts to prevent students from making negative comments about other students' appearance, clothing, social skills, and, in particular, values, it unconstitutionally strikes at the heart of moral and political discourse which is the lifeblood of constitutional self-government and the core concern of the First Amendment.[148]

The Court of Appeals found that the policy went beyond protecting the rights of other students. The Court of Appeals noted that there was no evidence on the record of past disruptions but only objections by students of comments made by other students. The court distinguished the holding in West v. Derby Unified School District and held that in Saxe there was insufficient evidence of possible disruption or invasion of the rights of others. The Court of Appeals stated:

> "To summarize: Under Fraser, a school may categorically prohibit lewd, vulgar, or profane language. Under Hazelwood, a school may regulate school-sponsored speech . . . on the basis of any legitimate pedagogical concern. Speech falling outside of these categories is subject to Tinker's general rule: it may be regulated only if it would substantially disrupt school operations or interfere with the rights of others."[149]

The Court of Appeals concluded that the policy appears to cover substantially more speech than could be prohibited under Tinker substantial disruption test and that therefore the policy is unconstitutionally overbroad.

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[145] Id. at 203.
[146] Id. at 206.
[147] Id. at 209; citing, Texas v. Johnson, 491 U.S. 397, 414, 109 S.Ct. 2533 (1989).
[148] Id. at 210.
[149] Id. at 215; citing, Chandler v. McMinnville School District, 978 F.2d 524 (9th Cir. 1992).

In DeJohn v. Temple University,[150] the Third Circuit Court of Appeals held that Temple University's sexual harassment policy was unconstitutionally overbroad and vague. The Temple University's policy read in part:

> ". . . All forms of sexual harassment are prohibited, including . . . expressive, visual, or physical conduct of a sexual or gender-motivated nature, when . . . (c) such conduct has the purpose or effect of unreasonably interfering with an individual's work, educational performance, or status; or (d) such conduct has the purpose or effect of creating an intimidating, hostile, or offensive environment."

The plaintiff claimed that the policy was facially overbroad because it inhibited him from expressing his opinions in class concerning women in combat and women in the military. As a history graduate student, DeJohn found himself engaged in conversations and class discussions regarding issues he believed were implicated by the policy. As a result, the plaintiff was concerned that discussing his social, cultural, political and/or religious views regarding these issues might be sanctionable by the university. Thus, the plaintiff contended that the policy had a chilling effect on his ability to exercise his constitutionally-protected free speech rights.[151]

The Third Circuit Court of Appeals noted that the overbreadth doctrine may be appropriately utilized in the school setting.[152] The courts have recognized that the university is a traditional sphere of free expression so fundamental to the functioning of our society that the government's ability to control speech within the university is restricted by the vagueness and overbreadth doctrines of the First Amendment.

In the context of school antidiscrimination policies, the Third Circuit has emphasized that harassing or discriminatory speech, although evil and offensive, may be used to communicate ideas or emotions that are protected by the First Amendment.[153] If there is a fundamental principle underlying the First Amendment, it is that the government may not prohibit expression of an idea simply because society finds the idea offensive or disagreeable.[154] Because overbroad harassment policies can suppress or chill protected speech, and are susceptible to selective application amounting to content-based or viewpoint discrimination, the overbreadth doctrine may be invoked in student free speech cases.[155] In reviewing policies in response to an overbreadth challenge, the court must determine whether the relatively broad language of the policy can reasonably be viewed narrowly enough to avoid any overbreadth problem.[156]

The Court of Appeals in DeJohn also noted that in reviewing the overbreadth of a policy, there is a difference between the extent that an elementary or high school may regulate student speech and that of a university. It is well recognized that the college classroom is recognized as

[150] DeJohn v. Temple University, 537 F.3d 301 (3rd Cir. 2008).
[151] Id. at 305.
[152] See, Rust v. Sullivan, 500 U.S. 173, 200, 111 S.Ct. 1759 (1991); Keyishian v. Board of Regents, State University of New York, 385 U.S. 589, 603, 605-06, 87 S.Ct. 675 (1967).
[153] Saxe v. State College Area School District, 240 F.3d 200, 209 (3rd Cir. 2001).
[154] Texas v. Johnson, 491 U.S. 397, 414, 109 S.Ct. 2533 (1989).
[155] DeJohn v. Temple University, 537 F.3d 301, 314 (3rd Cir. 2008).
[156] Sypniewski v. Warren Hills Regional Board of Education, 307 F.3d 243, 258-59 (3rd Cir. 2002).

a marketplace of ideas and the First Amendment guarantees wide freedom in matters of adult public discourse. However, certain speech which cannot be prohibited to adults may be prohibited to public elementary and high school students.[157] In effect, public school administrators are granted more leeway to restrict speech than public colleges and universities.[158]

The Court of Appeals noted that when laws or policies against harassment attempt to regulate oral or written expression, the views expressed may be protected by the First Amendment. While there is no question that physically harassing conduct is entirely outside the protection of the free speech clause of the First Amendment, where pure expression is involved, antidiscrimination laws may collide with the First Amendment.[159]

In DeJohn, the Court of Appeals took issue with Temple University's policies that focused on the motives of the speaker. The court noted that under Tinker, a public school must show that the speech will cause actual material disruption before prohibiting it. Under the Temple University policy, a student who intends to interfere with another student's work, educational performance or status or to create a hostile environment would be subject to punishment regardless of whether these motives and actions had their intended effect. Thus, the court stated, "As such, the focus on motive is contrary to Tinker's requirement that speech cannot be prohibited in the absence of a tenable threat of disruption."[160]

In addition, the court stated that the Temple University policy's use of "hostile," "offensive," and "gender-motivated" is, on its face, sufficiently broad and subjective that the policy could conceivably be applied to cover any speech of a gender-motivated nature, the contents of which offends someone. This could include core political and religious speech, such as gender politics and sexual morality. Absent any requirement that there be a showing of severity or pervasiveness, the policy provides no shelter for core-protected speech, according to the court in DeJohn.[161]

The Third Circuit Court of Appeals noted that the term "gender-motivated" is a fluid concept subject to a broad interpretation. The court also noted that the policy punishes not only speech that actually causes disruption, but also speech that merely intends to do so.[162] For these reasons, the Court of Appeals found that the policy fails to satisfy the Tinker requirement of disruption. The Court of Appeals stated:

> "As we observed in Saxe, . . . we do believe that a school has a compelling interest in preventing harassment. Yet, unless harassment is qualified with a standard akin to a severe or pervasive requirement, a harassment policy may suppress core-protected speech."[163]

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[157] Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 89 S.Ct. 733 (1969); Bethel School District No. 403 v. Fraser, 478 U.S. 675, 106 S.Ct. 3159 (1986).
[158] DeJohn v. Temple University, 537 F.3d 301, 316 (3rd Cir. 2008).
[159] Id. at 316.
[160] Id. at 317.
[161] Id. at 317-318.
[162] Id. at 318-319.
[163] Id. at 319-320.

The Court of Appeals also held that some speech that creates a hostile or offensive environment may be protected speech under the First Amendment. The court indicated that the term "hostile or offensive environment" is very broad and could encompass any speech that might simply be offensive to a listener, or a group of listeners, believing that they are being subjected to or surrounded by hostility.[164] The court concluded that the Temple University policy covers much more speech than could be prohibited under Tinker's substantial disruption test and did not amount to "fighting words" speech which would not be protected.[165]

The Court of Appeals concluded that injunctive relief was appropriate and affirmed the district court's order granting injunctive relief in favor of DeJohn.

In summary, the courts will continue to struggle with balancing the potential conflicts between the First Amendment protections and anti-harassment policies. Anti-harassment policies that are too broad or go beyond the statutory definition of harassment run the risk of being declared unconstitutional by the courts.

To avoid running afoul of First Amendment requirements, anti-harassment policies should be tightly worded and only speech which has the purpose and effect of interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment, which meets the Tinker standard of disruption of school operations, and that interferes with the rights of others may be prohibited. Anti-harassment policies such as in Saxe that go beyond the statutory protected characteristics or as in DeJohn prohibit speech which has the purpose or intent of disruption or creating an intimidating, hostile or offensive environment may be struck down as unconstitutional by the courts.

Given the difficulty of determining when a policy crosses the line into unconstitutional territory, it can be expected that the courts will continue to struggle with this issue in the future.

In Rodriguez v. Maricopa County Community College District,[166] the Ninth Circuit Court of Appeals held that a community college professor's e-mail speech was protected by the First Amendment.

Professor Kehowski sent three e-mails over a distribution list maintained by the Maricopa County Community College District, where he teaches math. Every district employee with an e-mail address received a copy.[167]

Plaintiffs, a certified class of the district's Hispanic employees, sued the district, its governing board and two district administrators (the chancellor and the president), claiming that their failure to properly respond to Kehowski's e-mails created a hostile work environment, in violation of Title VII of the 1964 Civil Rights Act and the Equal Protection Clause.[168]

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[164] Id. at 320.
[165] Id. at 320. See, also, Chaplinsky v. New Hampshire, 315 U.S. 568, 572-73, 62 S.Ct. 766 (1942).
[166] 605 F.3d 703, 257 Ed.Law Rep. 30 (9th Cir. 2010).
[167] Id. at 705.
[168] Id. at 706.

In his first e-mail, Kehowski criticized the district's celebration of Dia de la Raza as an explicitly racist event and claimed that the holiday was celebrated by some Hispanics instead of Columbus Day.[169]

Kehowski's next e-mail about Columbus Day stated that it was time to acknowledge and celebrate the superiority of western civilization and noted that democracy, human rights, and cultural freedom are European ideas.[170]

A third e-mail from Kehowski stated that his prior e-mails were not racist and criticized multi-culturalism and former President Bill Clinton. The third e-mail linked to a website maintained by Kehowski on the district's web server. The college's technology policy encouraged faculty to develop district hosted websites for use as a learning tool, although faculty also maintained sites of a personal nature. Kehowski's site declared that immigration reform should preserve the white majority in the United States and urged people to report illegal aliens to the Immigration Service.[171]

The president of the college circulated an e-mail stating that Kehowski's e-mails were counter to the college's beliefs about inclusiveness and respect. The college president stated that he supported the district's values and philosophy about diversity.[172]

The chancellor of the community college district issued a press release stating that Kehowski's message is not aligned with the vision of the community college district and explained that disciplinary action against Kehowski could seriously undermine the college's promotion of true academic freedom.[173]

A number of students found out about Kehowski's e-mails and protested. A number of district employees complained to the district's administration that Kehowski had created a hostile work environment. No disciplinary action was taken against Kehowski and no steps were taken to enforce the district's existing anti-harassment policy.[174]

The plaintiffs sued and sought damages against the community college district for failing to take immediate or appropriate steps to prevent Kehowski from sending plaintiffs harassing e-mails and from disseminating harassing speech via the district hosted website. The district court granted summary judgment to the president and chancellor on plaintiffs' Title VII claim on the ground that Title VII liability does not extend to agents of the employer. The district court denied summary judgment to the president and chancellor on the plaintiffs' constitutional claim. The chancellor and the president appealed.[175]

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[169] Id. at 705.
[170] Ibid.
[171] Id. at 706.
[172] Ibid.
[173] Ibid.
[174] Ibid.
[175] Id. at 706-07.

The Court of Appeals held that public employees are entitled to equal protection to be free of purposeful workplace harassment. The Court of Appeals held that it must address the First Amendment free speech issue.[176]

The Court of Appeals noted that the objections to Kehowski's speech are based entirely on his point of view and noted that government may not silence speech because the ideas it promotes are thought to be offensive.[177] The Court of Appeals held that precisely because Kehowski's ideas fall outside the mainstream, his words have sparked intense debate. The court noted that the Constitution embraces such a heated exchange of views, even when they concern sensitive topics like race.[178] The Court of Appeals stated:

> "Without the right to stand against society's most strongly held convictions, the marketplace of ideas would decline into a boutique of the banal, as the urge to censor is greatest where debate is most disquieting and orthodoxy most entrenched. . . . The right to provoke, offend and shock lies at the core of the First Amendment."[179]

The Court of Appeals noted that intellectual advancement has traditionally progressed through discord and dissent as a diversity of views ensures that ideas survive. Colleges and universities have historically fostered that exchange. The desire to maintain a sedate academic environment does not justify limitations on a teacher's freedom to express himself on political issues in vigorous, argumentative, unmeasured and even distinctly unpleasant terms.[180]

The Court of Appeals noted that free speech has been a powerful force for the spread of equality under the law. The courts must not squelch free speech because it may also be harnessed by those who promote retrograde or unattractive ways of thought. The Court of Appeals went on to state that it doubted that a college professor's expression on a matter of public concern, directed to the college community, could ever constitute unlawful harassment and justify the judicial intervention that the plaintiffs seek. The Court of Appeals noted that harassment law generally targets conduct and can only target speech when it is consistent with the First Amendment. For example, the court noted that racial insults or sexual advances directed at particular individuals in the workplace may be prohibited on the basis of their nonexpressive qualities, as they do not seek to disseminate a message to the general public, but intrude upon the targeted listener and do so in an especially offensive way.[181]

The Court of Appeals held that Kehowski's website and e-mails were pure speech. The court held that they were the effective equivalent of standing on a soapbox in a campus square and speaking to all within earshot. The offensive quality was based entirely on their meaning and not on any conduct or inherent threat of conduct that they contained. The fact Kehowski

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[176] Id. at 707; see, Alaska v. EEOC, 564 F.3d 1062, 1069 (9th Cir. 2009); Bator v. Hawaii, 39 F.3d 1021, 1029 (9th Cir. 1994).
[177] Id. at 708; see, Brandenburg v. Ohio, 395 U.S. 434, 448-49 (1969); Saxe v. State College Area School District, 240 F.3d 200, 204 (3rd Cir. 2001); DeAngelis v. El Paso Municipal Police Officers' Association, 51 F.3d 591, 596-97 (5th Cir. 1995).
[178] Ibid; see, R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992).
[179] Ibid.
[180] Id. at 708-09; see, Adamian v. Jacobsen, 523 F.2d 929, 934 (9th Cir. 1975).
[181] Id. at 710; citing, Frisby v. Schultz, 487 U.S. 474, 486 (1988); Meritor Savings Bank v. Vinson, 477 U.S. 57, 60, 73 (1986).

disseminated his views using the district's web servers and e-mail, which provided such resources on a content-neutral basis to facilitate campus discussion, does not suggest official endorsement of the resulting speech.[182]

The Court of Appeals rejected plaintiffs' argument that the district could have suppressed Kehowski's speech by limiting discussion on its mailing list and web servers to official school business. The Court of Appeals noted that the community college district had a policy which it is not enforcing. The Court of Appeals stated:

> "If speech is harassment, the proper response is to silence the harasser, not shut down the forum. And if speech is not harassment, listeners who are offended by the ideas being discussed certainly are not entitled to shut down an entire forum simply because they object to what some people are saying. Such a rule would contravene the First Amendment's hostility toward laws that confer broad powers of censorship in the form of a 'heckler's veto' upon any opponent of certain points of view."[183]

The Court of Appeals concluded that the defendants did not violate plaintiffs' right to be free of workplace harassment. The Court of Appeals stated:

> ". . . the First Amendment doesn't allow us to weigh the pros and cons of certain types of speech. Those offended by Kehowski's ideas should engage him in debate or hit the 'delete' button when they receive his e-mails. They may not invoke the power of the government to shut him up."[184]

DISCRIMINATION BASED UPON DISABILITY

A. Section 504 of the Rehabilitation Act

The Rehabilitation Act of 1973 prohibits discrimination against qualified disabled individuals by reason of their disability in programs receiving federal financial assistance.[185] The Act states in part:

> "No otherwise qualified individual with a disability . . . shall, solely by reason of his or her disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[186]

[182] Id. at 710; citing, Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819, 841 (1995).
[183] Id. at 711.
[184] Id. at 711.
[185] 29 U.S.C. Section 794(a).
[186] 29 U.S.C. Section 794(a).

An individual with a disability is defined as any person who has a physical or mental impairment which substantially limits one or more of such person's major life activities, has a record of such impairment, or is regarded as having such an impairment.[187] Under the federal regulations, major life activities include functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing and learning.[188] An individual with a disability does not include illegal users of drugs, alcoholics, those with infectious diseases, homosexuals, bisexuals, those with sexual behavior disorders, and compulsive gamblers, kleptomaniacs and pyromaniacs.[189]

In order to establish a case based on a violation of Section 504 of the Rehabilitation Act, the plaintiff must show that he or she is an individual with a disability under the Act, that they are otherwise qualified for the position sought, that they are being excluded from the position solely by reason of their disability and the position exists as part of a program or activity receiving federal financial assistance.[190] No affirmative action by the employer is required to accommodate an individual who is not otherwise qualified.[191]

The definition of individuals with disabilities includes those who are suffering from diseases such as tuberculosis and AIDS.[192] In School Board of Nassau County v. Arline, the United States Supreme Court held that a teacher suffering from tuberculosis was a handicapped individual within the meaning of Section 504 of the Rehabilitation Act. The United States Supreme Court remanded the case back to the lower court to determine whether the teacher was otherwise qualified for the job of elementary school teacher. The Court wanted the lower court to make a factual determination as to the risk to third parties, given the nature of the risk, the means by which the disease is transmitted, the duration of the risk, the period of time the person is infectious and the severity of the risk. The Supreme Court noted:

> "A person who poses a significant risk of communicating an infectious disease to others in the workplace will not be otherwise qualified for his or her job if reasonable accommodations will not eliminate that risk. The Act would not require a school board to place a teacher with active contagious tuberculosis in a classroom with elementary school children."[193]

B. Section 504 – Teacher with AIDS

In Chalk v. United States District Court, the United States Ninth Circuit Court of Appeals held that the teacher with AIDS was suffering irreparable injury by being excluded from his classroom position even though the teacher was receiving full pay and benefits and had been

[187] 29 U.S.C. Section 706(7)(B).
[188] 34 C.F.R. Section 104.3(j)(2)(ii).
[189] 29 U.S.C. Section 706(B)(D) and (E).
[190] Doe v. New York University, 666 F.2d 761 (2d Cir. 1981).
[191] Southeastern Community College v. Davis, 442 U.S. 397, 99 S.Ct. 2361 (1979).
[192] School Board of Nassau County v. Arline, 107 S.Ct. 1123, 37 Ed. Law Rep. 448 (1987); Chalk v. United States District Court 840 F.2d 701 (9th Cir. 1988).
[193] School Board Nassau County v. Arline, 107 S.Ct. 1123, 1131, n. 16 (1987).

transferred to an office assignment. The Court of Appeals ordered the teacher transferred back to the classroom.[194]

C. U.S. Supreme Court – Admission to Nursing Program

In Southeastern Community College v. Davis, the United States Supreme Court held that Davis was not an otherwise qualified disabled individual under Section 504. Davis had been denied admission to the community college nursing program. Davis was unable to understand speech except through lip reading. The community college rejected her application for admission to the program because it believed that her hearing disability made it impossible for her to participate safely in the normal clinical training program or to care safely for patients.

The United States Supreme Court held that the decision to exclude Davis from the community college's nursing program was not discriminatory with the meaning of Section 504 of the Rehabilitation Act of 1973. The United States Supreme Court stated:

> ". . . Section 504 by its terms does not compel educational institutions to disregard the disabilities of handicapped individuals or to make substantial modifications in their programs to allow disabled persons to participate. Instead, it requires only that an otherwise qualified handicapped individual not be excluded from participation in a federally funded program solely by reason of his handicap, indicating only that mere possession of a handicap is not a permissible ground for assuming and inability to function in a particular context . . .
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> * * *
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> ". . . An otherwise qualified person is one who is able to meet all of the program's requirements in spite of his handicap."[195] [Emphasis added]

The Court noted that legitimate physical qualifications may be essential to participation in particular programs and found that the ability to understand speech without reliance on lip reading is necessary for patients' safety during the clinical phase of the program and is indispensable for many of the functions that a registered nurse must perform.[196]

The Court rejected Davis' contention that Section 504 required the community college to undertake affirmative action that would dispense with the need for effective oral communication. The Court also rejected Davis' suggestions that Davis could be given individual supervision by faculty members whenever she attends patients directly or that certain required courses might be dispensed with.

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[194] Chalk v. United States District Court, 840 F.2d 701, 704-710 (9th Cir. 1988).
[195] Id. at 405, 99 S.Ct. at 2366-67. See, also, Sutton v. United Airlines, Inc., 119 S.Ct. 2139 (1999), in which the Superior Court held that the definition of disability under the ADA requires that mitigating measures such as eyeglasses, medication, etc., must be considered in determining whether someone is disabled.
[196] Id. at 407-08, 99 S.Ct. at 2368.

The Court held that Section 504 does not require such a fundamental alteration in the nature of a program, stating:

> "Moreover, an interpretation of the regulations that required the extensive modifications necessary to include respondent in the nursing program would raise grave doubts about their validity. If these regulations were to require substantial adjustments in existing programs beyond those necessary to eliminate discrimination against otherwise qualified individuals, they would do more than clarify the meaning of Section 504. Instead, they would constitute an unauthorized extension of the obligations imposed by that statute.
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> ". . . [N]either the language, purpose, nor history of Section 504 reveals an intent to impose an affirmative action obligation on all recipients of federal funds. . . ."[197]

The Court acknowledged that the difference between illegal discrimination and affirmative action will not always be clear, particularly in light of the rapid technological advances which are taking place. The Court concluded that whether a particular refusal to accommodate the needs of a disabled person constitutes discrimination will have to be determined on a case by case basis. However, the Court clearly ruled out major modifications to programs:

> "In this case, however, it is clear that Southeastern's unwillingness to make major adjustments in its nursing program does not constitute such discrimination . . . Section 504 imposes no requirement upon an education institution to lower or to effect substantial modifications of standards to accommodate a handicapped person."[198]

Following the United States Supreme Court's decision in Davis, a number of federal agencies promulgated regulations defining reasonable accommodation.[199] These regulatory definitions of reasonable accommodation have been incorporated into the statutory language of the ADA.[200] In both instances, reasonable accommodation has been defined in terms of employment. However, the courts have applied the principle of reasonable accommodation to public school programs.

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[197] Id. at 410-11, 99 S.Ct. at 2769-2770.
[198] Id. at 413, 99 S.Ct. at 2370-2371.
[199] See, 34 C.F.R. Part 104, Appendix A, p. 489 (1988).
[200] 42 U.S.C. Section 12111(9).

D. Graduation from High School

In Brookhart v. Illinois State Board of Education,[201] the Court of Appeals cited Southeastern Community College v. Davis and held that the State of Illinois was not required to lower its graduation requirements to accommodate students with disabilities if the students are given sufficient notice of the requirements.

E. Residential Placements

In Colin K. v. Schmidt,[202] the Court of Appeals held that Section 504 of the Rehabilitation Act does not require school districts to provide disabled students with residential placements. In Turillo v. Tyson,[203] the district court stated, "While Section 504 might require a school system to modify its school to accommodate handicapped children, it never compels the school system to finance a private educational placement."[204]

F. Deaf Parents

In Rothschild v. Grottenthaler,[205] the Court of Appeals applied the principal of reasonable accommodation to hearing impaired parents of nonhearing impaired children who attended schools in the district. The parents requested that a sign language interpreter be provided at district expense to assist the parents at parent-teacher meetings. The Court of Appeals noted there must be a balance between reasonable accommodation to permit access to handicapped persons and the financial and administrative burdens of requiring such an accommodation. It found that the parents were entitled to sign language interpreter services provided at the school district's expense only at those activities directly involving their child's academic and/or disciplinary progress. The parents were not entitled to a sign language interpreter at the child's graduation ceremony.

G. Service Dog

In Sullivan v. Vallejo City Unified School District,[206] the district court ordered a school district to allow a disabled student to bring her service dog to school. The student was sixteen years old, with cerebral palsy, learning disabilities and right side deafness. The service dog was specially trained to assist her in overcoming her physical disabilities.

The court noted that allowing a service dog onto a school campus did not impose an undue financial or administrative burden on the school district and California law provides that physically disabled persons shall have the right to be accompanied by a service dog. By denying access to a student's service dog, the school district had greatly diminished the student's ability to function independently and violated Section 504 by failing to reasonably accommodate her.

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[201] 697 F.2d 179, 8 Ed.Law Rep. 608 (7th Cir.1983).
[202] 715 F.2d 1, 13 Ed.Law Rep. 221 (1st Cir. 1983). See, contra, 34 C.F.R. Section 104.33 (c)(3), which requires school districts to provide private residential placement.
[203] 535 F.Supp. 577, 3 Ed.Law Rep. 639 (D.R.I. 1982).
[204] Id. at 588, 3 Ed.Law Rep. at 650.
[205] 907 F.2d 286, 61 Ed.Law Rep. 490 (2nd Cir. 1990).
[206] 731 F.Supp. 947, 59 Ed.Law Rep. 73 (E.D. Cal. 1990).

H. Medical School Exams

In Wynne v. Tufts University School of Medicine,[207] the Court of Appeals discussed the extent to which schools and universities must modify their testing procedures to accommodate the disabled. The plaintiff alleged that he was learning disabled and that his disability placed him at an unfair disadvantage in taking written multiple-choice examinations.

The Court of Appeals found that Tufts University considered alternative means of testing and came to a rationally justifiable conclusion regarding the adverse effects of plaintiff's proposed accommodation. The Court of Appeals stated:

> "Tufts not only documented the importance of biochemistry in a medical school curriculum, but explained why, in the departmental chair's words, 'the multiple choice format provides the fairest way to test the students' mastery of the subject matter of biochemistry.' . . . It concluded that [changing test procedures] would require substantial program alterations, result in lowering academic standards, and devalue Tufts' end product – highly trained physicians carrying the prized credential of a Tufts degree. . . . Tufts decided . . . that no further accommodation could be made without imposing an undue (and injurious) hardship on the academic program. . . . Given the other circumstances extant in this case, we do not think that a reasonable factfinder could conclude that Tufts, having volunteered such an array of remedial measures, was guilty of failing to make a reasonable accommodation merely because it did not also offer Wynne, unsolicited, an oral rendering of the biochemistry examination."[208]

The Court of Appeals concluded that Tufts University had met its burden of proof and granted summary judgment in favor of Tufts.

I. Law School

A similar conclusion was reached by the district court in McGregor v. Louisiana State University Board of Supervisors.[209] In McGregor, a law student with orthopedic and neurological handicaps sought changes in the testing procedures of the law school. The record showed that the law school allowed the student to stay in school even though his grades were below the required minimum and allowed him to take tests at home the first year. The student's classes were moved to more accessible locations and he was given considerable tutorial assistance from professors. The following year, the student was not allowed to take his exams at home, but was given a choice of locations and extra time. Later, he was not allowed to proceed to the third year of law school because his grades were below the minimum required. The

[207] 976 F.2d 791, 77 Ed. Law Rep. 1136 (1st Cir. 1992).
[208] Id. at 794.
[209] 3 F.3d 850 (1993), cert. denied 114 S.Ct. 1103 (1994).

student then sought a part time schedule and the right to take examinations at home. The law school refused.

The Court of Appeals noted that no other student had ever been allowed to audit a course in the second semester after failing the first semester, and that no other student had ever been assigned a professor for individual assistance. No other students had ever been allowed to take exams at home in their first year.[210] The court noted that while other universities may have part-time programs, Louisiana State University was not required to establish a part-time program under Section 504.

The Court of Appeals concluded that the law school reasonably accommodated McGregor's disability and that if any additional accommodations were granted it would constitute preferential treatment and go beyond the elimination of discriminatory treatment required by Section 504. The Court of Appeals affirmed the summary judgment in favor of the law school and found that McGregor was not an otherwise qualified individual legally entitled to the benefits of the law school's program.[211]

J. The Americans with Disabilities Act – Statutory Provisions

The Americans with Disabilities Act (ADA) was signed into law on July 26, 1990.[212] It is a comprehensive statutory scheme designed to prohibit discrimination against the disabled in a wide range of activities conducted by both public and private entities.

It is expected that the ADA will have its greatest impact in the private sector since the provisions of the ADA are patterned after the provisions of Section 504 of the Rehabilitation Act of 1973,[213] which prohibits discrimination against the disabled by agencies receiving federal financial assistance. It does not appear that the passage of the ADA will affect the requirements to provide elementary and secondary students with disabilities a free appropriate public education under the Individuals with Disabilities Education Act (IDEA).[214]

However, in several respects, the ADA will impact public education. The main impact will be in the employment area. School districts, as well as all other educational employers covered by the Act, will have to reasonably accommodate disabled individuals and make modifications to the nonessential functions of their programs. In addition, school districts will be prohibited from making medical inquiries or requiring medical examinations prior to an offer of employment.

The introduction to the ADA contains Congressional findings that 43 million Americans have one or more physical or mental disabilities and that the number is increasing as the population as a whole is growing older. Congress made further findings that discrimination against individuals with disabilities persists in employment, housing, public accommodations,

[210] Ibid.
[211] Id. at 860.
[212] 42 U.S.C. Section 12101 et seq.
[213] 29 U.S.C. Section 794.
[214] 20 U.S.C. Section 1400 et seq. (Formerly, the Education of the Handicapped Act (EHA).)

education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services.[215] Congress outlined the purpose of the Act as follows:

1. To provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

2. To provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

3. To ensure that federal government plays a central role in enforcing the standards established in the Act on behalf of individuals with disabilities; and

4. To invoke the sweep of Congressional authority, including the power to enforce the Fourteenth Amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.[216]

The ADA defines "disability" as a physical or mental impairment that substantially limits one or more of the major life activities of an individual, an individual with a record of such an impairment or an individual being regarded as having such an impairment.[217]

Title V of the ADA excludes from the definition of "disabled" transvestites and persons who engage in homosexuality and bisexuality.[218] Transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, other sexual behavior disorders, compulsive gambling, kleptomania, pyromania, and psychoactive substance use disorders resulting from current illegal use of drugs are also excluded.[219]

Also excluded from the term "individual with a disability" are individuals who are currently engaging in the illegal use of drugs when the employer acts on the basis of such use.[220] However, included within the definition of "individual with a disability" are the following:

1. Persons who have successfully completed a supervised drug rehabilitation program and are no longer engaging in illegal use of drugs or who have otherwise been rehabilitated successfully and are longer using drugs;

2. Persons participating in a supervised rehabilitation program and no longer engaging in the use of drugs; or

3. Persons erroneously regarded as having engaged in drug use but who have not in fact engaged in such use.[221]

[215] 42 U.S.C. Section 12101.
[216] 42 U.S.C. Section 12101.
[217] 42 U.S.C. Section 12102.
[218] 42 U.S.C. Section 12211.
[219] 42 U.S.C. Section 12211(b).
[220] 42 U.S.C. Section 12210.

Title I outlines the provisions of the ADA with regard to employment.[222] The ADA applies only to qualified individuals with a disability and these are individuals with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position.[223] Job descriptions prepared prior to interviewing applicants are evidence of what the essential functions of each job are.

Employers must accommodate disabled workers but only to a reasonable degree. Such "reasonable accommodation" includes making existing facilities readily accessible to individuals with disabilities, job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations.[224] An employer does not have to provide reasonable accommodation to a qualified individual with a disability if it would be an undue hardship.[225]

The ADA applies not only to job hiring but also prohibits discrimination in advancement, discharge, compensation, job training, or other terms and conditions and privileges of employment.[226] The ADA also prohibits an employer from conducting a medical examination or making inquiries of a job applicant as to whether the applicant is an individual with a disability unless there is a business necessity. However, preemployment inquiries into the ability of an applicant to perform job related functions is permissible.[227]

Employers may require a medical examination only after an offer of employment has been made to a job applicant and prior to the commencement of employment duties if all entering employees are subjected to such an examination regardless of disability.[228] The information obtained from the medical examination of the applicant must be maintained in a separate, confidential medical file used solely to determine necessary restrictions on the duties or reasonable accommodations for the employee, for first aid or emergency treatment, or for investigating compliance with the ADA by appropriate government officials.

Under the provisions of Title II of the ADA, no qualified individuals with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity or be subjected to discrimination by any

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[221] 42 U.S.C. Section 12210(b).
[222] 42 U.S.C. Section 12111 et seq.
[223] 42 U.S.C. Section 12111(8).
[224] 42 U.S.C. Section 12111(9). (This definition is virtually identical to the definition of reasonable accommodation under Section 504. See, 34 C.F.R. Part 104, Appendix A, p. 489 (1988)).
[225] 42 U.S.C. Section 12111(10). The term "undue hardship" means an action requiring significant difficulty or expense when considering the following factors: (1) The nature and cost of the accommodation needed under the Act; (2) The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; (3) The number of persons employed at such facility; (4) The effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility; (5) The overall financial resources of the covered entity; (6) The overall size of the business of a covered entity with respect to the number of its employees; (7) The number, type and location of its facilities; (8) The type of operation or operations of the covered entity, including the composition, structure and functions of the work force of such entity; and (9) The geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.
[226] 42 U.S.C. Section 12112(a).
[227] 42 U.S.C. Section 12112(d).
[228] 42 U.S.C. Section 12112(d).

such entity. This prohibition applies to students, parents, and independent contractors as well as employees.[229] The remedies for a violation of Title II include: reinstatement with back pay; civil action by the Attorney General or Equal Employment Opportunities Commission; injunctive relief; and, attorney fees.[230]

The ADA authorizes awards of attorney fees to a prevailing party, prohibits retaliation against persons exercising their rights under the ADA, authorizes states to establish higher standards for protecting the disabled and abrogates state immunity from damages under the ADA.[231]

The ADA defines "reasonable accommodation" as making existing facilities readily accessible to individuals with disabilities, job restructuring, modified work schedules, modification of equipment, the provision of qualified interpreters or readers and other similar accommodations.[232]

K. Amendments to the Americans with Disabilities Act

On September 25, 2008, President Bush signed legislation amending the Americans with Disabilities Act and Section 504 of the Rehabilitation Act.[233] The legislation takes effect January 1, 2009.

The legislation also amends Section 504 of the Rehabilitation Act by indicating that Section 504 applies to any person who has a disability as defined under the Americans with Disabilities Act. It is likely that more individuals will qualify as disabled under the Americans with Disabilities Act and Section 504 of the Rehabilitation Act under this new language.

The purpose of the legislation is to broaden the scope of Section 504 and the Americans with Disabilities Act. Congress made specific findings that it disagreed with rulings of the United States Supreme Court narrowly defining the provisions of the Americans with Disabilities Act.[234] Congress redefined the purposes of the Americans with Disabilities Act and stated that the definition of disability in the ADA shall be construed in favor of broad coverage of individuals under the ADA, to the maximum extent permitted by the terms of the Act.

Congress stated that an impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability. Congress also stated that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. In addition, Congress stated that the determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as medication, medical supplies, equipment, or other devices.[235]

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[229] 42 U.S.C. Section 12132.
[230] 42 U.S.C. Section 12133. See, also, 29 U.S.C. Section 794a.
[231] 42 U.S.C. Section 12201 et seq.
[232] 42 U.S.C. Section 12111(9).
[233] S.3406.
[234] See, Section 2 of S.3406, citing Congress' differences with U.S. Supreme Court decisions in Sutton v. United Airlines, Inc., 527 U.S. 471 (1999); Toyota Motor Mfg. v. Williams, 534 U.S. 184 (2002).
[235] The definition excludes ordinary eyeglasses or contact lenses.

Previously, no examples of major life activities were found in the Americans with Disabilities Act or Section 504. However, the new amendments include examples of major life activities including, "caring for oneself, performing manual tasks, walking, singing, hearing, speaking, breathing, learning, and working."[236] Also included are eating, sleeping, standing, lifting, bending, reading, concentrating, thinking and communicating. The term also includes the operation of major bodily function, including functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions.[237]

The legislation also sets forth a broad view of the definition of regarded as a disability. An individual is regarded as having such an impairment if the individual establishes that he or she has been subjected to an action prohibited by the ADA or Section 504 because of an actual or perceived impairment whether or not the impairment limits or is perceived to limit a major life activity.[238] The regarded as having an impairment definition does not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of six months or less.[239]

The effect of these amendments is to broaden the scope of Section 504 and the definition of disability under Section 504. For example, if a student is learning satisfactorily but has trouble concentrating, the student may be disabled under Section 504. If a student's Attention Deficit Hyperactivity Disorder (ADHD) is completely controlled by medication, the student may still be considered disabled under Section 504. In Bragdon v. Abbott,[240] the Supreme Court held that an individual infected with the Human Immunodeficiency Virus (HIV) is disabled under the ADA even when it has not progressed to the stage of Acquired Immune Deficiency Syndrome (AIDS). The Court held that HIV infection was a physical impairment that substantially limited a major life activity (i.e. the ability to reproduce and bear children).[241]

L. Workplace Safety

In Chevron U.S.A., Inc. v. Echazabal,[242] the United States Supreme Court upheld a regulation of the Equal Employment Opportunity Commission allowing an employer to refuse to hire an individual whose health would be endangered by the conditions on the job site.

Beginning in 1972, Mario Echazabal worked for an independent contractor at an oil refinery owned by Chevron. Twice he applied for a job directly with Chevron which offered to hire him if he could pass the company's physical examination. Each time, the physical examination showed liver abnormality or damage which was eventually diagnosed as Hepatitis C. Chevron's doctors believed that Mr. Echazabal's condition would be aggravated by continued exposure to toxins at Chevron's refinery. In each instance, the company withdrew its

[236] See, Section 4 of S. 3406 amending 42 U.S.C. Section 12102.
[237] Ibid.
[238] Ibid.
[239] Ibid. See, also, School Board of Nassau County v. Arline, 408 U.S. 273 (1987).
[240] 118 S.Ct. 2196, 524 U.S. 624 (1998).
[241] Id. at 2206-2207.
[242] 122 S.Ct. 2045, 536 U.S. 73 (2002).

job offer and the second time it asked the independent contractor employing Echazabal to either reassign him to a job without exposure to harmful chemicals or to remove him from the refinery altogether. The independent contractor laid him off in early 1996.[243]

Mr. Echazabal then filed suit, claiming a violation of the Americans with Disabilities Act in refusing to hire him, or to even let him continue working in the plant because of his disability, his liver condition. Chevron defended its actions under a regulation of the Equal Employment Opportunity Commission permitting the defense that a worker's disability on the job would pose a "direct threat" to his health.[244] The regulation states:

> "The term 'qualification standard' may include a requirement that an individual shall not pose a direct threat to the health or safety of the individual or others in the work place."

The term "direct threat" is defined in the federal regulations, as, ". . . a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation."[245] The regulation requires that the determination that an individual poses a "direct threat" be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. The assessment must be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. The United States District Court granted summary judgment for Chevron. On appeal, the United States Court of Appeals for the Ninth Circuit reversed the summary judgment and declared the regulation void as exceeding its statutory authority.[246]

The Americans with Disabilities Act provision states:

> "(a) In general
>
> "It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.
>
> "(b) Qualification standards
>
> "The term 'qualification standards' may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace."[247]

[243] Id. at 2047-2048.
[244] See, 29 C.F.R.Section 1630.15(b)(2).
[245] 29 C.F.R. Section 1630.2(r).
[246] Id. at 2048.
[247] 42 U.S.C. Section 12113.

The United States Supreme Court reversed the decision of the U.S. Court of Appeals for the Ninth Circuit, indicating that it conflicted with decisions from the Eleventh Circuit, Moses v. American Nonwovens, Inc.,[248] and the Seventh Circuit, Koshinski v. Decatur Foundry, Inc.[249]

The United States Supreme Court held that the statute, Section 12113(a) broadly allows the defense of direct threat based on an application of qualifications, standards, tests, or selection of criteria that have been shown to be job-related and consistent with business necessity. The statutory language in subsection (b) defining qualification standards states that qualification standards may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace. The United States Supreme Court held that subsection (b) was not an exhaustive list, but an example of qualification standards and rejected the employee's argument that Congress intended to limit the scope of qualification standards and the defense of business necessity.[250]

The Court went on to state that since Congress had not spoken exhaustively on threats to worker's own health, the EEOC regulation was reasonable. The Court balanced the public policy behind the Americans with Disabilities Act with that of other statutory provisions enacted by Congress including the Occupational Safety and Health Act of 1970 (OSHA), which guarantees every working man and woman in the nation safe and healthful working conditions.[251] The Court held that the EEOC's regulation fairly resolved the tension between the Americans with Disabilities Act and OSHA since the direct threat defense must be based on a reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence upon an expressly individualized assessment of the individual's present ability to safely perform the essential functions of the job reached after considering, among other things, the imminence of the risk and the severity of the harm.[252]

The Court concluded that the EEOC regulation was reasonable and remanded the case back to the Court of Appeals for further proceedings.

The United States Supreme Court's decision in Chevron U.S.A., Inc. should be helpful to all employers who are faced with hiring an employee whose health may be harmed by otherwise safe working conditions.

M. Punitive Damages

In Barnes v. Gorman,[253] the United States Supreme Court held that individuals may not recover punitive damages under the American With Disabilities Act (ADA) or Section 504 of the Rehabilitation Act of 1973.

[248] 97 F.3d 446, 447 (1996).
[249] 177 F.3d 599, 603 (1999).
[250] 122 S.Ct. 2045.
[251] See, 29 U.S.C. Section 651 et seq.
[252] 122 S.Ct. 2045, 2053 (2002).
[253] 122 S.Ct. 2047, 536 U.S. 181 (2002).

The plaintiff, a paraplegic, confined to a wheelchair, was arrested for trespass after fighting with a bouncer at a Kansas City, Missouri, nightclub. While waiting for a police van to be transported to the police station, he was injured due to the fact that the van was not equipped to handle the plaintiff's wheelchair. The plaintiff suffered serious medical problems including a bladder infection, serious low back pain and uncontrollable spasms that left him unable to work full-time.[254]

The plaintiff brought suit against the Kansas City Board of Police Commissioners, the Chief of Police and the officer who drove the van alleging a violation of the ADA and Section 504 by failing to maintain appropriate policies for the arrest and transportation of persons with spinal cord injuries.[255]

The jury found the City liable and awarded $1 million in compensatory damages and $1.2 million in punitive damages. The District Court vacated the punitive damages award holding that punitive damages are unavailable in suits under the ADA and Section 504. The Court of Appeals reversed and reinstated the punitive damages award. The United States Supreme Court granted a hearing and reversed the Court of Appeals and held that punitive damages were not available under the ADA and Section 504.[256]

The United States Supreme Court held that the Americans With Disabilities Act and Section 504 were passed under the Spending Clause provisions of the United States Constitution are in the nature of a contract (i.e., in return for federal funds, the recipient local agencies agree to comply with federally imposed conditions. The Court held that under the spending power, recipients of federal funds must voluntarily and knowing accept the terms of the contract and Congress must impose conditions on the grant of federal monies clearly and unambiguously. The Court held that under the language of the ADA and Section 504, recipients of federal funds would not be on notice when punitive damages could be awarded for breaches of the ADA and Section 504. The Court noted that under traditional contract law, punitive damages are not available in suits for breach of contract and that many recipients of federal funds may not have accepted the funding if punitive damages liability was a required condition.[257] The United States Supreme Court stated:

> "When a federal funds recipient violates conditions of Spending Clause legislation, the wrong done is the failure to provide what the contractual obligation requires; and that wrong is 'made good' when the recipient compensates the Federal Government or a third-party beneficiary (as in this case) for the loss caused by that failure . . . Punitive damages are not compensatory . . ."[258]

[254] Id. at 2099.
[255] Ibid.
[256] Ibid.
[257] Id. at 2100-2102.
[258] Id. at 2102-2103.

The decision in Barnes eliminates the possibility of punitive damages being awarded for violations of the ADA and Section 504. However, courts may still award injunctive relief and compensatory damages.

N. Seniority Rules

In U.S. Airways, Inc. v. Barnett,[259] the United States Supreme Court held that a requested accommodation pursuant to the ADA that conflicts with an employer's seniority rules is ordinarily, as a matter of law, not a reasonable accommodation. The court also held that the employee may present evidence of special circumstances that makes a seniority rule exception reasonable in that particular case. The overall impact of the decision is that, in most cases, the employer's seniority system will prevail over an employee's request for reasonable accommodation under the ADA if the request conflicts with the provisions of the seniority system.

In 1990, plaintiff Robert Barnett injured his back while working in a cargo handling position for U.S. Airways, Inc. Mr. Barnett invoked his seniority rights and transferred to a less physically demanding mailroom position. Under the U.S. Airways seniority system, that position, like others periodically became open to seniority-based employee bidding. In 1992, Barnett learned that at least two employees, senior to him, intended to bid for the mailroom job. Barnett asked U.S. Airways to accommodate his disability-imposed limitations by making an exception that would allow him to remain in the mailroom. U.S. Airways eventually decided not to make an exception and Barnett lost his job.[260]

The United States District Court found that the undisputed facts showed that there was a seniority system in place and granted summary judgment in favor of U.S. Airways. The U.S. District Court held that U.S. Airways had shown that it would be an undue hardship on the operation of its business if it was required to accommodate Barnett by altering its seniority policy.[261]

The United States Court of Appeals for the Ninth Circuit reversed and held that the presence of a seniority system is merely a factor in the undue hardship analysis. The Court of Appeal held that a case by case fact-intensive analysis was required to determine whether any particular reassignment would constitute an undue hardship to the employer.[262]

The United States Supreme Court agreed to hear the matter noting that there was a split among the appellate courts with regard to the legal significance of a seniority system. The Supreme Court noted that the ADA that employers may not discriminate against a qualified individual with a disability, and that the ADA defines a qualified individual as an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the relevant employment position.[263] The court noted that the ADA states that discrimination includes an employer not making reasonable accommodations to the known physical or mental

[259] 122 S.Ct. 1516, 535 U.S. 391 (2002).
[260] Id. at 1519.
[261] Ibid.
[262] Id. at 1520.
[263] 42 U.S.C. Section 12111(a) and 42 U.S.C. Section 12112(a).

limitations of an otherwise qualified employee, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of its business.[264] In addition, the ADA states that the term "reasonable accommodation" may include reassignment to a vacant position.[265]

U.S. Airways argued that an accommodation that would violate the rules of a seniority system is by definition not a reasonable accommodation. In Barnett's view, a seniority system violation never indicates that a requested accommodation is not a reasonable one. The majority opinion of the court rejected both views and held that in most cases, an established seniority system will ordinarily prevail over a requested accommodation that conflicts with the seniority system, but left open the possibility that an employee could present evidence of special circumstances that make a seniority rule exception reasonable in a particular case. For example, the Supreme Court indicated that the plaintiff might show that the employer had frequently made exceptions to the seniority system for other reasons.[266]

The Supreme Court noted that a number of lower court decisions had unanimously found that collectively bargained seniority systems trump the need for reasonable accommodation under Section 504 of the Rehabilitation Act, which has similar language to the ADA. The court noted that in Trans World Airlines, Inc. v. Hardison,[267] the Supreme Court held that in a Title VII religious discrimination case, an employer was not required to accommodate an employee's special worship schedule as a reasonable accommodation, where doing so would conflict with the seniority rights of other employees. The court went on to state that although the prior cases discussed religious discrimination and collectively bargained seniority systems, not systems unilaterally established by management, the court held that the same reasoning would apply to such seniority systems. The Supreme Court concluded:

> ". . . A showing that the assignment would violate the rules of a seniority system warrants summary judgment for the employer - unless there is more. The plaintiff must present evidence that 'more,' namely, special circumstances surrounding the particular case demonstrate the assignment is nonetheless reasonable."[268]

In summary, employers, both public and private, are not required, in most circumstances, to reasonably accommodate disabled employees in violation of seniority provisions in a collective bargaining agreement or an employer's policy.

O. Use of Illegal Drugs

In Hernandez v. Hughes Missile System Company,[269] held that a company's blanket policy that bars the re-employment of a former employee who was involved in the use of illegal

[264] 42 U.S.C. Section 12112(b)(5)(A).
[265] 42 U.S.C. Section 12111(9)(B).
[266] 122 S.Ct. 1516, 1520-1522 (2002).
[267] 432 U.S. 63, 79-80 (1977).
[268] 122 S.Ct. 1516, 1525 (2002).
[269] 292 F.3d 1038 (9th Cir. 2002).

drugs despite the employee's successful rehabilitation violates the Americans with Disabilities Act (ADA).

In July 1991, the employee was given a drug test at his place of employment and tested positive for cocaine. He had worked for the company for approximately twenty-five years as a janitor and as a calibration service technician. The employee also struggled with an alcohol problem. Rather than being terminated, the employee was given the option to resign in lieu of termination, which he chose to do. On the employee's separation summary filled out at the time of his resignation was the handwritten note that Hernandez "quit in lieu of discharge" and that the reason for his leaving was "discharge for personal conduct."[270]

On January 24, 1994, the employee applied to be re-hired by Hughes as a calibration service technician or a product test specialist. Hughes rejected the application. The employee filed a complaint with the Equal Employment Opportunity Commission (EEOC) alleging that his application was rejected because of his disability, specifically, because of his record of drug addiction. The EEOC issued a right to sue letter. The employee then filed an action under the ADA and the District Court granted the company's motion for summary judgment. The Court of Appeals reversed.[271]

When the employee applied to be rehired, he attached to his application a copy of his resume and two reference letters. The first letter was from a pastor of his church and the second letter was from a counselor who stated that he works with recovering alcoholics and that the employee attended Alcoholics Anonymous regularly, maintains his sobriety and has a strong commitment to his recovery.[272]

The employee's application was forwarded to the company's labor relations department where it was reviewed by an employee in the personnel department. The employee in the personnel department testified in deposition that she pulled his personnel file and reviewed the employee's separation sheet. The personnel department employee stated that once she saw that the employee quit in lieu of discharge, she concluded that he was ineligible for rehire. The company had an unwritten policy of not rehiring former employees whose employment ended due to termination or resignation in lieu of termination. The personnel department employee testified that at the time she made the decision not to hire Hernandez, she did not know the grounds for, or the conduct underlying, his resignation.[273]

Hernandez argues that in rejecting his application for rehire, the company discriminated against him on the basis of a disability in violation of the ADA. Under the ADA a "disability" is defined as:

1. A physical or mental impairment that substantially limits one or more of the major life activities of such individual;

2. A record of such an impairment; or

[270] Id. at 1040.
[271] Ibid.
[272] Ibid.
[273] Ibid.

3. Being regarded as having such an impairment. [274]

Hernandez claims that he has a record of such an impairment (e.g., drug addiction) and is regarded as having such an impairment and that was the reason for the company refusing to rehire him. The Court of Appeals also held that Hernandez must also demonstrate that he was "qualified" for the job for which he sought rehire and must demonstrate that he has the requisite skill, experience, education and other job related requirements of the employment position. The Court of Appeals held that Hernandez had presented a prima facie case of discrimination and presented sufficient evidence to preclude a grant of summary judgment against him. The Court of Appeals reversed the lower court's granting of the summary judgment and remanded the case back to the lower court for further proceedings.[275]

The Court of Appeals decision in Hernandez would apply to public agencies as well. Districts should consult with legal counsel if ex-employees who resigned or were terminated due to drug addiction or alcohol addiction, seek re-employment and claim to be rehabilitated.

P. Current Use of Alcohol

In Brown v. Lucky Stores, Inc., [276] held that an employee arrested for drunk driving and who immediately enters an alcohol rehabilitation program may be terminated from her employment. The court held that such a termination would not be a violation of the Americans with Disabilities Act (ADA).

The Court of Appeals held that a provision of the ADA (the so-called "Safe Harbor" Provision in 42 U.S.C. Section 12114(b)(2)), which extends the protections of the ADA to an individual who is participating in a supervised rehabilitation program and who is no longer engaging in the illegal use of drugs only applies to employees who have refrained from using drugs for a significant period of time.[277]

The plaintiff was employed as a checker at Lucky Stores when, early on the morning of November 10, 1996, she was arrested for drunk driving, possession of methamphetamine, and being under the influence of an illegal controlled substance. Unable to post bail, the plaintiff remained in jail from November 10 to November 15, 1996. On November 15, the plaintiff appeared in court and was convicted of driving under the influence of intoxicants and possession of methamphetamine. The court conditioned the suspension of the plaintiff's sentence on her participation in a 24 hour, 90 day drug and rehabilitation program called Sunrise House. Brown attended the program from November 15, 1996, to February 12, 1997.[278]

On the day of her arrest, the plaintiff contacted her sister-in-law and asked her sister-in-law to inform the manager at Lucky Stores that she was in jail and could not make it to work that day. The plaintiff did not report to work because of her incarceration and drug treatment and was terminated for abandoning her job. Lucky Stores relied on a provision of the collective

[274] Id. at 1041.
[275] Id. at 1041-1042.
[276] 246 F.3d 1182 (9th Cir. 2001).
[277] Id. at 1185-1186.
[278] Id. at 1186.

bargaining agreement, which authorized the discharge of an employee for improper conduct, and a company policy providing that an employee that misses three consecutive shifts for an unauthorized reason will be terminated from employment.[279]

The plaintiff sued, alleging she was protected by the "Safe Harbor" language of the ADA, which states that the provision that the ADA does not protect employees who engage in illegal use of drugs or alcohol, does not apply to an individual who has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in drug or alcohol use. The plaintiff contended that her entrance into the rehabilitation program gave her protected status under the ADA, and that she was terminated for her alcoholism.[280]

The Court of Appeals held that the plaintiff continued to use illegal drugs and alcohol on November 10, as demonstrated by her arrest and incarceration, and that she had not refrained from the use of illegal drugs or alcohol for a sufficient length of time to be protected by the ADA. Therefore, the court upheld Lucky Stores' termination of the plaintiff.[281]

This case should assist both public and private employers in dealing with employees who are arrested for drunk driving or illegal use of drugs and who attempt to avoid termination by entering a rehabilitation program. Employees who have only recently stopped using drugs or alcohol may not be protected by the ADA, however, the Education Code and collective bargaining agreements provide additional protections to district employees. Therefore, districts should consult with legal counsel when similar situations arise.

Since the definition of reasonable accommodation is virtually identical under both Section 504 and the ADA, the courts have applied the same standards and principles set forth in the cases discussed above to educational programs under the ADA. In Barden v. City of Sacramento,[282] the Court of Appeals held that public sidewalks are a service program or activity of a public agency within the meaning of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act. The court held under 42 U.S.C. section 12132 and 29 U.S.C. section 794 that the city sidewalks were subject to the program accessibility regulations promulgated in furtherance of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act. Community college districts, school districts and regional occupational programs would be subject to the same requirements with respect to their facilities.

The plaintiffs were various individuals with mobility and/or vision disabilities. The plaintiffs filed a class action suit against the City of Sacramento alleging that the City violated the ADA and Rehabilitation Act for failing to install curb ramps in newly constructed or altered sidewalks and by failing to maintain existing sidewalks so as to ensure accessibility by persons with disabilities.[283] The Court of Appeals concluded:

[279] Ibid.
[280] Ibid.
[281] Id. at 1187-1189.
[282] 292 F.3d 1073 (9th Cir. 2002).
[283] Id. at 1074.

> "Title II's [Americans with Disabilities Act] prohibition of discrimination and the provision of public services applies to the maintenance of public sidewalks, which is normal function of a municipal entity. The legislative history of Title II indicates that all activities of local governments are subject to this prohibition of discrimination. This conclusion is also supported by the language of Section 35.150, which requires the provision of curb ramps in order for sidewalks to be accessible to individuals with disabilities. . . ."[284]

Districts should ensure compliance with the Americans with Disabilities Act and Section 504 of the Rehabilitation Act with respect to accessibility to public facilities when constructing, refurbishing or repairing their facilities. Architects employed by districts should be familiar with the accessibility requirements of the ADA and Section 504 of the Rehabilitation Act.

Q. Past Drug Use

In Lopez v. Pacific Maritime Association,[285] the Ninth Circuit Court of Appeals rejected the appeal of a job applicant who sued the Pacific Maritime Association alleging violations of the Americans with Disabilities Act and California Fair Employment and Housing Act.

The Court of Appeals held that the employer's one-strike rule did not facially discriminate against recovering or recovered drug addicts and did not have a disparate impact on recovered drug addicts.

The defendant, Pacific Maritime Association, represented the shipping lines that run the ports along the west coast of the United States. The defendant enforced policies that govern the hiring of longshore workers who work along the west coast. One of those policies is a "one-strike rule" which eliminates from consideration any applicant who tests positive for drug or alcohol use during the preemployment screening process. Defendant notifies its applicants at least seven days in advance of administering the drug test. Failing the drug test, even once, disqualifies an applicant permanently from future employment.[286]

Plaintiff first applied in 1997 at the port in Long Beach, California. At that time, plaintiff suffered from an addiction to drugs and alcohol. When defendant administered its standard drug test, plaintiff tested positive for marijuana. Defendant, therefore, disqualified plaintiff from further consideration under the one-strike rule.[287]

Plaintiff became clean and sober and in 2004 reapplied to be a longshoreman. Because of the one-strike rule, defendant rejected plaintiff's application. Plaintiff then filed a lawsuit under the Americans with Disabilities Act (ADA) and California Fair Employment and Housing Act (FEHA). The district court granted summary judgment to defendant and plaintiff appealed.[288]

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[284] Id. at 1077-1078.
[285] 636 F.3d 1197 (9th Cir. 2011).
[286] Id. at 1198.
[287] Ibid.
[288] Ibid.

The Court of Appeals affirmed the district court's decision, citing the Supreme Court's opinion in Raytheon Co. v. Hernandez.[289] The Court of Appeals held that the Raytheon decision supported its view that when an employer's policy, such as the one-strike rule, constituted a neutral, legitimate, and nondiscriminatory reason for refusing to rehire or hire, the policy did not violate the ADA. The Court of Appeals held that the ADA prohibits employment decisions made because of a person's qualifying disability and not decisions made because of factors merely related to a person's disability.[290]

The Court of Appeals noted that the defendant decided to disqualify applicants who tested positive permanent because it thought that applicants who could not abstain from using an illegal drug, even after receiving advance notice of an upcoming drug test, showed less responsibility and less interest in the job than applicants who passed the drug test. Thus, the defendant's reasons for rejecting applicants who test positive did not include a calculation that an applicant might test positive because of a drug addiction, rather than because of recreational use.[291]

The Court of Appeals held that it was lawful for the defendant to eliminate applicants who were using drugs when they applied to be longshore workers. It was likewise lawful for defendant to disqualify those applicants permanently. The Court of Appeals concluded:

> "We recognize that the one-strike rule imposes a harsh penalty on applicants who test positive for drug use. As defendant candidly concedes, many people question the rule's reasonableness in light of the fact that many people who use drugs later rehabilitate themselves, as plaintiff exemplifies. But unreasonable rules do not necessarily violate the ADA or the FEHA. Because plaintiff failed to establish that defendant intentionally discriminated against him on the basis of his protected status or that the one-strike rule disparately affects recovered drug addicts, we affirm the summary judgment in favor of defendant."[292]

R. Teaching Without Required Certificate

In Johnson v. Board of Trustees of the Boundary County School District,[293] the Ninth Circuit Court of Appeals held that the school board was not required by the Americans with Disabilities Act (ADA) to accommodate a teacher's disability by granting her request for provisional authorization to teach without a certificate.

Patricia Johnson was a special education teacher with the Boundary County School District in Idaho for ten years. She suffered from depression and bipolar disorder.

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[289] 540 U.S. 44, 124 S.Ct. 513 (2003).
[290] 636 F.3d 1197, 1200 (9th Cir. 2011).
[291] Id. at 1199-1200.
[292] Id. at 1202.
[293] 666 F.3d 561, 276 Ed.Law Rep. 57 (9th Cir.2011).

In May 2007, Johnson entered into a standard teaching contract with the school district requiring her to have and maintain the legal qualifications required to teach special education during the 2007-2008 school year. In Idaho, every person employed to serve in an elementary or secondary school in the capacity of a teacher is required to have and hold a certificate issued by the State Board of Education. The Idaho State Board of Education issued Johnson a teaching certificate valid from September 1, 2002 to September 1, 2007.

To renew her certificate, Johnson was required to complete at least six semester hours of professional development training, at least three of which had to be for college credit during the five year period that her certificate was valid. During this period, Johnson completed a number of courses toward renewal of her certificate. However, by the summer of 2007, Johnson was still short of the required three semester hours of college credit.

During the summer of 2007, Johnson experienced a major depressive episode that rendered her unable to take any college courses. Johnson informed the District Superintendent. The District Superintendent informed Johnson that she would need to petition the District's Board of Trustees to apply for a provisional authorization from the Idaho State Board of Education to teach without a certificate during the upcoming school year.

The Board of Trustees voted to deny Johnson's request for provisional authorization because there were two certificated special education teachers available to teach in the district. One of them was hired to fill in for Johnson.

Johnson alleged that under the ADA, the Board of Trustees was required to accommodate her request for provisional authorization.[294] The courts have held that to prevail on a disability discrimination claim the Plaintiff must first show that she is a qualified individual with a disability.[295] In addition, the Plaintiff must show that he or she was qualified at the time of the alleged discrimination.[296]

The ADA defines a qualified individual as an individual who, with or without reasonable accommodation can perform the essential functions of the employment position that the individual holds or desires.[297] The Equal Employment Opportunity Commission (EEOC) has promulgated regulations that establish a two part test. First, the qualified individual with a disability is one who satisfies the requisite skills, experience, education and other job-related requirements of the employment position that such individual holds or desires. Second, the qualified individual is one who, with or without reasonable accommodation, can perform the essential functions of such position.[298] The Ninth Circuit has adopted the EEOC's two step test as the test for whether an individual is qualified within the meaning of the ADA.[299]

The school district contended that Johnson's lack of legal authorization to teach in Idaho rendered her unqualified pursuant to the first step of the two step qualification inquiry. Johnson

[294] 42 U.S.C. Section 12112(a).
[295] Fredenburg v. Contra Costa County Department of Health Services, 172 F.3d 1176, 1178 (9th Cir. 1999).
[296] Weyer v. 20th Century Fox Film Corporation, 198 F.3d 1104, 112 (9th Cir. 2000).
[297] 42 U.S.C. Section 12111(8).
[298] 29 C.F.R. Section 1630.2(m).
[299] See, Bates v. United Parcel Service, Inc., 511 F.3d 974, 990 (9th Cir. 2007).

contends that because the school board could have granted her request for provisional authorization, the board should have granted her request for reasonable accommodation. However, the Court of Appeals held that the first step of the qualification inquiry, unlike the second step, contains no reference to reasonable accommodation. Therefore, the Court of Appeals held that the school district was under no obligation to provide reasonable accommodation (i.e., provisional authorization) to Johnson.

It is unclear whether California courts would rule in the same manner under the California Fair Employment and Housing Act (FEHA). FEHA requires employers to make reasonable accommodations for the known physical or mental disabilities of applicants and employees. In addition, the state courts have historically construed FEHA more broadly than the ADA. Therefore, it cannot be determined with certainty how California courts will rule under state law.

S. Retaliation Claims

In Alvarado v. Cajun Operating Company,[300] the Ninth Circuit Court of Appeals held that punitive and compensatory damages were not available for Americans with Disabilities (ADA) retaliation claims.

The underlying facts were that Alvarado was hired by the store manager of a Church's Chicken in Tucson, Arizona, to perform part-time maintenance work. Alvarado eventually became a cook at Church's. The cook position required the performance of various duties, including cleaning the walk-in refrigerator.[301]

For approximately three and a half years, Alvarado performed satisfactorily according to job evaluations by his supervisors. When Alvarado called Church's hotline to complain that his supervisor had made inappropriate comments about his age. Alvarado began receiving negative evaluations.[302]

Alvarado called the hotline a second time, accusing his supervisor of retaliation against him for making the first hotline call. Alvarado also complained to his supervisor about the pain in his hand when he worked in the walk-in refrigerator. Alvarado was then terminated and filed a lawsuit alleging employment discrimination in violation of the ADA, age discrimination, race and national origin discrimination and employment discrimination. The district court barred Alvarado from seeking punitive and compensatory damages for his ADA retaliation claim. The Court of Appeals affirmed.[303]

The Court of Appeals cited a Seventh Circuit decision and held that punitive and compensatory damages are not available for ADA retaliation claims.[304] The Court of Appeals held that the plain and unambiguous language of 42 U.S.C. Section 1981(a) limits the availability of compensatory and punitive damages to those specific ADA claims listed. ADA

[300] 588 F.3d 1261 (9th Cir. 2009).
[301] Id. at 1263.
[302] Ibid.
[303] Id. at 1263.
[304] Id. at 1265, citing Kramer v. Banc of America Securities, 355 F.3d 961 (7th Cir. 2004).

retaliation is not on the list. The Court of Appeals also held that ADA retaliation claims are redressable only by equitable relief and, therefore, no jury trial is available.[305]

AGE DISCRIMINATION

Discrimination based on age is prohibited by the federal Age Discrimination and Employment Act. The Act protects public as well as private employees between the ages of 40 to 70 from age based employment discrimination.[306] The Act allows employers to observe the terms of a bonafide seniority or employee benefit system but prohibits involuntary retirement before age 70 or health plans that would limit group health coverage to employees age 65 through 69.[307] California law also prohibits discrimination based upon age.[308]

In Marks v. Loral Corporation,[309] the Court of Appeal held that it was not a violation of state age discrimination statutes to prefer workers with lower salaries to workers with higher salaries, even if this preference negatively impacted older workers much more than younger workers. In EEOC v. Newport-Mesa Unified School District,[310] the Equal Employment Opportunities Commission (EEOC) brought suit against the Newport-Mesa Unified School District and the teachers' union alleging age discrimination for negotiating a salary structure that gives higher pay to teachers with greater experience. The EEOC contended that the negotiated salary structure discouraged the hiring of teachers with greater experience and, thus, had a disparate impact upon older workers in violation of federal age discrimination laws. The court ruled in favor of the school district and held that the salary structure does not violate federal age discrimination statutes.[311] The court held that employers may take cost into consideration and noted, ". . . the essence of employment decisions is whether an employee's salary is justified by that employee's productivity."[312] However, when salary is a pretext to discriminate on the basis of age a violation will be found.[313]

The California Legislature overturned the decision in Loral and added Government Code section 12941.1.[314] Section 12941.1 declares that the use of salary as the basis for differentiating between employees when terminating employees may be found to constitute age discrimination if use of the salary criterion adversely impacts older workers as a group. This legislation also may overturn the EEOC v. Newport-Mesa Unified School District case. Therefore, it is uncertain how courts will rule on this issue in the future.

DISCRIMINATION BASED UPON IMMIGRATION STATUS

All aliens whether lawfully or unlawfully in the United States are persons within the coverage of the Fourteenth Amendment and children of persons who have illegally entered the

[305] Id. at 1270.
[306] 29 U.S.C. Section 623(a).
[307] 29 C.F.R. Sections 860.105-860.120, 1625.7-1625.9.
[308] Government Code section 12941.
[309] 57 Cal.App.4th 30 (1997).
[310] 893 F.Supp. 927 (C.D.Cal. 1995).
[311] Ibid.
[312] Id. at 932.
[313] Id. at 932-933.
[314] Stats.1999, ch. 222 (Senate Bill No. 26).

country are entitled to public education.[315] However, parents who have sent their children across the border to be educated in the United States are subject to normal state law requirements affecting residence.[316]

In California, Proposition 187 appears to abrogate this right for illegal alien children to an education. The initiative added Education Code Section 48215:

> "(a) No public elementary or secondary school shall admit, or permit the attendance of, any child who is not a citizen of the United States, an alien lawfully admitted as a permanent resident, or a person who is otherwise authorized under federal law to be present in the United States."[317]

Commencing January 1, 1995, each school district is required to verify the legal status of each child enrolling in the school district for the first time in order to ensure that aliens who are not lawfully admitted to the United States are not enrolled.[318]

By January 1, 1996, each school district is required to verify the legal status of each child already enrolled and in attendance in the school district in order to ensure the enrollment or attendance of citizens and other persons who are otherwise authorized under federal law to be present in the United States.[319]

By January 1, 1996, each school district shall also have verified the legal status of each parent or guardian of each child enrolled in the school district to determine whether the parent or guardian is lawfully admitted as an alien or a citizen of the United States.[320]

Each school district shall provide information to the State Superintendent of Public Instruction, the Attorney General of California and the United States Immigration and Naturalization Service regarding pupils or their parents attending schools in the school district who are determined or reasonably suspected to be in violation of federal immigration laws within forty-five days after becoming aware of an apparent violation. The notice shall also be provided to the parent or legal guardian of the student and shall state that an existing student may not continue to attend school after ninety calendar days from the date of the notice, unless legal status is established.[321]

For each child who cannot establish legal status in the United States, each school district shall continue to provide education for a period of ninety days from the date of the notice. During the ninety day period, the school district shall assist the student in accomplishing an orderly transition from the school district to a school in the child's country of origin.[322] The

[315] Plyer v. Doe, 457 U.S. 202, 102 S.Ct. 2382 (1982).
[316] Morales v. Bynum, 103 S.Ct. 1838 (1983).
[317] Education Code section 48215(a).
[318] Education Code section 48215(b).
[319] Education Code section 48215(c).
[320] Education Code section 48215(d).
[321] Education Code section 48215(e).
[322] Education Code section 48215(f).

federal and state courts have enjoined the enforcement of Education Code section 48215 with respect to public schools as of September, 1999.

DISCRIMINATION BASED UPON RELIGION

A. The 1964 Civil Rights Act

Title VII of the 1964 Civil Rights Act also prohibits religious discrimination in employment and requires employers to make reasonable accommodations for an employee's religious observance where such accommodations would not impose an undue hardship upon the employer.[323] Title VII does not apply to independent contractors whose contracts are not renewed.[324] Requests for leaves of absences or shift changes to attend religious observances would qualify as religious accommodation short of undue employer hardship.[325]

The degree to which the employer has to accommodate an employee for religious purposes by such methods as shift changes, job reassignments, work schedule swaps with other employees, creating new shifts or new jobs, appointing temporary substitutes for religiously motivated absences or outright excusal from particular duties or particular workdays depends on the nature of the employer's business and the particular job circumstances.[326]

B. EEOC Manual

On July 22, 2008, the United States Equal Employment Opportunity Commission (EEOC) issued a new Compliance Manual Section regarding workplace discrimination on the basis of religion. The section on religion includes a comprehensive review of the relevant provisions of Title VII of the Civil Rights Act of 1964 and the EEOC's policies regarding religious discrimination, harassment and accommodation. This information can be found on the EEOC's website at www.eeoc.gov.

While the EEOC's manual does not have the force of law, the courts, in many cases, will follow EEOC's policies and recommendations. Therefore, the EEOC's policies should be viewed as guidelines for districts to follow.

The new section on religious discrimination in the manual is approximately 71 pages long. The following is a summary of the EEOC's Questions and Answers: Religious Discrimination in the Workplace.

1. What is "religion" under Title VII of the Civil Rights Act of 1964?

Federal law broadly protects all aspects of religious belief, observance and practice and defines religion very broadly. Title VII of the Civil Rights Act of 1964 includes traditional and organized religions and religious beliefs that are new, uncommon, or not part of any formal church or sect. An employee's belief or practice

[323] Trans World Airlines v. Hardison, 432 U.S. 63, 97 S.Ct 2264 (1977).
[324] Lutcher v. Musicians Union Local 47, 633 F.2d 880 (9th Cir. 1980).
[325] Ansonia Board of Education v. Philbrook, 479 U.S. 60, 107 S.Ct. 367 (1986).
[326] Trans World Airlines v. Hardison, 432 U.S. 63, 97 S.Ct. 2264 (1977).

can be "religious" under federal law, even if the employee is not affiliated with a religious group that espouses those beliefs or practices. Title VII also protects those who are discriminated against or need accommodations because they profess no religious beliefs.

Religious beliefs include theistic beliefs, as well as non-theistic moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views. Religion usually concerns ideas about life, purpose and death. Social, political, or economic philosophies, as well as personal preferences, are not religious beliefs protected by Title VII.

Religious observances or practices include such things as attending worship services, praying, wearing religious garb or symbols, displaying religious objects, adhering to certain dietary rules, proselytizing or other forms of religious expression, or refraining from certain activities. Whether a practice is religious depends on the employee's motivation.

Discrimination based on religion within the meaning of Title VII could include not hiring an otherwise qualified applicant because they are a member of a particular religious group or because a supervisor wishes to give a preference based on religion to a person who is a member of their religious group. Requests for accommodation of religious beliefs or practices could include such things as schedule changes to attend religious services, exceptions to a company's dress and grooming codes to allow the wearing of religious clothing, unpaid leave to attend a religious ceremony, excusal from a meeting where a religious invocation is offered, or accommodation with respect to not working on a particular day of the week.

2. Which employers are covered under Title VII of the Civil Rights Act of 1964?

Employers with at least 15 employees are covered by Title VII. Employers are prohibited from discriminating in employment based on race, color, religion, sex, and national origin. Title VII also prohibits retaliation against persons who complain of discrimination or participate in an EEOC investigation. Title VII prohibits:

- Treating applicants or employees differently based on their religious beliefs or practices or lack thereof in any aspect of employment, including recruitment, hiring, assignments, discipline, promotion and benefits.

- Subjecting employees to harassment because of their religious beliefs or practices or lack thereof or because of the religious beliefs or practices of the people with whom they associate.

- Denying a requested reasonable accommodation of an applicant's or employee's sincerely held religious beliefs or

practices if an accommodation will not impose more than a de minimis cost or burden on business operations.

- Retaliating against an employee or applicant who has engaged in protected activity, including participation or opposition to religious discrimination (e.g., filing a discrimination complaint with EEOC or a state agency).

3. What is the scope of the Title VII prohibition on disparate treatment based on religion?

Title VII prohibits disparate or different treatment based on religion. Employers may not refuse to recruit, hire, or promote individuals of a certain religion, impose stricter promotion requirements for persons of a certain religion, or impose more or different work requirements on an employee because of that employee's religious beliefs or practices. Employers may not refuse to hire an applicant due to their religious beliefs, and may not select one applicant over another based on a preference for employees of a particular religion. Employers may not exclude an applicant from hire due to the need for a reasonable accommodation unless it would cause an undue hardship.

4. What constitutes religious harassment under Title VII?

Religious harassment in violation of Title VII occurs when employees are required or coerced to abandon, alter, or adopt a religious practice as a condition of employment or subjected to unwelcome statements or conduct that is based on religion and is so severe or pervasive that the individual being harassed reasonably finds the work environment to be hostile or abusive, and there is a basis for holding the employer liable.

5. When is an employer liable for religious harassment?

An employer is liable for a supervisor's harassment if it results in a tangible employment action. An employer may be able to avoid liability or limit damages by showing that the employer exercised reasonable care to prevent and correct promptly any harassing behavior, and the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer. An employer is liable for harassment by co-workers where it knew or should have known about the harassment and failed to take prompt and appropriate corrective action. An employer is liable for harassment by non-employees where it knew or should have known about the harassment, could control the non-employee harasser's conduct or otherwise protect the employee, and failed to take prompt and appropriate corrective action.

6. When does Title VII require an employer to accommodate an applicant or employee's religious belief, practice, or observance?

Title VII requires an employer, once on notice that a religious accommodation is needed, to reasonably accommodate an employee who's sincerely held religious belief,

practice or observance conflicts with a work requirement, unless doing so would pose an undue hardship. To show that an undue hardship exists, the cost must be more than de minimis.

7. How does an employer learn that accommodation may be needed?

An applicant or employee who seeks religious accommodation must make the employer aware both of the need for accommodation and that the accommodation is being requested due to a conflict between religion and work.

Communication between the employer and employee and flexibility are the key to finding a reasonable accommodation. If the accommodation solution is not immediately apparent, the employer should discuss the request with the employee to determine what accommodations might be effective. If the employer requests additional information reasonably needed to evaluate the request, the employee should provide it. The employer is not required to provide the employee's preferred accommodation. The employer may provide an alternative accommodation that meets the employee's religious needs.

8. Does an employer have to grant every request for accommodation of a religious belief or practice?

No. Title VII requires employers to accommodate only those religious beliefs that are religious and sincerely held and that can be accommodated without an undue hardship. If the employer has a bona fide reason to doubt the basis for the accommodation request and whether the belief is sincerely held, the employer may make a limited inquiry into the facts and circumstances of the employee's claim that the religious belief or practice at issue is religious and sincerely held, and gives rise to the need for the accommodation.

9. When does an accommodation pose an undue hardship?

An accommodation would pose an undue hardship if it would cause more than de minimis cost on the operation of the employer's business. Factors relevant to undue hardship may include the type of workplace, the nature of the employee's duties, the identifiable cost of the accommodation in relation to the size and operating costs of the employer, and the number of employees who will in fact need a particular accommodation.

Costs that will be considered include not only direct monetary costs but also the burden on the conduct of the employer's business. The courts have found undue hardship where the accommodation diminishes efficiency in other jobs, infringes on other employees' job rights or benefits, impairs workplace safety, or causes co-workers to carry the accommodated employee's share of potentially hazardous or burdensome work. Whether the proposed accommodation conflicts with another law will also be considered.

To prove undue hardship, the employer will need to demonstrate how much cost or disruption a proposed accommodation would involve. An employer cannot rely on potential or hypothetical hardship but must rely on objective information. If an employee's proposed accommodation would pose an undue hardship, the employer should explore alternative accommodations.

10. Does an employer have to provide an accommodation that would violate a seniority system or collective bargaining agreement?

No. A proposed religious accommodation would pose an undue hardship if it would deprive another employee of a job preference or other benefit guaranteed by a bona fide seniority system or collective bargaining agreement (CBA). The employer would have to show that the accommodation would violate the employer's seniority system or collective bargaining agreement. An employer may allow co-workers to volunteer to substitute or swap shifts as an accommodation to address a scheduling need without violating a seniority system or collective bargaining agreement.

11. What if co-workers complain about an employee being granted an accommodation?

In some cases religious accommodations that infringe on co-workers' ability to perform their duties or subject co-workers to a hostile work environment will generally constitute undue hardship. However, general disgruntlement, resentment, or jealousy of co-workers will not rise to the level of undue hardship. Undue hardship requires more than evidence that some co-workers complained. To show undue hardship based on co-worker interests, there must be evidence that the accommodation would actually infringe on the rights on co-workers or cause disruption of work.

12. Can a requested accommodation be denied due to security considerations?

If a request for religious accommodation actually conflicts with a legally mandated security requirement, an employer may refuse to provide the accommodation because to do so would create an undue hardship. If the security requirement is not required by law or regulation but has been unilaterally imposed by the employer, the employer will need to decide whether it would be an undue hardship to modify or eliminate the requirement to accommodate an employee who has a religious conflict.

13. What are common methods of religious accommodation in the workplace?

Common examples of reasonable accommodation for religious purposes in the work place include:

- **Scheduling Changes, Voluntary Substitutes, and Shift Swaps**

  An employer may be able to accommodate an employee by allowing flexible arrival and departure times, floating or optional holidays, flexible work breaks, use of lunch time in exchange for early departure, staggered work hours and other means to enable an employee to make up time lost due to the observance of religious practices. Eliminating only part of the conflict is not sufficient and unless it entirely eliminated, the conflict could pose an undue hardship by disrupting business operations or impinging on other employee's benefits. The employer is obligated to make a good faith effort to allow voluntary substitutions and shift swaps and not to discourage employees from substituting for one another or trading shifts to accommodate a religious conflict. An employer does not have to permit a substitute or swap if it would pose more than de minimis cost or burden to business operations. If a swap or substitution would result in the employer having to pay premium wages (such as overtime pay), the frequency of the arrangement would be relevant in determining if it poses an undue hardship.

- **Change an employee's job tasks or providing a lateral transfer**

  When an employee's religious belief or practice conflicts with a particular task, appropriate accommodations may include relieving the employee of the task, or transferring the employee to a different position or location that eliminates the conflict. Whether such accommodations pose an undue hardship would depend on factors such as the nature or importance of the duty at issue, the availability of others to perform the function, the availability of other positions, and the applicability of a collective bargaining agreement or seniority system. If the employee cannot be accommodated in their current position due to undue hardship on the employer, the employer should consider whether a lateral transfer is a possible accommodation.

- **Making an exception to dress and grooming rules**

  When an employer has a dress or grooming code that conflicts with an employee's religious beliefs or practices, the employee may ask for an exception to the policy as a reasonable accommodation. Religious grooming practices may relate, for

example, to shaving or hair length. Religious dress may include clothes, head or face coverings, jewelry or other items. Absent undue hardship, religious discrimination may be found where an employer fails to accommodate the employee's religious dress or grooming practices. Some courts have concluded that it would pose an undue hardship if an employer was required to accommodate a religious dress or grooming practice that conflicts with the public image the employer wishes to convey to customers. EEOC recommends a case by case determination.

- **Use of the work facility for a religious observance**

  If an employee needs to use a workplace facility as a reasonable accommodation such as the use of a quiet area for prayer during break time, the employer should accommodate the request under Title VII unless it would pose an undue hardship. If the employer allows employees to use the facilities at issue for non-religious activities not related to work, an employer should allow the facilities to be used in the same manner for religious activities. The employer is not required to give precedence or preference to the use of the facility for religious reasons over use for a business purpose.

- **Accommodation relating to payment of union dues or agency fees**

  Employees who have religious objections to joining or financially supporting a union should be accommodated by allowing the equivalent of their union dues or agency fees to be paid to a charity agreeable to the employee, the union and the employer. If the employee's religious objection is not to joining or financially supporting a union, but rather the union's support of certain political or social causes, possible accommodations include, for example, reducing the amount owed, allowing the employee to donate to a charitable organization the full amount the employee owes or that portion that is attributed to any support of the cause to which the employee has a religious objection.

14. Do national origin, race, color, and religious discrimination intersect or overlap in some cases?

Yes, Title VII's prohibition against religious discrimination may overlap with Title VII's prohibitions against discrimination based on national origin, race, and color

where a given religion is strongly associated or perceived to be associated with a certain national origin discrimination.

15. Does Title VII prohibit retaliation?

Yes, Title VII prohibits retaliation by an employer where an individual has engaged in protected activity. Protected activity consists of opposing a practice the employee reasonably believes is made unlawful by one of the employment discrimination statutes or of filing a charge, testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing involving employment discrimination. Requesting religious accommodation is protected activity.

CALIFORNIA LAW – DISCRIMINATION

A. State Statutory Provisions

Under California law, discrimination is also prohibited.[327] The Unruh Civil Rights Act declares that all persons within California are free and equal, no matter what their sex,[328] race, color, religion, ancestry, national origin, physical disability, mental disability, medical condition, genetic information, marital status, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status are entitled to full and equal accommodations, advantages, facilities, privileges or services in all business establishments of whatever kind.[329] Any person who denies, aids, incites or discriminates against another person is liable for actual damages and attorney fees.[330]

The California Fair Employment and Housing Act specifically combats employment discrimination.[331] Under this law, it is an unlawful employment practice to discriminate based on race, religious creed, color, national origin, ancestry, medical condition, marital status, sex or sexual orientation.[332] An employer cannot refuse to hire and cannot discharge a physically disabled person unless the employee, because of his or her physical handicap, is unable to perform his or her duties or cannot perform such duties in a manner which would not endanger his or her health or safety or the health and safety of others.[333]

An employer may refuse to hire or discharge an employee because of the employee's medical condition if the employee is unable to perform his or her duties or cannot perform such duties in a manner which would not endanger the employee's health or safety or the health or safety of others.[334] A possibility that an employee might endanger his health sometime in the future because of the condition of his lower back may not justify an employer's refusal to

[327] See, Civil Code section 51 et seq.
[328] The definition of sexual harassment in Government Code section 12940(j)(4)(C) states that sexually harassing conduct need not be motivated by sexual desire.
[329] Civil Code section 51.
[330] Civil Code section 52.
[331] Government Code section 12900 et seq.
[332] Government Code section 12940.
[333] Ibid.
[334] Government Code section 12940.

employ a disabled employee as a truck driver.[335] The employer has a duty of reasonable accommodation to employees who are disabled or are suffering due to a medical condition.[336]

An employer may not discriminate on the basis of marital status, although the employer may reasonably regulate for reasons of supervision, safety, security, or morale, the employment of spouses in the same department, division or facility. Age discrimination over the age of 40, mandatory retirement, and discrimination based on pregnancy are also prohibited.[337]

An employer may not discriminate by inquiring or seeking information concerning a criminal conviction unless it is job related.[338] The California Fair Employment and Housing Commission (FEHC) has determined that in order for a criminal conviction to be disqualifying, there must be a direct relationship between the offense and the responsibilities of the employment sought.[339] In making its determination, the FEHC relied on the reasoning of the federal Eighth Circuit Court of Appeals in Green v. Missouri Pacific Railroad Company,.[340] In that case, the Court stated that it could not "conceive of any business necessity that would automatically place every individual convicted of any offense, except a minor traffic offense, in the permanent ranks of the unemployed." The Court added that "this is particularly true for blacks who have suffered and still suffer from the burdens of discrimination in our society." Nevertheless, an employer has the right to consider criminal convictions as they relate to the nature of a job.[341] For example, disqualification on the basis of a theft conviction may be justified if the job duties include handling cash.

On September 8, 2015 Governor Brown signed Senate Bill 600[342] effective January 1, 2016.

Senate Bill 600 amends the anti-discrimination provisions of Civil Code section 51 and adds sexual orientation, citizenship, primary language and immigration status to the protected classes under the anti-discrimination laws of the State of California.

Civil Code section 51(g) states that verification of immigration status and any discrimination based upon verified immigration status, where required by federal law, does not constitute a violation of Civil Code section 51. Section 51(h) states that nothing in Section 51 shall be construed to require the provision of services or documents in a language other than English, beyond that which is otherwise required by other provisions of federal, state, or local law. Section 2 of the Bill states that the amendment of Section 51 of the Civil Code by Senate Bill 600 does not constitute change in, but is declaratory of, existing law.

On July 16, 2015 Governor Brown signed Assembly Bill 987[343] effective January 1, 2016.

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[335] Sterling Transit Co. Inc. v. Fair Employment Practice Commission, 121 Cal.App.3d 791 (1981).
[336] Fisher v. Superior Court, 177 Cal.App.3d 779 (1986).
[337] Government Code sections 12940, 12941, 12942, 12943.
[338] 2 C.C.R. Section 7287.4.
[339] See, DFEH v. Housing Authority of City and County of Fresno, (1979) FEHC Dec. No. 80-20, p. 14.
[340] 523 F.2d. 1290 (8th Cir. 1975).
[341] See, Carter v. Gallagher, (8th Cir. 1971), 452 F.2d. 315; Hetherington v. State Personnel Board, (1978) 82 Cal.App.3d. 582.
[342] Stats. 2015, ch. 282.
[343] Stats. 2015, ch. 122.

Assembly Bill 987 amends Government Code section 12940 to make it clear that a request for reasonable accommodation based on religion or disability constitutes protected activity under Government Code section 12940. The purpose of the amendments is to protect persons making requests for reasonable accommodation based on religion or disability from retaliation.

Assembly Bill 987 adds Government Code section 12940(l)(4) which states that it is unlawful for an employer to retaliate or otherwise discriminate against a person for requesting accommodations for religious beliefs under Government Code section 12940 regardless of whether their request was granted. The addition of language to Government Code section 12940(m)(2) contains similar language with respect to reasonable accommodations for known physical or mental disabilities and makes it unlawful to retaliate or otherwise discriminate against a person who requests an accommodation under Government Code section 12940 regardless of whether the request was granted.

In Flowers v. Prasad,[344] the Court of Appeal held that Plaintiff could sue under both the Disabled Persons Act[345] and the Unruh Civil Rights Act[346].

The underlying facts were that Plaintiff alleged they were denied service at the Defendant's restaurant due to the Plaintiff's service dog. The Court of Appeal remanded the matter back to the Superior Court to reverse its granting of the summary adjudication of the Plaintiff's Unruh Act claim. The Court of Appeal ordered the trial court to conduct further proceedings in accordance with its opinion.

In Harris v. City of Santa Monica,[347] the California Supreme Court held that when a jury finds that unlawful discrimination was a substantial factor motivating a termination of employment under the Fair Employment and Housing Act (FEHA), and when the employer proves it would have made the same decision absent such discrimination, a court may not award damages, back pay, or an order of reinstatement. However, the court held that the employer does not escape liability under FEHA since it is the purpose of FEHA to prevent and deter unlawful discrimination in the workplace. The court held that the plaintiff, in these circumstances, could still be awarded, where appropriate, declaratory relief or injunctive relief to stop discriminatory practices. In addition, the court held that the plaintiff may be eligible for reasonable attorney's fees and costs.[348]

Wynona Harris was hired as a bus driver trainee in October, 2004, by the City of Santa Monica. During her 40-day training period, Harris had an accident, which the City deemed "preventable." Although, no passengers were on her bus and no one was injured, the accident cracked the glass on the bus's back door. The City's guidelines for Job Performance Evaluation stated that preventable accidents are an indication of unsafe driving and that those who drive in an unsafe manner will not pass probation.[349]

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[344] 238 Cal.App.4th 930 (2015).
[345] Civil Code sections 54-55.3.
[346] Civil Code section 51, 52.
[347] 56 Cal.App.4th 203, 152 Cal.Rptr.3d 392 (2013).
[348] Id. at 211.
[349] Ibid.

In November, 2004, Harris successfully completed her training period, and the City promoted her to the position of probationary part-time bus driver. As a probationary driver, Harris was an at-will employee. At some point during her first three month probationary evaluation period, Harris had a second preventable accident in which she sideswiped a parked car and tore off its side mirror. According to Harris, she hit the parked car after swerving to avoid a car that had cut her off in traffic.[350]

On February 18, 2005, Harris reported late to work. On March 1, 2005, Harris's supervisor gave her a written performance evaluation which stated that her overall performance rating indicated further development needed. On April 27, 2005, Harris again reported late to work. Transit Services Manager Bob Ayer investigated the circumstances of Harris's failure to report to work and testified that the Assistant Director asked him to examine Harris's complete personnel file. Ayer did so and told the Assistant Director that the file showed that Harris was not meeting the City's standards because she failed to report to work twice, had two preventable accidents, and had been evaluated as needing further development.[351]

On May 12, 2005, Harris had an encounter with her supervisor, George Reynoso, as she prepared to begin her shift. Seeing Harris's uniform shirt hanging loose, Reynoso told her to tuck it in. Harris confided to Reynoso that she was pregnant. Harris testified that Reynoso reacted with displeasure at the news asking her what she was going to do. Reynoso then asked her to get a doctor's note clearing her to continue to work. On May 16, 2005, Harris gave Reynoso a doctor's note permitting her to return to work with some limited restrictions. The morning Harris gave Reynoso the note, Reynoso attended a supervisor's meeting and received a list of probationary drivers who were not meeting standards for continued employment. Harris was on the list. Her last day on the job was May 18, 2005.[352]

In October 2005, Harris sued the City, alleging that the City fired her because she was pregnant, a form of sex discrimination.[353]

The California Supreme Court noted that the Fair Employment and Housing Act (FEHA) makes it an unlawful employment practice to discriminate on the basis of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation.[354]

The California Supreme Court noted that under FEHA, employment discrimination cases that do not involve mixed motives, are analyzed under a three-stage burden-shifting test established by McDonnell-Douglas Corporation v. Green.[355] Under this standard, a plaintiff has the initial burden to make a prima facie case of discrimination by showing that it is more likely than not that the employer has taken an adverse employment action based on a prohibitive criterion. A prima facie case establishes a presumption of discrimination. The employer may rebut the presumption by producing evidence that its action was taken for a legitimate,

[350] Id. at 211-12.
[351] Id. at 212.
[352] Id. at 212-13.
[353] Id. at 213.
[354] Government Code section 12940.
[355] 411 U.S. 792 (1973). See, also, Guz v. Bechtel National Inc., 24 Cal.4th 317 (2000).

nondiscriminatory reason. If the employer discharges this burden, the presumption of discrimination disappears. The plaintiff must then show that the employer's proffered nondiscriminatory reason was actually a pretext for discrimination, and the plaintiff may offer any other evidence of discriminatory motive. The ultimate burden of persuasion on the issue of discrimination remains with the plaintiff.[356]

The California Supreme Court noted that in a mixed motive case, there is no single true reason for the employer's action. The court interpreted the phrase, "because of" in FEHA in a manner similar to federal law. The court stated, "We believe that allowing a same decision showing to immunize the employer from liability . . . would tend to defeat the purpose of the FEHA." The court held that the jury should instead determine whether discrimination was a substantial motivating factor or reason and held that the trial court in Harris, on remand, should determine whether the evidence of discrimination in Harris's case warrants such an instruction. If the plaintiff has shown that discrimination was a substantial factor motivating a termination decision, then the remedy should be declaratory relief, injunctive relief, and a possible award of attorney's fees.[357] The court concluded:

> "Our opinion today reaffirms that reinstatement and back pay are unavailable under the FEHA upon an employer's same-decision showing because a terminated employee should not be put in a better position than she would have occupied had the discrimination not occurred. What the cases above do not hold is that a same decision showing precludes a finding of unlawful motive that provides a predicate for declaratory or injunctive relief."[358]

The California Supreme Court summed up its decision by stating:

> "In sum, we construe Section 12940(a) as follows: When a plaintiff has shown by a preponderance of the evidence that discrimination was a substantial factor motivating his or her termination, the employer is entitled to demonstrate that legitimate, nondiscriminatory reasons would have led it to make the same decision at the time. If the employer proves by a preponderance of the evidence that it would have made the same decision for lawful reasons, then the plaintiff cannot be awarded damages, back pay, or an order of reinstatement. However, where appropriate, the plaintiff may be entitled to declaratory or injunctive relief. The plaintiff also may be eligible for an award of reasonable attorney's fees and costs under Section 12965, subdivision (b). . . .
>
> "In light of today's decision, a jury in a mixed motive case alleging unlawful termination should be instructed that it must find

[356] See, Guz v. Bechtel National Inc., 24 Cal.4th 317, 354-356 (2000).
[357] Id. at 216.
[358] Id. at 237.

> the employer's action was substantially motivated by discrimination before the burden shifts to the employer to make a same decision showing, and that a same decision showing precludes an award of reinstatement, back pay, or damages. The trial court on remand should determine in the event of a retrial whether the evidence of discrimination in Harris's case warrants a mixed motive instruction."[359]

B. State Regulations

Whether such disqualification is appropriate depends largely on the provisions of Title 2, C.C.R. Section 7287.4 which provides in part:

> "(d) Specific Practices.
>
> "(1) Criminal Records. Except at otherwise provided by law (e.g., 12 U.S.C. Section 1829; Labor Code section 432.7), it is unlawful for an employer or other covered entity to inquire or seek information regarding any applicant concerning:
>
> "(A) Any arrest or detention which did not result in conviction;
>
> "(B) Any conviction for which the record has been judicially ordered sealed, expunged, or statutorily eradicated (e.g., juvenile offense records sealed pursuant to Welfare and Institutions Code Section 389 and Penal Code Sections 851.7 or 1203.45); any misdemeanor conviction for which probation has been successfully completed or otherwise discharged and the case has been judicially dismissed pursuant to Penal Code sections 1203.4; or
>
> "(C) Any arrest for which a pretrial diversion program has been successfully completed pursuant to Penal Code sections 1000.5 and 1001.5."

Additionally, Labor Code section 432.8 prohibits inquiries into marijuana convictions that are at least two years old.

Generally, district employment applications do not inquire into arrest records, so as to fall within the prohibitions of Section 7287.4(d)(1)(A) and (C) but simply direct an applicant to list all "criminal convictions." If a district wishes to disqualify an applicant for his/her dishonesty in failing to list a conviction, it is necessary to determine whether it is proper to inquire into the conviction, pursuant to Section 7287.4(d)(1)(B). In other words, it is not appropriate to disqualify an applicant for dishonesty in failing to disclose a conviction, if the district could not legally inquire into the conviction in the first place.

[359] Id. at 241.

In view of the foregoing, an employment application could be revised to include the following language:

> "You are not required to list any conviction for which the record has been judicially ordered sealed, expunged, or statutorily eradicated; any misdemeanor conviction for which probation has been successfully completed or otherwise discharged and the case has been judicially dismissed pursuant to Penal Code section 1203.4; or any marijuana conviction described in California Labor Code section 432.8."

C. Mental Disability

In Higgins-Williams v. Sutter Medical Foundation,[360] the Court of Appeal held that the inability to work under a particular supervisor because of anxiety and stress related to the supervisor's standard oversight of job performance is not a disability recognized in the California Fair Employment and Housing Act (FEHA).[361]

Under FEHA, a qualifying mental disability is defined as any mental or psychological disorder such as emotional or mental illness that limits a major life activity.[362] To establish a prima facie case of mental disability discrimination under FEHA, a plaintiff must show the following:

1. The individual suffers from mental disability;

2. The individual is otherwise qualified to do the job with or without reasonable accommodation; and

3. The individual is subjected to an adverse employment action because of the disability.[363]

The Court of Appeal held that an employee's inability to work under a particular supervisor because of anxiety and stress related to the supervisor's standard oversight of the employee's job performance does not constitute a disability under FEHA.[364]

The Court of Appeal held that the undisputed facts and the plaintiff's deposition testimony showed that the employer had a legitimate interest for terminating plaintiff and that the plaintiff had not raised an issue of fact that this issue was pretextual.

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[360] 237 Cal.App.4th 78 (2015).
[361] Government Code section 12900 et seq.
[362] Government Code section 12926(j)(1).
[363] Faust v. California Portland Cement Company, 150 Cal.App.4th 864, 886 (2007).
[364] Hobson v. Raychem Corp., 73 Cal.App.4th 614, 628 (1999); Weiler v. Household Finance Corp., 101 F.3d 519, 522, 524-525 (7th Cir. 1996).

D. Retaliation Claims

In Patten v. Grant Joint Union High School District,[365] the Court of Appeal held that the standard for "adverse employment action" that applies to an employment retaliation lawsuit under the Fair Employment and Housing Act (FEHA), also applies to a lawsuit under Labor Code section 1102.5(b), which prohibits retaliation for "whistleblowing" regarding reasonably believed legal violations.

The plaintiff, Colleen Patten, was the principal of a junior high school that was designated as an underperforming school. Patten contended that she disclosed four legal violations for which the district retaliated against her.

The first disclosure arose from a year-end financial audit. The district wanted to reassign expenditures already incurred for at least one other educational program to part of the surplus, allowing the district to retain this amount of unspent state grant funds rather than return the amount to the state. To effectuate this reassignment of expenditures, the district requested that Patten sign blank "transfer of funds" forms. Patten refused, explaining that there was no way to ensure that the reassigned expenditures were legitimate based on state guidelines. She met with a state assembly member and a representative of a state senator regarding the matter. Later, at a district board meeting, she provided information related to the funding issue that contradicted what the superintendent had previously told the board.

The second disclosure arose from complaints that a male physical education teacher was peering into the girls' locker room. Patten disclosed this information to her district superiors for personnel action. The third disclosure involved an off-color remark that a male science teacher had made to a female student. Again, Patten disclosed this information to her superiors for personnel action. The fourth disclosure arose from an assault against a student on the school campus. Patten requested additional staff to keep the campus safe.

At the end of the school year, the district notified Patten that she was being transferred to another principal position at a much smaller "magnet" junior high school comprised of high-achieving students. Due to health problems, Patten never began her new assignment. Eventually, she sued the district for whistleblower retaliation under Labor Code section 1102.5(b), based on the four disclosures described above.

The court then addressed whether the district subjected Patten to an "adverse employment action," by transferring her to the magnet school. The court relied on the recent decision in Yanowitz v. L'Oreal U.S.A., Inc.[366] in which the California Supreme Court defined an adverse employment action for FEHA retaliation purposes, as requiring that the adverse action "materially affect the terms and conditions of employment." In view of the similarity between an employee retaliation lawsuit under the FEHA and one under Labor Code section 1102.5(b), the court held that the "materiality" test also applies to Section 1102.5(b) claims. Under the "materiality" test, an "adverse employment action" is defined as requiring that the adverse action materially affect the terms and conditions of employment.

[365] 134 Cal.App. 4th 1378 (2005).
[366] 36 Cal.App.4th 128 (2005).

The district contended that Patten's lateral transfer did not amount to an adverse employment action as a matter of law, because her wages, benefits, and duties remained the same. The court observed that, at first glance, the transfer from an underperforming school to a magnet school did not resemble an "adverse" action. However, the court went on to note that Patten was a relatively young principal with her administrative career ahead of her, and that the magnet school "does not present the kinds of administrative challenges an up-and-coming principal wanting to make her mark would relish." In other words, the lateral transfer could adversely and "materially" affect her opportunity for advancement in her career.

The court listed other actions taken by the district, including inadequate administrative support regarding the issues of the P.E. teacher, the science teacher, and school safety, as well as budgetary, computer and student schedule matters. Although many of these actions and problems did not rise to material adverse actions on their own, the court noted that collectively they might constitute adverse employment actions. In conclusion, the court held that Patten raised a triable issue of material fact regarding adverse employment action.

E. Strict Liability For Acts of Supervisor

In State Department of Health Services v. Superior Court,[367] the California Supreme Court held that an employer is strictly liable under state law for sexual harassment by a supervisor. The California Supreme Court also held that under the avoidable consequences doctrine, if damages could have been avoided by prompt notice of the harassment to the employer, then the award of damages is barred. The employee must show with appropriate proof that damages could not have been avoided with reasonable effort and without undue risk, expense or humiliation to overcome the bar to the award of damages.

The court held that the avoidable consequences doctrine is well established and broadly applied and that nothing in the Fair Employment and Housing Act, Government Code section 12900 et seq., indicates that the Legislature intended to abrogate this fundamental legal principle. The court held that the failure to apply the avoidable consequences doctrine to sexual harassment claims could undermine a basic goal of state law which is to make employers the first line of defense against sexual harassment in the workplace. The court held that a rule making employers liable even for those damages that an employee could have avoided with reasonable effort and without undue risk, expense or humiliation would significantly weaken the incentive for employers to establish effective workplace remedies against sexual harassment.[368]

The court's holding in State Department of Health Services reiterates the importance of sexual harassment policies established by districts and the importance of informing employees of those policies. Districts should periodically inservice management, supervisory and bargaining unit employees of the laws relating to sexual harassment and the district's policies for reporting and preventing sexual harassment in the workplace. If employees fail to utilize the district's policies and procedures to notify the district of sexual harassment by a supervisor in a timely manner, under the holding in State Department of Health Services, the employee may be barred from recovering damages for sexual harassment from the district.

[367] 31 Cal.4th 1026, 6 Cal.Rptr.3d 441 (2003).
[368] Id. at 1034.

The court's holding in State Department of Health Services is similar to the United States Supreme Court's decisions in Burlington Industries, Inc. v. Ellerth,[369] and Faragher v. City of Boca Raton.[370] Under Ellerth and Faragher, the United States Supreme Court interpreted federal law regarding sexual harassment and held that where an employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer, the employer could raise this as an affirmative defense to contest the recovery of damages.

F. Acts of Co-Workers

In Carrisales v. Department of Corrections,[371] the California Supreme Court held that state discrimination laws do not apply to actions between coworkers not involving a supervisor relationship.

The plaintiff in Carrisales was employed by the State Department of Corrections. The employee sued the Department of Corrections, her two supervisors and a coworker for sexual harassment in violation of state law. The issue before the California Supreme Court was whether the non-supervisory coworker was liable for sexual harassment under the State Fair Employment and Housing Act (FEHA). The court's decision was based mainly on Government Code section 12949(h)(1), which stated at the time:

> "Harassment of an employee, an applicant, or a person providing services pursuant to a contract by an employee other than an agent or supervisor shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action."

The California Supreme Court interpreted this statutory language as imposing potential liability on the employer, but not on the non-supervisory coworker.

Following the Carrisales decision, the Legislature amended state law to make employees personally liable for prohibited harassment.[372] Government Code section 12940(j)(3) states in part, "[a]n employee of an entity subject to this subdivision is personally liable for any harassment prohibited by this section that is perpetrated by the employee . . . ." Clearly, this amendment imposes on non-supervisory coworkers, the personal liability that the California Supreme Court in Carrisales said that FEHA, as previously written, had not imposed.

G. Reasonable Accommodation

In Bagatti v. Department of Rehabilitation,[373] the Court held that the duty of an employer to provide reasonable accommodation for an employee with a disability is broader under the

[369] 524 U.S. 742, 765, 118 S.Ct. 2257 (1998).
[370] 524 U.S. 775, 807, 118 S.Ct. 2275 (1998).
[371] 21 Cal.4th 1132 (1999).
[372] Government Code section 12940(j). In McClung v. Employment Development Department, 34 Cal.4th 467, 20 Cal.Rptr.3d 428, the California Supreme Court held that the amendment of Section 12940(j) was not retroactive.
[373] 92 Cal.App.4th 344 (2002).

California Fair Employment and Housing Act (FEHA) than under the federal Americans with Disabilities Act (ADA).

The Plaintiff, Marilyn Bagatti, was a 12-year employee of the California Department of Rehabilitation. As a result of severe polio, she was unable to walk long distances. In 1998, she requested reasonable accommodation in the form of motorized transportation from her parked car to her work station, and motorized transportation within her work site. The employer denied her request, and also refused to provide hand railings and chairs along the hallways of the work site to aid the plaintiff in transporting herself around the site. The plaintiff subsequently suffered work-related injuries that included broken bones in her right leg and bruising and swelling in her left leg. After receiving a right to sue letter from the California Department of Fair Employment and Housing, she sued her employer, alleging, among other causes of action, that the employer had failed to reasonably accommodate her known disability in violation of Government Code section 12940(m). That subdivision makes it an unlawful employment practice for an employer to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee.

The employer relied on Brundage v. Hahn,[374] in which the Court of Appeal applied an interpretive statement of the federal Equal Employment Opportunity Commission (EEOC), construing the ADA to define the scope of reasonable accommodation under the FEHA. The Bagatti court declined to follow Brundage, concluding that the EEOC interpretive statement should not be applied to the FEHA.

The EEOC interpretive statement indicates that under the ADA: (1) the failure to provide reasonable accommodation is defined as an instance of discrimination; and (2) an employer has a duty to make reasonable accommodation only to a "qualified individual with a disability," defined as an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. The court found that, unlike the federal ADA statutes, California Government Code section 12940(m) does not require that reasonable accommodation be made only where the person is a "qualified individual" able to perform the essential functions of the job, nor does Section 12940(m) provide that the employee has a right to assert the duty of reasonable accommodation only where some kind of adverse employment action is taken against the employee.

The court also rejected the employer's argument that the Plaintiff's exclusive remedy was a Labor Code section 132a action under the California Workers Compensation Act. Following the reasoning of the California Supreme Court in City of Moorpark v. Superior Court,[375] the court concluded that an employer's failure to provide reasonable accommodation, as defined in Government Code section 12940(m), falls outside the "compensation bargain."

In Cuiellette v. City of Los Angeles[376] the Court of Appeal held that the City of Los Angeles violated the state Fair Employment and Housing Act (FEHA)[377] when it advised an employee to go home rather than work in a light duty position.

[374] 57 Cal.App.4th 228 (1997).
[375] 18 Cal.4th 1143 (1998).
[376] 194 Cal.App.4th 757 (2011).
[377] Id. at 760; see, Government Code section 12900 et seq.

The Court of Appeal summarized the facts. The Plaintiff was a police officer who was injured and placed on disability leave. After his workers' compensation claim resolved with the finding of 100 percent disability, the City accepted his request to return to work in May 2003. He worked less than five days before the City realized that he was "100 percent disabled" and on that basis, sent him home.[378]

The employee, prior to returning to work, had presented the City with a note from his physician saying that the employee could perform "permanent light duty – administrative work only." The note did not list or specify any particular restrictions on Plaintiff's activities.[379]

When the City returned the employee to work, the employee was assigned to the court or renditions desk in the fugitive warrants unit, which was a purely administrative assignment requiring no field work other than to occasionally drive to a nearby courthouse to deliver papers. On the advice of the workers compensation administrator, the City, after approximately five days at work, told the employee that he could not allow him to work because he was 100 percent disabled.[380]

In May 2003, the City of Los Angeles had a longstanding policy and practice of allowing sworn officers to perform "light duty" assignments that did not entail several essential functions of a peace officer such as making arrests, taking suspects into custody, and driving a police vehicle in emergency situations. At trial, Lieutenant Lutz, testified that in his 12 years as the Officer in Charge of the Medical Liaison unit from 1991 through 2002, his orders were to accommodate disabled officers by providing them with "light duty" assignments. During that 12 year period, Lieutenant Lutz accommodated hundreds of disabled officers by placing them in assignments that did not require any arrests, field work, or dangerous driving. Lieutenant Lutz specifically recalled assigning officers to purely administrative assignments in the drug testing and fugitive warrant units.[381]

Detective Bokatich testified at trial that he helped reassign as many as 25 disabled officers to the fugitive warrant unit, many of whom were receiving workers compensation benefits. Detective Bokatich admitted that although a civilian could be trained to perform the duties on the rendition or court desk, the City routinely placed sworn officers in these positions. The policy was later terminated by LAPD Chief Bratton.[382]

At trial, there was no dispute that in 2003, the Plaintiff's disabilities prevented him from performing the more rigorous functions of a sworn officer. However, there was testimony at trial that the City maintained permanent light duty vacancies in the drug testing and fugitive warrants units for the specific purpose of accommodating disabled officers who wanted to continue to work. In May 2003, when the Plaintiff was placed in the fugitive warrants unit, Plaintiff was a beneficiary of the policy. The Plaintiff testified that he had no problem getting to work, getting around the office, or getting to the courthouse in order to perform these light duties. Based on this evidence, the trial court ruled against the City of Los Angeles and held that the City of Los

[378] Id. at 761.
[379] Ibid.
[380] Id. at 762.
[381] Id. at 761.
[382] Id. at 762.

Angeles failed to provide a reasonable accommodation to the employee when they sent him home. The City appealed.[383]

The Court of Appeal noted that under FEHA it is unlawful for an employer to discriminate against an employee because of the employee's physical disability. Section 12940 excludes from coverage those persons who are not qualified, even with reasonable accommodation, to perform essential job functions. Therefore, in order to establish that an employer has discriminated on the basis of disability in violation of FEHA, the Plaintiff employee bears the burden of proving he or she was able to do the job, with or without reasonable accommodation.[384]

Government Code section 12940(m) provides that it is unlawful for an employer to fail to make reasonable accommodation for the known physical and mental disability of an applicant or an employee. The essential elements of a failure to accommodate claim are:

1. The Plaintiff has a disability covered by 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.[385]

Under 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.[386] 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.[387] Employers have an affirmative obligation to make a reasonable accommodation for a disabled employee but employers are not required to create a new position or promote the employee. Employers are required to reassign a disabled employee if an already funded, vacant position at the same level exists.[388]

Under FEHA, the 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 the employer's operation or if there is no vacant position for which the employee is qualified. For purposes of an alleged failure to reasonably accommodate a disability, a plaintiff must prove that he or she is qualified by establishing that he or she can perform the essential functions of the position to which reassignment is sought, rather than the essential functions of the existing position. An employer is not obligated, however, to make a

[383] Id. at 762-63.
[384] Id. at 766-67; see, also, Government Code section 12940(a); Green v. State of California, 42 Cal.4th 254, 262 (2007).
[385] Ibid; see, also, Jensen v. Wells Fargo Bank, 85 Cal.App.4th 245, 256, 102 Cal.Rptr.2d 55 (2000); Wilson v. County of Orange, 169 Cal.App.4th 1185, 1192 (2009).
[386] Id. at 766-67; see, also, Nadaf-Rahrov v. Neiman Marcus Group, Inc., 166 Cal.App.4th 952, 974 (2008).
[387] Id. at 767; see, also, Spitzer v. The Good Guys, Inc., 80 Cal.App.4th 1376, 1389 (2000).
[388] Ibid; see, also, Hastings v. Department of Corrections, 110 Cal.App.4th 963, 972, 2 Cal.Rptr.3d 329 (2003).

temporary position available indefinitely once the employer's temporary disability becomes permanent.[389]

The Court of Appeal ruled that in the present case, the City of Los Angeles, placed Plaintiff into a light duty assignment, and Plaintiff was able to perform the essential functions of that light duty assignment. Plaintiff's supervisors decided to send him home after learning from the City's workers compensation administrator that the Plaintiff was 100 percent disabled. The City's decision to send him home was an adverse employment action based on discriminatory criteria.[390]

The Court of Appeal noted that the Los Angeles Police Department had a longstanding policy and practice of assigning a significant number of disabled police officers to light duty assignments. The Court of Appeal noted that the LAPD employed about 8,500 sworn police officers, approximately 3,000 of whom worked with medical restrictions. Of the 3,000 police officers with medical restrictions, the LAPD employed about 250 officers in permanent light duty positions that would not allow them to work in the field.[391] The Court of Appeals stated:

> "Because the LAPD maintained permanent, light duty positions that it staffed with police officers who could not perform all of the essential duties of a police officer, the relevant inquiry is whether plaintiff was able to perform the essential duties of the light duty assignment he was given on his return to work and not whether he was able to perform all of the essential duties of a police officer in general."[392]

The City of Los Angeles did not challenge the trial court's finding that plaintiff was able to perform the essential duties of the court desk position on his return to work. The Court of Appeal held that because Plaintiff was qualified to perform the essential duties of the court desk position and was placed in that position pursuant to the LAPD's accommodation policy then in effect, the employee's removal from that position based on the 100 percent total permanent disability rating Plaintiff received in a workers compensation proceeding violated the accommodation provisions of Government Code section 12940(m).[393]

The Court of Appeal inferred that LAPD was not required to maintain a policy of assigning disabled police officers to court desk positions but having such a policy, the LAPD could not refuse to place this employee in one of those positions.[394]

In summary, the Court of Appeal concluded that if districts maintain policies or practices in which permanent light duty positions are maintained for disabled employees, districts cannot refuse to place a disabled employee into one of those permanent light duty positions simply

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[389] Ibid; see, also, Raine v. City of Burbank, 135 Cal.App.4th 1215, 1223 (2006); Spitzer v. The Good Guys, Inc., 80 Cal.App.4th 1376 (2000).
[390] Id. at 767-68.
[391] Id. at 768-69.
[392] Cuiellette v. City of Los Angeles, 194 Cal.App.4th 757, 769 (2011).
[393] Id. at 770-72.
[394] Id. at 772.

because they have been determined to be 100 percent disabled by the workers compensation administrator. It should be noted however, that districts are not required to maintain permanent light duty positions and if districts do not maintain permanent light duty positions they are not required to create one for a disabled employee.[395]

In Nealy v. City of Santa Monica,[396] the Court of Appeal held that the City of Santa Monica did not engage in disability discrimination, did not fail to provide reasonable accommodation, did not fail to engage in an interactive process and did not retaliate against an employee when it determined it could not reasonably accommodate the employee's disability.

The facts in the Nealy case are quite involved. We have set forth the facts in the case in considerable detail because they are typical of many cases that arise in public employment and the Court of Appeal described in great detail the steps the city took to successfully address the employer's assertions.

The steps taken and the procedures followed by the City of Santa Monica in the Nealy case should be a helpful guide to districts facing similar circumstances.

The underlying facts in Nealy illustrate the challenges that public employers face when attempting to reasonably accommodate employees with disabilities. Nealy began his employment with the City of Santa Monica in 1996. Nealy injured his right knee in July 2003 while working. A doctor declared him temporarily totally disabled after his injury. He had knee surgeries in 2003 and 2004. Nealy's temporary disability was extended to May 25, 2005, when his doctor, Dr. Harris, released him to light duty work with restrictions that stated he could not push large trash bins, which weighed 750 pounds empty and could weigh up to 1,200 pounds when full.[397]

The city had an accommodations committee to assist the city in providing reasonable accommodations to employees who needed them. The committee was made up of representatives from human resources, risk management, the city attorney's office, and the department that had an employee needing accommodation. Nealy and his legal representative met with the accommodations committee in July 2005. At the meeting, Nealy asked to be returned to the solid waste department in either a clerical position or as the operator of a type of refuse collection vehicle, the one-person automated side loader. He had operated the automated side loader many times before he injured his knee in 2003.[398]

The committee advised Nealy the city would consider a lateral transfer or voluntary demotion. A committee member identified a vacant groundskeeper position. The city forwarded an essential job functions analysis for the groundskeeper position to Dr. Harris whether Nealy could safely perform the essential functions of the position. Dr. Harris approved the placement, and Nealy began working as a groundskeeper in October 2005.[399]

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[395] Ibid.
[396] 234 Cal.App.4th 359 (2015).
[397] Id. at 365.
[398] Id. at 365.
[399] Id. at 365-66.

Nealy met with the accommodations committee again in February 2006 because he was having trouble performing some of the groundskeeper duties. Specifically, he was having trouble climbing or descending stairs with no railings. His knee would sometimes buckle in these situations. The committee agreed to update the essential functions job analysis for groundskeeper and forward the revised essential functions job analysis for his review. In the meantime, Nealy's supervisor limited Nealy's assignments until the issue was resolved. In March 2006, Dr. Harris reviewed the revised essential functions job analysis and stated Nealy could perform a groundskeeper position without restrictions. A committee member initiated efforts to find Nealy an alternative position as an equipment operator in his former department.[400]

In April 2006, the committee member requested an essential functions job analysis for an equipment operator position in street sweeping. Dr. Harris reviewed this essential functions job analysis and concluded that Nealy could not perform one essential function of the position, that of emptying trash cans by hand, which could weigh anywhere from 25 to 60 pounds. The position required emptying 240 trash cans, twice a day on the 3rd Street Promenade or 400 trash cans citywide.[401]

On or around August 1, 2006, Nealy was seen at a hospital emergency room for lower back pain. Nealy indicated that he had injured himself on the job. Nealy stated he was on a small tractor in a baseball field and when he stepped off the tractor, his knee buckled and he fell to the ground.[402]

Nealy sustained an injury to his lower back and Dr. Harris declared him temporarily totally disabled for a few weeks and then cleared him to return to work on August 14, 2006, with restrictions. He was permitted to do light duty, semi-sedentary office work, if such work was not available Dr. Harris indicated Nealy should continue to be considered temporary totally disabled. The city did not have any semi-sedentary office work available for Nealy, and he remained off work as temporarily totally disabled. Nealy never returned to work after August 1, 2006.[403]

Nealy had a workers' compensation claim pending with the city. The agreed medical examiner in that case was Dr. Silverman. Dr. Silverman issued a report in September 2008 in which he stated that Nealy can ambulate short distances. He should not do prolonged walking or prolonged standing of more than forty-five minutes out of every hour. He should avoid bending, stooping, squatting, and kneeling regarding the right knee. He should avoid heavy lifting regarding the lumbar spine. He could return to the job he wants to perform, that is, sitting in a truck and operating hand controls, although pushing trash bins weighing 750 pounds or greater is not possible. If modified activity driving an automated trash truck is available he could return to those activities immediately. In November 2008 Dr. Silverman issued a supplemental report in which he concluded another knee surgery might be required.[404]

[400] Id. at 366.
[401] Id. at 366.
[402] Id. at 366.
[403] Id. at 366.
[404] Id. at 366-67.

Nealy met with the accommodations committee again in December 2008. The committee and Nealy discussed his limitations and agreed he could not return to the groundskeeper position. Nealy expressed his wish to return to a solid waste equipment operator position. Committee members expressed concerns about the demands of the job and his limitations. Specifically, workers who operated two-person vehicles alternated duties and assisted each other by pushing trash bins, and those who operated one person vehicles sometimes needed to exit the vehicle and move trash bins not accessible to the automated lift. One committee member also expressed concern about the demands placed on the knee simply by operating the vehicle. Nealy informed the committee that his doctor recommended further knee surgery, and, if that occurred, he would be unable to return to work for an indefinite period of time. Nealy did, in fact, have a third knee surgery in September 2009.[405]

In April 2010, Dr. Silverman issued a report declaring Nealy at maximum medical improvement. Dr. Silverman stated Nealy should be precluded from kneeling, bending, stooping, squatting, walking over uneven terrain, running, and prolonged standing relative to the right knee as well as climbing and heavy lifting. He concluded that Nealy could return to work with these restrictions.[406]

In preparation for another accommodations meeting with Nealy, the city engaged a disability consulting firm to facilitate the process and prepare an essential functions job analysis for the position of solid waste equipment operator. The consulting firm prepared the essential functions job analysis in June 2010. In creating the essential functions job analysis the consulting firm visited the city's solid waste facility, observed various solid waste equipment, and interviewed three supervisory members of the solid waste department. The three supervisory employees and the city's human resources manager signed off on essential functions job analysis prepared by the consulting firm.[407]

The city scheduled the accommodations meeting for July 19, 2010. Prior to the meeting, the consulting firm sent Nealy the essential functions job analysis for solid waste equipment operator. Among other things, the essential functions job analysis for solid equipment operators were required to operate four different types of equipment, including the automated side loader. The city's written job description for the position also noted the operation of several different types of equipment among the position's major duties. The essential functions job analysis identified eight essential functions of the job:

1. Refuse and recyclable collection/disposal duties;

2. Driving/equipment operation;

3. Equipment maintenance/inspection;

4. Communication/customer service/liaison;

[405] Id. at 367.
[406] Id. at 367.
[407] Id. at 367-68.

5. Records/logs;

6. Heavy lifting;

7. Training duties;

8. Attendance of meetings/trainings.[408]

Under each essential function, the essential functions job analysis listed a paragraph of specific duties required for the job function. For example, under the job function "equipment maintenance/inspection" the operator performed daily pre- and post-trip inspections of the vehicle, swept and vacuumed the interior of the vehicle, and emptied trash and debris from the bulkhead of the vehicle.[409]

At the July 2010 accommodations meeting Nealy expressed his desire to return to the solid waste equipment operator position and said he did not agree with all of Dr. Silverman's restrictions. The city advised him that it was bound to comply with the restrictions imposed by Dr. Silverman, but it encouraged Nealy to discuss with his attorney the possibility of having Dr. Silverman modify the restrictions, if Nealy believed he could do some of the restricted activities safely. The city never received notification that Dr. Silverman had modified Nealy's restrictions.[410]

The city identified numerous job duties under the essential functions that it believed Nealy could not perform, based on the restrictions that he could not kneel, bend his right knee, squat, stoop, climb, walk on uneven ground, and lift heavy objects. These duties included clearing debris and trash from the hopper of vehicles, cleaning the bulkhead of the vehicles, repairing wheels on trash bins, looking under vehicles during pre- and post-trip inspections, vacuuming and washing equipment, pushing trash bins through walkways or alleys, retrieving bulk items that people may have left outside of bins, such as furniture or appliances, walking over areas that may include ramps, broken concrete or asphalt (uneven ground), climbing three steps to get into vehicles, and climbing a ladder to access the bulkhead vehicles. After looking at Nealy's restrictions and the essential functions of the solid waste equipment operator, the city said his restrictions were so significant that it could not find a way to reasonably accommodate the position.[411]

The committee then discussed reassigning Nealy to an alternative vacant position. Prior to the meeting, the city identified its vacant positions. One position identified was that of a city planning staff assistant. Nealy said he was interested in the position of city planning staff assistant. The city gave Nealy until July 26, 2010, to submit any applications, and if he did not submit any applications or the city determined it could not provide him with an alternative position, the city would submit a disability retirement application to CalPERS on his behalf. The

[408] Id. at 368.
[409] Id. at 368.
[410] Id. at 368.
[411] Id. at 368.

city advised Nealy that it posted all open positions on the city's website. It encouraged him to monitor the website and inform human resources if he was interested in any posted positions.[412]

Nealy submitted an application for city planning staff assistant. The city's human resources manager determined that he did not meet the minimum qualifications for the position and that he did not have two years of recent (within the last five years) paid work experience performing clerical support duties.[413]

On or about August 3, 2010, the city sent Nealy a letter stating it was unable to provide him with reasonable accommodation into an alternative position because he was not minimally qualified for the only position available that was not a promotion. The city advised him it would be extending his unpaid leave of absence while it completed his employer-generated CalPERS disability retirement application.[414]

The city filed the disability retirement application in September 2010. Nealy also submitted an application for the position of revenue collections assistant that month. He successfully passed the application process but did not pass the written examination for the position.[415]

In July 2011, CalPERS notified the city it had canceled the disability retirement application for Nealy based on Nealy's failure to submit necessary information.[416]

On January 10, 2011, Nealy filed a complaint with the California Department of Fair Employment and Housing (DFEH) and obtained a right-to-sue letter on that date. He then filed the instant lawsuit against the city on February 7, 2011.[417]

In 2011, Nealy also filed a workers' compensation claim against the city. The administrative law judge (ALJ) found Nealy had sustained combined permanent disability to his right knee and lower back of 40 percent after apportionment. He also found that Nealy was entitled to an unapportioned award of permanent disability for his right knee. The ALJ awarded Nealy $36, 260 in disability indemnity.[418]

FEHA prohibits several employment practices related to physical disabilities. It prohibits employers from refusing to hire, discharging, or otherwise discriminating against employees because of their physical disabilities.[419] Second, it prohibits employers from failing to make reasonable accommodation for the known physical disabilities of employees.[420] Third, it prohibits employers from failing to engage in a timely and good faith interactive process with employees to determine effective reasonable accommodation.[421] Fourth, FEHA prohibits

[412] Id. at 369.
[413] Id. at 369.
[414] Id. at 369.
[415] Id. at 369.
[416] Id. at 369.
[417] Id. at 369-70.
[418] Id. at 370.
[419] Government Code section 12940(a).
[420] Government Code section 12940(m).
[421] Government Code section 12940(n).

employers from retaliating against employees for opposing practices forbidden by FEHA.[422] Separate causes of action exists for each of these unlawful practices.[423]

A reasonable accommodation is a modification or adjustment to the work environment that enables the employee to perform the essential functions of the job he or she desires.[424] FEHA requires employers to make reasonable accommodations for the known disability of an employee unless doing so would produce undue hardship to the employer's operation.[425] The elements of a reasonable accommodation cause of action are:

1. The employee suffered a disability;

2. The employee could perform the essential functions of the job with reasonable accommodations; and

3. The employer failed to reasonably accommodate the employee's disability.[426]

The city argued that it was undisputed that Nealy could not perform the essential functions of a solid waste equipment operator, with or without reasonable accommodation. Nealy argued that there was a triable issue of material fact as to the essential functions of the position. Nealy asserts that one of the identified essential functions was, in fact, nonessential. Nealy also asserts there are triable issues on whether reasonable accommodations would have allowed him to perform the essential functions of the job and whether reassignment was available. The Court of Appeal held that the city's undisputed evidence entitled it to summary judgment on the reasonable accommodation cause of action.[427]

The Court of Appeal noted that "essential functions" means the fundamental job duties of the employment position the individual with a disability holds or desires. "Essential functions" does not include the marginal functions of the position.[428]

"Marginal functions" of an employment position are those that, if not performed, would not eliminate the need for the job or that could be readily performed by another employee that could be performed in an alternative way.[429] A job function may be considered essential for any of several reasons, including, but not limited to, any one or more of the following:

1. The reason the position exists is to perform that function;

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[422] Government Code section 12940(h).
[423] McCaskey v. California State Automobile Association, 189 Cal.App.4th 947, 987, 118 Cal.Rptr. 3d 34 (2010); Gelfo v. Lockhead Martin Corp., 140 Cal.App.4th 34, 54, 43, Cal.Rptr.3d 874 (2006).
[424] Nadaf-Rahrov v. Neiman Marcus Group, Inc., 166 Cal.App.4th 952, 974, 83 Cal.Rptr.3d 190 (2008).
[425] Government Code section 12940(m).
[426] Wilson v. County of Orange, 169 Cal.App4th 1185, 1192, 87 Cal.Rptr.3d 439 (2009); Nadaf-Rahrov v. Nieman Marcus Group, Inc., 166 Cal.App.4th 957, 977, 83 Cal.Rptr.3d 190 (2008).
[427] 234 Cal.App.4th 359, 373 (2015).
[428] Government Code section 12926(f).
[429] California Code of Regulations, Title 2, Section 11065(e)(3).

2. The limited number of employees available among whom the performance of that job function can be distributed; and

3. The incumbent in the position is hired for his or her expertise or ability to perform the particular function.[430]

The city argued that the driving/equipment operation essential function of the position required the ability to operate at least four different types of refuse collection vehicles – the automated side loader, a two person front loader, a two person rear loader and a one person bin truck that accompanied the rear loader. Nealy asserted the ability to operate all four vehicles is not essential and that he need only operate the automated side loader.[431]

The Court of Appeal held that the city's evidence indicated that all solid waste equipment operators were required to operate all four vehicles because the operators needed to fill in for one another when someone was absent from work. If an operator of a two-person vehicle was absent, the city would often need to assign an operator of an automated side loader to fill in. In addition, all operators were required to operate all vehicles because in the event of a natural disaster, the city would need operators to collect debris. To do this, they would need to drive a bigger two person vehicle that had the capacity to hold large debris, not the automated side loaders.[432]

The Court of Appeal noted that Nealy's argument fails to take note that there were numerous essential functions that Nealy could not perform. The other duties that the city identified given Nealy's restrictions were refuse and recyclable collection/disposal duties, equipment maintenance/inspection and heavy lifting. The Court of Appeal held that the fact that one essential function may be up for debate does not preclude summary judgment if the employee cannot perform other essential functions even with accommodation.

Reasonable accommodation may include, among other things, job restructuring or permitting an alteration of when or how an essential function is performed.[433] Job restructuring as a reasonable accommodation may include reallocation or redistribution of non-essential job functions in a job with multiple responsibilities.[434] The reasonableness of an accommodation generally is a question of fact.[435]

Nealy argued that the city could have restructured his old position so that he did not have to perform heavy lifting or kneeling, which might have been possible by assigning him to the automated side loader permanently. However, the city argued that eliminating heavy lifting and kneeling would eliminate essential functions of the job and that eliminating essential functions of the job is not a reasonable accommodation but is unreasonable as a matter of law. The Court of Appeal agreed that elimination of an essential function is not a reasonable accommodation. The

[430] Government Code section 12926(f)(1); California Code of Regulations, Title 2, Section 11065(e)(1).
[431] 234 Cal.App.4th 359, 374 (2015).
[432] Id. at 374.
[433] Government Code section 12926(p)(2); California Code of Regulations, Title 2, Section 11065(p)(2)(G).
[434] California Code of Regulations, Title 2, Section 11065(p)(2)(E).
[435] Hanson v. Lucky Stores, Inc., 74 Cal.App.4th 215, 228, n.11, 87 Cal.Rptr.2d 487 (1999).

court held that employers are not required to eliminate essential functions to suit an employee's medical restrictions.[436]

The Court of Appeal held that there was no dispute that heavy lifting was an essential function of the solid waste equipment operator position even for those who operated the automated side loader. The vehicle automatically lifted trash bins, emptied them into the hopper and placed the bins back on the street. The operator did this from inside the cab with a toggle stick or button. But if the equipment did not grip the bin properly, the bin could fall into the hopper or onto the street. When this happened, the operator had the discretion to return to the city yard and obtain assistance or to retrieve the bin from the hopper or to call for assistance to place the bin back on the street.[437]

The essential functions job analysis identified heavy lifting as an essential function and described the heavy lifting duties as lifting fallen bins and containers, lifting and carrying bulk items left out of bins and containers and removing bins which have fallen into the hopper and performing related duties as needed and assigned. Empty containers could weigh between 51 and 75 pounds, and full containers and bulk items such as furniture and appliances could weigh over 100 pounds.[438]

The essential functions job analysis indicated that solo operators would be required to lift at most, 50 pounds unassisted, and they could dispatch assistance for lifting items over 50 pounds. Still, assistance with lifting heavier items did not mean the need for heavy lifting by the solo operator disappeared. Because no one was required to lift more than 50 pounds unassisted, the logical inference is that the solo operator merely became one member of a two person team, both of whom working together lifted items over 50 pounds. Based on Nealy's restrictions, it was unclear how well Nealy would be able to assist others with heavy lifting tasks. The court stated that it seems likely that these tasks would require either stooping, squatting, bending his right knee or kneeling.[439]

The Court of Appeals noted that besides heavy lifting, it was also undisputed that equipment maintenance/inspection was an essential function of the solid waste equipment operator. This function obligated operators of equipment including the automated side loader to perform daily pre and post-trip inspections of their vehicles and clear debris from the bulkhead of vehicles. Inspections require the operator to inspect areas underneath the vehicle. Nealy himself testified operators of the automated side loader conducted inspections of the vehicle, and the inspections would require bending over, at the very least, if not getting down on one's knees or back. Thus, his restrictions against stooping and bending the right knee would prevent him from conducting inspections. Likewise, clearing debris from the bulkhead involved one of his restrictions. One had to climb a ladder to access the bulkhead. In addition, getting into the vehicles required climbing a few steps. The Court of Appeal concluded:

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[436] Dark v. Curry County, 451 F.3d 1078, 1089 (9th Cir. 2006)(The Americans with Disabilities Act does not require an employer to exempt an employee from performing essential functions or to reallocate essential functions to other employees.).
[437] 234 Cal.App.4th 359, 375 (2015).
[438] Id. at 376.
[439] Id. at 376.

> "In sum, there is no dispute heavy lifting was an essential function of a solid waste equipment operator. Nealy was absolutely precluded from heavy lifting by Dr. Silverman's restrictions. He does not propose any accommodation to the job other than eliminating the essential function of heavy lifting, which is not a reasonable accommodation. Further, equipment maintenance and inspection and driving a vehicle were indisputably essential functions. These things as well involved Nealy's restrictions."[440]

The Court of Appeal held that the city was not required to eliminate essential functions from the job to accommodate him.

The Court of Appeal noted that reasonable accommodation may also include reassignment to a vacant position if the employee cannot perform the essential functions of his or her position even with accommodation.[441] FEHA requires the employer to offer the employee comparable or lower grade vacant positions for which he or she is qualified.[442] FEHA does not require reassignment if there is no vacant position for which the employee is qualified.[443] In addition, FEHA does not require the employer to promote the employee or create a new position for the employee to a greater extent than it would create a new position for any employee, regardless of disability.[444]

Nealy argued that the city could have offered him the city planning staff position or another clerical position as a reasonable accommodation. However, the Court of Appeals noted that Nealy did not meet the qualifications for those positions and there were no other vacant positions for which he was qualified. The Court of Appeal ruled that Nealy failed to produce any evidence that there were vacant positions for which he was qualified and which existed during the relevant period during 2010. Since there were no other vacant positions for which Nealy was qualified, the city was relieved of its duty to reassign Nealy.[445]

The Court of Appeal further ruled that the city did not have a duty to wait until a vacant position opened up. The Court of Appeal held that a finite leave of absence may be a reasonable accommodation to allow an employee to recover, but FEHA does not require the employer to provide an indefinite leave of absence to await possible future vacancies.[446] The Court of Appeal stated:

> "In short, an employer can prevail on summary judgment on a claim of failure to reasonably accommodate by establishing through undisputed facts that 'there simply was no vacant position

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[440] Id. at 376-77.
[441] Government Code section 12926(p)(2); California Code of Regulations, Title 2, Section 11065(p)(2)(N); California Code of Regulations, Title 2, Section 11068(d)(1)(A).
[442] California Code of Regulations, Title 2, Section 11068(d)(1)(2).
[443] Cuillette v. City of Los Angeles, 194 Cal.App.4th 757, 767, 123 Cal.Rptr.3d 562 (2011).
[444] California Code of Regulations, Title 2, Section 11068(d)(4).
[445] 234 Cal.App.4th 359, 378 (2015).
[446] Nadaf-Rahrov v. Neiman Marcus Group, Inc., 166 Cal.App.4th 952, 974, 83 Cal.Rptr.3d 190 (2008); Hanson v. Lucky Stores, Inc., 74 Cal.App.4th 215, 228, n.11, 87 Cal.Rptr.2d 487 (1999).

> within the employer's organization for which the disabled employee was qualified and which the disabled employee was capable of performing with or without accommodation…'
>
> The city has done that here. Its evidence established Nealy could not perform the essential functions of the solid waste equipment operator with reasonable accommodation, and moreover, there were no vacant positions for which he was qualified. The burden then shifted to Nealy to produce evidence showing a triable issue of material fact. This he has not done. The trial court did not err in granting summary judgment on this cause of action."[447]

A prima facie case of disability discrimination under FEHA requires the employee to show he or she:

1. Suffered from a disability;

2. Was otherwise qualified to do his or job; and

3. Was subjected to adverse employment action because of the disability.[448]

Once the employer establishes his or her prima facie case, the burden shifts to the employer to offer a legitimate non-discriminatory reason for the adverse employment action.[449] The employee may still prevail over the employer showing with evidence that the stated reason is pretextual, the employer acted with discriminatory animus, or other evidence permitting a reasonable trier of fact to conclude that the employer intentionally discriminated.[450]

The city contended that Nealy was not a qualified individual within the meaning of FEHA. The city argued that Nealy was not a qualified individual who was able to perform the essential functions of his or her job with reasonable accommodation. Therefore, FEHA permitted the city to discharge Nealy since he was unable to perform the essential functions of his job even with reasonable accommodation.[451]

The Court of Appeal ruled that the city has shown that Nealy could not establish one or more elements of his disability discrimination cause of action and held that the trial court did not err in granting summary judgment on the disability discrimination cause of action.

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[447] 234 Cal.App.4th 359, 378 (2015).
[448] Faust v. California Portland Cement Co., 150 Cal.App.4th 864, 886, 58, Cal.Rptr.3d 729 (2007).
[449] Deschene v. Pinole Point Steel Co., 76 Cal.App.4th 33, 44, 90 Cal.Rptr.2d 15 (1999).
[450] Ibid.
[451] Government Code section 12940(a)(1).

Under FEHA, an employer must engage in a good faith interactive process with the disabled employee to explore the alternatives to accommodate the disability.[452] FEHA requires an informal process with the employee to attempt to identify reasonable accommodations.[453]

To prevail on a claim for failure to engage in the interactive process, the employee must identify a reasonable accommodation that would have been available the interactive process occurred.[454] The Court of Appeal noted that the present case was undisputed that the city convened a meeting of its accommodations committee after receiving Dr. Silverman's report on Nealy's restrictions in April 2010. The committee went through each of Nealy's restrictions and discussed them in relation to the essential functions of the solid waste equipment operator. The city also came prepared with list of vacant positions and informed Nealy of the vacant positions available.

Nealy argued the city should have restructured his old job so that he did not have to lift heavy objects or kneel, assign him to the automated side loader permanently, reassign him to another position, or provide retraining. The Court of Appeal concluded that restructuring his old job or assigning him to the automated side loader permanently were not reasonable accommodations. The Court of Appeal also found there were no vacant positions for which Nealy was qualified and the Court of Appeal questioned how retraining would assist Nealy. Since Nealy provided no detail as to what type of retraining would have enabled him to perform the solid waste equipment operator job or some other vacant position, the Court of Appeal rejected this argument.

The Court of Appeal held that to establish a prima facie case of retaliation under FEHA, the plaintiff must show:

1. He or she engaged in a protected activity;

2. The employer subjected the employee to an adverse employment action; and

3. A causal link existed between the protected activity and the employer's action.[455]

The Court of Appeal held that the Nealy did not engage in a protected activity. Nealy did not oppose any practices forbidden under FEHA. The Court of Appeal held that protected activity does not include a mere request for reasonable accommodation. Without more, exercising one's rights under FEHA to request reasonable accommodation or engage in the interactive process does not demonstrate some degree of opposition to or protest of unlawful conduct by the employer.[456]

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[452] Government Code section 12940(n); Wysinger v. Automobile Club of Southern California, 157 Cal.App.4th 413, 424, 69 Cal.Rptr.3d 1(2007).
[453] Wilson v. County of Orange, 169 Cal.App.4th 1185, 1195, 87, Cal.Rptr.3d 439 (2009).
[454] Scotch v. Art Institute of California, 173 Cal.App4th 986, 1018, 93 Cal.Rptr.3d 338 (2009).
[455] 234 Cal.App.4th 359, 380 (2015).
[456] Rope v. Auto-Chlor System of Washington, Inc., 220 Cal.App.4th 635, 652, 163 Cal.Rptr.3d 392 (2013).

The Court of Appeal held that Nealy failed to identify any activity that qualifies as protected activity. Therefore, the trial court did not err in granting summary judgment in favor of the city in the retaliation cause of action.[457]

In summary, the Court of Appeal upheld the dismissal of Nealy's lawsuit for the following reasons:

1. The city's evidence showed that all solid waste equipment operators are required to operate all four vehicles because the operators needed to fill in for one another when someone was absent from work.

2. Nealy was unable to operate all four vehicles and therefore was unable to perform the essential functions of the solid waste equipment operator position.

3. Elimination of an essential function of the solid waste equipment operator position is not a reasonable accommodation but is unreasonable as a matter of law.

4. Heavy lifting is an essential function of the solid waste equipment operator position and Nealy was absolutely precluded from heavy lifting by Dr. Silverman's restrictions.

5. There were no vacant positions during the relevant time period for which Nealy was qualified.

6. Nealy failed to establish one or more elements of a cause of action for disability discrimination, failure of the employer to engage in good faith in the interactive process or retaliation.

H. Required Training of Supervisors

By January 1, 2006, an employer having 50 or more employees must provide at least two hours of classroom or other interactive training and education regarding sexual harassment to all supervisory employees who are employed as of July 1, 2005. After July 1, 2005, the training must be provided to all new supervisory employees within six months of their assumption of a supervisory position. If an employer has provided this training to a supervisory employee after January 1, 2003, the employer is not required to provide training by the January 1, 2006, deadline. However, after January 1, 2006, each employer must provide sexual harassment training and education to each supervisory employee once every two years.

As used in the California Fair Employment and Housing Act, including Government Code section 12950.1, the term "supervisor" is defined in Section 12926(r) as follows:

[457] 234 Cal.App.4th 359, 380 (2015).

> "'Supervisor' means any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend that action, if, in connection with the foregoing, the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

A claim that the required training and education did not reach a particular supervisory employee or employees does not automatically result in liability of an employer to any present or former employee or applicant in an action alleging sexual harassment. Conversely, an employer's compliance with the training requirement does not insulate the employer from liability for sexual harassment.

I. Volunteers

In Mendoza v. Town of Ross,[458] the Court of Appeal held that an uncompensated volunteer was not an employee and therefore could not sue a public agency for discrimination under the California Fair Employment and Housing Act[459] (FEHA).

At the time of filing the lawsuit, the plaintiff was 35 years old. The plaintiff was born with cerebral palsy and used a wheelchair. The plaintiff began volunteering for the town of Ross in January 1996, as a Volunteer Community Service Officer, and was assigned to Ross Grammar School and assisted in traffic duties, crime prevention, and neighborhood crime watch programs.

The plaintiff was provided a uniform and issued a badge bearing his name and the words "Community Service Officer – Ross Police." The plaintiff also received a police identification card with the word "Police" in bold across the top. The plaintiff had a regular work schedule, worked on holidays, and two weeks vacation each year. His supervisors found his work satisfactory and sought to create a paid position for him.

On June 25, 2001, the plaintiff's position as a Community Service Officer was terminated. The plaintiff then filed suit alleging wrongful termination in violation of public policy based on disability discrimination.

The Court of Appeal reviewed the California FEHA definition of an employee as "any individual under the direction and control of an employer under any appointment or contract of hire or apprenticeship, expressed or implied, oral or written."[460]

The Court of Appeal noted that the town council had exclusive authority to appoint individuals to employment positions upon the advice of the city department heads. In plaintiff's case, no such appointment was made. The Court ruled that in order for plaintiff to allege any

[458] 128 Cal.App.4th 625, 27 Cal.Rptr.3d 452 (2005).
[459] Government Code section 12900 et seq.
[460] Government Code section 12901.

type of employment based cause of action, whether it is wrongful termination or disability discrimination, the plaintiff must sufficiently allege that he or she was employed or appointed in accordance with the applicable state statute or local ordinance or policy. Since plaintiff concedes that he was not appointed to his position by action of the Ross town council, the Court of Appeal ruled that he was not an employee for purposes of FEHA and therefore could not sue the town of Ross for disability discrimination.

The Court of Appeal also noted that the California Labor Code excludes volunteers.[461] The Court held that compensation by the employer to the employee in exchange for his or her services is an essential condition to the existence of an employer-employee relationship. Therefore, the Court concluded that the plaintiff's position was unpaid and therefore he was not an employee who could sue under state law for disability discrimination.

Districts that utilize the services of volunteers should make it clear to individuals who volunteer that they are volunteers and not employees to protect themselves from such lawsuits.

J. State Law on Discrimination Based on Disability

California law provides greater protection to disabled individuals than the Americans with Disabilities Act.[462] State law contains broader definitions of mental and physical disability and medical condition, and makes it an unlawful employment practice for an employer to fail to engage in a timely good faith interactive process to determine effective reasonable accommodations, if any, at the request of an employee or applicant with a known disability. It is also an unlawful employment practice for an employer to make any medical, psychological or disability related inquiry of any job applicant or employee unless it is job related and consistent with business necessity.[463] The state law specifically states that recent United States Supreme Court decisions decided on under the Americans with Disabilities Act do not apply and that California law provides additional protections for applicants and employees which are independent of the Americans with Disabilities Act.[464]

Undue hardship is defined under state law as an action requiring significant difficulty or expense when considered in light of the following factors:

1. The nature and cost of the accommodation needed;

2. The overall financial resources of the facilities involved in the provision of the reasonable accommodations, the number of persons employed at the facility and the effect on expenses and resources or the impact otherwise of these accommodations upon the operation of the facility;

3. The overall financial resources of the employer, the overall size of the business of the employer with respect to the number of employees and the number, type and location of its facilities;

[461] Labor Code section 3352(i).
[462] Government Code section 12926 et seq., (Stats.2000, ch. 1049) effective January 1, 2001.
[463] Government Code section 12926.
[464] Government Code section 12926.1.

4. The type of operations, including the compensation, structure and functions of the work force of the employer;

5. The geographic separateness, administrative or fiscal relationship of the facility or facilities.[465]

The California Court of Appeal in Prilliman v. United Airlines, interpreted the statutes and regulations and stated:[466]

> "In light of the foregoing, and consistent with the interpretation of the concept of reasonable accommodation under the FEHA as set out in Section 7293.9 of Title 2 of the California Code of Regulations, we conclude that an employer who knows of the disability of an employee has an affirmative duty to make known to the employee other suitable job opportunities with the employer 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 other disabled or nondisabled employees or as a policy of offering such assistance or benefit to any other employees. Such a duty is also consistent with the provisions of Government Code section 12940, subdivision (a), which, with specified exceptions, provides in pertinent part that it is an unlawful employment practice for an employer, because of the physical disability or mental condition of any person, 'to discriminate against the person in compensation or in terms, conditions or privileges of employment.'"[467]

The holding in Prilliman places an affirmative duty upon California employers to suggest reasonable accommodations for employees once they have knowledge of an employee's disability. In contrast, federal law does not place an affirmative duty upon an employer to suggest a reasonable accommodation, but an employer may inquire as to whether the employee is in need of reasonable accommodation. Under federal law, it is the responsibility of the individual with a disability to inform the employer that an accommodation is needed. When the need for accommodation is not obvious, an employer, before providing a reasonable accommodation, may require that the individual with a disability provide documentation of the need for accommodation.[468]

Since the Prilliman decision was based on an interpretation of California law, it is binding upon California employers. Therefore, in California when employers know of the disability of an employee, they have an affirmative duty to make known to the employee other suitable job opportunities and to offer similar assistance to disabled employees when needed. It

[465] Title 2, California Code of Regulations, section 7293.9(b).
[466] 62 Cal.Rptr.2d 142, 150, 53 Cal.App.4th 935, 950-951 (1998).
[467] Id. at 950-951.
[468] 20 C.F.R. Part 1630, Appendix 407.

is difficult to predict how the Prilliman decision will apply in a given situation, therefore, districts should consult with legal counsel when the district is aware that it has a disabled employee who is having difficulty performing the essential functions of his or her position.

In Raine v. City of Burbank[469] the California Court of Appeal held that the California Fair Employment and Housing Act[470] (FEHA) does not obligate an employer to convert a temporary light-duty position into a permanent one, when doing so would create a new position.

The plaintiff, Mark Raine, was employed as a police officer for the Burbank Police Department (BPD). After Raine suffered a work-related knee injury, BPD reassigned him to a temporary light-duty position at BPD's front desk to accommodate him while the injury healed. The evidence established that the front-desk position is permanently staffed by civilians, called "police technicians," who are paid substantially less and provided fewer benefits than sworn police officers. The front-desk position is also reserved as a temporary light-duty assignment for police officers recovering from injuries.

After Raine had served in the temporary position for six years, his personal physician advised BPD that his disability was permanent and he would never be able to perform the essential functions of a patrol officer. BPD engaged in the FEHA-mandated interactive process to determine effective reasonable accommodations, and advised Raine that he could not be permanently accommodated at the front desk without changing his status from police officer to police technician. Raine declined this offer, and took disability retirement. He then sued BPD and the city of Burbank, alleging disability discrimination, failure to accommodate, and other violations under the FEHA.

Prior to Raine, no California court had addressed whether an employer is obligated under the FEHA to make a temporary position available indefinitely once the employee's temporary disability becomes permanent. However, the court cited to several federal appellate decisions interpreting the Americans with Disabilities Act, in which the courts consistently held that an employer who has created a temporary light-duty position for the purpose of accommodating a disabled employee, has no duty to transform that accommodation into a permanent position once it is informed that the employee's disability has become permanent. Since state regulations defining "reasonable accommodation" under the FEHA are virtually identical to language in the ADA regulations, the Raine court elected to follow the reasoning in the federal decisions. The court held that an employer has no duty to accommodate a disabled employee by making a temporary accommodation permanent, if doing so would require the employer to create a new position just for the employee. More specifically, the defendants were not required to create a new position of front-desk police officer for the Plaintiff.

In Jankey v. Lee,[471] the California Supreme Court held that the California Disabled Persons Act, Civil Code section 55, authorizes the awarding of fees to prevailing defendants. The court held that the two-way attorney fee-shifting clause grants a mandatory right to fees to

[469] 135 Cal.App.4th 1215 (2006).
[470] Government Code section 12900 et seq.
[471] 55 Cal.4th 1038, 150 Cal.Rptr.3d 191 (2012).

prevailing defendants. Under the two-way attorney fee-shifting clause, the determination that a defendant is a prevailing party is generally discretionary.

The California Supreme Court held that the federal Americans with Disabilities Act did not preempt the awarding of fees under state law. The court disagreed with the Ninth Circuit Court of Appeal's decision in Hubbard v. SoBreck.[472] In Hubbard, the Ninth Circuit Court of Appeal held that federal law preempted state law and could not authorize the award of attorneys' fees to prevailing defendants.

K. Pregnancy Leave

In Sanchez v. Swissport Inc.,[473] the Court of Appeal held that the Fair Employment and Housing Act (FEHA) may require more disability leave for a pregnant employee than the Pregnancy Disability Leave Law. The Court of Appeal held that an employee who has exhausted all permissible leave available under the Pregnancy Disability Leave Law, Government Code section 12945, may state a cause of action under the California Fair Employment and Housing Act, Government Code section 12900 et seq. The Court of Appeal held that the allegations in the Appellant's First Amended Complaint are sufficient to state a *prima facie* case under the FEHA for employment discrimination.

Anna Sanchez was employed by Swissport from August 2007 until July 14, 2009, as a cleaning agent. On or about February 27, 2009, she was diagnosed with a high-risk pregnancy, requiring bed rest. After her diagnosis, Sanchez requested and received a temporary leave of absence from Swissport. Sanchez alleged that Swissport knew she needed a leave of absence that would last until she gave birth on or about October 19, 2009.[474]

Sanchez alleged that Swissport afforded her just over 19 weeks of leave, consisting of her accrued vacation time in addition to the time allotted under the California Family Rights Act, Government Code section 12945.1 and the Pregnancy Disability Leave Law, Government Code section 12945, before terminating her employment on or about July 14, 2009. Sanchez alleged that she was fired because of her pregnancy, her pregnancy-related disability, and her request for accommodations.[475]

Sanchez also alleged that at no time prior to the termination of her employment did Swissport contact her to engage her in a timely good faith interactive process in order to identify available accommodations, such as the extended leave of absence she had requested, so that she could remain employed. Sanchez also alleged that the reasonable accommodations necessitated by her pregnancy and pregnancy-related disabilities would not have created an undue hardship upon Swissport, nor would the proposed accommodations have adversely impacted, in any way, the operation of Swissport's business.[476]

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[472] 554 F.3d 742 (9th Cir. 2009).
[473] 213 Cal.App.4th 1331, 153 Cal.Rptr.3d 367 (2013).
[474] Id. at 1334.
[475] Id. at 1334-35.
[476] Id. at 1335.

The Superior Court dismissed the lawsuit. The Court of Appeal reversed and held that Swissport was not entitled to terminate Sanchez at the conclusion of her leave without first considering additional leaves as a reasonable accommodation under FEHA. The Court of Appeal held that the Pregnancy Disability Leave Law provides leave provisions in addition to the provisions governing pregnancy, child birth, or related medical conditions, and therefore, the employer had an obligation to provide reasonable accommodations for the disability absent undue hardship. The court held that granting additional leave could be a reasonable accommodation.[477]

The Court of Appeal held that under the Pregnancy Disability Leave Law, an employee is entitled up to four months of disability leave regardless of any hardship to the employer. Under FEHA, a disabled employee is entitled to a reasonable accommodation which may include leave of any duration provided that the accommodation is not an undue hardship on the employer. Thus, the Court of Appeal concluded that a leave of greater than four months may be a reasonable accommodation for a pregnancy-related disability.[478]

Therefore, districts should engage in an interactive process with an employee who is not medically able to return to work upon the exhaustion of pregnancy disability leave under Government Code section 12945. Additional leave may be a reasonable accommodation under FEHA and should be discussed with the employee.

L. Burden of Proof

In Green v. State of California,[479] the California Supreme Court held that under California's Fair Employment and Housing Act,[480] the employee has the burden of proof to show that he or she was qualified for the position sought or held by showing that he or she is able to perform the essential duties of the position with or without reasonable accommodation. The California Supreme Court overturned a lower court decision holding that the employer had the burden of proof.

In Green, the plaintiff worked for the state of the California, Department of Corrections at the California Institute for Men in Chino as a stationary engineer. The employee's duties included maintenance and repair of equipment and mechanical systems and supervision and instruction of a crew of inmates. In 1990, the employee was diagnosed with hepatitis C. The employee contracted the disease while working on sewer pipes at his job. From 1990 until 1997 the employee did not have any work restrictions because of the illness, nor did he lose any time from work.[481]

In 1997, the employee's physician began treating the employee with the drug interferon. As a result of these treatments, the employee felt fatigued, had trouble sleeping and suffered headaches and body aches. The employee's physician requested that the employee be placed on light duty until May or June 1997. The Department of Corrections accommodated the employee

[477] Id. at 1336-38.
[478] Id. at 1338.
[479] 42 Cal.4th 254 (2007).
[480] Government Code section 12900 et seq.
[481] Id. at 258.

and allowed him to arrive at work late on the days he received his treatments and assigned the employee to positions that did not require heavy labor. However, the Department of Corrections had a policy that employees could be on light duty for a limited time only.[482]

In October 2000, the employee was informed that he could not return to work unless he was cleared for full duty as a stationary engineer. The employee then filed a disability discrimination complaint with the Department of Fair Employment and Housing and then filed a complaint for damages in Superior Court. After trial, the jury returned a general verdict for the employee, awarding him $597,088.00 in economic damages and $2,000,000.00 in non-economic damages. The Department of Corrections moved for a new trial and the trial court ruled that a motion for a new trial would be granted, unless the employee accepted a smaller award, which the employee did. The Department of Corrections appealed the jury's verdict on a number of grounds including that the trial court erred in failing to instruct the jury that the employee had the burden of proof to show that he is a qualified individual who can perform the essential functions of the job, with or without reasonable accommodation.[483]

The Court of Appeal affirmed the judgment in the employee's favor, holding that state law does not require the employee to prove that he is a qualified individual and that the burden of proof is on the employer. The California Supreme Court granted the Department of Correction's petition for review and reversed the decision of the Court of Appeal.[484]

The California Supreme Court reviewed the legislative history of the Fair Employment and Housing Act (FEHA) and observed that state law was patterned after federal law, specifically, the Americans with Disabilities Act.[485] Under federal law, the Court found, the employee bears the burden of proving that he or she meets the definition of a qualified individual with a disability in order to establish a violation of the ADA and showing that with or without reasonable accommodation, the individual can perform the essential functions of the job. The California Supreme Court noted that the employee also had the burden of proof under the Rehabilitation Act of 1973.[486]

The Court went on to note that state law also prohibits discrimination on the basis of an employee's disability. The California Supreme Court concluded that state law is strikingly similar to the Americans with Disabilities Act. The court concluded it was not a coincidence that state law and federal law are very similar, but that it reflected the California Legislature's deliberate effort in 1992 to conform state law to federal law. The court also noted that under general state law, the party who brings an action in court has the burden of proof as to each fact that is essential to the claim for relief.[487] Therefore, the California Supreme Court concluded that under state law, the employee has the burden of proof of showing that he is a qualified individual, and that he or she can perform the essential functions of the job with or without reasonable accommodation.[488]

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[482] Ibid.
[483] Id. at 259-60.
[484] Id. at 260.
[485] Id. at 261; see 42 U.S.C. Section 12101 et seq.
[486] Ibid; see 29 U.S.C. Section 794.
[487] See Evidence Code section 500.
[488] Id. at 262-63.

This decision will be beneficial to districts and clarifies the issue of burden of proof under state law with respect to lawsuits alleging discrimination based on disability.

M. Threats of Violence

In Wills v. Superior Court,[489] the Court of Appeal held that the Superior Court of Orange County did not violate state law when it terminated a mentally disabled employee for making threats of violence against coworkers. The Court of Appeal held that the Superior Court's action did not violate state law prohibiting discrimination based upon mental disability.

The employee was employed as a court clerk by the Orange County Superior Court. The employee was diagnosed with bipolar disorder. Bipolar disorder is a mental disability characterized by mood swings between depressive and manic episodes. The parties did not dispute that the employee's mental disability caused the employee to make the threats. The employee handbook for the Orange County Superior Court prohibits employees from making threats against fellow employees.[490]

The Court of Appeal noted that the Fair Employment and Housing Act (FEHA)[491] protects employees from discrimination based on mental disability. The Court of Appeal reviewed federal case law under the Americans with Disabilities Act (ADA), and concluded that the ADA does not require an employer to retain an employee who threatens or commits acts of violence against coworkers, even if the employee's disability caused the misconduct.[492] The court concluded that under the federal cases, the ADA does not require an employer to retain a potentially violent employee and noted that employers have a duty to maintain a safe workplace.[493] The Court of Appeal stated:

> "Accordingly, consistent with the federal courts' interpretation of the ADA, we 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."[494]

The Court of Appeal went on to state that it believed that its interpretation of FEHA strikes an appropriate balance between protecting employees suffering from a disability and allowing employers to protect their employees and others from threats of violence and the fear

[489] 195 Cal.App. 4th 143 (2011).
[490] Id. at 149-50.
[491] Id. at 153; see, Government Code section 12940 et seq.
[492] Id. at 166; citing, Palmer v. Circuit Court of Cook County, Illinois, 117 F.3d 351, 352 (7th Cir. 1997).
[493] Id. at 164; see, also, EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities (March 25, 1997).
[494] Id. at 165-66.

that a hostile or potentially violent employee will act on those threats. This decision should be helpful to districts when faced with an employee who makes threats against other employees.[495]

N. Attorneys' Fees

In Williams v. Chino Valley Independent Fire District,[496] the California Supreme Court held that pursuant to Government Code section 12965, a prevailing defendant may only be awarded attorneys' fees and costs against the plaintiff when the plaintiff brought or continued litigating the action without an objective basis for believing it had potential merit. The California Supreme Court held that the standard in Christianburg Garment Company v. EEOC[497] should apply to actions brought under the Fair Employment and Housing Act (FEHA).

Therefore, the California Supreme Court concluded that a trial court may only award attorneys' fees and costs when it determines that a plaintiff brought a frivolous action without an objective basis for believing it had potential merit, or continued litigating the action without an objective basis for believing it had potential merit.

[495] Id. at 168-173.
[496] ____ Cal.4th ____ (2015).
[497] 434 U.S. 412 (1978).