



Elimination of Bias: Professionalism in the Workplace

Harassment and Discrimination Prevention

A Seminar Presented To

Association of Corporate Counsel
Sacramento Chapter

October 15, 2009

Presented by
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The Recorder

(October 14, 2009)

Gay Would-Be Judges
See Governor As Obstacle



Legal Pad

(October 12, 2009)

Marion Wiley Sworn in
Friday, October 9, 2009, San Francisco
County Superior Court Judge



New York Times

(October 6, 2007)

Big Law Firm Settles Age
Discrimination Lawsuit

(\$27.5 million)



CALIFORNIA ANTI-DISCRIMINATION LAWS

- Prohibit discrimination based on many characteristics
- More than 30!





CALIFORNIA ANTI-DISCRIMINATION LAWS

(Not Exhaustive)

- Age
- Aids and related conditions
- Ancestry
- Bankruptcy
- Citizenship or citizenship status
- Color



CALIFORNIA ANTI-DISCRIMINATION LAWS

(cont'd)

- Crime victim
- Disability or perception of disability (mental or physical)
- Filing a workers' compensation claim
- Garnishment because of a single debt
- Being illiterate



CALIFORNIA ANTI-DISCRIMINATION LAWS

(cont'd)

- Jury duty service
- Lactation
- Marital status
- Medical condition, including cancer in remission
- Missing work to accompany a child to school when child is facing a possible suspension



CALIFORNIA ANTI-DISCRIMINATION LAWS

(cont'd)

- Up to 40 hours off work per year to attend school with child
- Family and/or medical leave
- Military service
- Natural origin
- Participation in union activities
- Political beliefs



CALIFORNIA ANTI-DISCRIMINATION LAWS

(cont'd)

- Pregnancy
- Race
- Religion
- Sex
- Sexual orientation
- Veteran status



CALIFORNIA ANTI-DISCRIMINATION LAWS

(cont'd)

- Victim of domestic violence
- Time off to perform emergency duty as a volunteer firefighter

CALIFORNIA RULES OF PROFESSIONAL CONDUCT

Rule 2-400(b)

- In the management or operation of a law practice, a member shall not:

1. unlawfully discriminate, or
2. knowingly permit unlawful discrimination

on the basis of race, national origin, sex, sexual orientation, religion, age, or disability

CALIFORNIA RULES OF PROFESSIONAL CONDUCT

Rule 2-400(b) – cont'd

- A law practice shall not unlawfully discriminate or knowingly permit unlawful discrimination in:
 1. hiring, promoting, discharging, or otherwise determining the conditions of employment of any person, or
 2. accepting or terminating representation of any client

TO WHOM DOES THIS RULE APPLY?

- Sole practices
- Law partnerships
- Law corporations
- Corporate legal departments
- Government legal departments
- Other entities which employ members to practice law

UNLAWFUL DISCRIMINATION OR UNLAWFULLY DISCRIMINATE

- Determined by reference to applicable state or federal statutes or decisions making unlawful discrimination in employment and in offering goods and services to the public

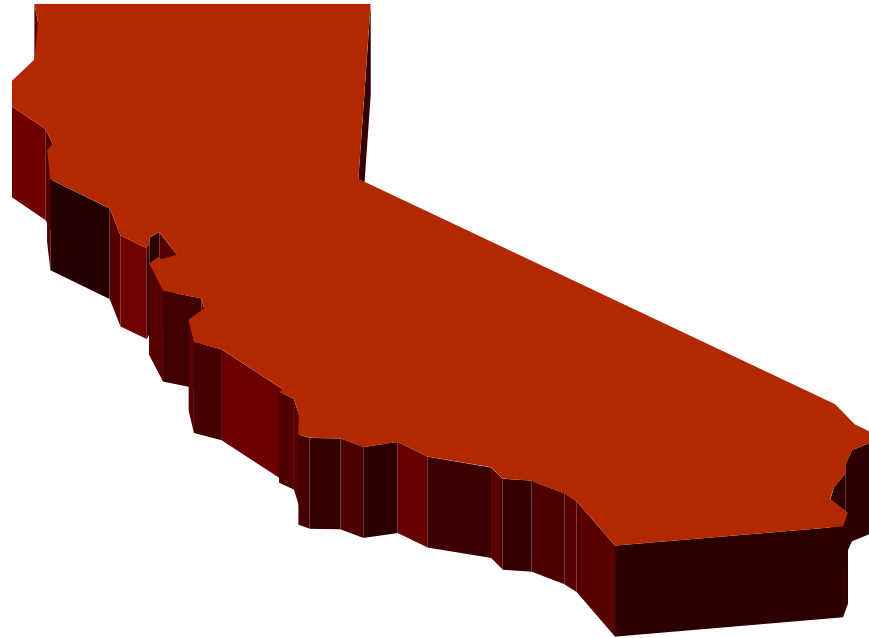
KNOWINGLY PERMIT

- A failure to advocate corrective action
- Where the member knows of a discriminatory policy or practice
- Results in prohibited unlawful discrimination

STATE BAR DISCIPLINE

- State Bar disciplinary investigation or proceeding requires a prior civil administrative (non-disciplinary) or judicial tribunal finding of unlawful discrimination under applicable state or federal law
- An imposition of discipline requires exhaustion of appeal rights or the dismissal of an appeal

CALIFORNIA LAW



CALIFORNIA LAW

- It is unlawful for an employer to refuse to hire or employ, refuse to train, or to discriminate in compensation or terms, conditions, or privileges of employment because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation

CALIFORNIA LAW

- It is unlawful for an employer, or any other person, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation, to harass an employee, an applicant, or a person providing services pursuant to a contract

FEDERAL LAW





FEDERAL LAW

- Title VII of the Civil Rights Act of 1964 (race, color, religion, sex or national origin)
- 42 U.S.C. § 1981 (racial discrimination)
- The Age Discrimination in Employment Act of 1967
- The Rehabilitation Act of 1973
- The Americans with Disabilities Act
- The Family and Medical Leave Act

EMPLOYEE HAS BIASES

- Bias:
 - Inclination; a preconceived opinion; a predisposition to decide a cause or an issue in a certain way, which does not leave the mind perfectly open to conviction.



EMPLOYEE HAS BIASES

- Having predispositions is not unlawful. However, how we act on our biases may be unlawfully discriminatory or by not acting on other's biases, we may knowingly permit unlawful discrimination.

HYPOTHETICAL

- General Counsel, Steve, supervises two attorneys – Bill and John. Because Steve likes Bill more than John, Steve regularly gives Bill bigger raises and better assignments than John.

True/False

Steve's actions are unlawfully discriminatory.

ANSWER

- FALSE:

Discrimination is only unlawful when based on a protected characteristic or classification.



TYPES OF UNLAWFUL DISCRIMINATION

- Disparate treatment
- Disparate impact
- Refusal to accommodate

INTENT v. IMPACT

- A General Counsel whose department is behind gathers the employees and announces: “We need to catch-up, so all employees who are Catholic are required to work this Saturday.”

True/False

This is unlawfully discriminatory.

ANSWER

- TRUE:

Employees are intentionally being treated differently in working conditions because of their religious beliefs.



INTENT v. IMPACT

- A General Counsel whose department is behind gathers the employees and announces: “We need to play catch-up, so all employees are required to work this Saturday – no exceptions.”

True/False

This is unlawfully discriminatory.

ANSWER

- MAYBE:

If there are employees for whom Saturday is a day of religious observance, they are being impacted differently because of their religious beliefs.

HYPOTHETICAL

- A law firm is suffering hard times financially and decides cutbacks are needed. It announces that all employees who make \$50,000 a year will be laid off.

True/False

This is unlawfully discriminatory.

ANSWER

- MAYBE:

This action may disproportionately impact older workers (40 or older), who tend to be higher earners.

HYPOTHETICAL

- General Counsel discharges an employee because she does not want people who were born in another country working at the company. It turns out, the employee was born in the United States.

True/False

This is not unlawful discrimination because the employee's nation of origin is the United States.

ANSWER

- FALSE:

It is unlawfully discriminatory to base an adverse employment decision on a perception, even if it was an incorrect perception, that the employee has a protected characteristic.

HYPOTHETICAL

- A Fortune 500 corporation's legal department is interviewing for an additional attorney. However, budgets are very tight. The best applicant for the position is blind, uses a guide dog, requires Braille equipment, and the assistance of another person to assist with reading materials. Because the budget does not include funds for an aid or Braille equipment for this applicant, the General Counsel hires the second best candidate.



True/False

This is not unlawfully discriminatory.

ANSWER

- **FALSE:**

Must not discriminate based upon physical disabilities. Must reasonably accommodate unless the accommodation would impose an undue hardship on the operation of the business.

HYPOTHETICAL

- A dark complected African-American partner of a law firm refuses to send a light complected African-American associate to training provided to all other associates.

True/False

This is not unlawful discrimination because the partner and associate are both African-American.

ANSWER

- FALSE:

Discrimination based on skin color is unlawful.

HYPOTHETICAL

- A legal department adopts the following policy: If two employees marry, at least one must leave the company.

True/False

This is not unlawful discrimination because it prevents claims of favoritism and conflicts of interest.

ANSWER

- FALSE:

It is unlawful marital status discrimination to bar co-workers from marrying. An employer may “reasonably regulate” the working of spouses in the same department.

WHAT CAN WE DO TO PREVENT BIAS IN THE LEGAL PROFESSION?



EDUCATE OURSELVES

- “Instruction in eliminating bias from the legal profession may make attorneys more aware of such biases and assist in eliminating them.”

J. Kennad’s dissenting opinion in *Warden v. State Bar*, 21 Cal. 4th 628, 655 (1999) (equal protection case challenging the constitutionality of the MCLE Program because of its exemptions for retired judges, state officers, elected officials, and law professors).





■ TAKE STEPS TO BE MORE ACCEPTING AND UNDERSTANDING OF OUR DIFFERENCES

- Focus on yourself: acceptance not tolerance
- Read books by authors from different ethnic backgrounds or who live with and write about their disabilities



■ TAKE STEPS TO BE MORE ACCEPTING AND UNDERSTANDING OF OUR DIFFERENCES

- Travel and immerse yourself in local culture
- Take courses about other cultures, disabilities, the other gender
- Get to know co-workers and neighbors from different cultures or with disabilities



ENCOURAGE DIVERSITY IN YOUR LEGAL WORKPLACE

- Speak up about having more diversity
- Provide and encourage internal mentors and, if necessary external mentors, who are diverse
- Build on diversity you have



ENCOURAGE DIVERSITY IN YOUR LEGAL WORKPLACE

- Diversity at every level
- Speak up when you witness offensive and discriminatory conduct

The ultimate measure of a man is not where he stands in moments of comfort and convenience, but where he stands at times of challenge and controversy. ~ Dr. Martin Luther King, Jr.

Q & A



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