

**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 Section 12920 of the Government Code (GC) that discrimination, harassment, and retaliation are against public policy.
- c. Further, it is unlawful under Section 12940(i) GC 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, Harassment, and Retaliation Complaint Process, of this manual.

3. **DISCRIMINATION.** Under Section 12940(a) GC, 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 or based on a combination of those characteristics. Discrimination also includes situations where a person is perceived to have any particular characteristic or combination of characteristics within the listed categories. Furthermore, discrimination extends to individuals who are perceived to be associated with someone who has, or is believed to have, any of the protected characteristics or combination of protected characteristics listed in this policy. In all cases, unfair treatment arising from these factors is prohibited. (Refer to Chapter 2, Protected Characteristics, Activities, Terms, and Definitions, of this manual.)

a. **Disparate Treatment.** Occurs when an applicant or employee is treated differently than similarly situated applicants or employees because of their protected characteristic, including their perceived protected characteristic, or association with a person who has, or is perceived to have, any of the characteristics, or any combination of those characteristics. It is not disparate treatment if the employer has a legitimate, nondiscriminatory reason for the employment decision.

b. **Disparate Impact.** An employment practice that appears facially neutral that has an unjustified adverse impact on members of a protected class or combination of a protected class and cannot be justified by a business necessity.

(1) **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.

4. **HARASSMENT.** Under Section 12940(j)(1) GC, employees, applicants, interns, volunteers, and vendors are protected from harassment by their employer or other employees based on the individual's protected characteristics, or any combination of those 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. Harassment, as used in this policy, refers to unwelcome conduct that is based, in whole or in part, on an employee's protected characteristic(s). This includes conduct based on an actual or perceived characteristic, any combination of such characteristics, or an individual's association with a person who has, or is perceived to have, one or more protected characteristics identified in the listed categories. 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 or a violation of policy when the harassing conduct has unreasonably interfered with the person's work performance or is sufficiently severe or pervasive to create an intimidating, hostile, or offensive work environment. 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. Unwelcome. The person did not solicit or invite the unwanted or offensive conduct. It is also considered conduct that creates a hostile work environment.

(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.

b. Hostile Work Environment. A type of workplace harassment that occurs when comments or conduct are severe or pervasive and are based on a person's protected characteristic, including their perceived protected characteristic, or association with a person who has, or is perceived to have, any of those characteristics. It is conduct that unreasonably interferes with an employee's work performance and/or creates an intimidating, hostile, abusive, or otherwise offensive work environment.

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.

c. Reasonable Person Standard. Standard to determine whether the harassment is sufficiently severe and pervasive to constitute a hostile work environment. The standard is whether a reasonable person in the victim's position considers the conduct severe or pervasive as to alter the conditions of their employment.

(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 severe or pervasive to a reasonable person.

d. 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.

e. 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 Section 12940(h) GC, employees who resist or object to discrimination or harassment are protected from retaliation. Retaliation is any adverse employment action taken against an applicant or employee because an individual engaged in a protected activity, or an activity the individual reasonably believed was a protected activity, 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. Protected Activity. Protected activities refer to the engagement in or the exercising of rights that are protected by law. This list is not exhaustive of acts which can constitute protected activity.

(1) Reporting or filing a complaint, or threatening to report or file a complaint, about discrimination, harassment, or retaliation against the employee or others.

(2) Participating or providing information in an employment discrimination, harassment, or retaliation proceeding or investigation.

(3) Refusing to obey an order reasonably believed to be discriminatory or illegal.

(4) Resisting harassing behavior or intervening to protect others from harassing behavior, including sexual advances.

(5) Requesting accommodation for a disability, lactation, or religious beliefs.

(6) Requesting or taking of a protected leave provided by law. State and federal leave of absence laws provide protections for employees who request or take time off for circumstances, including, but not limited to, military service, bereavement leave, leave under the California Family Rights Act or the Family and Medical Leave Act, Pregnancy Disability Leave, or reproductive loss leave.

(7) Off-duty and away from the workplace lawful cannabis use is a protected activity, except by individuals exempted from this protected activity as provided by law. This protected activity does not permit an employee to possess, to be impaired by, or to use cannabis on the job, nor does it affect the rights of the Department to maintain a drug and alcohol-free workplace. Department policy in Highway Patrol Manual 10.3, Personnel Transactions Manual, Chapter 14, Inconsistent and Incompatible Activities, prohibits uniformed employees from using or ingesting marijuana as defined by Section 11018 of the Health and Safety Code.

- c. Adverse Employment Action. The conduct or an action that materially affects the terms and conditions of the applicant's or employee's employment status or is reasonably likely to discourage the person from engaging in a protected activity. Even actions that 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.
- d. Causal Link. Retaliation requires a casual link between the protected activity and the adverse employment action. An employee or job applicant must establish they experienced the harm or adverse employment action at least in part because they engaged in a protected activity.
- e. Non-retaliatory Reason. There is no retaliation if there is a legitimate, non-discriminatory reason for the adverse employment action. For example, an employer can show that someone was suspended because of poor attendance records or performance issues, not because they filed a discrimination complaint.

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