Retaliation in Higher Education

Rashida Harmon
Senior Counsel
CRD Disclaimer

This guidance is for informational purposes only, does not establish substantive policy or rights, and does not constitute legal advice. The opinions expressed by the presenters do not necessarily reflect the opinions of CRD.
Mission

The Civil Rights Department (CRD) is California’s civil rights agency. The mission of CRD is to protect the people of California from unlawful discrimination in employment, housing, public accommodations, and state-funded and state-administered programs and activities, as well as from hate violence and human trafficking.

Effective July 1, 2022, we are now known as the Civil Rights Department, formerly known as the Department of Fair Employment and Housing. This name change better encompasses our full scope of responsibilities.
CRD Responsibilities

• Engage in public outreach and provide training and technical assistance to employers, business establishments, housing providers, and other stakeholders regarding their responsibilities under the law.
• Investigate discrimination complaints and cases of systemic discrimination.
• Facilitate mediation and resolution of disputes involving civil rights.
• Enforce the laws by prosecuting violations in civil court.
• Issue regulations that implement the FEHA and other statutes to provide greater clarity.
Intro to Fair Employment and Housing Act (FEHA)

- Went into effect in 1959, with many updates since
- Codified in Government Code sections 12900 – 12999 (and associated regulations)
- Covers both employment and housing.
FEHA & Employment

• Applies to all public employers AND private employers with 5 or more employees
• Makes it illegal for employers to discriminate against or harass job applicants/employees based on a protected characteristic
• Prohibits employers from retaliating against employee/applicant if they assert their rights under the law
• Requires reasonable accommodations for disabilities and sincerely held religious beliefs.

Note: Harassment is prohibited for private employers of ANY size (not just 5+)
Employment Protected Categories

- Race (incl. hair texture and style)
- Color
- Ancestry
- National Origin
- Religion
- Age (40 and over)
- Disability (mental and/or physical)
- Sex
- Gender
- Sexual Orientation
- Gender Identity
- Gender Expression
- Medical Condition
- Genetic Information
- Marital Status
- Military and Veteran Status

**Includes actual OR perceived identities and associational discrimination.
Govt Code §§ 12926, 12940
What is retaliation?

Pursuant to Govt. Code § 12940:

• It is unlawful for an employer to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under FEHA or because the person has filed a complaint, testified, or assisted in any proceeding under FEHA.

• It is also unlawful for an employer to retaliate or otherwise discriminate against a person for requesting an accommodation for religious practice or disability, regardless of whether the request was granted.

Note: an employer can generally be held liable for the retaliatory actions of a supervisor. (See Wysinger v. Automobile Club of SoCal (2007) 157 Cal.App.4th 413)
Legislative purpose

“The legislative purpose underlying FEHA’s prohibition against retaliation is to prevent employers from deterring employees from asserting good faith discrimination complaints.”

Special retaliation claims

An employer cannot retaliate against someone who has opposed discrimination or harassment on the basis of national origin by threatening to disclose their (or their family members’) immigration status to authorities. (2 C.C.R. § 11028)

All individuals, regardless of whether they qualify for California Family Rights Act (CFRA), are protected from retaliation for opposing any practice that is, or that they reasonably believe is, a violation of that law. (2 C.C.R. § 11094).
A note about retaliation against students

CSU has an internal policy that covers retaliation against students: Policy Prohibiting Discrimination, Harassment, Sexual Misconduct, Sexual Exploitation, Dating Violence, Domestic Violence, Stalking, and Retaliation.

The definition of retaliation in CSU’s policy mirrors the definition in the FEHA and associated regulations. However, CSU’s policy explicitly prohibiting retaliation against students falls outside of the scope of FEHA and therefore outside the scope of this presentation.
Establishing a claim of retaliation

“To establish a prima facie case of retaliation under FEHA [...] the employee must show the following:

(1) He or she was engaged in a protected activity,
(2) The employer subjected the employee to an adverse employment action, and
(3) A causal link exists between the protected activity and the employer's adverse action.”

Education and Outreach

What are protected legal activities? (1 of 3)

- Filing a CRD complaint or seeking advice from CRD
- Helping someone else file a CRD complaint
- Cooperating with an investigation
- Opposing employment practices that a person reasonably believes are illegal
- Participating in an activity that the employer perceives to be in opposition to discrimination, whether or not that is the person’s intention
- Contacting a local org to discuss possible employment discrimination

2 C.C.R. § 11009
What are protected legal activities? (2 of 3)

“Standing alone, an employee's unarticulated belief that an employer is engaging in discrimination will not suffice to establish protected conduct for the purposes of establishing a prima facie case of retaliation, where there is no evidence the employer knew that the employee's opposition was based upon a reasonable belief that the employer was engaging in discrimination.

[C]omplaints about personal grievances or vague or conclusory remarks that fail to put an employer on notice as to what conduct it should investigate will not suffice to establish protected conduct.”

*Castro-Ramirez v. Dependable Highway Express, Inc.*, 2 Cal. App. 5th 1028, 1046 [internal citations omitted].
What are protected legal activities? (3 of 3)

BUT note: “An employee is not required to use legal terms or buzzwords when opposing discrimination. The court will find opposing activity if the employee's comments, when read in their totality, oppose discrimination.”

Yanowitz v. L'Oreal USA, Inc. (2005) 36 Cal.4th 1028, 1047.

→ FEHA does not only protect people with sophisticated legal knowledge!
→ The relevant question is NOT whether the employee made a formal, legally valid accusation, but whether their communications sufficiently conveyed their reasonable concerns that the employer acted unlawfully.
Protected legal activities – Case study (1 of 2)

Mary is an administrator in the admissions department of Hypothetical University. Her supervisor, the Director of Admissions, is having a sexual relationship with June, another administrator. The Director of Admissions promotes June to a management position in the department, despite Mary being a more qualified candidate. Mary complains to HR that promoting someone based on a sexual relationship is unfair.

Is Mary engaging in a protected legal activity?
Protected legal activities – Case study (2 of 2)

Yes.

• Based on 2 C.C.R § 11009, Mary is opposing an employment practice that she reasonably believes is illegal → sexual favoritism

• FEHA recognizes that sexual harassment occurs when a sexual relationship between a supervisor and a subordinate is based upon an asserted quid pro quo

• BUT even if she was wrong about her boss’ conduct being illegal, still protected as long as her belief was reasonable and she sufficiently communicated her concerns

*Miller v. Dept. of Corrections* (2005) 36 Cal.4th 446
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What is an adverse employment action? (1 of 2)

- Demoting or suspending
- Cutting hours
- Failing to hire or consider for hire
- Terminating from employment (including constructive termination)
- Failing to give equal consideration in making employment decisions
- Unfairly negative evaluations or recommendations for subsequent employment
- Worsening working conditions, including by intensifying harassment
- Denying employment benefits
- Otherwise discriminating against the employee

2 C.C.R. § 11009; Govt. Code § 12940(h)
What is an adverse employment action? (2 of 2)

Includes the entire spectrum of employment actions that are reasonably likely to adversely and materially affect an employee’s job performance or opportunity for advancement in his or her career.

• Likely won’t include “mere offensive utterance or even a pattern of social’ slights by either the employer or coemployees”
• However, may include a pattern of acts that might not individually be sufficient to constitute discrimination or retaliation, but taken as a whole establish prohibited conduct.
• → Notion of an adverse action must be interpreted liberally and with a reasonable appreciation of the realities of the workplace

Yanowitz v. L’Oreal USA, Inc. (2005) 36 Cal.4th 1028, 1053-1054.
Adverse employment action – Case Study (1 of 3)

Mark is a professor in the math department of Hypothetical U. He is Muslim. He requests a reasonable accommodation to reschedule a Friday class so he can attend mosque services. The department head grants his request, but writes a negative evaluation calling him ‘inflexible’ and ‘not a team player’. In a department meeting, he jokingly refers to him as ‘high maintenance’ in front of his colleagues. He schedules a department party on a Friday, knowing Mark cannot attend.

Adverse employment action?
Adverse employment action – Case Study (2 of 3)

Probably.

• “[T]here is no requirement that an employer's retaliatory acts constitute one swift blow, rather than a series of subtle, yet damaging, injuries.”

• Collectively, these actions go beyond a “mere social slight” and materially affect Mark’s ability to advance in his career.

Yanowitz v. L’Oreal USA, Inc. (2005) 36 Cal.4th 1028.
But note:

Court has found an employer’s collective actions did NOT constitute an adverse employment action where employer:

• Did not respond to employee’s email asking to collaborate on a business plan;
• Did not invite employee to lunch; and
• Decided not to hire employee’s acquaintances in new position at his suggestion.

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What is a causal link?

• Retaliation is proved by showing that employee engaged in protected activities, that his or her employer was aware of the protected activities, and that the adverse action followed within a relatively short time thereafter.
• Both direct and circumstantial evidence can be used to show causal link.
• Circumstantial evidence may include factors like the plaintiff's job performance, the timing of events, and how the plaintiff was treated in comparison to other workers.

Burden of proof

Once an employee proves a causal link between the protected activity and the adverse employment action, burden shifts to employer to show a legitimate, non-retaliatory reason for the adverse employment action.

→ If the employer does this successfully, the presumption of retaliation “drops out of the picture” and the burden returns to the employee to prove that the employer’s justification is a pretext.

→ Retaliatory intention must be least a substantial or motivating factor in the adverse employment decision (even if there are other factors present).

Causal link – Case study (1 of 3)

Morgan worked as an electronic technician at UC in the engineering dept. He was one of two African American technicians. In August, he filed an internal grievance claiming racial discrimination after he was docked for leaving work early, but his white colleagues were not. An internal investigation determined all employees should have been docked but noted that Morgan had an ongoing attendance problem. Morgan was laid off in May of the following year due to budget cuts.
Causal link – Case study (2 of 3)

U.C. informed Morgan he would get preference for rehire if jobs for which he was qualified became available in other departments. A Computer Resource Specialist II position in the library systems department became available. Morgan applied but was not hired. Morgan alleged U.C.’s termination of his job, and refusal to rehire him as a Computer Resource Specialist II, constituted retaliation based on his discrimination complaint.

Causal link?
Causal link – Case study (3 of 3)

No. In this case, after the burden shifted to the employer, the employer was able to prove:

- Legitimate reason for lay-off (budget cuts)
- Hiring staff for Computer Resources Specialist II position were unaware of his past grievance
- Morgan was not qualified for the Computer Resources Specialist II position; didn’t know software
- Morgan unable to prove pretext.

Retaliation complaints

If someone believes they were subject to unlawful retaliation, they should:

• Document their experience (names, dates, specifics, etc.), including specific information about both the protected legal activity AND the adverse employment action (See 2 C.C.R. § 10002)

• As appropriate, speak with a supervisor, manager, or HR representative → could remedy situation

• Fill out a CRD intake online, by mail, or by phone within 3 years.
Remedies May Include:

- Reimbursement for actual losses and compensation for emotional distress
- Hiring or reinstatement
- Back pay or promotion
- Training and policy changes
- Monitoring and ongoing reporting
- Civil penalties
- Punitive damages
CRD Resources

CALIFORNIA PROTECTS THE CIVIL RIGHTS OF LGBTIQ+ PEOPLE
FACT SHEET

In California, LGBTIQ+ people enjoy equal rights under the law. LGBTIQ+ people have unique legal needs and face distinct barriers to accessing services and opportunities. Here are the basics.

- Discrimination is illegal in housing, employment, public accommodations, and education.
- LGBTIQ+ people have the right to marry and adopt children.
- LGBTIQ+ people have the right to serve in the military.
- LGBTIQ+ people have the right to access health care.

WHAT YOU CAN DO
- Contact the Dispute Resolution Section for help with legal questions.
- Contact the Legal Services Division for assistance with legal issues.
- Contact the Legal Advocacy Division for help with discrimination.

WHAT WE DO
- Provide legal advice and representation.
- Provide training and education.
- Engage in policy advocacy.
- Provide resources and publications.

WHERE TO FIND US
- 1201 N. First St., Suite 400, San Jose, CA 95113
- Phone: (408) 974-8241
- Fax: (408) 974-8242
- Email: info@crd.crd.gov

HATE VIOLENCE & CIVIL RIGHTS
FACT SHEET

What is hate crime?
Hate crime is a crime that is motivated by bias against a person’s race, ethnicity, religion, gender, or sexual orientation. Hate crimes are often targeted at individuals who are perceived to be different in some way from the attacker.

What to do if you experience a hate crime
- Call the police immediately.
- Do not fight back.
- Try to remember the attacker’s appearance.
- Do not leave the scene until the police arrive.
- Call the California Protection of Persons Commission at 1-800-362-8461.

Sexual Harassment
FACT SHEET

Sexual harassment is any unwanted sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature that creates an intimidating, hostile, or offensive work environment.

What to do if you experience sexual harassment
- Report the incident to your supervisor.
- File a complaint with the Equal Employment Opportunity Commission.
- Seek legal advice.

WAYS TO PREVENT HATE CRIME
- Educate yourself about hate crimes.
- Report any suspicious activity.
- Report any incidents of discrimination.

WAYS TO ADDRESS HATE CRIME
- Support anti-hate organizations.
- Attend community events.
- Speak out against hate.

TRANSGENDER RIGHTS IN THE WORKPLACE
FACT SHEET

What is transgender?
Transgender is a term used to describe people who experience a gender identity that differs from their sex assigned at birth.

What are the risks of discrimination?
Transgender people face discrimination in many areas of life, including employment, housing, and education.

What to do if you experience discrimination
- File a complaint with the Equal Employment Opportunity Commission.
- Seek legal advice.
- Contact the California Protection of Persons Commission at 1-800-362-8461.

WAYS TO PREVENT DISCRIMINATION
- Educate yourself about transgender rights.
- Speak out against discrimination.
- Support transgender individuals.
Accommodations and Language Access (1 of 2)

The Department provides equal access to people with disabilities. Anyone needing an accommodation should email contact.center@dfeh.ca.gov or accommodations@dfeh.ca.gov, call 844-541-2877 (voice) or via California Relay Service 711 or 800-700-2320 (TTY).
Accommodations and Language Access (2 of 2)

The Department offers bilingual services and provides some translated documents for people with limited English proficiency. You may contact our Communications Center and request assistance in a language other than English: contact.center@dfeh.ca.gov, call 844-541-2877 (voice) or via California Relay Service 711 or 800-700-2320 (TTY).
Thank you!

For more information, please contact CRD:

www.dfeh.ca.gov
Rashida.harmon@dfeh.ca.gov
Phone: (916) 584-3327