

**CHAPTER 3**  
**DISCRIMINATION, HARASSMENT, AND RETALIATION**  
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## CHAPTER 3

### DISCRIMINATION, HARASSMENT, AND RETALIATION

#### 1. INTRODUCTION.

a. The Department is committed to providing a work environment in which all individuals are treated with respect and dignity, adhering to federal and state laws which protect employees in the workplace, as well as applicants. The Department encourages employees and applicants to report violations when they believe their right to equal employment has been violated under the provisions of the Department's Equal Employment Opportunity (EEO) policy without fear of retaliation.

b. The California Legislature has declared under Government Code (GC) Section 12920 that discrimination, harassment, and retaliation are against public policy.

c. Further, it is unlawful under GC Section 12940(i), for any person to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under the California Fair Employment and Housing Act (FEHA), or to attempt to do so.

#### 2. POLICY.

a. The Department prohibits and does not tolerate workplace behavior that a reasonable person would perceive as discrimination or harassment. Additionally, the Department prohibits retaliation against an employee or applicant because such individual has opposed any practice forbidden under the Department's policy regarding discrimination, harassment, or retaliation, or because the individual has filed a complaint, testified, or assisted in any proceeding covered by this policy. Immediate and appropriate disciplinary or corrective action will be taken against those individuals determined to be in violation of this policy, up to and including, termination.

b. It is the policy of the California Highway Patrol to provide an internal process to report and resolve complaints alleging discrimination, harassment, or retaliation in departmental employment practices covering recruitment, selection, appointment, promotion, compensation, transfer, training, and other terms, conditions, and benefits of employment. This process also includes retaliation against employees or applicants for having opposed any alleged discriminatory employment practice or for participating in the discrimination complaint process. For information regarding

the Department's discrimination complaint process, refer to Chapter 5, Discrimination Complaint Process, of this manual.

3. **DISCRIMINATION**. Under GC Section 12940(a), employees, applicants, interns, volunteers, and vendors are protected from discrimination by their employers based on their protected group status. As used in this policy, discrimination is defined as the unequal treatment of an employee or applicant in any aspect of employment, based, solely or in part, on their protected characteristic, including their perceived protected characteristic, or their association with a person who has, or is perceived to have, any of those characteristics (Refer to Chapter 2, Protected Characteristics, Activities, Terms, and Definitions, of this manual.).

a. **Disparate Treatment**. Occurs when an applicant or employee is treated less favorably than other similarly situated applicants or employees because of their actual or perceived protected characteristic(s). In determining which individuals are similarly situated, individuals who would reasonably be expected to receive the same treatment in the context of a particular employment decision must be determined.

(1) **Elements**. To establish a prima facie case of discrimination alleging disparate treatment, the employee or applicant must prove the following:

- (a) The employee or applicant is qualified for the position;
- (b) Similarly situated individuals outside the employee's or applicant's protected characteristics were treated more favorably;
- (c) The employee or applicant was subjected to an adverse employment action;
- (d) The employee's or applicant's actual or perceived protected characteristic was a substantial motivating factor for the adverse employment decision;
- (e) The employee or applicant was harmed; and
- (f) The adverse employment decision was a substantial factor in causing the employee's or applicant's harm.

**Example**: An employer provides higher pay to men than women for performing the same job.

b. **Disparate Impact**. Occurs when an employment practice exists that appears neutral but has an adverse impact on members with protected characteristic(s) and

cannot be justified by business necessity. The employment practice, even though applied equally to all employees or applicants, has the effect of excluding or otherwise adversely affecting a group of protected characteristics in significant numbers.

(1) Elements. To establish a prima facie case of discrimination alleging disparate impact, the employee or applicant must prove the following:

(a) The employee or applicant was subjected to an employment practice or policy that had a disproportionate effect on the employee's or applicant's protected characteristic;

(b) The employee or applicant was harmed; and

(c) The employment practice or policy was a substantial factor in causing the employee's or applicant's harm.

Example: An employee experiencing a disability is required to pass an oral examination as part of the hiring process, without the consideration of reasonable accommodation(s). Such criteria could have an adverse effect on candidates who are deaf, hearing impaired or cannot speak, if reasonable accommodations were available but not offered.

c. Employment Decision. Employment decision includes actions such as hiring, terminations, promotions, and pay. This also includes granting breaks, approving leave, assigning workstations, or setting any other term or condition of employment, regardless of how small the act or decision may be. The employment decision does not have to be made by a supervisor or manager, so long as the decision or act was made by an individual who has employment powers or authority over other employees.

(1) Pursuant to the United States Equal Employment Opportunity Commission (EEOC) guidelines, there may be circumstances in which an employer could otherwise justify continued use of the procedure which has an adverse impact, but the employer must establish that an overriding legitimate business purpose exists which is necessary to the safe and efficient operation of the business. The business purpose must be sufficiently compelling to override any impact on a group of people of a protected characteristic. The practice must effectively carry out the business purpose it is alleged to serve, and there must be available no acceptable policies or practices which better accomplish the business purpose or accomplish it with lesser impact to a group of people of a protected characteristic.

4. HARASSMENT. Under GC Section 12940(j)(1), employees, applicants, interns, volunteers, and vendors are protected from harassment by their employer or other employees based on the individual's protected characteristics. Harassment of an employee, an applicant, an unpaid intern or volunteer, or a person providing services pursuant to a contract by an employee, other than the 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. An employer may also be responsible for the acts of nonemployees, with respect to harassment of employees, applicants, unpaid interns or volunteers, or persons providing services pursuant to a contract in the workplace, if the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action. As used in this policy, harassment is defined as unwelcome conduct that is based, solely or in part, on an employee's protected characteristic, including their perceived protected characteristics, or their association with a person who has, or is perceived to have, any of those characteristics. Harassment is disrespectful or unprofessional conduct which can be verbal (such as slurs, jokes, insults, epithets, gestures, or teasing), visual (such as the posting or distribution of offensive posters, symbols, cartoons, drawings, computer displays, or emails), or physical conduct (such as physically threatening another person, blocking someone's way, or making physical contact in an unwelcome manner.) Harassment becomes unlawful when enduring the offensive conduct becomes a condition of continued employment, or the conduct is sufficiently severe or pervasive to create a work environment that a reasonable person would consider hostile, offensive, oppressive, or intimidating. To be unlawful, the harassment must be both subjectively and objectively offensive. For information regarding sexual harassment, refer to Chapter 4, Sexual Harassment and Abusive Conduct Prevention, of this manual.

a. Elements. To establish a prima facie case of harassment, the employee must prove the following:

- (1) The affected employee's actual or perceived protected group status, or their association with a person who has, or is perceived to have, any of those characteristics was a substantial motivating factor for the harassing conduct;
- (2) The conduct was unwelcome;
- (3) The conduct was both subjectively and objectively offensive;
- (4) The conduct was objectively severe or pervasive;
- (5) A reasonable person would consider the work environment to be hostile, offensive, oppressive, or intimidating;

(6) The conduct so altered the working conditions as to make it more difficult to do the job;

(7) The employee was harmed; and

(8) The conduct was a substantial factor in causing the employee's harm.

(9) A supervisor engaged in the conduct or knew or should have known about the conduct and failed to take immediate and appropriate action.

b. Unwelcome. The conduct or behavior only becomes unlawful when it is unwelcome, meaning the individual did not solicit or invite it and regarded the conduct as unwanted or offensive.

(1) Employees are well-advised to assert their right to a workplace free from harassment. However, it is not a necessary element of the claim. It is important to recognize that an employee may fear repercussions for complaining about the harassment and that fear may explain a delay in opposing offensive conduct.

(2) Although an employee does not necessarily have to confront the harasser, the employee must demonstrate in some manner the conduct or behavior was unwelcome.

(3) There is a greater responsibility for expressing unwelcomeness in cases where the employee first willingly participates in mutual banter, but then ceases this participation and claims any continued conduct has created a hostile environment. The employee in this situation bears the burden of showing that further conduct or behavior is unwelcome. To do so, the employee must clearly notify the harasser that the conduct or behavior is no longer welcome.

(4) Mutual banter between coworkers is discouraged as other employees who observe or hear the mutual banter may find the conduct offensive and can file a complaint as an indirect third party. While the conduct may be welcome between the two employees engaging in it, it may be unwelcome for the individual(s) who witness such conduct in the workplace. All employees are expected to conduct themselves in a professional, respectful, and courteous manner to ensure a work environment that is free from discrimination, harassment, including sexual harassment, and retaliation.

c. Hostile, Offensive, Oppressive, or Intimidating Work Environment. Harassment creates a hostile, offensive, oppressive, or intimidating work environment when the conduct:

- (1) Sufficiently offends, humiliates, distresses, or intrudes upon the employee;
- (2) Disrupts the employee's emotional tranquility in the workplace;
- (3) Affects the employee's ability to perform the job as usual; or
- (4) Interferes with and undermines the employee's personal sense of well-being.

NOTE: The employee does not need to prove that their tangible productivity has declined as a result of the harassment. It suffices to prove that a reasonable person subjected to the same conduct would find that the harassment altered their working conditions as to make it more difficult to do their job.

d. Reasonable Person Standard. A standard for determining whether conduct can be considered harassment. The conduct may not be considered harassment if a reasonable person would not find the action offensive. This standard is not static, and may change as the views of a reasonable person change over time.

- (1) Petty slights, annoyances, and isolated incidents, unless extremely serious, may not rise to the level of harassment. To be unlawful, the conduct must create a work environment that is intimidating, hostile, oppressive, or offensive to a reasonable person.

e. Factors. Harassment cases are evaluated on a case-by-case basis. Therefore, it is necessary to consider several factors including, but not limited to:

(1) Type of Conduct. Offensive conduct may include, but is not limited to:

(a) Verbal harassment, e.g., epithets or name calling, offensive jokes, derogatory comments, or slurs.

(b) Physical harassment, e.g., physical assaults or threats, impeding or blocking movement, or any physical interference with normal work or movement, when directed at an individual.

(c) Visual forms of harassment, e.g., derogatory posters, cartoons, or drawings.

(2) Frequency. Consideration is given to the frequency of the conduct and the relationship between the number of incidents and the time period over which they occurred. However, it should be noted that a single incident of a harassing conduct may be sufficient to establish a violation of this policy if the conduct was severe enough that it unreasonably interfered with the employee's

work performance or created an intimidating, hostile, oppressive, or offensive working environment.

(3) Rank or Position. The employee's rank or position in relation to the harasser's rank or position. For example, single incidents of misconduct perpetrated by a supervisor or manager will carry much greater weight toward establishing a hostile, oppressive, offensive, or intimidating work environment than similar conduct by a peer of the employee.

(4) Number of Harassers. When there is more than one harasser involved in the conduct, factors evaluated are whether each harasser individually participated, encouraged, or substantially assisted in the conduct. For example, an employee may have been subjected to offensive comments or behavior by multiple harassers during a conversation.

(5) Prior Willing Participation. The employee may be considered a willing participant if the employee had engaged or participated in prior banter which then led to the alleged harassing conduct.

(6) Indirect Third Party. The hostile environment can occur toward the direct recipient of offensive behavior or to an indirect, third party recipient. For example, a third party who is present and is indirectly subjected to offensive behavior, such as seeing inappropriate touching or sexual items, or hearing jokes of an offensive nature directed towards another employee, may file a complaint of harassment based on a hostile environment.

f. Other Inappropriate Conduct. In some cases, an individual's inappropriate conduct may not constitute a violation of this policy; however, it is still inappropriate. Managers/supervisors have a responsibility to take immediate and appropriate action to eliminate such inappropriate or potentially harassing behavior(s). Seemingly isolated, inappropriate acts of an offensive nature may be a precursor to future harassment or possibly a symptom of an already hostile environment.

5. RETALIATION. Under GC Section 12940(h), employees who resist or object to discrimination or harassment are protected from retaliation. Retaliation is defined as any adverse employment action taken against an applicant or employee because the individual engaged in an activity protected under the Department's EEO policy or was reasonably thought to engage in protected activity under this policy. Protected activities may include, but are not limited to, reporting, or assisting in reporting suspected violations of this policy and/or involvement in investigations or proceedings arising out of an alleged violation of this policy.

a. The EEOC states an employer may not fire, demote, harass, or otherwise retaliate against an individual for filing a charge of discrimination, participating in a discrimination proceeding, or otherwise opposing discrimination. The same laws which prohibit discrimination based on a federally protected characteristic, prohibit retaliation against individuals who oppose alleged unlawful discrimination or participate in an employment discrimination proceeding.

b. Elements. To establish a prima facie case of retaliation, an employee must show:

(1) The employee is covered by the provisions of the Department's EEO policy;

(2) The employee was engaged in a protected activity as defined in this chapter;

(3) The employer subjected the employee to an adverse employment action;

(4) The employee's protected activity was a substantial motivating reason for the employer's decision to take an adverse employment action;

(5) The employee was harmed; and

(6) The employer's decision to take adverse action was a substantial factor in causing the employee's harm.

c. Protected Activity. A protected activity is an activity protected under the Department's EEO policy or an activity reasonably thought to be protected under this policy. The EEO laws prohibit adverse employment action taken against job applicants or employees for asserting their rights to be free from employment discrimination, including harassment. For example, it is unlawful to retaliate against applicants or employees for:

(1) Opposition to a practice believed to be unlawful discrimination, harassment, or retaliation, as defined in this manual. Opposition is alleging the Department engaged in unlawful discrimination, harassment, or retaliation. Opposition is protected from retaliation as long as it is based on a reasonable, good-faith belief the questionable practice violates anti-discrimination law and the manner of the opposition is reasonable.

(2) Participation in an employment discrimination, harassment or retaliation proceeding. Participation means taking part in an employment discrimination proceeding as a complainant, a representative, a respondent, an EEO Program official, a witness, or other departmental employees/applicants who

participate in or are involved in any stage of the complaint process, including the informal discrimination complaint process. Participation is a protected activity even if the allegation(s) ultimately proved to be unfounded.

- (3) Submitting a request for a reasonable or religious accommodation,
- (4) Requesting or taking of a protected leave provided by law,
- (5) Refusing sexual advances.

NOTE: Individuals who have a close association with someone who has engaged in such protected activity are also considered protected. For example, it is illegal to terminate an employee because their spouse engaged in an activity protected under the Department's EEO policy or an activity reasonably thought to be protected under this policy.

d. Adverse Employment Action. Adverse employment action is conduct or an action, or engagement in a pattern of conduct, that, taken as a whole, materially and adversely affects the terms, conditions, or privileges of the applicant's or employee's employment, or is reasonably likely to deter the person from engaging in a protected activity. Even actions which do not result in a direct loss of compensation or termination may be regarded as an adverse employment action when considered in the totality of the circumstances. For example, these may be considered adverse employment actions:

- (1) Unmeritorious or unwarranted work-related threats, warnings or reprimand;
- (2) Unmeritorious or unwarranted performance evaluations;
- (3) Harassment may constitute an adverse employment action if it rises to the level of severe and is done with intent to deter an employee's participation in the EEO complaint process.

e. Causal Link. A causal link is a correlation of cause and effect between an event or action and the result.

- (1) For retaliation to occur, a causal link must be established and exist between a protected activity and an adverse employment action. Retaliatory behavior without correlation to a protected activity does not constitute retaliation, as defined in this chapter.

NOTE: Employees shall continue to perform their employment duties and adhere to departmental policy regardless of their involvement or participation in

an EEO complaint process. Employees who engage in EEO activity are still subject to corrective action and discipline if they engage in activities that violate departmental policy or civil service laws. Anti-retaliation policies do not immunize employees from appropriate discipline or discharge who engage in misconduct, so long as the discipline is not imposed in retaliation for a protected activity.