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INVITATION TO COMMENT

CACI 21-02

Title	Action Requested
Civil Jury Instructions: Revisions to Judicial Council of California Civil Jury Instructions	Review and submit comments by September 2, 2021
Proposed Rules, Forms, Standards, or Statutes	Proposed Effective Date
Add and revise jury instructions and verdict forms	November 18, 2021
Proposed by	Contact
Advisory Committee on Civil Jury Instructions Justice Martin J. Tangeman, Chair	Eric Long, 415-865-7691 eric.long@jud.ca.gov

Executive Summary and Origin

The Advisory Committee on Civil Jury Instructions seeks public comment on proposed additions and revisions to the Judicial Council of California Civil Jury Instructions (CACI). Under California Rules of Court, rule 10.58, the advisory committee is responsible for regularly reviewing case law and statutes affecting jury instructions and making recommendations to the Judicial Council for updating, revising, and adding topics to the council's civil jury instructions. On approval by the Judicial Council, all changes will be published in the 2022 edition of the official LexisNexis Matthew Bender CACI publication.

Attachments and Links

1. Table of Contents, Civil Jury Instructions (CACI 21-02), pages 2–3
2. Proposed new and revised instructions and verdict forms, pages 4–100

This proposal has not been approved by the Judicial Council and is not intended to represent the views of the council, its Rules Committee, or its Legislation Committee. It is circulated for comment purposes only.

CIVIL JURY INSTRUCTIONS (CACI 21–02)

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2334. Bad Faith (Third Party)—Refusal to Accept Reasonable Settlement Within Liability Policy Limits—Essential Factual Elements

[*Name of plaintiff*] claims that [*he/she/nonbinary pronoun/it*] was harmed by [*name of defendant*]'s breach of the obligation of good faith and fair dealing because [*name of defendant*] failed to accept a reasonable settlement demand in a lawsuit against [*name of plaintiff*]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. That [*name of plaintiff in underlying case*] brought a lawsuit against [*name of plaintiff*] for a claim that was covered by [*name of defendant*]'s insurance policy;
2. That [*name of defendant*] failed to accept a reasonable settlement demand for an amount within policy limits;
3. That [*name of defendant*]'s failure to accept the settlement, whether by action or by failure to act, was the result of unreasonable conduct by [*name of defendant*]; and
34. That a monetary judgment was entered against [*name of plaintiff*] for a sum greater than the policy limits.

“Policy limits” means the highest amount available under the policy for the claim against [*name of plaintiff*].

A settlement demand for an amount within policy limits is reasonable if [*name of defendant*] knew or should have known at the time the demand was rejected that the potential judgment was likely to exceed the amount of the demand based on [*name of plaintiff in underlying case*]'s injuries or loss and [*name of plaintiff*]'s probable liability. However, the demand may be unreasonable for reasons other than the amount demanded.

An insurer's conduct is unreasonable when, for example, it places its own interests above those of the insured.

New September 2003; Revised December 2007, June 2012, December 2012, June 2016, November 2021

Directions for Use

This instruction is for use in an “excess judgment” case; that is one in which judgment was against the insured for an amount over the policy limits, after the insurer rejected a settlement demand within policy limits.

The instructions in this series assume that the plaintiff is the insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case.

For instructions regarding general breach of contract issues, refer to the Contracts series (CACI No. 300)

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et seq.).

If it is alleged that a demand was made in excess of limits and there is a claim that the defendant should have contributed the policy limits, then this instruction will need to be modified.

This instruction should also be modified if the insurer did not accept the policy-limits demand because of potential remaining exposure to the insured, such as a contractual indemnity claim or exposure to other claimants.

~~Under this instruction, if the jury finds that the policy limits demand was reasonable, then the insurer is automatically liable for the entire excess judgment. Language from the California Supreme Court supports this view of what might be called insurer “strict liability” if the demand is reasonable. (See *Johansen v. California State Auto. Assn. Inter-Insurance Bureau* (1975) 15 Cal.3d 9, 16 [123 Cal.Rptr. 288, 538 P.2d 744] [“[W]henver it is likely that the judgment against the insured will exceed policy limits ‘so that the most reasonable manner of disposing of the claim is a settlement which can be made within those limits, a consideration in good faith of the insured’s interest requires the insurer to settle the claim,’” italics added].)~~

~~However, there is language in numerous cases, including several from the California Supreme Court, that would require the plaintiff to also prove that the insurer’s rejection of the demand was “unreasonable.” (See, e.g., *Hamilton v. Maryland Cas. Co.* (2002) 27 Cal.4th 718, 724-725 [117 Cal.Rptr.2d 318, 41 P.3d 128] [“An unreasonable refusal to settle may subject the insurer to liability for the entire amount of the judgment rendered against the insured, including any portion in excess of the policy limits,” italics added]; *Graciano v. Mercury General Corp.* (2014) 231 Cal.App.4th 414, 425 [179 Cal.Rptr.3d 717] [claim for bad faith based on an alleged wrongful refusal to settle *also* requires proof the insurer *unreasonably* failed to accept an otherwise reasonable offer within the time specified by the third party for acceptance, italics added].) Under this view, even if the policy limits demand was reasonable, the insurer may assert that it had a legitimate reason for rejecting it. However, this option, if it exists, is not available in a denial of coverage case. (*Johansen, supra*, 15 Cal.3d at pp. 15-16.)~~

~~None of these cases, however, neither those seemingly creating strict liability nor those seemingly providing an opportunity for the insurer to assert that its rejection was reasonable, actually discuss, analyze, and apply this standard to reach a result. All are determined on other issues, leaving the pertinent language as arguably dicta.~~

~~For this reason, the committee has elected not to change the elements of the instruction at this time. Hopefully, someday there will be a definitive resolution from the courts. Until then, the need for an additional element requiring the insurer’s rejection of the demand to have been unreasonable is a plausible, but unsettled, requirement. For a thorough analysis of the issue, see the committee’s report to the Judicial Council for its June 2016 meeting, found at <https://jcc.legistar.com/View.ashx?M=F&ID=4496094&GUID=53DBD55C-AF07-498F-B665-D6BDD6DEFB28>~~

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Sources and Authority

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- “[T]he implied obligation of good faith and fair dealing requires the insurer to settle in an appropriate case although the express terms of the policy do not impose such a duty. [¶] The insurer, in deciding whether a claim should be compromised, must take into account the interest of the insured and give it at least as much consideration as it does to its own interest. When there is great risk of a recovery beyond the policy limits so that the most reasonable manner of disposing of the claim is a settlement which can be made within those limits, a consideration in good faith of the insured’s interest requires the insurer to settle the claim.” (*Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 659 [328 P.2d 198], citation omitted.)
- “Liability is imposed not for a bad faith breach of the contract but for failure to meet the duty to accept reasonable settlements, a duty included within the implied covenant of good faith and fair dealing.” (*Crisci v. Security Insurance Co. of New Haven, Connecticut* (1967) 66 Cal.2d 425, 430 [58 Cal.Rptr. 13, 426 P.2d 173].)
- “In determining whether an insurer has given consideration to the interests of the insured, the test is whether a prudent insurer without policy limits would have accepted the settlement offer.” (*Crisci, supra*, 66 Cal.2d at p. 429.)
- “[I]n deciding whether or not to compromise the claim, the insurer must conduct itself as though it alone were liable for the entire amount of the judgment. ... [T]he only permissible consideration in evaluating the reasonableness of the settlement offer becomes whether, in light of the victim’s injuries and the probable liability of the insured, the ultimate judgment is likely to exceed the amount of the settlement offer.” (*Johansen, supra*, 15 Cal.3d at p. 16, internal citation omitted.)
- “[A]n insurer is required to act in good faith in dealing with its insured. Thus, in deciding whether or not to settle a claim, the insurer must take into account the interests of the insured, and when there is a great risk of recovery beyond the policy limits, a good faith consideration of the insured’s interests may require the insurer to settle the claim within the policy limits. An unreasonable refusal to settle may subject the insurer to liability for the entire amount of the judgment rendered against the insured, including any portion in excess of the policy limits.” (*Hamilton, supra*, 27 Cal.4th at 724–725.)
- “The size of the judgment recovered in the personal injury action when it exceeds the policy limits, although not conclusive, furnishes an inference that the value of the claim is the equivalent of the amount of the judgment and that acceptance of an offer within those limits was the most reasonable method of dealing with the claim.” (*Crisci, supra*, 66 Cal.2d at p. 431.)
- “The covenant of good faith and fair dealing implied in every insurance policy obligates the insurer, among other things, to accept a reasonable offer to settle a lawsuit by a third party against the insured within policy limits whenever there is a substantial likelihood of a recovery in excess of those limits. The insurer must evaluate the reasonableness of an offer to settle a lawsuit against the insured by considering the probable liability of the insured and the amount of that liability, without regard to any coverage defenses. An insurer that fails to accept a reasonable settlement offer within policy limits will be held liable in tort for the entire judgment against the insured, even if that amount exceeds the policy limits. An insurer’s duty to accept a reasonable settlement offer in these circumstances is implied in law to protect the insured from exposure to liability in excess of coverage as a result of the insurer’s gamble—on which only the insured might lose.” (*Rappaport-Scott v. Interinsurance Exch.*

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of the Auto. Club (2007) 146 Cal.App.4th 831, 836 [53 Cal.Rptr.3d 245], internal citations omitted.)

- “An insured’s claim for bad faith based on an alleged wrongful refusal to settle first requires proof the third party made a reasonable offer to settle the claims against the insured for an amount within the policy limits. The offer satisfies this first element if (1) its terms are clear enough to have created an enforceable contract resolving all claims had it been accepted by the insurer, (2) all of the third party claimants have joined in the demand, (3) it provides for a complete release of all insureds, and (4) the time provided for acceptance did not deprive the insurer of an adequate opportunity to investigate and evaluate its insured’s exposure.” (*Graciano, supra*, 231 Cal.App.4th at p. 425, internal citations omitted.)
- “An insurer’s duty to accept a reasonable settlement offer is not absolute. ‘[I]n deciding whether or not to settle a claim, the insurer must take into account the interests of the insured, and when there is a great risk of recovery beyond the policy limits, a good faith consideration of the insured’s interests may require the insurer to settle the claim within the policy limits.’” An unreasonable refusal to settle may subject the insurer to liability for the entire amount of the judgment rendered against the insured, including any portion in excess of the policy limits. Therefore, failing to accept a reasonable settlement offer does not necessarily constitute bad faith. ‘[T]he crucial issue is ... the basis for the insurer’s decision to reject an offer of settlement.’” (*Pinto, supra*, 61 Cal.App.5th at p. 688, internal citations omitted, original italics.)
- “A claim for bad faith based on the wrongful refusal to settle thus requires proof the insurer unreasonably failed to accept an offer. Simply failing to settle does not meet this standard.” (*Pinto, supra*, 61 Cal.App.5th at p. 688, internal citation omitted.)
- “To be liable for bad faith, an insurer must not only cause the insured’s damages, it must act or fail to act without proper cause, for example by placing its own interests above those of its insured.” (*Pinto, supra*, 61 Cal.App.5th at p. 692.)
- “A bad faith claim requires ‘something beyond breach of the contractual duty itself, and that something more is ‘refusing, *without proper cause*, to compensate its insured for a loss covered by the policy’ [Citation.] Of course, the converse of “without proper cause” is that declining to perform a contractual duty under the policy *with proper cause* is not a breach of the implied covenant.’” (*Graciano, supra*, 231 Cal.App.4th at p. 433, original italics.)
- “Determination of the reasonableness of a settlement offer for purposes of a reimbursement action is based on the information available to [the insurer] at the time of the proposed settlement.” (*Isacson v. California Ins. Guarantee Assn.* (1988) 44 Cal.3d 775, 793 [244 Cal.Rptr. 655, 750 P.2d 297].)
- “The third party is entitled to set a reasonable time limit within which the insurer must accept the settlement proposal” (*Graciano, supra*, 231 Cal.App.4th at p. 434.)
- “Whether [the insurer] ‘refused’ the ‘offer,’ and whether it could reasonably have acted otherwise in light of the 11-day deadline imposed by the offer’s terms, were questions for the jury.” (*Coe v. State Farm Mut. Auto. Ins. Co.* (1977) 66 Cal.App.3d 981, 994 [136 Cal.Rptr. 331].)

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- “A cause of action for bad faith refusal to settle arises only after a judgment has been rendered in excess of the policy limits. ... Until judgment is actually entered, the mere possibility or probability of an excess judgment does not render the refusal to settle actionable.” (*Safeco Ins. Co. of Am. v. Superior Court* (1999) 71 Cal.App.4th 782, 788 [84 Cal.Rptr.2d 43], internal citations omitted.)
- “An insurer’s wrongful failure to settle may be actionable even without rendition of an excess judgment. An insured may recover for bad faith failure to settle, despite the lack of an excess judgment, where the insurer’s misconduct goes beyond a simple failure to settle within policy limits or the insured suffers consequential damages apart from an excess judgment.” (*Howard v. American National Fire Ins. Co.* (2010) 187 Cal.App.4th 498, 527 [115 Cal.Rptr.3d 42], internal citations omitted.)
- “ ‘An insurer who denies coverage *does so at its own risk and although its position may not have been entirely groundless*, if the denial is found to be wrongful it is liable for the full amount which will compensate the insured for all the detriment caused by the insurer’s breach of the express and implied obligations of the contract.’ Accordingly, contrary to the defendant’s suggestion, an insurer’s ‘good faith,’ though erroneous, belief in noncoverage affords no defense to liability flowing from the insurer’s refusal to accept a reasonable settlement offer.” (*Johansen, supra*, 15 Cal.3d at pp. 15–16, original italics, footnotes and internal citation omitted.)
- “[W]here the *kind* of claim asserted is not covered by the insurance contract (and not simply the *amount* of the claim), an insurer has no obligation to pay money in settlement of a noncovered claim, because ‘The insurer does not ... insure the entire range of an insured’s well-being, outside the scope of and unrelated to the insurance policy, with respect to paying third party claims....’ ” (*Dewitt v. Monterey Ins. Co.* (2012) 204 Cal.App.4th 233, 244 [138 Cal.Rptr.3d 705], original italics.)
- “A good faith belief in noncoverage is not relevant to a determination of the reasonableness of a settlement offer.” (*Samson v. Transamerica Insurance Co.* (1981) 30 Cal.3d 220, 243 [178 Cal.Rptr. 343, 636 P.2d 32], internal citation omitted.)
- “An insurer that breaches its duty of reasonable settlement is liable for all the insured’s damages proximately caused by the breach, regardless of policy limits. Where the underlying action has proceeded to trial and a judgment in excess of the policy limits has been entered against the insured, the insurer is ordinarily liable to its insured for the entire amount of that judgment, excluding any punitive damages awarded.” (*Hamilton, supra*, 27 Cal.4th at p. 725, internal citations omitted.)
- “[I]nsurers do have a ‘selfish’ interest (that is, one that is peculiar to themselves) in imposing a blanket rule which effectively precludes disclosure of policy limits, and that interest can adversely affect the possibility that an excess claim against a policyholder might be settled within policy limits. Thus, a palpable conflict of interest exists in at least one context where there is no formal settlement offer. We therefore conclude that a formal settlement offer is not an absolute prerequisite to a bad faith action in the wake of an excess verdict when the claimant makes a request for policy limits and the insurer refuses to contact the policyholder about the request.” (*Boicourt v. Amex Assurance Co.* (2000) 78 Cal.App.4th 1390, 1398–1399 [93 Cal.Rptr.3d 763].)
- “For bad faith liability to attach to an insurer’s failure to pursue settlement discussions, in a case

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where the insured is exposed to a judgment beyond policy limits, there must be, at a minimum, some evidence either that the injured party has communicated to the insurer an interest in settlement, or some other circumstance demonstrating the insurer knew that settlement within policy limits could feasibly be negotiated. In the absence of such evidence, or evidence the insurer by its conduct has actively foreclosed the possibility of settlement, there is no “opportunity to settle” that an insurer may be taxed with ignoring.” (*Reid v. Mercury Ins. Co.* (2013) 220 Cal.App.4th 262, 272 [162 Cal.Rptr.3d 894].)

- “~~(4) [12:245] Insurer culpability required?~~—A number of cases suggest that some degree of insurer ‘culpability’ is required before an insurer’s refusal to settle a third party claim can be found to constitute ‘bad faith.’” [~~(Howard v. American Nat’l Fire Ins. Co. (2010) 187 Cal.App.4th 498, 529 [115 Cal.Rptr.3d 42].), 69 (quoting text)~~]

~~(a) [12:246] Good faith or mistake as excuse: ‘If the insurer has exercised good faith in all of its dealings ... and if the settlement which it has rejected has been fully and fairly considered and has been based upon an honest belief that the insurer could defeat the action or keep any possible judgment within the limits of the policy, and its judgments are based on a fair review of the evidence after reasonable diligence in ascertaining the facts, and upon sound legal advice, a court should not subject the insurer to further liability if it ultimately turns out that its judgment is a mistaken judgment.’ [See *Brown v. Guarantee Ins. Co.* (1957) 155 CA2d 679, 684, 319 P2d 69, 72 (emphasis added); *Howard v. American Nat’l Fire Ins. Co.*, supra, 187 CA4th at 529, 115 CR3d at 69—‘an insurer may reasonably underestimate the value of a case, and thus refuse settlement’ on this basis (acknowledging but not applying rule)]~~

~~‘In short, so long as insurers are not subject to a strict liability standard, there is still room for an honest, innocent mistake.’ [*Walbrook Ins. Co. Ltd. v. Liberty Mut. Ins. Co.* (1992) 5 CA4th 1445, 1460, 7 CR2d 513, 521]] [12:246.1] Comment: These cases are difficult to reconcile with the ‘only permissible consideration’ standard of a ‘reasonable settlement demand’ set out in *Johansen* and CACI 2334 (see ¶12:235.1). A possible explanation is that these cases address the ‘reasonableness’ of the insurer’s refusal to settle based on a dispute as to the value of the case (or other matters unrelated to coverage), whereas *Johansen* addressed ‘reasonableness’ in the context of a coverage dispute (see ¶12:235). [See *Howard v. American Nat’l Fire Ins. Co.*, supra, 187 CA4th at 529, 115 CR3d at 69 (quoting text)]” (Croskey et al., California Practice Guide: Insurance Litigation, Ch. 12B-B, *Bad Faith Refusal To Settle*, ¶¶ 12:245–12:246.1 (The Rutter Group), bold in original.)~~

Secondary Sources

2 Witkin, Summary of California Law (11th ed. 2017) Insurance, §§ 366–368

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 12B-A, *Implied Covenant Liability—Introduction*, ¶¶ 12:202–12:224 (The Rutter Group)

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 12B-B, *Bad Faith Refusal To Settle*, ¶¶ 12:226–12:548 (The Rutter Group)

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Croskey et al., California Practice Guide: Insurance Litigation, Ch. 12B-C, *Bad Faith Liability Despite Settlement Of Third Party Claims*, ¶¶ 12:575–12:581.12 (The Rutter Group)

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 12B-D, *Refusal To Defend Cases*, ¶¶ 12:582–12:686, (The Rutter Group)

2 California Liability Insurance Practice: Claims and Litigation (Cont.Ed.Bar) Actions for Failure to Settle, §§ 26.1–26.35

2 California Insurance Law and Practice, Ch. 13, *Claims Handling and the Duty of Good Faith*, § 13.07[1]–[3] (Matthew Bender)

26 California Forms of Pleading and Practice, Ch. 308, *Insurance*, § 308.24 (Matthew Bender)

12 California Points and Authorities, Ch. 120, *Insurance*, §§ 120.195, 120.199, 120.205, 120.207 (Matthew Bender)

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2521A. Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant (Gov. Code, §§ 12923, 12940(j))

[Name of plaintiff] claims that *[he/she/nonbinary pronoun]* was subjected to harassment based on *[his/her/nonbinary pronoun]* *[describe protected status, e.g., race, gender, or age]* at *[name of defendant]* and that this harassment created a work environment that was hostile, intimidating, offensive, oppressive, or abusive.

To establish this claim, *[name of plaintiff]* must prove all of the following:

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

[That a supervisor engaged in the conduct;]

[or]

[That *[name of defendant]* [or *[his/her/nonbinary pronoun/its]* supervisors or agents] knew or should have known of the conduct and failed to take immediate and appropriate corrective action;]
 7. That *[name of plaintiff]* was harmed; and
 8. That the conduct was a substantial factor in causing *[name of plaintiff]*'s harm.
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Derived from former CACI No. 2521 December 2007; Revised June 2013, December 2015, May 2018, July 2019, May 2020, November 2021

Directions for Use

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This instruction is for use in a hostile work environment case when the defendant is an employer or other entity covered by the FEHA. If the defendant is a labor organization, employment agency, apprenticeship training program or any training program leading to employment (rather than an employer) the instruction should be modified as appropriate. (See Gov. Code, § 12940(j)(1).) If the plaintiff is an external applicant for a position or if the alleged harassment did not occur in the workplace, the instruction should be modified as appropriate. (See *Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1051 [58 Cal.Rptr.2d 122] [“[A]s long as the harassment occurs in a work-related context, the employer is liable”].)

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

Modify element 2 if plaintiff was not actually a member of the protected class, but alleges harassment because the plaintiff was perceived to be a member, or associated with someone who was or was perceived to be a member, of the protected class. (See Gov. Code, § 12926(o).)

In element 6, select the applicable basis of employer liability: (a) strict liability for a supervisor’s harassing conduct, or (b) the employer’s ratification of the conduct. For a definition of “supervisor,” see CACI No. 2525, *Harassment—“Supervisor” Defined*. If there are both employer and individual supervisor defendants (see CACI No. 2522A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant*) and both are found liable, they are both jointly and severally liable for any damages. Comparative fault and Proposition 51 do not apply to the employer’s strict liability for supervisor harassment. (*State Dept. of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1041–1042 [6 Cal.Rptr.3d 441, 79 P.3d 556]; see *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 1000 [16 Cal.Rptr.2d 787], disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [25 Cal.Rptr.2d 109, 863 P.2d 179]; see also *Rashtian v. BRAC-BH, Inc.* (1992) 9 Cal.App.4th 1847, 1851 [12 Cal.Rptr.2d 411] [Proposition 51 cannot be applied to those who are without fault and only have vicarious liability by virtue of some statutory fiat].)

Sources and Authority

- Legislative Intent With Regard to Application of the Laws About Harassment. Government Code section 12923.
- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- “Employer” Defined for Harassment. Government Code section 12940(j)(4)(A).

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- Harassment Because of Sex. Government Code section 12940(j)(4)(C).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Perception and Association. Government Code section 12926(o).
- “To establish a prima facie case of a hostile work environment, [the plaintiff] must show that (1) [plaintiff] is a member of a protected class; (2) [plaintiff] was subjected to unwelcome harassment; (3) the harassment was based on [plaintiff’s] protected status; (4) the harassment unreasonably interfered with [plaintiff’s] work performance by creating an intimidating, hostile, or offensive work environment; and (5) defendants are liable for the harassment.” (*Ortiz v. Dameron Hospital Assn.* (2019) 37 Cal.App.5th 568, 581 [250 Cal.Rptr.3d 1].)
- “[T]he adjudicator’s inquiry should center, dominantly, on whether the discriminatory conduct has unreasonably interfered with the plaintiff’s work performance. To show such interference, ‘the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment.’ It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to ‘make it more difficult to do the job.’” (*Harris v. Forklift Sys.* (1993) 510 U.S. 17, 25 [114 S.Ct. 367, 126 L.Ed.2d 295], conc. opn. of Ginsburg, J.; see Gov. Code, § 12923(a) endorsing this language as reflective of California law.)
- “[A]n employer is strictly liable for all acts of sexual harassment by a supervisor.” (*State Dept. of Health Servs., supra*, 31 Cal.4th at p. 1042.)
- “The applicable language of the FEHA does not suggest that an employer’s liability for sexual harassment by a supervisor is constrained by principles of agency law. Had the Legislature so intended, it would have used language in the FEHA imposing the negligence standard of liability on acts of harassment by an employee ‘other than an agent,’ ‘not acting as the employer’s agent,’ or ‘not acting within the scope of an agency for the employer.’ By providing instead in section 12940, subdivision (j)(1), that the negligence standard applies to acts of harassment ‘by an employee other than an agent *or supervisor*’ (italics added), the Legislature has indicated that all acts of harassment by a supervisor are to be exempted from the negligence standard, whether or not the supervisor was then acting as the employer’s agent, and that agency principles come into play only when the harasser is not a supervisor. (*State Dept. of Health Services, supra*, 31 Cal.4th at p. 1041, original italics.)
- “When the harasser is a nonsupervisory employee, employer liability turns on a showing of negligence (that is, the employer knew or should have known of the harassment and failed to take appropriate corrective action).” (*Rehmani v. Superior Court* (2012) 204 Cal.App.4th 945, 952 [139 Cal.Rptr.3d 464].)
- “If an employee other than an agent or supervisor commits the harassment, and the employer takes immediate and appropriate corrective action when it becomes or reasonably should become aware of

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the conduct—for example, when the victim or someone else informs the employer—there simply is no ‘unlawful employment practice’ that the FEHA governs.” (*Carrisales v. Dept. of Corrections* (1999) 21 Cal.4th 1132, 1136 [90 Cal.Rptr.2d 804, 988 P.2d 1083], called into doubt on other grounds by statute.)

- “[I]n order for the employer to avoid strict liability for the supervisor’s actions under the FEHA, the harassment must result from a completely private relationship unconnected with the employment. Otherwise, the employer is strictly liable for the supervisor’s actions regardless of whether the supervisor was acting as the employer’s agent.” (*Myers v. Trendwest Resorts, Inc.* (2007) 148 Cal.App.4th 1403, 1421 [56 Cal.Rptr.3d 501].)
- Employers may be liable for the conduct of certain agents. (See Gov. Code, §§ 12925(d), 12926(d), and 12940(j)(1) and *Reno v. Baird* (1998) 18 Cal.4th 640, 658 [76 Cal.Rptr.2d 499, 957 P.2d 1333] [California Supreme Court declined to express opinion whether “agent” language in the FEHA merely incorporates respondeat superior principles or has some other meaning].)
- “Here, [defendant] was jointly liable with its employees on a respondeat superior or vicarious liability theory on every cause of action in which it was named as a defendant.” (*Bihun, supra*, 13 Cal.App.4th at p. 1000.)
- “The *McDonnell Douglas* burden-shifting framework does not apply to [plaintiff]’s harassment claim either. Since ‘there is no possible justification for harassment in the workplace,’ an employer cannot offer a legitimate nondiscriminatory reason for it.” (*Cornell v. Berkeley Tennis Club* (2017) 18 Cal.App.5th 908, 927 [227 Cal.Rptr.3d 286].)
- “[A]lthough no California cases have directly addressed racial harassment in the workplace, the California courts have applied the federal threshold standard to claims of sexual harassment and held that FEHA is violated when the harassment was ‘sufficiently severe or pervasive to alter the conditions of the victim’s employment.’ ” (*Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 464–465 [79 Cal.Rptr.2d 33], internal citations and footnote omitted.)
- “When the workplace is permeated with discriminatory intimidation, ridicule and insult that is ‘sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment,’ the law is violated.” (*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 409 [27 Cal.Rptr.2d 457], internal citation omitted.)
- “[N]ot every utterance of a racial slur in the workplace violates the FEHA or Title VII. As the United States Supreme Court has recognized in the context of sexual harassment: ‘[N]ot all workplace conduct that may be described as “harassment” affects a “term, condition, or privilege” of employment within the meaning of Title VII. For sexual harassment to be actionable, it must be sufficiently severe or pervasive “to alter the conditions of [the victim’s] employment and create an abusive working environment.” ’ . . . ‘Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII’s purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim’s employment, and there is no Title VII violation.’ . . . California courts have adopted the same

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standard in evaluating claims under the FEHA.” (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 129–130 [87 Cal.Rptr.2d 132, 980 P.2d 846], internal citations omitted.)

- “To be actionable, ‘a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.’ That means a plaintiff who subjectively perceives the workplace as hostile or abusive will not prevail under the FEHA, if a reasonable person in the plaintiff’s position, considering all the circumstances, would not share the same perception. Likewise, a plaintiff who does not perceive the workplace as hostile or abusive will not prevail, even if it objectively is so.” (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 284 [42 Cal.Rptr.3d 2, 132 P.3d 211], internal citations omitted.)
- “The stray remarks doctrine ... allows a court to weigh and assess the remarks in isolation, and to disregard the potentially damaging nature of discriminatory remarks simply because they are made by ‘nondecisionmakers, or [made] by decisionmakers unrelated to the decisional process.’ [Defendant] also argues that ambiguous remarks are stray, irrelevant, prejudicial, and inadmissible. However, ‘the task of disambiguating ambiguous utterances is for trial, not for summary judgment.’ Determining the weight of discriminatory or ambiguous remarks is a role reserved for the jury.” (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 540–541 [113 Cal.Rptr.3d 327, 235 P.3d 988], internal citations omitted.)
- “[I]n reviewing the trial court’s grant of [defendant]’s summary judgment motion, the Court of Appeal properly considered evidence of alleged discriminatory comments made by decision makers and coworkers along with all other evidence in the record.” (*Reid, supra*, 50 Cal.4th at p. 545.)
- “[M]any employment cases present issues of intent, and motive, and hostile working environment, issues not determinable on paper. Such cases, we caution, are rarely appropriate for disposition on summary judgment, however liberalized it be.” (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 286 [100 Cal.Rptr.3d 296].)
- “In contending that the ‘subjectively offensive’ element was not proven, a defendant ‘will assert that a plaintiff consented to the conduct through active participation in it, or was not injured because the plaintiff did not subjectively find it abusive.’ [¶] [Evidence Code] Section 1106 limits the evidence the defendant may use to support this assertion. It provides that ‘[i]n any civil action alleging conduct which constitutes sexual harassment, sexual assault, or sexual battery, opinion evidence, reputation evidence, and evidence of specific instances of the plaintiff’s sexual conduct, or any of that evidence, is not admissible by the defendant in order to prove consent by the plaintiff or the absence of injury to the plaintiff’ This general rule is, however, subject to the exception that it ‘does not apply to evidence of the plaintiff’s sexual conduct with the alleged perpetrator.’ The term ‘sexual conduct’ within the meaning of section 1106 has been broadly construed to include ‘all active or passive behavior (whether statements or actions), that either directly or through reasonable inference establishes a plaintiff’s willingness to engage in sexual activity,’ including ‘racy banter, sexual horseplay, and statements concerning prior, proposed, or planned sexual exploits.’ ” (*Meeks v. AutoZone, Inc.* (2018) 24 Cal.App.5th 855, 874 [235 Cal.Rptr.3d 161], internal citations omitted.)

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- “[A]llegations of a racially hostile work-place must be assessed from the perspective of a reasonable person belonging to the racial or ethnic group of the plaintiff.” (*McGinest v. GTE Serv. Corp.* (9th Cir. 2004) 360 F.3d 1103, 1115.)
- “Under ... FEHA, sexual harassment can occur between members of the same gender as long as the plaintiff can establish the harassment amounted to discrimination *because of sex*.” (*Lewis v. City of Benicia* (2014) 224 Cal.App.4th 1519, 1525 [169 Cal.Rptr.3d 794], original italics.)
- “[T]here is no requirement that the *motive* behind the sexual harassment must be sexual in nature. ‘[H]arassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex.’ Sexual harassment occurs when, as is alleged in this case, sex is used as a weapon to create a hostile work environment.” (*Singleton v. United States Gypsum Co.* (2006) 140 Cal.App.4th 1547, 1564 [45 Cal.Rptr.3d 597], original italics, internal citation omitted.)
- “The plaintiff must show that the harassing conduct took place because of the plaintiff’s sex, but need not show that the conduct was motivated by sexual desire. For example, a female plaintiff can prevail by showing that the harassment was because of the defendant’s bias against women; she need not show that it was because of the defendant’s sexual interest in women. In every case, however, the plaintiff must show a discriminatory intent or motivation based on gender.” (*Pantoja v. Anton* (2011) 198 Cal.App.4th 87, 114 [129 Cal.Rptr.3d 384], internal citations omitted.)
- “[A] heterosexual male is subjected to harassment because of sex under the FEHA when attacks on his heterosexual identity are used as a tool of harassment in the workplace, irrespective of whether the attacks are motivated by sexual desire or interest.” (*Taylor v. Nabors Drilling USA, LP* (2014) 222 Cal.App.4th 1228, 1239–1240 [166 Cal.Rptr.3d 676].)
- “A recent legislative amendment modifies section 12940, subdivision (j)(4)(C) (a provision of FEHA specifying types of conduct that constitute harassment because of sex) to read: ‘For purposes of this subdivision, “harassment” because of sex includes sexual harassment, gender harassment, and harassment based on pregnancy, childbirth, or related medical conditions. *Sexually harassing conduct need not be motivated by sexual desire.*’ ” (*Lewis, supra*, 224 Cal.App.4th at p. 1527 fn. 8, original italics.)
- “California courts have held so-called ‘me too’ evidence, that is, evidence of gender bias against employees other than the plaintiff, may be admissible evidence in discrimination and harassment cases.” (*Meeks, supra*, 24 Cal.App.5th at p. 871.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 363, 370

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

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

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

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

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

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

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

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2521B. Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant (Gov. Code, §§ 12923, 12940(j))

[*Name of plaintiff*] **claims that coworkers at [*name of defendant*] were subjected to harassment based on [*describe protected status, e.g., race, gender, or age*] and that this harassment created a work environment for [*name of plaintiff*] that was hostile, intimidating, offensive, oppressive, or abusive.**

To establish this claim, [*name of plaintiff*] must prove all of the following:

1. That [*name of plaintiff*] was **[an employee of/an applicant for a position with/a person providing services under a contract with/an unpaid intern with/a volunteer with]** [*name of defendant*];
 2. That [*name of plaintiff*], **although not personally subjected to harassing conduct, personally witnessed harassing conduct that took place in [*his/her/nonbinary pronoun*] immediate work environment;**
 3. **That the harassing conduct was severe or pervasive;**
 4. **That a reasonable [*describe member of protected group, e.g., woman*] in [*name of plaintiff*]'s circumstances would have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive;**
 5. **That [*name of plaintiff*] considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive toward [*e.g., women*];**
 6. [*Select applicable basis of defendant's liability:*]
[That a supervisor engaged in the conduct;]

[*or*]

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

Derived from former CACI No. 2521 December 2007; Revised June 2013, December 2015, May 2018, July 2019, November 2021

Directions for Use

Draft—Not Approved by Judicial Council

This instruction is for use in a hostile work environment case if the plaintiff was not the target of the harassing conduct and the defendant is an employer or other entity covered by the FEHA. If the defendant is a labor organization, employment agency, apprenticeship training program or any training program leading to employment (rather than an employer), the instruction should be modified as appropriate. (See Gov. Code, § 12940(j)(1).) If the plaintiff is an external applicant for a position or if the alleged harassment did not occur in the workplace, the instruction should be modified as appropriate. (See *Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1051 [58 Cal.Rptr.2d 122]. [“[A]s long as the harassment occurs in a work-related context, the employer is liable”].)

For an individual defendant, such as the alleged harasser or plaintiff’s coworker, see CACI No. 2522B, *Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant*. For a case in which the plaintiff is the target of the harassment, see CACI No. 2521A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant*. For an instruction for use if the hostile environment is due to widespread sexual favoritism, see CACI No. 2521C, *Work Environment Harassment—Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant*. Also read CACI No. 2523, “*Harassing Conduct Explained*,” and CACI No. 2524, “*Severe or Pervasive Explained*.”

In element 6, select the applicable basis of employer liability: (a) strict liability for a supervisor’s harassing conduct, or (b) the employer’s ratification of the conduct. For a definition of “supervisor,” see CACI No. 2525, *Harassment—“Supervisor” Defined*. If there are both employer and individual supervisor defendants (see CACI No. 2522B, *Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant*) and both are found liable, they are both jointly and severally liable for any damages. Comparative fault and Proposition 51 do not apply to the employer’s strict liability for supervisor harassment. (*State Dep’t of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1041–1042 [6 Cal.Rptr.3d 441, 79 P.3d 556]; see *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 1000 [16 Cal.Rptr.2d 787], disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [25 Cal.Rptr.2d 109, 863 P.2d 179]; see also *Rashtian v. BRAC-BH, Inc.* (1992) 9 Cal.App.4th 1847, 1851 [12 Cal.Rptr.2d 411] [Proposition 51 cannot be applied to those who are without fault and only have vicarious liability by virtue of some statutory fiat].)

See also the Sources and Authority to CACI No. 2521A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant*.

Sources and Authority

- Legislative Intent With Regard to Application of the Laws About Harassment. Government Code section 12923.
- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- “Employer” Defined for Harassment. Government Code section 12940(j)(4)(A).

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- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C),
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Perception and Association. Government Code section 12926(o).
- “The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior.” (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)
- “[T]he adjudicator's inquiry should center, dominantly, on whether the discriminatory conduct has unreasonably interfered with the plaintiff's work performance. To show such interference, ‘the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment.’ It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to ‘make it more difficult to do the job.’ ” (*Harris v. Forklift Sys.* (1993) 510 U.S. 17, 25 [114 S.Ct. 367, 126 L.Ed.2d 295], conc. opn. of Ginsburg, J.; see Gov. Code, § 12923(a) endorsing this language as reflective of California law.)
- “The plaintiff's work environment is affected not only by conduct directed at herself but also by the treatment of others. A woman's perception that her work environment is hostile to women will obviously be reinforced if she witnesses the harassment of other female workers.” (*Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 519 [76 Cal.Rptr.2d 547], internal citations omitted.)
- “Harassment against others in the workplace is only relevant to the plaintiff's case if she has personal knowledge of it. Unless plaintiff witnesses the conduct against others, or is otherwise aware of it, that conduct cannot alter the conditions of her employment and create an abusive working environment. Stated another way, a reasonable person in plaintiff's position would not find the environment hostile or abusive unless that person had knowledge of the objectionable conduct toward others.” (*Beyda, supra*, 65 Cal.App.4th at p. 520.)
- “To state that an employee must be the direct victim of the sexually harassing conduct is somewhat misleading as an employee who is subjected to a hostile work environment is a victim of sexual harassment even though no offensive remarks or touchings are directed to or perpetrated upon that employee. Generally, however, sexual conduct that involves or is aimed at persons other than the plaintiff is considered less offensive and severe than conduct that is directed at the plaintiff. A hostile work environment sexual harassment claim by a plaintiff who was not personally subjected to offensive remarks and touchings requires ‘an even higher showing’ than a claim by one who had been sexually harassed without suffering tangible job detriment: such a plaintiff must ‘establish that the

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sexually harassing conduct permeated [her] direct work environment.’ ¶¶ To meet this burden, the plaintiff generally must show that the harassment directed at others was in her immediate work environment, and that she personally witnessed it. The reason for this is obvious: if the plaintiff does not witness the incidents involving others, ‘those incidents cannot affect ... her perception of the hostility of the work environment.’” (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 284-285 [42 Cal.Rptr.3d 2, 132 P.3d 211], internal citations omitted.)

- “[U]nder the FEHA, an employer is strictly liable for *all* acts of sexual harassment by a supervisor. (*State Dep’t of Health Servs., supra*, 31 Cal.4th at p. 1041, original italics.)
- “The applicable language of the FEHA does not suggest that an employer’s liability for sexual harassment by a supervisor is constrained by principles of agency law. Had the Legislature so intended, it would have used language in the FEHA imposing the negligence standard of liability on acts of harassment by an employee ‘other than an agent,’ ‘not acting as the employer’s agent,’ or ‘not acting within the scope of an agency for the employer.’ By providing instead in section 12940, subdivision (j)(1), that the negligence standard applies to acts of harassment ‘by an employee other than an agent *or supervisor*’ (italics added), the Legislature has indicated that all acts of harassment by a supervisor are to be exempted from the negligence standard, whether or not the supervisor was then acting as the employer’s agent, and that agency principles come into play only when the harasser is not a supervisor. (*State Dept. of Health Services, supra*, 31 Cal.4th at p. 1041, original italics.)
- “[I]n order for the employer to avoid strict liability for the supervisor’s actions under the FEHA, the harassment must result from a completely private relationship unconnected with the employment. Otherwise, the employer is strictly liable for the supervisor’s actions regardless of whether the supervisor was acting as the employer’s agent.” (*Myers v. Trendwest Resorts, Inc.* (2007) 148 Cal.App.4th 1403, 1421 [56 Cal.Rptr.3d 501].)
- “In order to be actionable, it must be shown that respondents knew, or should have known, of the alleged harassment and failed to take appropriate action.” (*McCoy v. Pacific Maritime Assn.* (2013) 216 Cal.App.4th 283, 294 [156 Cal.Rptr.3d 851].)
- “If an employee other than an agent or supervisor commits the harassment, and the employer takes immediate and appropriate corrective action when it becomes or reasonably should become aware of the conduct—for example, when the victim or someone else informs the employer—there simply is no ‘unlawful employment practice’ that the FEHA governs.” (*Carrisales v. Dept. of Corrections* (1999) 21 Cal.4th 1132, 1136 [90 Cal.Rptr.2d 804, 988 P.2d 1083], called into doubt on other grounds by statute.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 363, 370

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

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68,

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2.75, Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.21, 3.36, 3.45

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

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

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

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

**2521C. Work Environment Harassment—Sexual Favoritism—Essential Factual Elements—
Employer or Entity Defendant (Gov. Code, §§ 12923, 12940(j))**

[*Name of plaintiff*] claims that [*he/she/nonbinary pronoun*] was subjected to harassment based on sexual favoritism at [*name of defendant*] and that this harassment created a work environment that was hostile, intimidating, offensive, oppressive, or abusive. “Sexual favoritism” means that another employee has received preferential treatment with regard to promotion, work hours, assignments, or other significant employment benefits or opportunities because of a sexual relationship with an individual representative of the employer who was in a position to grant those preferences.

To establish this claim, [*name of plaintiff*] must prove all of the following:

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

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

[*or*]

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

7. That [*name of plaintiff*] was harmed; and
 8. That the conduct was a substantial factor in causing [*name of plaintiff*]’s harm.
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Derived from former CACI No. 2521 December 2007; Revised December 2015, May 2018, July 2019, May 2020, November 2021

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Directions for Use

This instruction is for use in a hostile work environment case involving sexual favoritism when the defendant is an employer or other entity covered by the FEHA. If the defendant is a labor organization, employment agency, apprenticeship training program or any training program leading to employment (rather than an employer), the instruction should be modified as appropriate. (See Gov. Code, § 12940(j)(1).) The relevant provision also protects an applicant for a position. (Id.) If the facts of the case support it, the instruction should be modified as appropriate for the applicant’s circumstances.

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

In element 6, select the applicable basis of employer liability: (a) strict liability for a supervisor’s harassing conduct, or (b) the employer’s ratification of the conduct. For a definition of “supervisor,” see CACI No. 2525, *Harassment—“Supervisor” Defined*. If there are both employer and individual supervisor defendants (see CACI No. 2522C, *Work Environment Harassment—Sexual Favoritism—Essential Factual Elements—Individual Defendant*) and both are found liable, they are both jointly and severally liable for any damages. Comparative fault and Proposition 51 do not apply to the employer’s strict liability for supervisor harassment. (*State Dep’t of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1041–1042 [6 Cal.Rptr.3d 441, 79 P.3d 556]; see *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 1000 [16 Cal.Rptr.2d 787], disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [25 Cal.Rptr.2d 109, 863 P.2d 179]; see also *Rashtian v. BRAC-BH, Inc.* (1992) 9 Cal.App.4th 1847, 1851 [12 Cal.Rptr.2d 411] [Proposition 51 cannot be applied to those who are without fault and only have vicarious liability by virtue of some statutory fiat].)

See also the Sources and Authority to CACI No. 2521A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant*.

Sources and Authority

- Declaration of Legislative Intent With Regard to Application of the Laws About Harassment. Government Code section 12923.
- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- “Employer” Defined for Harassment. Government Code section 12940(j)(4)(A).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).

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- Harassment Because of Sex. Government Code section 12940(j)(4)(C).
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Perception and Association. Government Code section 12926(o).
- “The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior.” (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)
- “[T]he adjudicator’s inquiry should center, dominantly, on whether the discriminatory conduct has unreasonably interfered with the plaintiff’s work performance. To show such interference, ‘the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment.’ It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to ‘make it more difficult to do the job.’” (*Harris v. Forklift Sys.* (1993) 510 U.S. 17, 25 [114 S.Ct. 367, 126 L.Ed.2d 295], conc. opn. of Ginsburg, J; see Gov. Code, § 12923(a) endorsing this language as reflective of California law.)
- “Following the guidance of the EEOC, and also employing standards adopted in our prior cases, we believe that an employee may establish an actionable claim of sexual harassment under the FEHA by demonstrating that widespread sexual favoritism was severe or pervasive enough to alter his or her working conditions and create a hostile work environment.” (*Miller v. Dept. of Corrections* (2005) 36 Cal.4th 446, 466 [30 Cal.Rptr.3d 797, 115 P.3d 77], internal citations omitted.)
- “[S]exual favoritism by a manager may be actionable when it leads employees to believe that ‘they [can] obtain favorable treatment from [the manager] if they became romantically involved with him’, the affair is conducted in a manner ‘so indiscreet as to create a hostile work environment,’ or the manager has engaged in ‘other pervasive conduct ... which created a hostile work environment.’” (*Miller, supra*, 36 Cal.4th at p. 465, internal citations omitted.)
- “[A] romantic relationship between a supervisor and an employee does not, without more, give rise to a sexual discrimination or sexual harassment claim either under the FEHA or the public policy of the state.” (*Proksel v. Gattis* (1996) 41 Cal.App.4th 1626, 1631 [49 Cal.Rptr.2d 322].)
- “The FEHA imposes two standards of employer liability for sexual harassment, depending on whether the person engaging in the harassment is the victim’s supervisor or a nonsupervisory coemployee. The employer is liable for harassment by a nonsupervisory employee only if the employer (a) knew or should have known of the harassing conduct and (b) failed to take immediate and appropriate corrective action. This is a negligence standard. Because the FEHA imposes this negligence standard only for harassment ‘by an employee other than an agent or supervisor’, by

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implication the FEHA makes the employer strictly liable for harassment by a supervisor.” (*State Dep’t of Health Servs.*, *supra*, 31 Cal.4th at pp. 1040–1041, original italics.)

- “The applicable language of the FEHA does not suggest that an employer’s liability for sexual harassment by a supervisor is constrained by principles of agency law. Had the Legislature so intended, it would have used language in the FEHA imposing the negligence standard of liability on acts of harassment by an employee ‘other than an agent,’ ‘not acting as the employer’s agent,’ or ‘not acting within the scope of an agency for the employer.’ By providing instead in section 12940, subdivision (j)(1), that the negligence standard applies to acts of harassment ‘by an employee other than an agent *or supervisor*’ (italics added), the Legislature has indicated that all acts of harassment by a supervisor are to be exempted from the negligence standard, whether or not the supervisor was then acting as the employer’s agent, and that agency principles come into play only when the harasser is not a supervisor. (*State Dept. of Health Services*, *supra*, 31 Cal.4th at p. 1041, original italics.)
- “[I]n order for the employer to avoid strict liability for the supervisor’s actions under the FEHA, the harassment must result from a completely private relationship unconnected with the employment. Otherwise, the employer is strictly liable for the supervisor’s actions regardless of whether the supervisor was acting as the employer’s agent.” (*Myers v. Trendwest Resorts, Inc.* (2007) 148 Cal.App.4th 1403, 1421 [56 Cal.Rptr.3d 501].)
- “In order to be actionable, it must be shown that respondents knew, or should have known, of the alleged harassment and failed to take appropriate action.” (*McCoy v. Pacific Maritime Assn.* (2013) 216 Cal.App.4th 283, 294 [156 Cal.Rptr.3d 851].)
- “If an employee other than an agent or supervisor commits the harassment, and the employer takes immediate and appropriate corrective action when it becomes or reasonably should become aware of the conduct—for example, when the victim or someone else informs the employer—there simply is no ‘unlawful employment practice’ that the FEHA governs.” (*Carrisales v. Dept. of Corrections* (1999) 21 Cal.4th 1132, 1136 [90 Cal.Rptr.2d 804, 988 P.2d 1083], called into doubt on other grounds by statute.)

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 363, 370

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

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

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

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

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

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

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2522A. Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant (Gov. Code, §§ 12923, 12940(j))

[Name of plaintiff] claims that [name of defendant] subjected [him/her/nonbinary pronoun] to harassment based on [describe protected status, e.g., race, gender, or age] at [name of employer] and that this harassment created a work environment that was hostile, intimidating, offensive, oppressive, or abusive.

To establish this claim, [name of plaintiff] must prove all of the following:

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

Derived from former CACI No. 2522 December 2007; Revised June 2013, December 2015, May 2018, July 2019, May 2020, November 2021

Directions for Use

This instruction is for use in a hostile work environment case if the plaintiff was the target of the harassing conduct and the defendant is an individual such as the alleged harasser or plaintiff’s coworker. If the plaintiff is an external applicant for a position or if the alleged harassment did not occur in the workplace, the instruction should be modified as appropriate. (See Gov. Code, § 12940(j)(1); Doe v. Capital Cities (1996) 50 Cal.App.4th 1038, 1051 [58 Cal.Rptr.2d 122]. [“[A]s long as the harassment occurs in a work-related context, the employer is liable”].)

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For an employer defendant, see CACI No. 2521A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant*. For a case in which the plaintiff is not the target of the harassment, see CACI No. 2522B, *Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant*. For an instruction for use if the hostile environment is due to sexual favoritism, see CACI No. 2522C, *Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Individual Defendant*. Also read CACI No. 2523, “*Harassing Conduct*” Explained, and CACI No. 2524, “*Severe or Pervasive*” Explained.

Modify element 2 if the plaintiff was not actually a member of the protected class, but alleges harassment because the plaintiff was perceived to be a member, or associated with someone who was or was perceived to be a member, of the protected class. (See Gov. Code, § 12926(o).)

If there are both employer and individual supervisor defendants (see CACI No. 2521A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant*) and both are found liable, they are both jointly and severally liable for any damages. Comparative fault and Proposition 51 do not apply to the employer’s strict liability for supervisor harassment. (*State Dept. of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1041–1042 [6 Cal.Rptr.3d 441, 79 P.3d 556]; see *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 1000 [16 Cal.Rptr.2d 787], disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [25 Cal.Rptr.2d 109, 863 P.2d 179]; see also *Rashtian v. BRAC-BH, Inc.* (1992) 9 Cal.App.4th 1847, 1851 [12 Cal.Rptr.2d 411] [Proposition 51 cannot be applied to those who are without fault and only have vicarious liability by virtue of some statutory fiat].)

See also the Sources and Authority to CACI No. 2521A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant*.

Sources and Authority

- Legislative Intent With Regard to Application of the Laws About Harassment. Government Code section 12923.
- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- Personal Liability for Harassment. Government Code section 12940(j)(3).
- “Employer” Defined for Harassment. Government Code section 12940(j)(4)(A).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Perception and Association. Government Code section 12926(o).

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- “To establish a prima facie case of a hostile work environment, [the plaintiff] must show that (1) [plaintiff] is a member of a protected class; (2) [plaintiff] was subjected to unwelcome harassment; (3) the harassment was based on [plaintiff’s] protected status; (4) the harassment unreasonably interfered with [plaintiff’s] work performance by creating an intimidating, hostile, or offensive work environment; and (5) defendants are liable for the harassment.” (*Ortiz v. Dameron Hospital Assn.* (2019) 37 Cal.App.5th 568, 581 [250 Cal.Rptr.3d 1].)
- “[T]he adjudicator’s inquiry should center, dominantly, on whether the discriminatory conduct has unreasonably interfered with the plaintiff’s work performance. To show such interference, ‘the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment.’ It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to ‘make it more difficult to do the job.’ ” (*Harris v. Forklift Sys.* (1993) 510 U.S. 17, 25 [114 S.Ct. 367, 126 L.Ed.2d 295], conc. opn. of Ginsburg, J.; see Gov. Code, § 12923(a) endorsing this language as reflective of California law.)
- “Under FEHA, an employee who harasses another employee may be held personally liable.” (*Lewis v. City of Benicia* (2014) 224 Cal.App.4th 1519, 1524 [169 Cal.Rptr.3d 794].)
- “A supervisor who, without more, fails to take action to prevent sexual harassment of an employee is not personally liable as an aider and abettor of the harasser, an aider and abettor of the employer or an agent of the employer.” (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1331 [58 Cal.Rptr.2d 308].)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 363, 370

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

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

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

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

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

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

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2522B. Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant (Gov. Code, §§ 12923, 12940(j))

[*Name of plaintiff*] **claims that coworkers at [*name of employer*] were subjected to harassment based on [*describe protected status, e.g., race, gender, or age*] and that this harassment created a work environment for [*name of plaintiff*] that was hostile, intimidating, offensive, oppressive, or abusive.**

To establish this claim, [*name of plaintiff*] must prove all of the following:

1. That [*name of plaintiff*] was [an employee of/**an applicant for a position with**/a person providing services under a contract with/an unpaid intern with/a volunteer with] [*name of employer*];
 2. That [*name of plaintiff*], although not personally subjected to harassing conduct, personally witnessed harassing conduct that took place in [*his/her/nonbinary pronoun*] immediate work environment;
 3. That the harassing conduct was severe or pervasive;
 4. That a reasonable [*describe member of protected group, e.g., woman*] in [*name of plaintiff*]’s circumstances would have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive;
 5. That [*name of plaintiff*] considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive toward [*e.g., women*];
 6. That [*name of defendant*] [participated in/assisted/ [or] encouraged] the harassing conduct;
 7. That [*name of plaintiff*] was harmed; and
 8. That the conduct was a substantial factor in causing [*name of plaintiff*]’s harm.
-

Derived from former CACI No. 2522 December 2007; Revised June 2013, December 2015, May 2018, July 2019, **November 2021**

Directions for Use

This instruction is for use in a hostile work environment case if the plaintiff was not the target of the harassing conduct and the defendant is an individual such as the alleged harasser or plaintiff’s coworker. **If the plaintiff is an external applicant for a position or if the alleged harassment did not occur in the workplace, the instruction should be modified as appropriate. (See Gov. Code, § 12940(j)(1); Doe v. Capital Cities (1996) 50 Cal.App.4th 1038, 1051 [58 Cal.Rptr.2d 122]. [“[A]s long as the harassment occurs in a work-related context, the employer is liable”].)**

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For an employer defendant, see CACI No. 2521B, *Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant*. For a case in which the plaintiff is the target of the harassment, see CACI No. 2522A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant*. For an instruction for use if the hostile environment is due to sexual favoritism, see CACI No. 2522C, *Work Environment Harassment—Sexual Favoritism—Essential Factual Elements—Individual Defendant*. Also read CACI No. 2523, “*Harassing Conduct*” Explained, and CACI No. 2524, “*Severe or Pervasive*” Explained.

If there are both employer and individual supervisor defendants (see CACI No. 2521B, *Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant*) and both are found liable, they are both jointly and severally liable for any damages. Comparative fault and Proposition 51 do not apply to the employer’s strict liability for supervisor harassment. (*State Dep’t of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1041–1042 [6 Cal.Rptr.3d 441, 79 P.3d 556]; see *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 1000 [16 Cal.Rptr.2d 787], disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [25 Cal.Rptr.2d 109, 863 P.2d 179]; see also *Rashtian v. BRAC-BH, Inc.* (1992) 9 Cal.App.4th 1847, 1851 [12 Cal.Rptr.2d 411] [Proposition 51 cannot be applied to those who are without fault and only have vicarious liability by virtue of some statutory fiat].)

See also the Sources and Authority to CACI No. 2521A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant*.

Sources and Authority

- Legislative Intent With Regard to Application of the Laws About Harassment. Government Code section 12923.
- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- Personal Liability for Harassment. Government Code section 12940(j)(3).
- “Employer” Defined for Harassment. Government Code section 12940(j)(4)(A).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Perception and Association. Government Code section 12926(o).
- “The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the

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

- “[T]he adjudicator’s inquiry should center, dominantly, on whether the discriminatory conduct has unreasonably interfered with the plaintiff’s work performance. To show such interference, ‘the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment.’ It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to ‘make it more difficult to do the job.’ ” (*Harris v. Forklift Sys.* (1993) 510 U.S. 17, 25 [114 S.Ct. 367, 126 L.Ed.2d 295], conc. opn. of Ginsburg, J; see Gov. Code, § 12923(a) endorsing this language as reflective of California law.)
- “The plaintiff’s work environment is affected not only by conduct directed at herself but also by the treatment of others. A woman’s perception that her work environment is hostile to women will obviously be reinforced if she witnesses the harassment of other female workers.” (*Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 519 [76 Cal.Rptr.2d 547], internal citations omitted.)
- “Harassment against others in the workplace is only relevant to the plaintiff’s case if she has personal knowledge of it. Unless plaintiff witnesses the conduct against others, or is otherwise aware of it, that conduct cannot alter the conditions of her employment and create an abusive working environment. Stated another way, a reasonable person in plaintiff’s position would not find the environment hostile or abusive unless that person had knowledge of the objectionable conduct toward others.” (*Beyda, supra*, 65 Cal.App.4th at p. 520.)
- “To state that an employee must be the direct victim of the sexually harassing conduct is somewhat misleading as an employee who is subjected to a hostile work environment is a victim of sexual harassment even though no offensive remarks or touchings are directed to or perpetrated upon that employee. Generally, however, sexual conduct that involves or is aimed at persons other than the plaintiff is considered less offensive and severe than conduct that is directed at the plaintiff. A hostile work environment sexual harassment claim by a plaintiff who was not personally subjected to offensive remarks and touchings requires ‘an even higher showing’ than a claim by one who had been sexually harassed without suffering tangible job detriment: such a plaintiff must ‘establish that the sexually harassing conduct permeated [her] direct work environment.’ [¶] To meet this burden, the plaintiff generally must show that the harassment directed at others was in her immediate work environment, and that she personally witnessed it. The reason for this is obvious: if the plaintiff does not witness the incidents involving others, ‘those incidents cannot affect ... her perception of the hostility of the work environment.’ ” (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 284–285 [42 Cal.Rptr.3d 2, 132 P.3d 211], internal citations omitted.)
- “[W]e conclude a nonharassing supervisor, who fails to take action to prevent sexual harassment, is not personally liable for sexual harassment under the Fair Employment and Housing Act (FEHA).” (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1322 [58 Cal.Rptr.2d 308].)
- “A supervisor who, without more, fails to take action to prevent sexual harassment of an employee is

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not personally liable as an aider and abettor of the harasser, an aider and abettor of the employer or an agent of the employer.” (*Fiol, supra*, 50 Cal.App.4th at p. 1331.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 363, 370

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

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

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

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

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

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

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2522C. Work Environment Harassment—Sexual Favoritism—Essential Factual Elements—
Individual Defendant (Gov. Code, §§ 12923, 12940(j))

[*Name of plaintiff*] claims that [*he/she/nonbinary pronoun*] was subjected to harassment based on sexual favoritism at [*name of employer*] and that this harassment created a work environment that was hostile, intimidating, offensive, oppressive, or abusive. “Sexual favoritism” means that another employee has received preferential treatment with regard to promotion, work hours, assignments, or other significant employment benefits or opportunities because of a sexual relationship with an individual representative of the employer who was in a position to grant these preferences.

To establish this claim, [*name of plaintiff*] must prove all of the following:

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

Derived from former CACI No. 2522 December 2007; Revised December 2015, May 2018, July 2019, May 2020, November 2021

Directions for Use

This instruction is for use in a hostile work environment case involving sexual favoritism when the defendant is an individual such as the alleged harasser or plaintiff’s coworker. The relevant provision also protects an applicant for a position. (Gov. Code, § 12940(j)(1).) If the facts of the case support it, the instruction should be modified as appropriate to the applicant’s circumstances.

For an employer defendant, see CACI No. 2521C, *Work Environment Harassment—Sexual Favoritism—*

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Essential Factual Elements—Employer or Entity Defendant. For a case in which the plaintiff is the target of harassment based on a protected status such as gender, race, or sexual orientation, see CACI No. 2522A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant.* For an instruction for use if the plaintiff is not the target of the harassment, see CACI No. 2522B, *Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant.* Also read CACI No. 2523, “*Harassing Conduct*” Explained, and CACI No. 2524, “*Severe or Pervasive*” Explained.

If there are both employer and individual supervisor defendants (see CACI No. 2521C, *Work Environment Harassment—Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant*) and both are found liable, they are both jointly and severally liable for any damages. Comparative fault and Proposition 51 do not apply to the employer’s strict liability for supervisor harassment. (*State Dep’t of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1041–1042 [6 Cal.Rptr.3d 441, 79 P.3d 556]; see *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 1000 [16 Cal.Rptr.2d 787], disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [25 Cal.Rptr.2d 109, 863 P.2d 179]; see also *Rashtian v. BRAC-BH, Inc.* (1992) 9 Cal.App.4th 1847, 1851 [12 Cal.Rptr.2d 411] [Proposition 51 cannot be applied to those who are without fault and only have vicarious liability by virtue of some statutory fiat].)

See also the Sources and Authority to CACI No. 2521A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant.*

Sources and Authority

- Declaration of Legislative Intent With Regard to Application of the Laws About Harassment. Government Code section 12923.
- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- Personal Liability for Harassment. Government Code section 12940(j)(3).
- “Employer” Defined for Harassment. Government Code section 12940(j)(4)(A).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Perception and Association. Government Code section 12926(o).
- “The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently

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

- “[T]he adjudicator’s inquiry should center, dominantly, on whether the discriminatory conduct has unreasonably interfered with the plaintiff’s work performance. To show such interference, ‘the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment.’ It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to ‘make it more difficult to do the job.’ ” (*Harris v. Forklift Sys.* (1993) 510 U.S. 17, 25 [114 S.Ct. 367, 126 L.Ed.2d 295], conc. opn. of Ginsburg, J.; see Gov. Code, § 12923(a) endorsing this language as reflective of California law.)
- “Following the guidance of the EEOC, and also employing standards adopted in our prior cases, we believe that an employee may establish an actionable claim of sexual harassment under the FEHA by demonstrating that widespread sexual favoritism was severe or pervasive enough to alter his or her working conditions and create a hostile work environment.” (*Miller v. Dept. of Corrections* (2005) 36 Cal.4th 446, 466 [30 Cal.Rptr.3d 797, 115 P.3d 77], internal citations omitted.)
- “[S]exual favoritism by a manager may be actionable when it leads employees to believe that ‘they [can] obtain favorable treatment from [the manager] if they became romantically involved with him’, the affair is conducted in a manner ‘so indiscreet as to create a hostile work environment,’ or the manager has engaged in ‘other pervasive conduct ... which created a hostile work environment.’ ” (*Miller, supra*, 36 Cal.4th at p. 465, internal citations omitted.)
- “[A] romantic relationship between a supervisor and an employee does not, without more, give rise to a sexual discrimination or sexual harassment claim either under the FEHA or the public policy of the state.” (*Proksel v. Gattis* (1996) 41 Cal.App.4th 1626, 1631 [49 Cal.Rptr.2d 322].)
- “[W]e conclude a nonharassing supervisor, who fails to take action to prevent sexual harassment, is not personally liable for sexual harassment under the Fair Employment and Housing Act (FEHA).” (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1322 [58 Cal.Rptr.2d 308].)
- “A supervisor who, without more, fails to take action to prevent sexual harassment of an employee is not personally liable as an aider and abettor of the harasser, an aider and abettor of the employer or an agent of the employer.” (*Fiol, supra*, 50 Cal.App.4th at p. 1331.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 363, 370

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

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

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

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

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36[5] (Matthew Bender)

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

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VF-2506A. Work Environment Harassment—Conduct Directed at Plaintiff—Employer or Entity
Defendant (Gov. Code, §§ 12923, 12940(j))

We answer the questions submitted to us as follows:

1. Was [name of plaintiff] [an employee of/**an applicant for a position with**/a person providing services under a contract with/an unpaid intern with/a volunteer with] [name of defendant]?
- ___ Yes ___ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was [name of plaintiff] subjected to harassing conduct because [he/she/nonbinary pronoun] was [protected status, e.g., a woman]?
- ___ Yes ___ No

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

3. Was the harassment severe or pervasive?
- ___ Yes ___ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Would a reasonable [e.g., woman] in [name of plaintiff]'s circumstances have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive?
- ___ Yes ___ No

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

5. Did [name of plaintiff] consider the work environment to be hostile, intimidating, offensive, oppressive, or abusive?
- ___ Yes ___ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

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6. Did [name of defendant] [or [his/her/nonbinary pronoun/its] supervisors or agents] know or should [he/she/nonbinary pronoun/it/they] have known of the harassing conduct?
____ Yes ____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Did [name of defendant] [or [his/her/nonbinary pronoun/its] supervisors or agents] fail to take immediate and appropriate corrective action?
____ Yes ____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. Was the harassing conduct a substantial factor in causing harm to [name of plaintiff]?
____ Yes ____ No

If your answer to question 8 is yes, then answer question 9. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

9. What are [name of plaintiff]'s damages?

[a. Past economic loss

[lost earnings	\$ _____]
[lost profits	\$ _____]
[medical expenses	\$ _____]
[other past economic loss	\$ _____]

Total Past Economic Damages: \$ _____]

[b. Future economic loss

[lost earnings	\$ _____]
[lost profits	\$ _____]
[medical expenses	\$ _____]
[other future economic loss	\$ _____]

Total Future Economic Damages: \$ _____]

[c. Past noneconomic loss, including [physical pain/mental suffering:]
\$ _____]

[d. Future noneconomic loss, including [physical

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pain/mental suffering:]

\$ _____]

TOTAL \$ _____

Signed: _____
Presiding Juror

Dated: _____

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

Derived from former CACI No. VF-2506 December 2007; Revised December 2010, June 2013, December 2016, May 2020, May 2021, November 2021

Directions for Use

This verdict form is based on CACI No. 2521A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Relationships other than employer/employee can be substituted in question 1, as in element 1 of CACI No. 2521A. Depending on the facts of the case, other factual scenarios for employer liability can be substituted in questions 6 and 7, as in element 6 of the instruction.

Modify question 2 if the plaintiff was not actually a member of the protected class, but alleges harassment because the plaintiff was perceived to be a member, or associated with someone who was or was perceived to be a member, of the protected class. (See Gov. Code, § 12926(o).)

If specificity is not required, users do not have to itemize all the damages listed in question 9 and do not have to categorize “economic” and “noneconomic” damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

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

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any factual findings that are required in order to calculate the amount of prejudgment interest.

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VF-2506B. Work Environment Harassment—Conduct Directed at Others—Employer or Entity
Defendant (Gov. Code, §§ 12923, 12940(j))

We answer the questions submitted to us as follows:

1. Was [*name of plaintiff*] [an employee of/**an applicant for a position with**/a person providing services under a contract with/an unpaid intern with/a volunteer with] [*name of defendant*]?
 Yes No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [*name of plaintiff*] personally witness harassing conduct that took place in [*his/her/nonbinary pronoun*] immediate work environment?
 Yes No

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

3. Was the harassment severe or pervasive?
 Yes No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Would a reasonable [*describe member of protected group, e.g., woman*] in [*name of plaintiff*]'s circumstances have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive?
 Yes No

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

5. Did [*name of plaintiff*] consider the work environment to be hostile, intimidating, offensive, oppressive, or abusive toward [*e.g., women*]?
 Yes No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

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6. Did [name of defendant] [or [his/her/nonbinary pronoun/its] supervisors or agents] know or should [he/she/nonbinary pronoun/it/they] have known of the harassing conduct?

___ Yes ___ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Did [name of defendant] [or [his/her/nonbinary pronoun/its] supervisors or agents] fail to take immediate and appropriate corrective action?

___ Yes ___ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. Was the harassing conduct a substantial factor in causing harm to [name of plaintiff]?

___ Yes ___ No

If your answer to question 8 is yes, then answer question 9. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

9. What are [name of plaintiff]'s damages?

[a. Past economic loss

[lost earnings \$ _____]

[lost profits \$ _____]

[medical expenses \$ _____]

[other past economic loss \$ _____]

Total Past Economic Damages: \$ _____]

[b. Future economic loss

[lost earnings \$ _____]

[lost profits \$ _____]

[medical expenses \$ _____]

[other future economic loss \$ _____]

Total Future Economic Damages: \$ _____]

[c. Past noneconomic loss, including [physical pain/mental suffering:]

\$ _____]

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[d. Future noneconomic loss, including [physical pain/mental suffering:]

\$ _____]

TOTAL \$ _____

Signed: _____
Presiding Juror

Dated: _____

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

Derived from former CACI No. VF-2506 December 2007; Revised December 2010, June 2013, December 2016, May 2020, May 2021, November 2021

Directions for Use

This verdict form is based on CACI No. 2521B, *Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Relationships other than employer/employee can be substituted in question 1, as in element 1 of CACI No. 2521B. Depending on the facts of the case, other factual scenarios for employer liability can be substituted in questions 6 and 7, as in element 6 of the instruction.

If specificity is not required, users do not have to itemize all the damages listed in question 9 and do not have to categorize “economic” and “noneconomic” damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

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

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VF-2506C. Work Environment Harassment—Sexual Favoritism—Employer or Entity Defendant
(Gov. Code, §§ 12923, 12940(j))

We answer the questions submitted to us as follows:

1. Was [name of plaintiff] [an employee of/**an applicant for a position with**/a person providing services under a contract with/**an unpaid intern with**/a volunteer with] [name of defendant]?
 Yes No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was there sexual favoritism in the work environment?
 Yes No

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

3. Was the sexual favoritism severe or pervasive?
 Yes No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Would a reasonable [describe member of protected group, e.g., woman] in [name of plaintiff]'s circumstances have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive?
 Yes No

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

5. Did [name of plaintiff] consider the work environment to be hostile, intimidating, offensive, oppressive, or abusive because of the sexual favoritism?
 Yes No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

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6. Did [name of defendant] [or [his/her/nonbinary pronoun/its] supervisors or agents] know or should [he/she/nonbinary pronoun/it/they] have known of the sexual favoritism?

___ Yes ___ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Did [name of defendant] [or [his/her/nonbinary pronoun/its] supervisors or agents] fail to take immediate and appropriate corrective action?

___ Yes ___ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. Was the sexual favoritism a substantial factor in causing harm to [name of plaintiff]?

___ Yes ___ No

If your answer to question 8 is yes, then answer question 9. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

9. What are [name of plaintiff]'s damages?

[a. Past economic loss

[lost earnings \$ _____]

[lost profits \$ _____]

[medical expenses \$ _____]

[other past economic loss \$ _____]

Total Past Economic Damages: \$ _____]

[b. Future economic loss

[lost earnings \$ _____]

[lost profits \$ _____]

[medical expenses \$ _____]

[other future economic loss \$ _____]

Total Future Economic Damages: \$ _____]

[c. Past noneconomic loss, including [physical pain/mental suffering:]

\$ _____]

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[d. Future noneconomic loss, including [physical pain/mental suffering:]

\$ _____]

TOTAL \$ _____

Signed: _____
Presiding Juror

Dated: _____

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

Derived from former CACI No. VF-2506 December 2007; Revised December 2010, December 2016, May 2020, May 2021, November 2021

Directions for Use

This verdict form is based on CACI No. 2521C, *Work Environment Harassment—Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Relationships other than employer/employee can be substituted in question 1, as in element 1 of CACI No. 2521C. Depending on the facts of the case, other factual scenarios for employer liability can be substituted in questions 6 and 7, as in element 6 of the instruction.

If specificity is not required, users do not have to itemize all the damages listed in question 9 and do not have to categorize “economic” and “noneconomic” damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

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

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VF-2507A. Work Environment Harassment—Conduct Directed at Plaintiff—Individual Defendant (Gov. Code, §§ 12923, 12940(j))

We answer the questions submitted to us as follows:

1. Was [name of plaintiff] [an employee of/**an applicant for a position with**/a person providing services under a contract with/an unpaid intern with/a volunteer with] [name of employer]?
- ___ Yes ___ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was [name of plaintiff] subjected to harassing conduct because [he/she/nonbinary pronoun] was [protected status, e.g., a woman]?
- ___ Yes ___ No

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

3. Was the harassment severe or pervasive?
- ___ Yes ___ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Would a reasonable [e.g., woman] in [name of plaintiff]'s circumstances have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive?
- ___ Yes ___ No

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

5. Did [name of plaintiff] consider the work environment to be hostile, intimidating, offensive, oppressive, or abusive?
- ___ Yes ___ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

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6. Did [name of defendant] [participate in/assist/ [or] encourage] the harassing conduct?
____ Yes ____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Was the harassing conduct a substantial factor in causing harm to [name of plaintiff]?
____ Yes ____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. What are [name of plaintiff]'s damages?

[a. Past economic loss
[lost earnings \$ _____]
[lost profits \$ _____]
[medical expenses \$ _____]
[other past economic loss \$ _____]
Total Past Economic Damages: \$ _____]

[b. Future economic loss
[lost earnings \$ _____]
[lost profits \$ _____]
[medical expenses \$ _____]
[other future economic loss \$ _____]
Total Future Economic Damages: \$ _____]

[c. Past noneconomic loss, including [physical pain/mental suffering:]
\$ _____]

[d. Future noneconomic loss, including [physical pain/mental suffering:]
\$ _____]

TOTAL \$ _____

Signed: _____
Presiding Juror

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Dated: _____

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

Derived from former CACI No. VF-2507 December 2007; Revised December 2010, June 2013, December 2016, May 2020, May 2021, November 2021

Directions for Use

This verdict form is based on CACI No. 2522A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Relationships other than employer/employee can be substituted in question 1, as in element 1 of CACI No. 2522A.

Modify question 2 if the plaintiff was not actually a member of the protected class, but alleges harassment because the plaintiff was perceived to be a member, or associated with someone who was or was perceived to be a member, of the protected class. (See Gov. Code, § 12926(o).)

If specificity is not required, users do not have to itemize all the damages listed in question 8 and do not have to categorize “economic” and “noneconomic” damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

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

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VF-2507B. Work Environment Harassment—Conduct Directed at Others—Individual Defendant
(Gov. Code, §§ 12923, 12940(j))

We answer the questions submitted to us as follows:

1. Was [*name of plaintiff*] [an employee of/**an applicant for a position with**/a person providing services under a contract with/an unpaid intern with/a volunteer with] [*name of employer*]?
 Yes No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [*name of plaintiff*] personally witness harassing conduct that took place in [*his/her/nonbinary pronoun*] immediate work environment?
 Yes No

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

3. Was the harassment severe or pervasive?
 Yes No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Would a reasonable [*describe member of protected group, e.g., woman*] in [*name of plaintiff*]'s circumstances have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive?
 Yes No

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

5. Did [*name of plaintiff*] consider the work environment to be hostile, intimidating, offensive, oppressive, or abusive toward [*e.g., women*]?
 Yes No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

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6. Did [name of defendant] [participate in/assist/ [or] encourage] the harassing conduct?
____ Yes ____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Was the harassing conduct a substantial factor in causing harm to [name of plaintiff]?
____ Yes ____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. What are [name of plaintiff]'s damages?

[a. Past economic loss

[lost earnings \$ _____]
[lost profits \$ _____]
[medical expenses \$ _____]
[other past economic loss \$ _____]

Total Past Economic Damages: \$ _____]

[b. Future economic loss

[lost earnings \$ _____]
[lost profits \$ _____]
[medical expenses \$ _____]
[other future economic loss \$ _____]

Total Future Economic Damages: \$ _____]

[c. Past noneconomic loss, including [physical pain/mental suffering:]

\$ _____]

[d. Future noneconomic loss, including [physical pain/mental suffering:]

\$ _____]

TOTAL \$ _____

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Signed: _____
Presiding Juror

Dated: _____

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

Derived from former CACI No. VF-2507 December 2007; Revised December 2010, June 2013, December 2016, May 2020, May 2021, November 2021

Directions for Use

This verdict form is based on CACI No. 2522B, *Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Relationships other than employer/employee can be substituted in question 1, as in element 1 of CACI No. 2521C, *Work Environment Harassment—Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant*.

If specificity is not required, users do not have to itemize all the damages listed in question 8 and do not have to categorize “economic” and “noneconomic” damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

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

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VF-2507C. Work Environment Harassment—Sexual Favoritism—Individual Defendant (Gov. Code, §§ 12923, 12940(j))

We answer the questions submitted to us as follows:

1. Was *[name of plaintiff]* [an employee of/**an applicant for a position with**/a person providing services under a contract with/**an unpaid intern with**/a volunteer with] *[name of employer]*?
 Yes No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was there sexual favoritism in the work environment?
 Yes No

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

3. Was the sexual favoritism severe or pervasive?
 Yes No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Would a reasonable *[describe member of protected group, e.g., woman]* in *[name of plaintiff]*'s circumstances have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive?
 Yes No

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

5. Did *[name of plaintiff]* consider the work environment to be hostile, intimidating, offensive, oppressive, or abusive because of the sexual favoritism?
 Yes No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

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6. Did *[name of defendant]* [participate in/assist/ [or] encourage] the sexual favoritism?
____ Yes ____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Was the sexual favoritism a substantial factor in causing harm to *[name of plaintiff]*?
____ Yes ____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. What are *[name of plaintiff]*'s damages?

[a. Past economic loss

[lost earnings \$ _____]
[lost profits \$ _____]
[medical expenses \$ _____]
[other past economic loss \$ _____]

Total Past Economic Damages: \$ _____]

[b. Future economic loss

[lost earnings \$ _____]
[lost profits \$ _____]
[medical expenses \$ _____]
[other future economic loss \$ _____]

Total Future Economic Damages: \$ _____]

[c. Past noneconomic loss, including [physical pain/mental suffering:]

\$ _____]

[d. Future noneconomic loss, including [physical pain/mental suffering:]

\$ _____]

TOTAL \$ _____

Signed: _____

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Presiding Juror

Dated: _____

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

Derived from former CACI No. VF-2507 December 2007; Revised December 2010, December 2014, December 2016, May 2020, May 2021, November 2021

Directions for Use

This verdict form is based on CACI No. 2522C, *Work Environment Harassment—Sexual Favoritism—Essential Factual Elements—Individual Defendant*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Relationships other than employer/employee can be substituted in question 1, as in element 1 in CACI No. 2521C. Depending on the facts of the case, other factual scenarios for employer liability can be substituted in questions 6 and 7, as in element 6 of the instruction.

If specificity is not required, users do not have to itemize all the damages listed in question 8 and do not have to categorize “economic” and “noneconomic” damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

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

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2702. Nonpayment of Overtime Compensation—Essential Factual Elements (Lab. Code, § 1194)

[Name of plaintiff] claims that [name of defendant] owes [him/her/nonbinary pronoun] overtime pay as required by state law. To establish this claim, [name of plaintiff] must prove all of the following:

1. That [name of plaintiff] performed work for [name of defendant];
2. That [name of plaintiff] worked overtime hours;
3. That [name of defendant] knew or should have known that [name of plaintiff] had worked overtime hours;
4. That [name of plaintiff] was [not paid/paid less than the overtime rate] for some or all of the overtime hours worked; and
5. The amount of overtime pay owed.

Overtime hours are the hours worked longer than [insert applicable definition(s) of overtime hours].

Overtime pay is [insert applicable formula].

An employee is entitled to be paid the legal overtime pay rate even if the employee agrees to work for a lower rate.

New September 2003; Revised June 2005, June 2014, June 2015, May 2020, November 2021

Directions for Use

The court must determine the overtime compensation rate under applicable state or federal law. (See, e.g., Lab. Code, §§ 1173, 1182; Cal. Code Regs., tit. 8, § 11000, subd. 2, § 11010, subd. 4(A), and § 11150, subd. 4(A).) If an employee earns a flat sum bonus during a pay period, under state law the overtime pay rate is calculated using the actual number of non-overtime hours worked by the employee during the pay period. (Alvarado v. Dart Container Corp. of California (2018) 4 Cal.5th 542, 573 [229 Cal.Rptr.3d 347, 411 P.3d 528].) The jury must be instructed accordingly on the applicable overtime pay formula. It is possible that the overtime rate will be different over different periods of time.

Wage and hour claims are governed by two sources of authority: the provisions of the Labor Code, and a series of 18 wage orders adopted by the Industrial Welfare Commission. (See *Mendiola v. CPS Security Solutions, Inc.* (2014) 60 Cal.4th 833, 838 [182 Cal.Rptr.3d 124, 340 P.3d 355].) Both the Labor Code and the IWC wage orders provide for certain exemptions from overtime laws. (See, e.g., Lab. Code, § 1171 [outside salespersons are exempt from overtime requirements]). The assertion of an employee's exemption is an affirmative defense, which presents a mixed question of law and fact. (*Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 794 [85 Cal.Rptr.2d 844, 978 P.2d 2].) For instructions on exemptions, see CACI No. 2720, *Affirmative Defense—Nonpayment of Overtime—Executive Exemption*,

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and CACI No. 2721, *Affirmative Defense—Nonpayment of Overtime—Administrative Exemption*.

Sources and Authority

- Employee Right to Recover Minimum Wage or Overtime Compensation. Labor Code section 1194(a).
- Recovery of Liquidated Damages. Labor Code section 1194.2.
- “Wages” Defined. Labor Code section 200.
- Payment of Uncontested Wages Required. Labor Code section 206(a).
- What Hours Worked Are Overtime. Labor Code section 510.
- Rate of Compensation. Labor Code section 515(d).
- Action by Department to Recover Unpaid Minimum Wage or Overtime Compensation. Labor Code section 1193.6(a).
- “[T]he assertion of an exemption from the overtime laws is considered to be an affirmative defense, and therefore the employer bears the burden of proving the employee’s exemption.” (*Ramirez, supra*, 20 Cal.4th at pp. 794–795.)
- “[W]here an employer has no knowledge that an employee is engaging in overtime work and that employee fails to notify the employer or deliberately prevents the employer from acquiring knowledge of the overtime work, the employer’s failure to pay for the overtime hours is not a violation” (*Jong v. Kaiser Foundation Health Plan, Inc.* (2014) 226 Cal.App.4th 391, 395 [171 Cal.Rptr.3d 874] [applying rule under federal Fair Labor Standards Act to claims under California Labor Code].)
- “[A]n employer’s actual or constructive knowledge of the hours its employees work is an issue of fact” (*Jong, supra*, 226 Cal.App.4th at p. 399.)
- “The question whether [plaintiff] was an outside salesperson within the meaning of applicable statutes and regulations is ... a mixed question of law and fact.” (*Ramirez, supra*, 20 Cal.4th at p. 794.)
- “The FLSA [federal Fair Labor Standards Act] requires overtime pay only if an employee works more than 40 hours per week, regardless of the number of hours worked during any one day. California law, codified at Labor Code section 510, is more stringent and requires overtime compensation for ‘[a]ny work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek.’ ” (*Flowers v. Los Angeles County Metropolitan Transportation Authority* (2015) 243 Cal.App.4th 66, 83 [196 Cal.Rptr.3d 352], internal citation omitted.)
- “We conclude that the flat sum bonus at issue here should be factored into an employee’s regular rate of pay by dividing the amount of the bonus by the total number of nonovertime hours actually worked

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during the relevant pay period and using 1.5, not 0.5, as the multiplier for determining the employee’s overtime pay rate.” (Alvarado, supra, 4 Cal.5th at p. 573.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 417, 420, 421, 437, 438, 439

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-D, *Payment Of Wages*, ¶¶ 11:456, 11:470.1 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-F, *Payment Of Overtime Compensation*, ¶¶ 11:730, 11:955 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-J, *Enforcing California Laws Regulating Employee Compensation*, ¶¶ 11:1342, 11:1478.5 (The Rutter Group)

1 Wilcox, California Employment Law, Ch. 3, *Overtime Compensation and Regulation of Hours Worked*, §§ 3.03[1], 3.04[1], 3.07[1], 3.08[1], 3.09[1]; Ch. 5, *Administrative and Judicial Remedies Under Wage and Hour Laws*, § 5.72 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes*, § 250.40 (Matthew Bender)

California Civil Practice: Employment Litigation, §§ 4:67, 4:76 (Thomson Reuters)

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

~~If you decide that [name of plaintiff] has proved [his/her/nonbinary pronoun] claim against [name of defendant] for [unpaid wages/[insert other claim]], then [name of plaintiff] may be entitled to receive an award of an additional penalty based on the number of days [name of defendant] failed to pay [his/her/nonbinary pronoun] [wages/other] when due.~~

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

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

1. That [name of plaintiff]’s employment with [name of defendant] ended; **and**
2. That [name of defendant] **willfully** failed to pay [name of plaintiff] all wages when due; **and**
- ~~3. That [name of defendant] willfully failed to pay these wages.~~

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

[Name of plaintiff] must also prove the following:

1. ~~The date on which [name of plaintiff]’s wages were due;~~
- ~~2. [Name of plaintiff]’s daily wage rate at the time [his/her/nonbinary pronoun] employment with [name of defendant] ended; and/~~
- ~~3. [The date on which [name of defendant] finally paid [name of plaintiff] all wages due/That [name of defendant] never paid [name of plaintiff] all wages.]~~

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

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

Directions for Use

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

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

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

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

Sources and Authority

- Wages of Discharged Employee Due Immediately. Labor Code section 201.
- Wages of Employee on Quitting. Labor Code section 202.
- Willful Failure to Pay Wages of Discharged Employee. Labor Code section 203.
- Right of Action for Unpaid Wages. Labor Code section 218.
- “Wages” Defined. Labor Code section 200.
- Payment for Accrued Vacation of Terminated Employee. Labor Code section 227.3.
- Wages Partially in Dispute. Labor Code section 206(a).
- Exemption for Certain Governmental Employers. Labor Code section 220(b).
- “Labor Code section 203 empowers a court to award ‘an employee who is discharged or who quits’ a penalty equal to up to 30 days’ worth of the employee’s wages ‘[i]f an employer *willfully* fails to pay’ the employee his full wages immediately (if discharged) or within 72 hours (if he or she quits). It is called a waiting time penalty because it is awarded for effectively making the employee wait for his or her final paycheck. A waiting time penalty may be awarded when the final paycheck is for less than the applicable wage—whether it be the minimum wage, a prevailing wage, or a living wage.” (*Diaz v. Grill Concepts Services, Inc.* (2018) 23 Cal.App.5th 859, 867 [233 Cal.Rptr.3d 524], original italics, internal citations omitted.)
- “ ‘[T]he public policy in favor of full and prompt payment of an employee’s earned wages is

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fundamental and well established ...’ and the failure to timely pay wages injures not only the employee, but the public at large as well. We have also recognized that sections 201, 202, and 203 play an important role in vindicating this public policy. To that end, the Legislature adopted the penalty provision as a disincentive for employers to pay final wages late. It goes without saying that a longer statute of limitations for section 203 penalties provides additional incentive to encourage employers to pay final wages in a prompt manner, thus furthering the public policy.” (*Pineda v. Bank of America, N.A.* (2010) 50 Cal.4th 1389, 1400 [117 Cal.Rptr.3d 377, 241 P.3d 870], internal citations omitted.)

- “ ‘The plain purpose of [Labor Code] sections 201 and 203 is to compel the immediate payment of earned wages upon a discharge.’ The prompt payment of an employee’s earned wages is a fundamental public policy of this state.” (*Kao v. Holiday* (2017) 12 Cal.App.5th 947, 962 [219 Cal.Rptr.3d 580], internal citation omitted.)
- “The statutory policy favoring prompt payment of wages applies to employees who retire, as well as those who quit for other reasons.” (*McLean v. State* (2016) 1 Cal.5th 615, 626 [206 Cal.Rptr.3d 545, 377 P.3d 796].)
- “[A]n employer may not delay payment for several days until the next regular pay period. Unpaid wages are due *immediately* upon discharge. This requirement is strictly applied and may not be ‘undercut’ by company payroll practices or ‘any industry habit or custom to the contrary.’ ” (*Kao, supra*, 12 Cal.App.5th at p. 962, original italics, internal citation omitted.)
- “ ‘ “[T]o be at fault within the meaning of [section 203], the employer’s refusal to pay need not be based on a deliberate evil purpose to defraud workmen of wages which the employer knows to be due. As used in section 203, ‘willful’ merely means that the employer intentionally failed or refused to perform an act which was required to be done.” ...’ ” (*Gonzalez v. Downtown LA Motors, LP* (2013) 215 Cal.App.4th 36, 54 [155 Cal.Rptr.3d 18].)
- “In civil cases the word ‘willful’ as ordinarily used in courts of law, does not necessarily imply anything blameable, or any malice or wrong toward the other party, or perverseness or moral delinquency, but merely that the thing done or omitted to be done, was done or omitted intentionally. It amounts to nothing more than this: That the person knows what he is doing, intends to do what he is doing, and is a free agent.” (*Nishiki v. Danko Meredith, P.C.* (2018) 25 Cal.App.5th 883, 891 [236 Cal.Rptr.3d 626].)
- “[A]n employer’s reasonable, good faith belief that wages are not owed may negate a finding of willfulness.” (*Choate v. Celite Corp.* (2013) 215 Cal.App.4th 1460, 1468 [155 Cal.Rptr.3d 915].)
- “A ‘good faith dispute’ that any wages are due occurs when an employer presents a defense, based in law or fact which, if successful, would preclude any recover[y] on the part of the employee. The fact that a defense is ultimately unsuccessful will not preclude a finding that a good faith dispute did exist.” (*Kao, supra*, 12 Cal.App.5th at p. 963.)
- “A ‘good faith dispute’ excludes defenses that ‘are unsupported by any evidence, are unreasonable, or are presented in bad faith.’ Any of the three precludes a defense from being a good faith dispute.

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Thus, [defendant]’s good faith does not cure the objective unreasonableness of its challenge or the lack of evidence to support it.” (*Diaz, supra*, 23 Cal.App.5th at pp. 873–874, original italics, internal citations omitted.)

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

Secondary Sources

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

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

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

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

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

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

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

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

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

2705. Independent Contractor—Affirmative Defense to Labor Code, Unemployment Insurance Code, and Wage Order Violations—Plaintiff Worker Was Not Defendant’s Hiring Entity’s Employee (Lab. Code, § 2775)

[Name of defendant] claims that ~~he/she/nonbinary pronoun/it~~ **is not liable for [specify violation(s) of the Labor Code, the Unemployment Insurance Code, and/or wage order(s), e.g., failure to pay minimum wage] because** [name of plaintiff] was not [his/her/nonbinary pronoun/its] employee, but rather an independent contractor. To establish ~~this defense that [name of plaintiff] was an independent contractor~~, [name of defendant] must prove all of the following:

- a. That [name of plaintiff] is under the terms of the contract and in fact free from the control and direction of [name of defendant] in connection with the performance of the work that [name of plaintiff] was hired to do;
 - b. That [name of plaintiff] performs work for [name of defendant] that is outside the usual course of [name of defendant]’s business; and
 - c. That [name of plaintiff] is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed for [name of defendant].
-

New November 2018; Revised May 2020, May 2021, November 2021

Directions for Use

~~This instruction may be used if a hiring entity claims that the worker is an independent contractor and not an employee, and is primarily intended for use in cases involving claims under the Labor Code, the Unemployment Insurance Code, or a wage order. Any person providing services or labor for remuneration is presumptively an employee. (Lab. Code, § 2775—This instruction may be needed if there is a dispute as to whether the defendant was the plaintiff’s employer for purposes of a claim covered by the Labor Code, the Unemployment Insurance Code, or a California wage order. (Lab. Code, § 2775; see *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903, 913–914, & fn. 3 [232 Cal.Rptr.3d 1, 416 P.3d 1].) The defendant hiring entity has the burden to prove independent contractor status. (Lab. Code, § 2775(b)(1); *Dynamex, supra*, 4 Cal.5th at p. 916.) This instruction may not be appropriate if the defendant hiring entity claims independent contractor status based on Proposition 22 (Bus. & Prof. Code, § 7451) or one of the many exceptions listed in Labor Code sections 2776–2784. For an instruction on employment status under the *Borello* test, see CACI No. 3704, *Existence of “Employee” Status Disputed*.~~

The ~~rule on employment status has been that if there are disputed facts, it’s for the jury to only~~ decides whether ~~one a worker~~ is an employee or an independent contractor when there are disputed issues of fact material to the determination. (*Espejo v. The Copley Press, Inc.* (2017) 13 Cal.App.5th 329, 342 [221 Cal.Rptr.3d 1].) However, on undisputed facts, the court may ~~decides that whether~~ the relationship is

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employment as a matter of law. (*Dynamex, supra*, 4 Cal.5th at p. 963.) ~~The court may address the three factors in any order when making this determination, and if the defendant’s undisputed facts fail to prove any one of them, the inquiry ends; the plaintiff is an employee as a matter of law and the question does not reach the jury.~~

~~If, however, there is no failure of proof as to any of the three factors without resolution of disputed facts, the determination of whether the plaintiff was defendant’s employee should be resolved by the jury using this instruction. If the court concludes based on undisputed facts that the defendant *has* proved one or more of the three factors, that factor (or factors) should be removed from the jury’s consideration and the jury should only consider whether the employer has proven those factors that cannot be determined without further factfinding.~~

Sources and Authority

- Worker Status: Employees. Labor Code section 2775.
- “The ABC test presumptively considers all workers to be employees, and permits workers to be classified as independent contractors only if the hiring business demonstrates that the worker in question satisfies each of three conditions: (a) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of the work and in fact; and (b) that the worker performs work that is outside the usual course of the hiring entity’s business; and (c) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.” (*Dynamex, supra*, 4 Cal.5th at pp. 955–956.)
- “A business that hires any individual to provide services to it can always be said to knowingly ‘suffer or permit’ such an individual to work for the business. A literal application of the suffer or permit to work standard, therefore, would bring within its reach even those individuals hired by a business—including unquestionably independent plumbers, electricians, architects, sole practitioner attorneys, and the like—who provide only occasional services unrelated to a company’s primary line of business and who have traditionally been viewed as working in their own independent business.” (*Dynamex, supra*, 4 Cal.5th at pp. 948–949.)
- “A multifactor standard—like the economic reality standard or the *Borello* standard—that calls for consideration of all potentially relevant factual distinctions in different employment arrangements on a case-by-case, totality-of-the-circumstances basis has its advantages. A number of state courts, administrative agencies and academic commentators have observed, however, that such a wide-ranging and flexible test for evaluating whether a worker should be considered an employee or an independent contractor has significant disadvantages, particularly when applied in the wage and hour context.” (*Dynamex, supra*, 4 Cal.5th at p. 954.)
- “Thus, on the one hand, when a retail store hires an outside plumber to repair a leak in a bathroom on its premises or hires an outside electrician to install a new electrical line, the services of the plumber or electrician are not part of the store’s usual course of business and the store would not reasonably be seen as having suffered or permitted the plumber or electrician to provide services to it as an employee. On the other hand, when a clothing manufacturing company hires work-at-

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home seamstresses to make dresses from cloth and patterns supplied by the company that will thereafter be sold by the company, or when a bakery hires cake decorators to work on a regular basis on its custom-designed cakes, the workers are part of the hiring entity's usual business operation and the hiring business can reasonably be viewed as having suffered or permitted the workers to provide services as employees. In the latter settings, the workers' role within the hiring entity's usual business operations is more like that of an employee than that of an independent contractor.” (*Dynamex, supra*, 4 Cal.5th at pp. 959–960, internal citations omitted.)

- “A company that labels as independent contractors a class of workers who are not engaged in an independently established business in order to enable the company to obtain the economic advantages that flow from avoiding the financial obligations that a wage order imposes on employers unquestionably violates the fundamental purposes of the wage order. The fact that a company has not prohibited or prevented a worker from engaging in such a business is not sufficient to establish that the worker has independently made the decision to go into business for himself or herself.” (*Dynamex, supra*, 4 Cal.5th at p. 962.)
- “The trial court's determination of employee or independent contractor status is one of fact if it depends upon the resolution of disputed evidence or inferences and, as such, must be affirmed on appeal if supported by substantial evidence. The question is one of law only if the evidence is undisputed. ‘The label placed by the parties on their relationship is not dispositive, and subterfuges are not countenanced.’ ” (*Espejo, supra*, 13 Cal.App.5th at pp. 342–343.)
- “It bears emphasis that in order to establish that a worker is an independent contractor under the ABC standard, the hiring entity is required to establish the existence of each of the three parts of the ABC standard. Furthermore, inasmuch as a hiring entity's failure to satisfy any one of the three parts itself establishes that the worker should be treated as an employee for purposes of the wage order, *a court* is free to consider the separate parts of the ABC standard in whatever order it chooses. Because in many cases it may be easier and clearer for *a court* to determine whether or not part B or part C of the ABC standard has been satisfied than for *the court* to resolve questions regarding the nature or degree of a worker's freedom from the hiring entity's control for purposes of part A of the standard, the significant advantages of the ABC standard--in terms of increased clarity and consistency--will often be best served by first considering one or both of the latter two parts of the standard in resolving the employee or independent contractor question.” (*Dynamex, supra*, 4 Cal.5th at p. 963, italics added.)
- “An entity that controls the business enterprise may be an employer even if it did not ‘directly hire, fire or supervise’ the employees. Multiple entities may be employers where they ‘control different aspects of the employment relationship.’ ‘This occurs, for example, when one entity (such as a temporary employment agency) hires and pays a worker, and another entity supervises the work.’ ‘Supervision of the work, in the specific sense of exercising control over how services are performed, is properly viewed as one of the “working conditions”’ ” (*Castaneda v. Ensign Group, Inc.* (2014) 229 Cal.App.4th 1015, 1019 [177 Cal.Rptr.3d 581].)

Secondary Sources

Draft—Not Approved by Judicial Council

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, § 29A

Chin, et al., California Practice Guide: Employment Litigation, Ch. 11-B, Coverage and Exemptions—In General, ¶ 11:115 et seq. (The Rutter Group)

Wilcox, California Employment Law, Ch. 250, *Employment Law: Wage and Hour Disputes*, § 250.13 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 1, *Overview of Wage and Hour Laws*, § 1.04 (Matthew Bender)

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2750. Failure to Compensate Employee for Necessary Expenditures or Losses—Essential Factual Elements (Lab. Code, § 2802(a))

[Name of plaintiff] claims that [name of defendant] owes [him/her/nonbinary pronoun] compensation for necessary [expenditures] [and] [losses] made as a direct consequence of [his/her/nonbinary pronoun] employment with [name of defendant]. To establish this claim, [name of plaintiff] must prove all of the following:

- 1. That [name of plaintiff] incurred necessary [expenditures] [and] [losses] in direct consequence of [the discharge of [his/her/nonbinary pronoun] employment duties/obedience to the directions of [name of defendant]];**
- 2. That the necessary [expenditures] [and] [losses] were reasonable;**
- 3. That [name of defendant] failed to reimburse [name of plaintiff] for the full amount of the necessary [expenditures] [and] [losses]; and**
- 4. The amount of the [expenditures] [and] [losses] that [name of defendant] failed to compensate.**

“Necessary [expenditures] [and] [losses]” may include [expenditures] [and] [losses] [name of plaintiff] would have incurred even if [he/she/nonbinary pronoun] did not also incur them in direct consequence of the discharge of [his/her/nonbinary pronoun] employment duties or obedience to the direction of [name of defendant].

New November 2021

Directions for Use

This instruction assumes the plaintiff is an employee and the defendant is the employer. Labor Code section 2802 covers necessary expenditures and losses. If only one of those is at issue, modify the instruction accordingly.

If there is an argument that the directions of the employer were unlawful, modify the instruction as necessary. (See Lab. Code, § 2802(a).)

Necessary expenditures and losses may include some personal expenses, e.g., the cost of a personal cell phone that is used to make work-related calls. (See *Cochran v. Schwan’s Home Service, Inc.* (2014) 228 Cal.App.4th 1137, 1144 [176 Cal.Rptr.3d 407].)

Sources and Authority

- Obligations of Employer to Indemnify. Labor Code section 2802(a).
- “We conclude that an employer may satisfy its statutory reimbursement obligation by paying

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employees enhanced compensation in the form of increases in base salary or increases in commission rates, or both, provided there is a means or method to apportion the enhanced compensation to determine what amount is being paid for labor performed and what amount is reimbursement for business expenses.” (*Gattuso v. Harte-Hanks Shoppers, Inc.* (2007) 42 Cal.4th 554, 559 [67 Cal.Rptr.3d 468, 169 P.3d 889].)

- “Does an employer always have to reimburse an employee for the reasonable expense of the mandatory use of a personal cell phone, or is the reimbursement obligation limited to the situation in which the employee incurred an extra expense that he or she would not have otherwise incurred absent the job? The answer is that reimbursement is always required. Otherwise, the employer would receive a windfall because it would be passing its operating expenses on to the employee. Thus, to be in compliance with section 2802, the employer must pay some reasonable percentage of the employee’s cell phone bill.” (*Cochran, supra*, 228 Cal.App.4th at p. 1144.)
- “In calculating the reimbursement amount due under section 2802, the employer may consider not only the actual expenses that the employee incurred, but also whether each of those expenses was ‘necessary,’ which in turn depends on the reasonableness of the employee’s choices. For example, an employee’s choice of automobile will significantly affect the costs incurred. An employee who chooses an expensive model and replaces it frequently will incur substantially greater depreciation costs than an employee who chooses a lower priced model and replaces it less frequently. Similarly, some vehicles use substantially more fuel or require more frequent or more costly maintenance and repairs than others. The choice of vehicle will also affect insurance costs. Other employee choices, such as the brand and grade of gasoline or tires and the shop performing maintenance and repairs, will also affect the actual costs. Thus, calculation of automobile expense reimbursement using the actual expenses method requires not only detailed recordkeeping by the employee and complex allocation calculations, but also the exercise of judgment (by the employer, the employee, and officials charged with enforcement of § 2802) to determine whether the expenses incurred were reasonable and therefore necessary.” (*Gattuso, supra*, 42 Cal.4th at p. 568.)

Secondary Sources

2752. Tip Pool Gratuities—Essential Factual Elements (Lab. Code, § 351)

[Name of plaintiff] **claims that** *[name of defendant]* **[took gratuities/allowed** *[specify ineligible individual(s) or class(es) of individuals]* **to take gratuities]** from a tip pool that *[name of plaintiff]* **was entitled to receive.** **[The court has determined that** *[specify ineligible individual(s) or class(es) of individuals]* **[was/were] not eligible to receive gratuities from a tip pool.]**

To establish this claim, *[name of plaintiff]* must prove all of the following:

1. That *[name of defendant]* was a(n) **[employer/[other covered entity]]**;
2. That *[name of plaintiff]* was an employee of *[name of defendant]*;
3. That *[name of plaintiff]* was entitled to gratuities left for **[him/her/nonbinary pronoun]** as an amount over and above the actual amount due to *[name of defendant]* for **[specify services rendered or goods, food, drink, or articles sold to the patron(s)]**;
4. That *[name of defendant]* maintained a tip pool for **[his/her/nonbinary pronoun/its]** employees in which gratuities left by patrons were pooled to be distributed among employees including *[name of plaintiff]*;
5. That *[name of defendant]* took money from the tip pool that *[name of plaintiff]* was entitled to receive;

[or]

That *[name of defendant]* allowed *[specify ineligible individual(s) or class(es) of individuals]* to take money from the tip pool that *[name of plaintiff]* was entitled to receive;

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

To establish harm, *[name of plaintiff]* does not have to prove the exact amount of money that was taken. *[Name of plaintiff]* can establish harm by proving the taking of any amount of gratuity that *[name of plaintiff]* was entitled to receive.

[Name of defendant] is required to keep accurate records of all gratuities received by **[him/her/nonbinary pronoun/it]** for **[his/her/nonbinary pronoun/its]** employees.

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This instruction sets forth the elements required for an employee to establish wrongful conversion of tip pool money.

Element 5 presents alternate factual scenarios: the defendant’s direct conversion of tip pool money and the defendant’s misallocation of tip pool money to any individual who should not be included in the tip pool, e.g., the employer, the owner, managers, and supervisors. For the second option, the court must determine as a matter of law whether an individual was properly included in the tip pool. (See Lab. Code, § 350(a), (d) [defining employer and agent to include “every person other than the employer having the authority to hire or discharge any employee or supervise, direct, or control the acts of employees”], § 351 [prohibiting employers and agents from receiving any gratuity paid to an employee by a patron]. Include the optional sentence in the introductory paragraph if the court has determined that the defendant allowed ineligible individuals to partake in the tip pool.

Sources and Authority

- “Employer” Defined. Labor Code section 350(a).
- “Employee” Defined. Labor Code section 350(b).
- “Gratuity” Defined. Labor Code section 350(e).
- Employee Gratuities. Labor Code section 351.
- Employer’s Duty to Keep Records. Labor Code section 353.
- “The purpose of section 351, as spelled out in the language of the statute, is to prevent an employer from collecting, taking or receiving gratuity income or any part thereof, as his own as part of his daily gross receipts, from deducting from an employee's wages any amount on account of such gratuity, and from requiring an employee to credit the amount of the gratuity or any part thereof against or as a part of his wages. And the legislative intent reflected in the history of the statute, was to ensure that employees, not employers, receive the full benefit of gratuities that patrons intend for the sole benefit of those employees who serve them.” (*Leighton v. Old Heidelberg, Ltd.* (1990) 219 Cal.App.3d 1062, 1068 [268 Cal.Rptr. 647].)
- “[W]hen a customer leaves a tip in a collective tip box, the customer necessarily understands the tip is not intended for a particular person and the tip will be divided among the behind-the-counter service employees. It is undisputed that these employees consist of baristas and shift supervisors. It would be inconsistent with the purpose of the statute to require an employer to disregard the customer's intent and to instead compel the employer to redirect the tips to only some of the service personnel.” (*Chau v. Starbucks Corp.* (2009) 174 Cal.App.4th 688, 699 [94 Cal.Rptr.3d 593].)

Secondary Sources

Draft—Not Approved by Judicial Council

2753. Failure to Pay All Vested Vacation Time—Essential Factual Elements (Lab. Code, § 227.3)

[Name of plaintiff] claims that [name of defendant] owes [him/her/nonbinary pronoun] compensation for unpaid, vested vacation time.

To establish this claim, [name of plaintiff] must prove both of the following:

- 1. That [name of defendant] did not pay [him/her/nonbinary pronoun] all vested vacation time at [his/her/nonbinary pronoun] final rate of pay in accordance with the [contract of employment/employer policy]; and**
 - 2. The amount owed to [name of plaintiff] for vested vacation time.**
-

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Directions for Use

An employee’s proportionate right to a paid vacation vests as the labor is rendered. (*Suastez v. Plastic Dress-Up Co.* (1982) 31 Cal.3d 774, 784 [183 Cal.Rptr. 846, 647 P.2d 122].) If there is a dispute as to the amount of vested vacation time, the jury should be instructed to determine a pro rata share of vested vacation time. An employment contract or employer policy shall not provide for forfeiture of vested vacation upon termination. (Lab. Code, § 227.3.)

Sources and Authority

- Vested Vacation Wages. Labor Code section 227.3.
- “The right to a paid vacation, when offered in an employer’s policy or contract of employment, constitutes deferred wages for services rendered. Case law from this state and others, as well as principles of equity and justice, compel the conclusion that a proportionate right to a paid vacation ‘vests’ as the labor is rendered. Once vested, the right is protected from forfeiture by section 227.3. On termination of employment, therefore, the statute requires that an employee be paid in wages for a pro rata share of his vacation pay.” (*Suastez, supra*, 31 Cal.3d at p. 784.)
- “Under Labor Code section 227.3, an employee has the right to be paid for unused vacation only after the ‘employee is terminated without having taken off his vested vacation time.’ Thus, termination of employment is the event that converts the employer’s obligation to allow an employee to take vacation from work into the monetary obligation to pay that employee for unused vested vacation time. Consequently, [the plaintiff’s] cause of action to enforce his statutory right to be paid for vested vacation did not accrue until the date his employment was terminated.” (*Church v. Jamison* (2006) 143 Cal.App.4th 1568, 1576–1577 [50 Cal.Rptr.3d 166], footnote omitted.)

Secondary Sources

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2754. Reporting Time Pay—Essential Factual Elements

[Name of plaintiff] claims that [name of defendant] scheduled or otherwise required [him/her/nonbinary pronoun] to [report to work] [and] [report to work for a second shift] but when [name of plaintiff] reported to work, [name of defendant] [failed to put [name of plaintiff] to work] [and] [furnished a shortened [workday/shift]]. To establish this claim, [name of plaintiff] must prove all of the following:

- 1. That [name of defendant] was a[n] [employer/[specify other covered entity]];**
- 2. That [name of plaintiff] was an employee of [name of defendant];**
- 3. That [name of defendant] required [name of plaintiff] to report to work for one or more [workdays] [and] [second shifts]; and**
- 4. That after [name of plaintiff] reported for work, [name of defendant] [failed to put [name of plaintiff] to work] [and] [furnished less than [half of the usual day’s work/ two hours of work on a second shift]].**

If you find that [name of plaintiff] has proved all of the above elements, you must determine the amount of wages [name of defendant] must pay to [name of plaintiff.] For each workday when an employee reports to work, as required, but is either not put to work or furnished with less than half the usual day’s work, the employer must pay wages for half the usual or scheduled day’s work at the employee’s regular rate of pay (and in no event for less than two hours or more than four hours).

[Name of plaintiff]’s regular rate of pay in this case is [specify amount]. [For each occasion when an employee reports, as required, for a second shift in the same workday but is furnished less than two hours of work, the employer must pay wages for two hours at the employee’s regular rate of pay.]

“Workday” means any consecutive 24-hour period beginning at the same time each calendar day.

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Directions for Use

This instruction is intended to instruct the jury on factual determinations required for the judge to then calculate damages for the defendant’s failure to pay reporting time under section 5 of the Industrial Welfare Commission’s wage orders. (Cal. Code Regs., tit. 8, § 11010, subd. 5, § 11020, subd. 5, § 11030, subd. 5, § 11040, subd. 5, § 11050, subd. 5, § 11060, subd. 5, § 11070, subd. 5, § 11080, subd. 5, § 11090, subd. 5, § 11100, subd. 5, § 11110, subd. 5, § 11120, subd. 5, § 11130, subd. 5, § 11140, subd. 5, § 11150, subd. 5, and § 11160, subd. 5.)

Modify the introductory paragraph and elements 3 and 4 if a second shift is at issue, and modify the introductory paragraph and element 4 to indicate whether the plaintiff was not provided work at all or

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was provided a shortened shift, or both.

Include the final bracketed sentence in the penultimate paragraph only if the plaintiff claims that the defendant required the plaintiff to report for work a second time in a single workday.

Sources and Authority

- “Employer” Defined. Labor Code section 350(a).
- “Employee” Defined. Labor Code section 350(b).
- Reporting Time Pay. Cal. Code Regs., tit. 8, § 11010–11160, subd. 5.

Secondary Sources

Draft—Not Approved by Judicial Council

3041. Violation of Prisoner’s Federal Civil Rights—Eighth Amendment—Medical Care (42 U.S.C. § 1983)

[Name of plaintiff] claims that [name of defendant] provided [him/her/nonbinary pronoun] with inadequate medical care in violation of [his/her/nonbinary pronoun] constitutional rights. To establish this claim, [name of plaintiff] must prove all of the following:

1. That [name of plaintiff] had a serious medical need;
2. That [name of defendant] knew that [name of plaintiff] faced a substantial risk of serious harm if [his/her/nonbinary pronoun] medical need went untreated;
3. That [name of defendant] consciously disregarded that risk by not taking reasonable steps to treat [name of plaintiff]’s medical need;
4. That [name of defendant] was acting or purporting to act in the performance of [his/her/nonbinary pronoun] official duties;
5. That [name of plaintiff] was harmed; and
6. That [name of defendant]’s conduct was a substantial factor in causing [name of plaintiff]’s harm.

A serious medical need exists if the failure to treat a prisoner’s condition could result in further significant injury or the unnecessary and pointless infliction of pain.

Neither medical negligence alone, nor a difference of opinion between medical personnel or between doctor and patient, is enough to establish a violation of [name of plaintiff]’s constitutional rights.

[In determining whether [name of defendant] consciously disregarded a substantial risk, you should consider the personnel, financial, and other resources available to [him/her/nonbinary pronoun] or those that [he/she/nonbinary pronoun] could reasonably have obtained. [Name of defendant] is not responsible for services that [he/she/nonbinary pronoun] could not provide or cause to be provided because the necessary personnel, financial, and other resources were not available or could not be reasonably obtained.]

New September 2003; Revised December 2010; Renumbered from CACI No. 3012 December 2012; Revised June 2014, December 2014, June 2015, May 2020, November 2021

Directions for Use

Give this instruction in a case involving the deprivation of medical care to a prisoner. For an instruction on a pretrial detainee’s claim of inadequate medical care, see CACI No. 3046, *Violation of Pretrial Detainee’s Federal Civil Rights—Fourteenth Amendment—Medical Care and Conditions of*

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Confinement.

For an instruction on the creation of a substantial risk of serious harm, see CACI No. 3040, *Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Substantial Risk of Serious Harm*. For an instruction involving the deprivation of necessities, see CACI No. 3043, *Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Deprivation of Necessities*.

In prison-conditions cases, the inmate must show that the defendant was deliberately indifferent to the inmate's health or safety. In a medical-needs case, deliberate indifference requires that the prison officials have known of and disregarded an excessive risk to the inmate's health or safety. Negligence is not enough. (*Farmer v. Brennan* (1994) 511 U.S. 825, 834–837 [114 S.Ct. 1970, 128 L.Ed.2d 811].) Elements 2 and 3 express deliberate indifference.

The “official duties” referred to in element 3 must be duties created by a state, county, or municipal law, ordinance, or regulation. This aspect of color of law most likely will not be an issue for the jury, so it has been omitted to shorten the wording of element 3.

The Ninth Circuit has held that in considering whether an individual prison medical provider was deliberately indifferent, the jury should be instructed to consider the economic resources made available to the prison health care system. (See *Peralta v. Dillard* (9th Cir. 2014) 744 F.3d 1076, 1084 [*en banc*].) Although this holding is not binding on California courts, the last optional paragraph may be given if the defendant has presented evidence of lack of economic resources and the court decides that this defense should be presented to the jury.

Sources and Authority

- Deprivation of Civil Rights. Title 42 United States Code section 1983.
- “[D]eliberate indifference to serious medical needs of prisoners constitutes the ‘unnecessary and wanton infliction of pain,’ proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors in their response to the prisoner’s needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed. Regardless of how evidenced, deliberate indifference to a prisoner’s serious illness or injury states a cause of action under section 1983.” (*Estelle v. Gamble* (1976) 429 U.S. 97, 104–105 [97 S.Ct. 285, 50 L.Ed.2d 251], internal citation and footnotes omitted.)
- “Our cases have held that a prison official violates the Eighth Amendment only when two requirements are met. First, the deprivation alleged must be, objectively, ‘sufficiently serious.’ For a claim ... based on a failure to prevent harm, the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm. The second requirement follows from the principle that ‘only the unnecessary and wanton infliction of pain implicates the Eighth Amendment.’ To violate the Cruel and Unusual Punishments Clause, a prison official must have a ‘sufficiently culpable state of mind.’ In prison-conditions cases that state of mind is one of ‘deliberate indifference’ to inmate health or safety” (*Farmer, supra*, 511 U.S. at p. 834, internal citations omitted.)

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- “ ‘To set forth a constitutional claim under the Eighth Amendment predicated upon the failure to provide medical treatment, first the plaintiff must show a serious medical need by demonstrating that failure to treat a prisoner’s condition could result in further significant injury or the unnecessary and wanton infliction of pain. Second, a plaintiff must show the defendant’s response to the need was deliberately indifferent.’ The ‘deliberate indifference’ prong requires ‘(a) a purposeful act or failure to respond to a prisoner’s pain or possible medical need, and (b) harm caused by the indifference.’ ‘Indifference may appear when prison officials deny, delay or intentionally interfere with medical treatment, or it may be shown in the way in which prison [officials] provide medical care.’ ‘[T]he indifference to [a prisoner’s] medical needs must be substantial. Mere “indifference,” “negligence,” or “medical malpractice” will not support this [claim].’ Even gross negligence is insufficient to establish deliberate indifference to serious medical needs.” (*Lemire v. Cal. Dep’t of Corr. & Rehab.* (9th Cir. 2013) 726 F.3d 1062, 1081–1082, internal citations omitted.)

“Indications that a plaintiff has a serious medical need include ‘[t]he existence of an injury that a reasonable doctor or patient would find important and worthy of comment or treatment; the presence of a medical condition that significantly affects an individual’s daily activities; or the existence of chronic and substantial pain.’ ” (*Colwell v. Bannister* (9th Cir. 2014) 763 F.3d 1060, 1066.)

- “Consistent with that concept and the clear connections between mental health treatment and the dignity and welfare of prisoners, the Eighth Amendment’s prohibition against cruel and unusual punishment requires that prisons provide mental health care that meets ‘minimum constitutional requirements.’ When the level of a prison’s mental health care ‘fall[s] below the evolving standards of decency that mark the progress of a maturing society,’ the prison fails to uphold the constitution’s dignitary principles.” (*Disability Rights Montana, Inc. v. Batista* (9th Cir. 2019) 930 F.3d 1090, 1097, internal citation omitted.)
- “We hold ... that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.” (*Farmer, supra*, 511 U.S. at p. 837.)
- “The subjective standard of deliberate indifference requires ‘more than ordinary lack of due care for the prisoner’s interests or safety.’ The state of mind for deliberate indifference is subjective recklessness. But the standard is ‘less stringent in cases involving a prisoner’s medical needs . . . because “the State’s responsibility to provide inmates with medical care ordinarily does not conflict with competing administrative concerns.” ’ ” (*Snow v. McDaniel* (9th Cir. 2012) 681 F.3d 978, 985, internal citations omitted.)
- “[D]eliberate indifference ‘may appear when prison officials deny, delay or intentionally interfere with medical treatment, or it may be shown by the way in which prison physicians provide medical care.’ . . . ‘[A] prisoner need not show his harm was substantial.’ ” (*Wilhelm v. Rotman* (9th Cir. 2012) 680 F.3d 1113, 1122, internal citation omitted.)
- “[A]llegations that a prison official has ignored the instructions of a prisoner’s treating physician are sufficient to state a claim for deliberate indifference.” (*Wakefield v. Thompson* (9th Cir. 1999) 177

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F.3d 1160, 1165.)

- “[A] complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner.” (*Estelle, supra*, 429 U.S. at p. 106.)
- “ ‘A difference of opinion between a physician and the prisoner—or between medical professionals—concerning what medical care is appropriate does not amount to deliberate indifference.’ Rather, ‘[t]o show deliberate indifference, the plaintiff “must show that the course of treatment the doctors chose was medically unacceptable under the circumstances” and that the defendants “chose this course in conscious disregard of an excessive risk to plaintiff’s health.” ’ ” (*Colwell, supra*, 763 F.3d at p. 1068.)
- “It has been recognized ... that inadequate medical treatment may, in some instances, constitute a violation of 42 United States Code section 1983. In *Sturts v. City of Philadelphia*, for example, the plaintiff alleged that defendants acted ‘carelessly, recklessly and negligently’ when they failed to remove sutures from his eye, neck and face. The court concluded that although plaintiff was alleging inadequate medical treatment, he had stated a cause of action under section 1983: ‘... where a prisoner has received some medical attention and the dispute is over the adequacy of the treatment, federal courts are generally reluctant to second guess medical judgments. In some cases, however, the medical attention rendered may be so woefully inadequate as to amount to no treatment at all, thereby rising to the level of a § 1983 claim. ...’ ” (*Ochoa v. Superior Court* (1985) 39 Cal.3d 159, 176-177 [216 Cal.Rptr. 661, 703 P.2d 1], internal citations omitted.)
- “Because society does not expect that prisoners will have unqualified access to health care, deliberate indifference to medical needs amounts to an Eighth Amendment violation only if those needs are ‘serious.’ ” (*Hudson v. McMillian* (1992) 503 U.S. 1, 9 [112 S.Ct. 995, 117 L.Ed.2d 156], internal citation omitted.)
- “[T]here is a two-pronged test for evaluating a claim for deliberate indifference to a serious medical need: First, the plaintiff must show a serious medical need by demonstrating that failure to treat a prisoner's condition could result in further significant injury or the unnecessary and wanton infliction of pain. Second, the plaintiff must show the defendant’s response to the need was deliberately indifferent. This second prong . . . is satisfied by showing (a) a purposeful act or failure to respond to a prisoner's pain or possible medical need and (b) harm caused by the indifference.” (*Akhtar v. Mesa* (9th Cir. 2012) 698 F.3d 1202, 1213.)
- “Where a plaintiff alleges systemwide deficiencies, ‘policies and practices of statewide and systematic application [that] expose all inmates in [the prison’s] custody to a substantial risk of serious harm,’ we assess the claim through a two-pronged inquiry. The first, objective, prong requires that the plaintiff show that the conditions of the prison pose ‘a substantial risk of serious harm.’ The second, subjective, prong requires that the plaintiff show that a prison official was deliberately indifferent by being ‘aware of the facts from which the inference could be drawn that a substantial risk of serious harm exists,’ and ‘also draw[ing] the inference.’ ” (*Disability Rights Montana, Inc., supra*, 930 F.3d at p. 1097, internal citations and footnote omitted.)

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- “A prison medical official who fails to provide needed treatment because he lacks the necessary resources can hardly be said to have intended to punish the inmate. The challenged instruction properly advised the jury to consider the resources [defendant] had available in determining whether he was deliberately indifferent.” (*Peralta, supra*, 744 F.3d at p. 1084.)
- “We recognize that prison officials have a ‘better grasp’ of the policies required to operate a correctional facility than either judges or juries. For this reason, in excessive force and conditions of confinement cases, we instruct juries to defer to prison officials’ judgments in adopting and executing policies needed to preserve discipline and maintain security. [¶] Such deference is generally absent from serious medical needs cases, however, where deliberate indifference ‘can typically be established or disproved without the necessity of balancing competing institutional concerns for the safety of prison staff or other inmates.’ ” (*Mendiola-Martinez v. Arpaio* (9th Cir. 2016) 836 F.3d 1239, 1254, internal citations omitted.)
- “[T]rial judges in prison medical care cases should not instruct jurors to defer to the adoption and implementation of security-based prison policies, unless a party’s presentation of the case draws a plausible connection between a security-based policy or practice and the challenged medical care decision.” (*Chess v. Dovey* (9th Cir. 2015) 790 F.3d 961, 962.)
- “Although claims by pretrial detainees arise under the Fourteenth Amendment and claims by convicted prisoners arise under the Eighth Amendment, our cases do not distinguish among pretrial and postconviction detainees for purposes of the excessive force, conditions of confinement, and medical care deference instructions.” (*Shorter v. Baca* (9th Cir. 2018) 895 F.3d 1176, 1182, fn. 4.)
- “We now turn to the second prong of the inquiry, whether the defendants were deliberately indifferent. This is not a case in which there is a difference of medical opinion about which treatment is best for a particular patient. Nor is this a case of ordinary medical mistake or negligence. Rather, the evidence is undisputed that [plaintiff] was denied treatment for his monocular blindness solely because of an administrative policy, even in the face of medical recommendations to the contrary. A reasonable jury could find that [plaintiff] was denied surgery, not because it wasn’t medically indicated, not because his condition was misdiagnosed, not because the surgery wouldn’t have helped him, but because the policy of the [defendant] is to require an inmate to endure reversible blindness in one eye if he can still see out of the other. This is the very definition of deliberate indifference.” (*Colwell, supra*, 763 F.3d at p. 1068.)
- “[C]laims for violations of the right to adequate medical care ‘brought by pretrial detainees against individual defendants under the Fourteenth Amendment’ must be evaluated under an objective deliberate indifference standard. Based thereon, the elements of a pretrial detainee’s medical care claim against an individual defendant under the due process clause of the Fourteenth Amendment are: (i) the defendant made an intentional decision with respect to the conditions under which the plaintiff was confined; (ii) those conditions put the plaintiff at substantial risk of suffering serious harm; (iii) the defendant did not take reasonable available measures to abate that risk, even though a reasonable official in the circumstances would have appreciated the high degree of risk involved—making the consequences of the defendant’s conduct obvious; and (iv) by not taking such measures, the defendant caused the plaintiff’s injuries. ‘With respect to the third element, the defendant’s conduct

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must be objectively unreasonable, a test that will necessarily “turn[] on the facts and circumstances of each particular case.”’ The ‘ “mere lack of due care by a state official” does not deprive an individual of life, liberty, or property under the Fourteenth Amendment.’ Thus, the plaintiff must ‘prove more than negligence but less than subjective intent—something akin to reckless disregard.’ ” (*Gordon v. County of Orange* (9th Cir. 2018) 888 F.3d 1118, 1124–1125, internal citations omitted.)

- “A ‘serious’ medical need exists if the failure to treat a prisoner’s condition could result in further significant injury or the ‘unnecessary and wanton infliction of pain.’ The ‘routine discomfort’ that results from incarceration and which is ‘part of the penalty that criminal offenders pay for their offenses against society’ does not constitute a ‘serious’ medical need.” (*Doty v. County of Lassen* (9th Cir. 1994) 37 F.3d 540, 546, internal citations and footnote omitted.)

Secondary Sources

3 Witkin & Epstein, California Criminal Law (4th ed. 2012) Punishment, § 244

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, § 901

Schwarzer, et al., California Practice Guide: Federal Civil Procedure Before Trial, Ch. 2E-10, *Special Jurisdictional Limitations--Eleventh Amendment As Limitation On Actions Against States*, ¶ 2:4923 (The Rutter Group)

3 Civil Rights Actions, Ch. 11, *Deprivation of Rights Under Color of State Law-Prisons*, ¶ 11.09 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 114, *Civil Rights: Prisoners’ Rights*, § 114.15 (Matthew Bender)

19A California Points and Authorities, Ch. 196, *Public Entities*, § 196.183 (Matthew Bender)

3046. Violation of Pretrial Detainee’s Federal Civil Rights—Fourteenth Amendment—Medical Care and Conditions of Confinement (42 U.S.C. § 1983)

[Name of plaintiff] claims that *[name of defendant]* failed to provide *[him/her/nonbinary pronoun]* *[safe conditions of confinement/needed medical care]* in violation of *[his/her/nonbinary pronoun]* constitutional rights. To establish this claim, *[name of plaintiff]* must prove all of the following:

1. That *[name of defendant]* made an intentional decision regarding the *[conditions of confinement/denial of needed medical care]*;
 2. That the *[conditions of confinement/denial of needed medical care]* put *[name of plaintiff]* at substantial risk of serious harm;
 3. That *[name of defendant]* did not take reasonable available measures to prevent or reduce the risk of serious harm, even though a reasonable officer under the same or similar circumstances would have understood the high degree of risk involved;
 4. That *[name of defendant]* was acting or purporting to act in the performance of *[his/her/nonbinary pronoun]* official duties;
 5. That *[name of plaintiff]* was harmed; and
 6. That *[name of defendant]*’s conduct was a substantial factor in causing *[name of plaintiff]*’s harm.
-

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Directions for Use

Give this instruction in a case involving a pretrial detainee’s conditions of confinement, including access to medical care. The instruction may be modified for use in a failure to protect case, see *Castro v. County of Los Angeles* (9th Cir. 2016) 833 F.3d 1060 [en banc], or to specify the condition of confinement at issue. For example, if the plaintiff claims that the defendant delayed or intentionally interfered with needed medical treatment, it may be not be sufficiently clear to describe the defendant’s conduct as a denial of needed medical care.

Sources and Authority

- Deprivation of Civil Rights. Title 42 United States Code section 1983.
- “[W]e hold that claims for violations of the right to adequate medical care ‘brought by pretrial detainees against individual defendants under the Fourteenth Amendment’ must be evaluated under an objective deliberate indifference standard.” (*Gordon v. County of Orange* (9th Cir. 2018) 888 F.3d

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1118, 1124–25.)

- “[C]laims for violations of the right to adequate medical care ‘brought by pretrial detainees against individual defendants under the Fourteenth Amendment’ must be evaluated under an objective deliberate indifference standard. Based thereon, the elements of a pretrial detainee’s medical care claim against an individual defendant under the due process clause of the Fourteenth Amendment are: (i) the defendant made an intentional decision with respect to the conditions under which the plaintiff was confined; (ii) those conditions put the plaintiff at substantial risk of suffering serious harm; (iii) the defendant did not take reasonable available measures to abate that risk, even though a reasonable official in the circumstances would have appreciated the high degree of risk involved—making the consequences of the defendant’s conduct obvious; and (iv) by not taking such measures, the defendant caused the plaintiff’s injuries. ‘With respect to the third element, the defendant’s conduct must be objectively unreasonable, a test that will necessarily “turn[] on the facts and circumstances of each particular case.” ’ The ‘ “mere lack of due care by a state official” does not deprive an individual of life, liberty, or property under the Fourteenth Amendment.’ Thus, the plaintiff must ‘prove more than negligence but less than subjective intent—something akin to reckless disregard.’ ” (*Gordon, supra*, 888 F.3d at pp. 1124–1125, internal citations omitted.)
- “Our cases make clear that prison officials violate the Constitution when they ‘deny, delay or intentionally interfere’ with needed medical treatment. The same is true when prison officials choose a course of treatment that is ‘medically unacceptable under the circumstances.’ ” (*Sandoval v. County of San Diego* (9th Cir. 2021) 985 F.3d 657, 679.)

Secondary Sources

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3050. Retaliation—Essential Factual Elements (42 U.S.C. § 1983)

[Name of plaintiff] claims that [name of defendant] retaliated against [him/her/nonbinary pronoun] for exercising a constitutional right. To establish retaliation, [name of plaintiff] must prove all of the following:

1. That [he/she/nonbinary pronoun] was engaged in a constitutionally protected activity[, which I will determine after you, the jury, decide certain facts];

2. That [name of defendant] did not have probable cause for the [arrest/prosecution][, which I will determine after you, the jury, decide certain facts];

3. That [name of defendant] [specify alleged retaliatory conduct];

4. That [name of plaintiff]’s constitutionally protected activity was a substantial or motivating factor for [name of defendant]’s acts;

5. That [name of defendant]’s acts would likely have deterred a **reasonable person of ordinary firmness** from [specify engaging in that protected activity, e.g., filing a lawsuit]; and

6. That [name of plaintiff] was harmed as a result of [name of defendant]’s conduct.

The law requires that the trial judge, rather than the jury, decide if [name of plaintiff] has proven element 1 [and element 2] above.

[But before I can do so, you must decide whether [name of plaintiff] has proven the following: [list all factual disputes that must be resolved by the jury].]

[or]

[The court has determined that by [specify conduct], [name of plaintiff] was exercising [his/her/nonbinary pronoun] constitutionally protected right of [insert right, e.g., privacy].]

[or]

[The court has determined that [name of defendant] did not have probable cause for the [arrest/prosecution].]

New June 2010; Revised December 2010, Renumbered from CACI No. 3016 and Revised December 2012; Revised June 2013, May 2020, May 2021, November 2021

Directions for Use

Give this instruction along with CACI No. 3000, *Violation of Federal Civil Rights—In General—Essential Factual Elements*, if the claimed civil rights violation is retaliation for exercising

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constitutionally protected rights, including exercise of free speech rights as a private citizen. For a claim by a public employee who alleges that they suffered an adverse employment action in retaliation for their speech on an issue of public concern, see CACI No. 3053, *Retaliation for Exercise of Free Speech Rights—Public Employee—Essential Factual Elements*.

The retaliation should be alleged generally in element 1 of CACI No. 3000. The constitutionally protected activity refers back to the right alleged to have been violated in element 3 of CACI No. 3000.

Element 2 applies only in retaliatory arrest and prosecution cases. Omit element 2 if the retaliation alleged is not based on an arrest or prosecution.

Whether plaintiff was engaged in a constitutionally protected activity and, if applicable, whether probable cause for arrest or prosecution was absent (or whether the no-probable-cause requirement does not apply because of an exception) will usually have been resolved by the court as a matter of law before trial. (See *Nieves v. Bartlett* (2019) __ U.S. __ [139 S.Ct. 1715, 1724, 1727, 204 L.Ed.2d 1] [requiring a plaintiff to plead and prove the absence of probable cause for arrest but stating an exception to the no-probable-cause requirement “when a plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been”].) If there is a question of fact that the jury must resolve, include the optional bracketed language with element 1 and/or element 2, and give the first bracketed option of the final paragraph, identifying with specificity all disputed factual issues the jury must resolve for the court to determine the contested element or elements. If the court has determined element 1 or element 2, omit the optional bracketed language of the element and instruct the jury that the element has been determined as a matter of law by giving the second and/or third optional sentence(s) in the final paragraph. If there are contested issues of fact regarding the exception to the no-probable-cause requirement, this instruction may be augmented to include the specific factual findings necessary for the court to determine whether the exception applies.

The plaintiff must show that the defendant acted with a retaliatory motive and that the motive was a “but for” cause of the plaintiff’s injury, i.e., that the retaliatory action would not have been taken absent the retaliatory motive. (See *Nieves, supra*, 139 S.Ct. at p. 1722.) A plaintiff may prove causal connection with circumstantial evidence but establishing a causal connection between a defendant’s animus and a plaintiff’s injury will depend on the type of retaliation case. (*Id.* at pp. 1722–1723 [distinguishing straightforward cases from more complex cases].)

If the defendant claims that the response to the plaintiff’s constitutionally protected activity was prompted by a legitimate reason, the defendant may attempt to persuade the jury that the defendant would have taken the same action even in the absence of the alleged impermissible, retaliatory reason. See CACI No. 3055, *Rebuttal of Retaliatory Motive*. (*Id.* at p. 1727.)

Sources and Authority

- “Where, as here, the plaintiff claims retaliation for exercising a constitutional right, the majority of federal courts require the plaintiff to prove that (1) he or she was engaged in constitutionally protected activity, (2) the defendant’s retaliatory action caused the plaintiff to suffer an injury that would likely deter a person of ordinary firmness from engaging in that protected activity, and (3) the retaliatory action was motivated, at least in part, by the plaintiff’s protected activity.”

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(*Tichinin v. City of Morgan Hill* (2009) 177 Cal.App.4th 1049, 1062–1063 [99 Cal.Rptr.3d 661].)

- “[A]ctions that are otherwise proper and lawful may nevertheless be actionable if they are taken in retaliation against a person for exercising his or her constitutional rights.” (*Tichinin, supra*, 177 Cal.App.4th at p. 1084.)
- “The plaintiff must show that the retaliation was a substantial or motivating factor behind the [arrest], and, if that showing is made, the defendant can prevail only by showing that the [arrest] would have been initiated without respect to retaliation.” (*Nieves, supra*, 139 S.Ct. at p. 1725, internal citation omitted.)
- “To state a First Amendment retaliation claim, a plaintiff must plausibly allege ‘that (1) he was engaged in a constitutionally protected activity, (2) the defendant’s actions would chill a person of ordinary firmness from continuing to engage in the protected activity and (3) the protected activity was a substantial or motivating factor in the defendant’s conduct.’ To ultimately ‘prevail on such a claim, a plaintiff must establish a “causal connection” between the government defendant’s “retaliatory animus” and the plaintiff’s “subsequent injury.” Specifically, a plaintiff must show that the defendant’s retaliatory animus was ‘a “but-for” cause, meaning that the adverse action against the plaintiff would not have been taken absent the retaliatory motive.’ ” (*Capp v. County of San Diego* (9th Cir. 2019) 940 F.3d 1046, 1053, internal citations omitted.)
- “For a number of retaliation claims, establishing the causal connection between a defendant’s animus and a plaintiff’s injury is straightforward. Indeed, some of our cases in the public employment context ‘have simply taken the evidence of the motive and the discharge as sufficient for a circumstantial demonstration that the one caused the other,’ shifting the burden to the defendant to show he would have taken the challenged action even without the impermissible motive. But the consideration of causation is not so straightforward in other types of retaliation cases.” *Nieves, supra*, 139 S.Ct. at pp. 1722–1723.)
- “To demonstrate retaliation in violation of the First Amendment, [the plaintiff] must ultimately prove first that [defendant] took action that ‘would chill or silence a person of ordinary firmness from future First Amendment activities.’ ” (*Skoog v. County of Clackamas* (9th Cir. 2006) 469 F.3d 1221, 1231–1232, footnote and citation omitted.)
- “The plaintiff pressing a retaliatory arrest claim must plead and prove the absence of probable cause for the arrest.” (*Nieves, supra*, 139 S.Ct. at p. 1724.)
- “[W]e conclude that the no-probable-cause requirement should not apply when a plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been.” (*Nieves, supra*, 139 S.Ct. at p. 1727.)
- “[T]he evidence of [plaintiff]’s alleged injuries, if believed, is sufficient to support a finding that the retaliatory action against him would deter a person of ordinary firmness from exercising his or her First Amendment rights. [¶] [Defendant] argues that plaintiff did not suffer any injury—i.e., [defendant]’s action did not chill [plaintiff]’s exercise of his rights—because he continued to litigate against [defendant]. However, that [plaintiff] persevered despite [defendant]’s action is not

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determinative. To reiterate, in the context of a claim of retaliation, the question is not whether the plaintiff was actually deterred but whether the defendant’s actions would have deterred a person of ordinary firmness.” (*Tichinin, supra*, 177 Cal.App.4th at p. 1082.)

- “Intent to inhibit speech, which ‘is an element of the [retaliation] claim,’ can be demonstrated either through direct or circumstantial evidence.” (*Mendocino Envtl. Ctr. v. Mendocino County* (9th Cir. 1999) 192 F.3d 1283, 1300–1301, internal citation omitted.)
- “[Defendant] may avoid liability if he shows that a ‘final decision maker's independent investigation and termination decision, responding to a biased subordinate's initial report of misconduct, . . . negate[s] any causal link’ between his retaliatory motive and the adverse employment action. This is because a final decision maker’s wholly independent investigation and decision establish that ‘the employee’s protected speech was not a but-for cause of the adverse employment action.’ ” (*Karl v. City of Mountlake Terrace* (9th Cir. 2012) 678 F.3d 1062, 1072–1073, internal citation omitted.)
- “While the scope, severity and consequences of [their] actions are belittled by defendants, we have cautioned that ‘a government act of retaliation need not be severe . . . [nor] be of a certain kind’ to qualify as an adverse action.” (*Marez v. Bassett* (9th Cir. 2010), 595 F.3d 1068, 1075.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 894, 895, 978

2 Wilcox, California Employment Law, Ch. 40, *Overview of Equal Opportunity Laws*, § 40.26 (Matthew Bender)

3 Civil Rights Actions, Ch. 17, *Discrimination in Federally Assisted Programs*, ¶ 17.24B (Matthew Bender)

4 Civil Rights Actions, Ch. 21A, *Employment Discrimination Based on Race, Color, Religion, Sex, or National Origin*, ¶ 21.22(1)(f) (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.37 (Matthew Bender)

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

3709. Ostensible Agent

[Name of plaintiff] claims that [name of defendant] is responsible for [name of agent]’s conduct because [he/she/nonbinary pronoun] was [name of defendant]’s apparent [employee/agent]. To establish this claim, [name of plaintiff] must prove all of the following:

1. That [name of defendant] intentionally or carelessly created the impression that [name of agent] was [name of defendant]’s [employee/agent];
 2. That [name of plaintiff] reasonably believed that [name of agent] was [name of defendant]’s [employee/agent]; and
 3. That [name of plaintiff] reasonably relied on [his/her/nonbinary pronoun] belief.
-

New September 2003; Revised November 2019, November 2021

Directions for Use

Give this instruction with CACI No. 3701, *Tort Liability Asserted Against Principal—Essential Factual Elements*, if the plaintiff is relying on the doctrine of ostensible agency to establish the principal-agent relationship in CACI No. 3701.

~~For an instruction on ostensible agency in the physician-hospital context, see CACI No. 3714, *Ostensible Agency—Physician-Hospital Relationship*. A somewhat different instruction is required to hold a hospital responsible for the acts of a physician under ostensible agency when the physician is actually an employee of a different entity. In that context, it has been said that the only relevant factual issue is whether the patient had reason to know that the physician was not an agent of the hospital. (See *Markow v. Rosner* (2016) 3 Cal.App.5th 1027 [208 Cal.Rptr.3d 363]; see also *Mejia v. Community Hospital of San Bernardino* (2002) 99 Cal.App.4th 1448, 1454 [122 Cal.Rptr.2d 233].)~~

Sources and Authority

- Agency Is Actual or Ostensible. Civil Code section 2298.
- “Ostensible Agency” Defined. Civil Code section 2300.
- “Ostensible Authority” Defined. Civil Code section 2317.
- When Principal is Bound by Ostensible Agent. Civil Code section 2334.
- “[O]stensible authority arises as a result of conduct of the principal which causes the *third party* reasonably to believe that the agent possesses the authority to act on the principal’s behalf.’ ‘Ostensible authority may be established by proof that the principal approved prior similar acts of the agent.’ ‘ “[W]here the principal knows that the agent holds himself out as clothed with certain

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authority, and remains silent, such conduct on the part of the principal may give rise to liability. ...” ...’ ” (*Chicago Title Ins. Co. v. AMZ Ins. Services, Inc.* (2010) 188 Cal.App.4th 401, 426–427 [115 Cal.Rptr.3d 707], original italics, internal citations omitted.)

- “Whether an agent has ostensible authority is a question of fact and such authority may be implied from circumstances.” (*Pierson v. Helmerich & Payne Internat. Drilling Co.* (2016) 4 Cal.App.5th 608, 635 [209 Cal.Rptr.3d 222].)
- “ ‘It is elementary that there are three requirements necessary before recovery may be had against a principal for the act of an ostensible agent. The person dealing with the agent must do so with belief in the agent’s authority and this belief must be a reasonable one; such belief must be generated by some act or neglect of the principal sought to be charged; and the third person in relying on the agent’s apparent authority must not be guilty of negligence.’ ” (*Associated Creditors’ Agency v. Davis* (1975) 13 Cal.3d 374, 399 [118 Cal.Rptr. 772, 530 P.2d 1084], internal citations omitted.)
- “Ostensible agency cannot be established by the representations or conduct of the purported agent; the statements or acts of the principal must be such as to cause the belief the agency exists.” (*American Way Cellular, Inc. v. Travelers Property Casualty Co. of America* (2013) 216 Cal.App.4th 1040, 1053 [157 Cal.Rptr.3d 385].)
- “Liability of the principal for the acts of an ostensible agent rests on the doctrine of ‘estoppel,’ the essential elements of which are representations made by the principal, justifiable reliance by a third party, and a change of position from such reliance resulting in injury.” (*Preis v. American Indemnity Co.* (1990) 220 Cal.App.3d 752, 761 [269 Cal.Rptr. 617], internal citation omitted.)

~~• “But the adequacy of the notice is only one of the many fact questions that arise under ostensible agency. The jury must also determine whether the patient entrusted herself to the hospital, whether the hospital selected the doctor, and whether the patient reasonably believed the doctor was an agent of the hospital.” (*Whitlow v. Rideout Memorial Hospital* (2015) 237 Cal.App.4th 631, 641 [188 Cal.Rptr.3d 246].)~~

~~• “Where a patient seeks to hold a hospital liable for the negligence of a physician, the doctrine of ostensible agency is now commonly expressed as having two elements: ‘(1) conduct by the hospital that would cause a reasonable person to believe that the physician was an agent of the hospital, and (2) reliance on that apparent agency relationship by the plaintiff.’ Generally, the first element is satisfied ‘when the hospital “holds itself out” to the public as a provider of care,’ ‘unless it gave the patient contrary notice.’ Nonetheless, a hospital’s ‘contrary notice’ may be insufficient ‘to avoid liability in an emergency room context, where an injured patient in need of immediate medical care cannot be expected to understand or act upon that information.’ Reliance upon an apparent agency is demonstrated ‘when the plaintiff “looks to” the hospital for services, rather than to an individual physician.’ Ultimately, ‘there is really only one relevant factual issue: whether the patient had reason to know that the physician was not an agent of the hospital. As noted above, hospitals are generally deemed to have held themselves out as the provider of services unless they gave the patient contrary notice, and the patient is generally presumed to have looked to the hospital for care unless he or she was treated by his or her personal physician. Thus, unless the patient had some reason to know of the true relationship between the hospital and the physician — i.e., because the hospital gave the patient~~

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~~actual notice or because the patient was treated by his or her personal physician—ostensible agency is readily inferred.’” (Markow, *supra*, 3 Cal.App.5th at p. 1038, internal citations omitted.)~~

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 154–159

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-A, *Vicarious Liability*, ¶¶ 2:676, 2:677 (The Rutter Group)

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, § 8.04[6] (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent*, §§ 427.11, 427.22 (Matthew Bender)

18 California Points and Authorities, Ch. 182, *Principal and Agent*, §§ 182.04, 182.120 et seq. (Matthew Bender)

California Civil Practice: Torts § 3:29 (Thomson Reuters)

3714. Ostensible Agency—Physician-Hospital Relationship

[Name of plaintiff] claims that [name of hospital] is responsible for [name of physician]’s conduct because [he/she/nonbinary pronoun] was [name of hospital]’s apparent [employee/agent]. To establish this claim, [name of plaintiff] must prove both of the following:

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

[Generally speaking, a hospital holds itself out to the public as a provider of care unless the hospital gives notice to a patient that a physician is not an [employee/agent] of the hospital. However, the notice may not be adequate if a patient in need of medical care cannot be expected to understand or act upon the information provided. In deciding whether [name of plaintiff] has proved element 1, you must take into consideration [name of plaintiff]’s condition at the time and decide whether any notice provided was adequate to give a reasonable person in [name of plaintiff]’s condition notice of the disclaimer.]

New November 2021

Directions for Use

Use this instruction only if a patient claims that a hospital defendant is responsible for a physician’s negligence or other wrongful conduct. Give this instruction with CACI No. 3701, *Tort Liability Asserted Against Principal—Essential Factual Elements*, if the plaintiff is relying on the doctrine of ostensible agency to establish the principal-agent relationship in CACI No. 3701.

Include the bracketed paragraph only if the hospital claims it notified the plaintiff that the physician was not its employee or agent.

Sources and Authority

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

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

- “[T]he adequacy of the notice is only one of the many fact questions that arise under ostensible agency. The jury must also determine whether the patient entrusted herself to the hospital, whether the hospital selected the doctor, and whether the patient reasonably believed the doctor was an agent of the hospital.” (*Whitlow v. Rideout Memorial Hospital* (2015) 237 Cal.App.4th 631, 640–641 [188 Cal.Rptr.3d 246].)
- “Effectively, all a patient needs to show is that he or she sought treatment at the hospital, which is precisely what plaintiff alleged in this case. Unless the evidence conclusively indicates that the patient should have known that the treating physician was not the hospital’s agent, such as when the patient is treated by his or her personal physician, the issue of ostensible agency must be left to the trier of fact.” (*Mejia v. Community Hospital of San Bernardino* (2002) 99 Cal.App.4th 1448, 1458 [122 Cal.Rptr.2d 233].)

Secondary Sources

Draft—Not Approved by Judicial Council

4304. Termination for Violation of Terms of Lease/Agreement—Essential Factual Elements

[Name of plaintiff] claims that [name of defendant] [and [name of subtenant], a subtenant of [name of defendant],] no longer [has/have] the right to occupy the property because [name of defendant] has failed to perform [a] requirement(s) under [his/her/nonbinary pronoun/its] [lease/rental agreement/sublease]. To establish this claim, [name of plaintiff] must prove all of the following:

- 1. That [name of plaintiff] [owns/leases] the property;**
- 2. That [name of plaintiff] [rented/subleased] the property to [name of defendant];**
- 3. That under the [lease/rental agreement/sublease], [name of defendant] agreed [insert required condition(s) that were not performed];**
- 4. That [name of defendant] failed to perform [that/those] requirement(s) by [insert description of alleged failure to perform];**
- 5. That [name of plaintiff] properly gave [name of defendant] [and [name of subtenant]] three days’ written notice to [either [describe action to correct failure to perform] or] vacate the property; [and]**
- [6. That [name of defendant] did not [describe action to correct failure to perform]; and]**
- 7. That [name of defendant] [or subtenant [name of subtenant]] is still occupying the property.**

[[Name of defendant]’s failure to perform the requirement(s) of the [lease/rental agreement/sublease] must not be trivial, but must be a substantial violation of [an] important obligation(s).]

New August 2007; Revised June 2010, December 2010, June 2011, December 2011, May 2020, November 2021

Directions for Use

Include the bracketed references to a subtenancy in the opening paragraph, in element 5, and in ~~the last~~ element 7 if persons other than the tenant-defendant are in occupancy of the premises.

If the plaintiff is the landlord or owner, select either “lease” or “rental agreement” in the opening paragraph and in element 3, “owns” in element 1, and “rented” in element 2. Commercial documents are usually called “leases” while residential documents are often called “rental agreements.” Select the term that is used on the written document.

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If the plaintiff is a tenant seeking to recover possession from a subtenant, select “sublease” in the opening paragraph and in element 3, “leases” in element 1, and “subleased” in element 2. (Code Civ. Proc., § 1161(3).)

Defective service may be waived if defendant admits timely receipt of notice. (See *Valov v. Tank* (1985) 168 Cal.App.3d 867, 876 [214 Cal.Rptr. 546].) However, if the fact of service is contested, compliance with the statutory requirements must be shown. (*Palm Property Investments, LLC v. Yadegar* (2011) 194 Cal.App.4th 1419, 1425 [123 Cal.Rptr.3d 816].) Therefore, this instruction does not provide an option for the jury to determine whether or not defective service was waived if there was actual receipt.

If a commercial lease requires service by a particular method, actual receipt by the tenant will not cure the landlord’s failure to comply with the service requirements of the lease. (*Culver Center Partners East #1, L.P. v. Baja Fresh Westlake Village, Inc.* (2010) 185 Cal.App.4th 744, 752 [110 Cal.Rptr.3d 833].) Whether the same rule applies to a residential lease that specifies a method of service has not yet been decided.

If the lease specifies a time period for notice other than the three-day period, substitute that time period in element 5. [See use note, below, concerning the Tenant Protection Act of 2019.](#)

If the violation of the condition or covenant involves assignment, sublet, or waste, or if the breach cannot be cured, the landlord is entitled to possession on service of a three-day notice to quit; no opportunity to cure by performance is required. (Code Civ. Proc., § 1161(4); *Salton Community Services Dist. v. Southard* (1967) 256 Cal.App.2d 526, 529 [64 Cal.Rptr. 246].) In such a case, omit the bracketed language in element 5 and also omit element 6. If the violation involves nuisance or illegal activity, give CACI No. 4308, *Termination for Nuisance or Unlawful Use—Essential Factual Elements*.

Include the last paragraph if the tenant alleges that the violation was trivial. (See *Boston LLC v. Juarez* (2016) 245 Cal.App.4th 75, 81 [199 Cal.Rptr.3d 452].) It is not settled whether the landlord must prove the violation was substantial or the tenant must prove triviality as an affirmative defense. (See *Superior Motels, Inc. v. Rinn Motor Hotels, Inc.* (1987) 195 Cal.App.3d 1032, 1051 [241 Cal.Rptr. 487]; *Keating v. Preston* (1940) 42 Cal.App.2d 110, 118 [108 P.2d 479].)

The Tenant Protection Act of 2019 and/or local or federal law may impose additional requirements for the termination of a rental agreement based on breach of a condition. (See, e.g., Civ. Code, § 1946.2(a) [“just cause” requirement for termination of certain residential tenancies], (b) [“just cause” defined].) This instruction should be modified accordingly if applicable. [For example, modify element 5 for a just cause eviction involving a residential real property tenancy of 12 months or more. \(See Code Civ., § 1946.2\(c\) \[“Before an owner of residential real property issues a notice to terminate a tenancy for just cause that is a curable lease violation, the owner shall first give notice of the violation to the tenant with an opportunity to cure the violation pursuant to paragraph \(3\) of Section 1161 of the Code of Civil Procedure. If the violation is not cured within the time period set forth in the notice, a three-day notice to quit without an opportunity to cure may thereafter be served to terminate the tenancy.”\].\)](#)

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See CACI No. 4305, *Sufficiency and Service of Notice of Termination for Violation of Terms of Agreement*, for an instruction on proper written notice.

See also CACI No. 312, *Substantial Performance*.

Sources and Authority

- Unlawful Detainer Based on Failure to Perform Conditions. Code of Civil Procedure section 1161(3), (4).
- Tenant Protection Act of 2019. Civil Code section 1946.2.
- Dual Notice Requirement for Certain Residential Tenancies. Civil Code section 1946.2(c).
- Conversion of Unlawful Detainer to Ordinary Civil Action if Possession No Longer at Issue. Civil Code section 1952.3(a).
- “[Code of Civil Procedure section 1161(3)] provides, that where the conditions or covenants of a lease can be performed, a lessee may within three days after the service of the notice perform them, and so save a forfeiture of his lease. By performing, the tenant may defeat the landlord’s claim for possession. Where, however, the covenants cannot be performed, the law recognizes that it would be an idle and useless ceremony to demand their performance, and so dispenses with the demand to do so. And this is all that it does dispense with. It does not dispense with the demand for the possession of the premises. It requires that in any event. If the covenants can be performed, the notice is in the alternative, either to perform them or deliver possession. When the covenants are beyond performance an alternative notice would be useless, and demand for possession alone is necessary. Bearing in mind that the object of this statute is to speedily permit a landlord to obtain possession of his premises where the tenant has violated the covenants of the lease, the only reasonable interpretation of the statute is, that before bringing suit he shall take that means which should be most effectual for the purpose of obtaining possession, which is to demand it. If upon demand the tenant surrenders possession, the necessity for any summary proceeding is at an end, and by the demand is accomplished what the law otherwise would accord him under the proceeding.” (*Schnittger v. Rose* (1903) 139 Cal. 656, 662 [73 P. 449].)
- “It is well settled that the notice required under [Code Civ. Proc., § 1161] subdivisions 2 and 3 (where the condition or covenant assertedly violated is capable of being performed) must be framed in the alternative, viz., pay the rent *or* quit, perform the covenant *or* quit, and a notice which merely directs the tenant to quit is insufficient to render such tenant guilty of unlawful detainer upon his continued possession.” (*Hinman v. Wagon* (1959) 172 Cal.App.2d 24, 27 [341 P.2d 749], original italics.)
- “Plaintiff argues, however, that he should be allowed to amend his complaint so as to bring his action under section 1161, subdivision 4. The notice thereunder required need not be framed in the alternative. However, plaintiff has at no time, either by his three days’ notice or

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in any of his pleadings, suggested that defendant had assigned the lease or sublet the property, or had committed waste contrary to the conditions or covenants of the lease, or maintained a nuisance on the premises, or had used the property for an unlawful purpose. Plaintiff had three opportunities to state a cause of action; if he was of the belief that facts existed which brought his case under 1161, subdivision 4, it would have been a simple matter to allege such facts, but this he did not do.” (*Hinman, supra*, 172 Cal.App.2d at p. 29.)

- “The law sensibly recognizes that although every instance of noncompliance with a contract’s terms constitutes a breach, not every breach justifies treating the contract as terminated. Following the lead of the Restatements of Contracts, California courts allow termination only if the breach can be classified as ‘material,’ ‘substantial,’ or ‘total.’ ” (*Superior Motels, Inc., supra*, 195 Cal.App.3d at p. 1051, internal citations omitted.)
- “ ‘[A] lease may be terminated only for a substantial breach thereof, and not for a mere technical or trivial violation.’ This materiality limitation even extends to leases which contain clauses purporting to dispense with the materiality limitation.” (*Boston LLC, supra*, 245 Cal.App.4th at p. 81, internal citation omitted.)
- “ ‘Normally the question of whether a breach of an obligation is a material breach ... is a question of fact,’ however ‘ “if reasonable minds cannot differ on the issue of materiality, the issue may be resolved as a matter of law.” ’ ” (*Boston LLC, supra*, 245 Cal.App.4th at p. 87.)
- “As to the substantiality of the violation, the evidence shows that the violation was wilful. Therefore, the court will not measure the extent of the violation.” (*Hignell v. Gebala* (1949) 90 Cal.App.2d 61, 66 [202 P.2d 378].)
- “Where a covenant in a lease has been breached and the breach cannot be cured, a demand for performance is not a condition precedent to an unlawful detainer action.” (*Salton Community Services Dist., supra*, 256 Cal.App.2d at p. 529.)
- “If the tenant gives up possession of the property after the commencement of an unlawful detainer proceeding, the action becomes an ordinary one for damages.” (*Fish Construction Co. v. Moselle Coach Works, Inc.* (1983) 148 Cal.App.3d 654, 658 [196 Cal.Rptr. 174].)
- “Proper service on the lessee of a valid three-day notice to pay rent or quit is an essential prerequisite to a judgment declaring a lessor’s right to possession under section 1161, subdivision 2. A lessor must allege and prove proper service of the requisite notice. Absent evidence the requisite notice was properly served pursuant to section 1162, no judgment for possession can be obtained.” (*Liebovich v. Shahrokhkhany* (1997) 56 Cal.App.4th 511, 513 [65 Cal.Rptr.2d 457], internal citations omitted.)
- “Section 1162 does not authorize service of a three-day notice to pay rent or quit by mail delivery alone, certified or otherwise. It provides for service by: personal delivery; leaving a copy with a person of suitable age and discretion at the renter’s residence or usual place of business *and* sending a copy through the mail to the tenant’s *residence*; or posting *and* delivery of a copy to a person there residing, if one can be found, *and* sending a copy through

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the mail. Strict compliance with the statute is required.” (*Liebovich, supra*, 56 Cal.App.4th at p. 516, original italics, internal citations omitted.)

- “In the cases discussed . . . , a finding of proper service turned on a party’s acknowledgment or admission the notice in question was in fact received. In the present case, defendant denied, in his answer and at trial, that he had ever received the three-day notice. Because there was no admission of receipt in this case, service by certified mail did not establish or amount to personal delivery. Further, there was no evidence of compliance with any of the three methods of service of a three-day notice to pay rent or quit provided in [Code of Civil Procedure] section 1162. Therefore, the judgment must be reversed.” (*Liebovich, supra*, 56 Cal.App.4th at p. 518.)
- “[Code of Civil Procedure section 1162 specifies] three ways in which service of the three-day notice may be effected on a residential tenant: As explained in *Liebovich, supra*, . . . , ‘[w]hen the fact of service is contested, compliance with one of these methods must be shown or the judgment must be reversed.’ ” (*Palm Property Investments, LLC, supra*, 194 Cal.App.4th at p. 1425.)

Secondary Sources

12 Witkin, Summary of California Law (11th ed. 2017) Real Property, §§ 753, 759

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.50–8.54

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 5.2, 6.38–6.49

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 12-G, *Termination of Section 8 Tenancies*, ¶ 12:200 et seq. (The Rutter Group)

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 7-C, *Bases For Terminating Tenancy*, ¶ 7:93 et seq. (The Rutter Group)

7 California Real Estate Law and Practice, Ch. 200, *Termination: Causes and Procedures*, § 200.21 (Matthew Bender)

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, §§ 210.21, 210.23, 210.24 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.07

29 California Forms of Pleading and Practice, Ch. 332, *Landlord and Tenant: The Tenancy*, § 332.28 (Matthew Bender)

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.10 (Matthew Bender)

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23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, §§ 236.11, 236.20 (Matthew Bender)

Miller & Starr California Real Estate 4th, § 34.182 (Thomson Reuters)

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4330. Affirmative Defense—Requested Accommodation—Denial of Accommodation

[Name of plaintiff] claims that the requested accommodation for [[name of defendant]’s/a member of [name of defendant]’s household’s] disability was properly denied because of an exception. To succeed on this defense, [name of plaintiff] must prove:

[Specify the provision(s) at issue from California Code of Regulations, title 2, section 12179, e.g., that the requested accommodation would impose an undue financial and administrative burden on the plaintiff].

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Directions for Use

This instruction is for use with CACI No. 4329, *Affirmative Defense—Failure to Provide Reasonable Accommodation*. Give this instruction only if the plaintiff in an unlawful detainer case claims that the requested accommodation was properly denied. (See Cal. Code Regs., tit. 2, § 12179.) Include only factors from the regulation that are at issue.

Sources and Authority

- Denial of Reasonable Accommodation. Cal. Code Regs., tit. 2, § 12179.

Secondary Sources