

CALIFORNIA
WOMEN'S
LAW CENTER

Pursuing Justice for Women and Girls

Federal and California State Sex-Based Discrimination, Harassment, and Assault Laws



Updated February 2022

I.	SEX-BASED DISCRIMINATION.....	2
A.	SEX-BASED DISCRIMINATION UNDER FEDERAL LAW	2
1.	<i>Title VII: Civil Rights Act of 1964, as amended (42 U.S.C. § 2000e, et seq.)</i>	2
2.	<i>Title IX: Education Amendments Act of 1972 (20 U.S.C. § 1681)</i>	3
3.	<i>Equal Pay Act (29 U.S.C. § 206(d)(1))</i>	4
B.	SEX-BASED DISCRIMINATION UNDER CALIFORNIA LAW	5
1.	<i>Fair Employment and Housing Act (FEHA) (Cal. Gov’t Code §§ 12900-12996)</i>	5
2.	<i>California Fair Pay Act (Cal. Labor Code § 1197.5)</i>	6
3.	<i>Unruh Civil Rights Act (Cal. Civ. Code § 51)</i>	6
II.	SEXUAL HARASSMENT.....	7
A.	SEXUAL HARASSMENT UNDER FEDERAL LAW.....	7
1.	<i>Title VII: Harassment in Workplace (42 U.S.C. § 2000e et. seq)</i>	7
2.	<i>Title VII: Retaliation (42 U.S.C. § 2000e-3(a))</i>	10
3.	<i>Title IX: Education Amendments Act of 1972 (20 U.S.C. § 1681)</i>	11
B.	SEXUAL HARASSMENT UNDER CALIFORNIA LAW	13
1.	<i>FEHA: Harassment in the Workplace (Cal. Gov’t Code § 12940(j))</i>	13
2.	<i>FEHA: Retaliation (Cal. Gov’t Code § 12940(h))</i>	17
3.	<i>Harassment in Business Relationships (Cal. Civ. Code § 51.9)</i>	18
4.	<i>Ralph Act (Cal. Civ. Code § 51.7)</i>	19
III.	SEXUAL ASSAULT AND OTHER SEXUAL MISCONDUCT	20
A.	SEXUAL ASSAULT UNDER FEDERAL LAW: CIVIL CAUSES OF ACTION.....	20
1.	<i>Title IX: Education Amendments Act of 1972 (20 U.S.C. § 1681)</i>	20
B.	SEXUAL ASSAULT UNDER FEDERAL LAW: CRIMINAL CAUSES OF ACTION	21
1.	<i>Sexual Abuse (18 U.S.C. § 2242)</i>	21
2.	<i>Sexual Abuse of a Minor (18 U.S.C. § 2243)</i>	22
3.	<i>Aggravated Sexual Abuse (18 U.S.C. § 2241)</i>	23
4.	<i>Abusive Sexual Contact (18 U.S.C. § 2244)</i>	24
5.	<i>Interstate Stalking (18 U.S.C. § 2261A)</i>	24
6.	<i>Interstate Domestic Violence (18 U.S.C. § 2261)</i>	26
7.	<i>Interstate Violation of a Protective Order (18 U.S.C. § 2262)</i>	27
B.	SEXUAL ASSAULT UNDER CALIFORNIA LAW: CIVIL CAUSES OF ACTION	27
1.	<i>Sexual Battery (Cal. Civ. Code § 1708.5)</i>	27
2.	<i>Gender Violence (Cal. Civ. Code § 52.4)</i>	28
3.	<i>Stalking (Cal. Civ. Code § 1708.7)</i>	29
C.	SEXUAL ASSAULT UNDER CALIFORNIA LAW: CRIMINAL CAUSES OF ACTION.....	30
1.	<i>Assault with Intent to Rape (Cal. Penal Code § 220)</i>	30
2.	<i>Rape (Cal. Penal Code §§ 261-262)</i>	31
3.	<i>Statutory Rape (Cal. Penal Code § 261.5)</i>	32
4.	<i>Stalking (Cal. Penal Code § 646.9)</i>	32
5.	<i>Indecent Exposure (Cal. Penal Code § 314)</i>	33
6.	<i>Hate Crimes (Cal. Penal Code § 422.6)</i>	34
7.	<i>Revenge Porn (Cal. Penal Code § 647(j)(4))</i>	34

I. Sex-Based Discrimination

A. Sex-Based Discrimination under Federal Law

1. *Title VII: Civil Rights Act of 1964, as amended (42 U.S.C. § 2000e, et seq.)*

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against employees on the basis of sex.¹ In general, Title VII applies to employers with 15 or more employees.

Disparate Treatment

Disparate treatment is the most common theory under which plaintiffs bring discrimination claims. This theory requires a plaintiff to show that the employer had a discriminatory motive, either by direct² or indirect³ evidence. A defendant may attempt to rebut that presumption by showing that their actions had a nondiscriminatory purpose.⁴

Elements of Disparate Treatment Under Title VII (direct evidence):

1. Direct evidence of discriminatory motive.⁵

Example:

- A prima facie case of sex-based discrimination in violation of Title VII was established when an employee alleged that her supervisor “frequently made demeaning and derogatory comments about women . . . [which,] considered along with [her supervisor’s] interactions with [the employee] over the course of her employment at Boeing, [were] sufficient to create an inference of discriminatory motive even though the comments were not directed specifically at [the employee] or made in regard to decisions about her employment.”⁶

Elements of a Disparate Treatment Claim Under Title VII (indirect evidence):⁷

1. A member of a protected class (e.g., women)
2. Who is qualified for the position
3. Suffers an adverse employment action (e.g., termination or demotion)
4. Under circumstances that suggest a discriminatory motive.

Example:

- Female employees sued their employer, alleging that the employer’s “Fetal Protection Policy,” which mandated that pregnant women or women capable of bearing children be excluded from jobs involving lead exposure, constituted sex discrimination in violation of Title VII. One woman became sterilized to avoid losing her job; another was transferred to a different position for which she was paid a lower salary. The employer could not establish that the policy’s exclusion on the basis of sex related to a bona fide occupational qualification, and it was thus found to be discriminatory.⁸

Disparate Impact

Unlike disparate treatment, a disparate impact theory of discrimination does not require a plaintiff to allege that the defendant acted with a discriminatory motive or intent. Rather, the plaintiff must allege facts to show that, no matter the motive, a facially neutral policy did in fact lead to discriminatory results in its application. Plaintiffs often rely on statistical evidence to prove disparate impact.⁹ If the plaintiff successfully proves disparate impact, the defendant must then show that the policy is necessary for business to defeat the claim.¹⁰

Elements of a Disparate Impact Claim Under Title VII:¹¹

1. A policy that is neutral on its face
2. Has a discriminatory impact in practice because it disproportionately and adversely impacts a protected group.

Examples:

- Five women were denied paramedic jobs in Chicago. Chicago had implemented a physical-skills test for potential hires, which, between 2000 and 2009, 98% of male applicants and only 60% of female applicants passed. Plaintiffs prevailed on a disparate impact claim because Chicago failed to establish that skills tested reflected “important elements of job performance,” rather than sex discrimination.¹²
- Plaintiffs filed a Title VII suit claiming disparate impact on the basis of sex after they applied for a promotion. Initially, all of the female applicants were denied an interview. After additional screenings, several female employees were interviewed and one female employee was promoted to the position in question. The court found that the plaintiffs failed to show discriminatory impact, because the promotion rate of female applicants exceeded the promotion rate of male applicants.¹³

Exhaustion of Administrative Remedies/Statute of Limitations

A plaintiff must file a charge with the Equal Employment Opportunity Commission (EEOC) prior to commencing a civil action in federal court.¹⁴ A plaintiff must first file a charge with the EEOC within either:

1. 180 calendar days after the alleged unlawful employment practice occurred; or
2. 300 calendar days after the alleged unlawful employment practice occurred, if the plaintiff institutes proceedings “with a State or local agency with authority to grant or seek relief from such practice” or 30 calendar days “after receiving notice that the State or local agency has terminated the proceedings,” whichever is earlier.¹⁵

The EEOC will issue a Notice of Right to Sue if it determines that there are grounds for a discrimination claim. Once the “right to sue” letter is received, a lawsuit must be filed within 90 days.¹⁶

2. Title IX: Education Amendments Act of 1972 (20 U.S.C. § 1681)

Title IX of the Education Amendments of 1972 is a federal law that prohibits sex discrimination by any federally funded education program or activity. Most schools, including many private schools, receive some federal funds and are thus subject to Title IX. The Department of Education’s Office of Civil Rights (OCR) enforces Title IX.

The statutory language, in pertinent part, states, “No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”¹⁷

Who does Title IX apply to?

Title IX applies to any education institution that receives money from the federal government. This includes institutions such as colleges, universities, elementary schools, secondary schools, as well as education or training programs (e.g., interscholastic, intercollegiate, club, or intramural athletics offered by the institution).¹⁸

Elements of a Cause of Action for Discrimination under Title IX:¹⁹

1. An intentional act of ***discrimination***²⁰
2. On the basis of sex.

Discrimination: Discrimination under Title IX is broadly construed and includes retaliation. Actions not expressly mentioned in the statute have been found to be discriminatory.²¹

Examples:

- A girls' basketball coach complained that his team was receiving less funding and less access to equipment and facilities than the boys' team and was eventually fired. He sued the Board of Education, claiming retaliation in violation of Title IX's prohibition against discrimination on the basis of sex. The Supreme Court found that he was discriminated against "on the basis of sex," because the retaliation against him occurred as a result of his allegations of sex discrimination.²²
- A school violated Title IX where opportunities for sports participation were not provided equally for male and female students, female students were underrepresented among athletes, and the high school could not show a continuing practice of program expansion to "fully and effectively accommodate" the interests and abilities of female students.²³

Statute of Limitations

Because Title IX does not expressly provide a statute of limitations, the appropriate statute of limitations is that of comparable state personal injury actions.²⁴ In California, a person must file a lawsuit under Title IX within two years of a discriminatory act.

Note: Unlike claims brought under Title VII, Title IX has no requirement that a claim first be brought before an administrative agency before a lawsuit can be filed.²⁵

3. Equal Pay Act (29 U.S.C. § 206(d)(1))

The Equal Pay Act protects the rights of employees to be free from pay discrimination on the basis of sex.

Elements of a Cause of Action under the Equal Pay Act:²⁶

1. The employer pays different wages to employees of the opposite sex
2. For **substantially equal** work
3. Such differential in payment is not based on:
 - a. A seniority system;
 - b. A merit system;
 - c. A system which measures earnings by quantity or quality of production; or
 - d. A differential based on any other factor other than sex.

Substantially Equal: To be eligible for equal pay, jobs held by employees of the opposite sex must be substantially equal, rather than identical. Inconsequential differences between the positions may be disregarded, but the positions must require substantially equal skills, effort, and responsibility to be performed under similar conditions.²⁷

- Actual performance requirements, rather than job classifications or titles, are determinative.²⁸

Examples:

- Female prison matrons and male prison guards were found not to be in substantially similar jobs because each male guard was responsible for guarding a substantially larger number of prisoners than each matron and the matrons did substantially more clerical work than the male guards.²⁹
- Fresno County Office of Education paid the female plaintiff less than comparable male employees for the same work. Fresno County argued that the employees' prior salary was a "factor other than sex" under the Equal Pay Act that can justify a wage differential. The Ninth Circuit held that an employer may not justify a wage differential between male and female employees by relying on prior salary, either alone or in combination with other factors.³⁰

Statute of Limitations

Two years. Three years in instances of willful discrimination.³¹ For a violation to be "willful," and the three-year statute of limitations period to apply, the plaintiff must show that the employer either knew or recklessly disregarded whether its conduct was prohibited by the statute.³²

B. Sex-Based Discrimination under California Law

1. Fair Employment and Housing Act (FEHA) (Cal. Gov't Code §§ 12900–12996)

*FEHA has considerable overlap with Title VII. However, FEHA is broader in scope, meaning that an employer could be liable under FEHA but not under Title VII. California courts look to federal law when applying FEHA, so the standards are substantially similar.*³³

Disparate Treatment

Disparate treatment is the most common theory under which plaintiffs bring discrimination claims. This theory requires a plaintiff to show that the employer had a discriminatory motive. As under Title VII, to avoid liability, the defendant must show that their actions had a nondiscriminatory purpose.³⁴

Elements of a Cause of Action for Disparate Treatment:³⁵

1. A member of a protected group (e.g., women)
2. Who is qualified for the position or performing competently in the position
3. Suffers an adverse employment action (e.g., firing or demotion)
4. Under circumstances that suggest a discriminatory motive (e.g., the employer continued to seek applicants from persons with the plaintiff's same qualifications).

Examples:

- An engineer for the Public Utilities Commission of the City and County of San Francisco was subjected to a variety of discriminatory actions at work. The court found that the plaintiff succeeded in pleading a prima facie case of disparate treatment by showing the engineer satisfied the four elements: the plaintiff was an African-American woman of Choctaw and Chickasaw ancestry; she was qualified for the position; she received unwarranted negative evaluations and was reassigned to an inferior position; and she was treated differently than her colleagues who did not belong to the same protected classes.³⁶
- An employee at Wal-Mart did not prevail on his disparate impact claim, as he only pointed to Wal-Mart's parking policy and hiring practice, "neither of which was facially neutral as articulated by the employee." The employee should have challenged these policies through a disparate treatment claim.³⁷

Disparate Impact

Disparate impact does not require a plaintiff to allege that the defendant acted with a discriminatory motive or intent. Rather, the plaintiff must allege facts to show that, no matter the motive, a facially neutral policy did in fact lead to discriminatory results in its application. To avoid liability, the defendant must show that the policy is necessary for a business purpose.³⁸

Elements of a Cause of Action for Disparate Impact:³⁹

1. A policy that is neutral on its face
2. With an impact that is, in practice, discriminatory because it disproportionately adversely impacts a protected group (e.g., women).
3. The plaintiff is a member of the impacted protected group and
4. Was harmed by the employer's policy.

Example:

- A woman sued the City of San Diego under both Title VII and FEHA, alleging that the City's failure to promote her to a permanent lifeguard position was based on her sex.⁴⁰ She alleged that, after she complained, the City retaliated against her in violation of Title VII and FEHA by not scheduling her for summer lifeguarding. The court found that she stated a prima facie claim of disparate

impact gender discrimination by submitting a statistician's expert report that concluded "that female lifeguards are disparately impacted by the promotion process used by the City."⁴¹

Exhaustion of Administrative Remedies/Statute of Limitations

Before a FEHA claim can proceed to court, a complaint must be filed with the California Department of Fair Employment and Housing (DFEH). A complainant has three years from the date of the injury for employment cases, and one year from the date of the injury for most other cases, to file a complaint with DFEH.⁴² If a person first obtains knowledge of the occurrence of a discriminatory act within 90 days of the filing deadline, they can still file a claim with the DFEH within that 90-day period.⁴³

2. California Equal Pay Act (Cal. Labor Code § 1197.5)

The California Equal Pay Act prohibits employers from paying employees lower wages for work that is substantially similar to the work of higher paid employees of the opposite sex.

Elements of a California Equal Pay Act Claim:⁴⁴

1. Employer paid lower wages to an employee as compared to employees of another sex
2. For substantially similar work, when viewed as a composite of skill, effort, and responsibility
3. Performed under similar conditions
4. Without demonstrating an appropriate ***exception*** applies.

Exceptions: An employer may pay an employee a lower rate than that paid to employees of the opposite sex if the wage differential is reasonably based upon one or more of the following factors:⁴⁵

- (a) A seniority system
- (b) A merit system
- (c) A system that measures earnings by quantity or quality of production
- (d) A bona fide factor other than sex, such as education, training, or experience.

Example:

- A construction superintendent successfully demonstrated that she was paid less than a newly-hired male employee with the same position. She further demonstrated that, subsequent to her departure from the company, her male replacement was paid more than she had been paid. This constituted prima facie evidence of unequal pay.⁴⁶ Nevertheless, her employer successfully established that a business reason other than sex led to the wage differential, stating that the unequal pay was based on differences in prior work experience between the relevant employees.⁴⁷

Statute of Limitations

A claim alleging a violation of the California Equal Pay Act must be filed within two years of the alleged discrimination, except that a cause of action arising out of a willful violation may be filed within three years after the alleged discrimination.⁴⁸

3. Unruh Civil Rights Act (Cal. Civ. Code § 51)

The Unruh Civil Rights Act states that all persons are entitled to free and equal accommodations in all business establishments of any kind.

The statutory language, in pertinent part, states the following:

All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.⁴⁹

Elements of a Cause of Action under the Unruh Act:⁵⁰

1. Denial of full or equal accommodations, advantages, facilities, privileges or services
2. Because of sex
3. By any business establishment.

Examples:

- Sex based price discounts on car washes were held to be arbitrary discrimination prohibited by the Unruh Act.⁵¹
- Male night club patrons were charged higher admission because of their sex. It was not necessary to prove they had been denied specifically-requested equal treatment to bring a claim under the Act.⁵² Any plaintiff who has “suffered an invasion of legally protected interests” may do so.⁵³
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Statute of Limitations

Courts are divided as to whether the statute of limitations is two years (as for personal injury) or three years (as for liability created by statute).⁵⁴

II. Sexual Harassment

What Is Harassment?

Sexual harassment has been defined as “[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.”⁵⁵ Sexual harassment may include any of the following behaviors:⁵⁶

- Verbal harassment: May include epithets, derogatory comments or slurs (or repeated romantic overtures, sexual comments and jokes or prying into one’s personal affairs).
- Physical harassment: May include unwanted touching, rubbing against someone, assault and physical interference with movement or work.
- Visual harassment: May include derogatory cartoons, drawings or posters, or lewd gestures.

A. Sexual Harassment Under Federal Law

1. Title VII: Harassment in Workplace (42 U.S.C. § 2000e et seq.)

Title VII of the Civil Rights Act of 1964 is a federal statute that prohibits discrimination based on statutorily enumerated categories, including sexual harassment.

The statutory language, in pertinent part, states:

It shall be an unlawful employment practice for an employer— . . . to discriminate against any individual with respect to [their] compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.⁵⁷

Although the statutory text does not expressly include sexual harassment, the Equal Employment Opportunity Commission (EEOC) has interpreted sexual harassment as a type of sexual discrimination that is prohibited by Title VII. The Supreme Court has upheld the EEOC’s view of sexual harassment as a type of sexual discrimination.⁵⁸ Federal regulations explicitly state that “[h]arassment on the basis of sex is a violation of section 703 of [T]itle VII.”⁵⁹

Who does this statute apply to?

Title VII applies to employers with 15 or more employees.⁶⁰

Hostile Work Environment

Hostile work environment is a theory under which a plaintiff can bring a sexual harassment claim. Hostile work environment sexual harassment is characterized as conduct that has the purpose or effect of unreasonably interfering with work performance or creating an intimidating, hostile, or offensive environment.⁶¹

For a plaintiff to prevail on a hostile work environment sexual harassment claim, the plaintiff must prove the following elements:⁶²

1. The employee belongs to a protected group;
2. The employee was subjected to **unwelcome sexual harassment**;
3. The harassment complained of was **based on sex**; and
4. The harassment complained of affected a term or condition or privilege of employment in that it was **sufficiently severe or pervasive** to “alter the conditions of the victim’s employment and create an abusive working environment”
5. From an **objective and subjective perspective**.⁶³

Unwelcome Sexual Harassment: The complained of sexual harassment must be unwelcome. Examples of unwelcome advances, conduct, or comments that may create a hostile work environment include:

- **Sexual advances or propositions:** Unwelcome sexual advances or requests for sexual favors may give rise to a claim for hostile environment harassment, even where an employee “voluntarily” engages in a sexual relationship out of fear of losing her job.⁶⁴
- **Unwanted touching:** Even without express sexual propositions, a hostile environment claim may arise where an employee is subjected to unwanted touching, such as fondling or touching in an offensive manner.⁶⁵
- **Leering:** A supervisor or coworker’s regular staring at a female employee’s breasts, for example, may give rise to a hostile environment claim.⁶⁶
- **Verbal harassment:** This may include offensive sexual remarks, offensive nonsexual but discriminatory comments, or unwelcome sexually-connoted comments about someone’s appearance or body.⁶⁷
- **Nonsexual hostile conduct:** If hostile but nonsexual conduct is directed at an employee because of her sex or gender, it may give rise to a hostile environment claim.⁶⁸

Based on Sex: The harassment complained of must be based on the plaintiff’s sex (i.e., the plaintiff’s gender).⁶⁹

- **Sex or gender does not need to be the sole reason:** A victim must show that sex or gender is a substantial motivating factor in the unwelcome conduct. However, there may be other motivating factors.⁷⁰
- **Generally vulgar language is not necessarily “because of sex”:** The general use of vulgar gender-related language in the workplace, when not directed at the plaintiff, is not necessarily “because of sex.”⁷¹

Sufficiently Severe or Pervasive: The harassment must have been either so severe or pervasive so as to alter the conditions of the victim’s employment and create an abusive environment.⁷²

- There is no bright-line rule as to what specific conduct satisfies the threshold for severe or pervasive.⁷³ However, unless a physical assault (or threat of a physical assault) is involved, isolated incidents of objectionable conduct are generally not held to be sufficiently pervasive.⁷⁴ Rather, the court will look at the totality of the circumstances to make this determination.⁷⁵
- In evaluating the totality of the circumstances, courts have looked at the following factors:⁷⁶
 - Frequency of the discriminatory conduct;
 - Severity of the conduct;
 - Whether it is physically threatening or humiliating or merely offensive; and
 - Whether it unreasonably interferes with an employee’s work performance.

Objective and Subjective Perspective: The sexual harassment complained of must be sufficiently severe or pervasive both from an objective and a subjective perspective.⁷⁷

- To satisfy the objective perspective standard, the reasonable person standard is employed by courts (i.e., would a reasonable person find the work environment hostile or abusive?).
- To satisfy the subjective perspective standard, the individual plaintiff must find the work environment hostile or abusive because of the sexual harassment.

Quid Pro Quo

Quid pro quo is an alternative theory under which a plaintiff can bring a sexual harassment claim. Quid pro quo sexual harassment is characterized as an employee's submission to conduct that is either (1) made a term or a condition of employment; or (2) forms a basis for employment decisions affecting that individual. Put another way, quid pro quo sexual harassment is "harassment that involves the conditioning of concrete employment benefits on sexual favors."⁷⁸

For a plaintiff to prevail on a quid pro quo sexual harassment claim under Title VII, the plaintiff must prove the following elements:⁷⁹

1. The employee belonged to a protected group;
2. The employee was subject to unwelcome sexual harassment;
3. The harassment complained of was based on sex; and
4. The employee's reaction to the unwelcome behavior affected **tangible aspects** of the employee's compensation, terms, conditions, or privileges of employment.

The first three requirements under this theory directly match those for a hostile work environment sexual harassment claim. However, the last requirement under this theory of sexual harassment is different.

Tangible Aspects: The employee's reaction to the unwelcome behavior must have resulted in some tangible employment action. Thus, the supervisor's express or implied threat must be carried out.⁸⁰

When Is an Employer Liable?

Hostile Work Environment

A hostile work environment sexual harassment claim presents a different liability scheme for employers based on the status of the harassing employee.

- If the harassing employee is the plaintiff's **supervisor** (i.e., a person who has the authority to take tangible employment actions against the employee), the employer will be held vicariously liable for the sexual harassment. However, the employer can potentially assert an affirmative defense. The employer can only escape liability if it can prove: "(a) that [it] exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."⁸¹
- If the harassing employee is a **coworker** of the plaintiff, then the burden is on the plaintiff to prove that the employer was negligent in order for the employer to be held liable. To prove that the employer was negligent, the plaintiff must demonstrate that the employer knew or should have known of the harassment and subsequently failed to take prompt and effective corrective action.⁸²

Quid Pro Quo

Under a quid pro quo sexual harassment claim, the employer is strictly liable for the conduct of supervisory employees that they have authority over hiring, advancement, dismissal and discipline under the common law theory of respondeat superior.⁸³

Examples:

- An employee's allegations were sufficient to state a claim of a hostile work environment against her employer and supervisor where her supervisor asked her to have sexual relations with him and

made sexual advances (e.g., caressed her on the job, followed her to the bathroom when she was there alone, and exposed himself to her) towards the employee during and after business hours. Employee also testified that the bank supervisor assaulted and raped her.⁸⁴

- An employee's allegations were insufficient to state a claim of hostile work environment sexual harassment where the alleged harassment consisted of an isolated incident where the employee's supervisor read a comment aloud about the employee ("I hear making love to you is like making love to the Grand Canyon") and the supervisor and another employee laughed.⁸⁵

Exhaustion of Administrative Remedies/Statute of Limitations

A plaintiff must file a charge with the EEOC prior to commencing a civil action in federal court.⁸⁶ A plaintiff must first file a charge with the EEOC within either:

1. 180 calendar days after the alleged unlawful employment practice occurred; or
2. 300 calendar days after the alleged unlawful employment practice occurred, if plaintiff institutes proceedings "with a State or local agency with authority to grant or seek relief from such practice" or 30 calendar days "after receiving notice that the State or local agency has terminated the proceedings," whichever is earlier.⁸⁷

The EEOC will issue a Notice of Right to Sue if it determines that there are grounds for a discrimination claim. Once the "right to sue" letter is received, a lawsuit must be filed within 90 days.⁸⁸

2. Title VII: Retaliation (42 U.S.C. § 2000e-3(a))

Title VII prohibits employers from retaliating against current or former employees who exercise their rights guaranteed under the statute. In addition, Title VII prevents employers from retaliating against current or former employees who participate in any investigation, proceeding, or hearing.

The statutory language, in pertinent part, states the following:

It shall be an unlawful employment practice for an employer to discriminate against any of [their] employees or applicants for employment . . . because he has opposed any practice, made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.⁸⁹

Elements of the Cause of Action:

For the plaintiff to establish a claim for retaliation under Title VII, the plaintiff must prove the following elements:⁹⁰

1. The plaintiff engaged in a **protected conduct**;
2. The plaintiff was thereafter subject to a **material adverse employment action**; and
3. A **causal connection** exists between the protected conduct and the adverse action.

Protected conduct: There are two types of protected activity. These are (1) the **opposition** clause and (2) the **participation** clause.⁹¹

- Under the opposition clause, employers cannot discriminate against employees who have **opposed an unlawful employment practice** proscribed by Title VII, such as through informal protests, complaints to the employer, or utilization of employer grievance procedures.
- Under the participation clause, employers cannot discriminate against employees who have "made a charge, testified, assisted, or **participated in any manner** in an investigation, or proceeding, or hearing" under Title VII.⁹² Additionally, a plaintiff may prevail on a claim of retaliation even if the original claim of sexual harassment is not proven.⁹³

Material adverse employment action: The plaintiff must have suffered a material adverse employment action. A material adverse employment action includes being fired, demoted, suspended, denied a

promotion, reassigned to an unfavorable job, or any other adverse employment decision or treatment that would likely “dissuade a reasonable worker from making or supporting a charge of discrimination.”⁹⁴

Causal Connection: There must be a causal connection between the protected conduct and the material adverse employment action. The causal connection can be proven indirectly through circumstantial evidence.⁹⁵ Temporal proximity between the employer’s knowledge of protected activity and the alleged adverse employment action must be “very close.”⁹⁶

Affirmative Defenses

An employer can assert the same affirmative defenses for a retaliation claim under Title VII as for claims of supervisor sexual harassment. That is, the employer can escape liability by showing:⁹⁷

1. That the employer exercised reasonable care to prevent and correct promptly any harassing behavior; and
2. That the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer to avoid harm otherwise.

Examples:

- An employee of a railroad company (the only female worker) sufficiently stated a retaliation claim under Title VII where the employee was reassigned to duties that were more arduous and dirtier than the employee’s current forklift operator duties after the employee complained of sex discrimination by her supervisor. The court found that this reassignment of duties illustrated that a reasonable employee would have been dissuaded from making or supporting a charge of discrimination.⁹⁸
- A military veteran’s allegations that he was retaliated against for filing an EEOC charge and civil complaint in the form of a mediocre performance evaluation were insufficient to state a claim of retaliation against defendant Secretary of the Navy because these performance evaluations were not relied upon in making a further materially adverse employment action (e.g., no meaningful change in work assignments) against the military veteran. Therefore, the mediocre performance evaluations did not rise to the level of materially adverse employment action that would satisfy unlawful retaliation.⁹⁹

Exhaustion of Administrative Remedies/Statute of Limitations

A plaintiff must file a charge with the EEOC prior to commencing a civil action in federal court. A plaintiff must first file a charge with the EEOC within either:

1. 180 calendar days after the alleged unlawful employment practice occurred; or
2. 300 calendar days after the alleged unlawful employment practice occurred, if the plaintiff institutes proceedings “with a State or local agency with authority to grant or seek relief from such practice” or 30 calendar days “after receiving notice that the State or local agency has terminated the proceedings,” whichever is earlier.¹⁰⁰

The EEOC will issue a Notice of Right to Sue if it determines that there are grounds for a discrimination claim. Once the “right to sue” letter is received, a lawsuit must be filed within 90 days.¹⁰¹

3. Title IX: Education Amendments Act of 1972 (20 U.S.C. § 1681)

Sexual harassment is a form of sex discrimination prohibited by Title IX.¹⁰² Whether gender-oriented conduct rises to the level of harassment is a context-driven determination.¹⁰³

Elements of the Cause of Action for Sexual Harassment under Title IX:¹⁰⁴

1. The school exercised **substantial control** over both the harasser and the context in which the harassment occurred;
2. The plaintiff suffered an assault that was so **severe, pervasive, and objectively offensive** that it can be said to deprive the plaintiff of access to the educational opportunities or benefits provided by the school;

3. The harassment was committed on the basis of sex;
4. The school had *actual knowledge* of the harassment;
5. The school responded with *deliberate indifference*; and
6. The school's deliberate indifference subjected the plaintiff to further harassment or made the plaintiff liable or vulnerable to it.

Substantial Control: The harasser must have been under the school's disciplinary authority;¹⁰⁵ and the assault must have occurred during school hours and on school grounds.¹⁰⁶

Severe, Pervasive, and Objectively Offensive: Conduct under Title IX must be so severe, pervasive, and objectively offensive that it deprives the plaintiff of access to educational opportunities or benefits provided by the school.¹⁰⁷

- A single occurrence of sexual assault may satisfy this requirement where "sufficiently serious" or particularly severe.¹⁰⁸
- To show deprivation of access, it is not necessary to show that a victim was physically excluded from educational opportunities or benefits. Sufficient evidence may include demonstrating dropping grades, being diagnosed with behavioral and/or anxiety disorders, or becoming homebound or hospitalized due to harassment, physical violence, or sexual assault.¹⁰⁹

Actual Knowledge: An institution can be held liable under Title IX only where it had actual knowledge of the harassment.¹¹⁰ An appropriate school official, who had authority to take remedial measures, must have had knowledge of the harassment.¹¹¹ The official must respond to the misconduct "in a manner that is not clearly unreasonable."¹¹²

Example:

- An institution's awareness of a "general problem of sexual violence against its students," combined with deficient corrective measures, was not sufficient to establish actual knowledge or deliberate indifference for a Title IX claim.¹¹³

Deliberate Indifference: A plaintiff must prove that the school district's response amounted to deliberate indifference.¹¹⁴ A school district is deemed to act with deliberate indifference when, after notice of the sexual harassment, either its actions are grossly inadequate or it does not take any action at all and, through its inadequate action or its lack of action, it effectively causes the student damage.¹¹⁵

- A plaintiff must show that the school district or university's response was deficient, rather than merely negligent, lazy, or careless.¹¹⁶

Examples:

- Deliberate indifference could be found where the school board made no effort to either investigate or put an end to the harassment once given notice of it.¹¹⁷
- A high school student and her parents' allegations of sexual harassment by the student's teacher were insufficient to state a claim under Title IX against the school district where there was no evidence that any school official was aware of the harassment.¹¹⁸
- A student's allegations of sexual harassment during a football camp were sufficient to state a claim under Title IX against the school district where the coach of the football camp, who had the authority to take corrective action, witnessed the sexual harassment and only verbally reprimanded the harassing students.¹¹⁹

Note: Courts often look to cases interpreting the Civil Rights Act statute, Section 1983, on which Title IX was based, in determining what constitutes "deliberate indifference" in specific cases.¹²⁰

Statute of Limitations

Because Title IX does not expressly provide a statute of limitations, the appropriate statute of limitations is that of comparable personal injury actions in the relevant state.¹²¹ In California, a person must file a Title IX lawsuit within two years of a discriminatory act.¹²²

Note: Unlike claims brought under Title VII, Title IX has no requirement that a claim first be brought before an administrative agency before a lawsuit can be filed.¹²³

B. Sexual Harassment Under California Law

1. FEHA: Harassment in the Workplace (Cal. Gov't Code § 12940(j))

In California, the Fair Employment and Housing Act (FEHA) makes it unlawful for any employer to harass an employee or job applicant because of sex. Harassment because of sex includes sexual harassment, gender harassment, and harassment based on pregnancy or childbirth.

The statutory language, in pertinent part, states the following:

It is an unlawful employment practice . . . [f]or an employer, labor organization, employment agency, apprenticeship training program or any training program leading to employment, or any other person, because of . . . sex, gender, gender identity, gender expression . . . to harass an employee, an applicant, an unpaid intern or volunteer, or a person providing services pursuant to a contract.¹²⁴

Title VII case law generally applies

Where FEHA and Title VII are similar, California courts look to Title VII federal case law to interpret FEHA.¹²⁵ Yet FEHA is more expansive than Title VII in important respects.¹²⁶

- FEHA specifically prohibits sexual harassment and retaliation, not just sex-based discrimination.
- FEHA applies to all employers, regardless of number of employees.
- FEHA protects independent contractors, unpaid interns, and volunteers.¹²⁷

Gender of the harasser may be same as victim

In California, a cause of action for sexual harassment may be stated by a person of the same gender as their harasser.¹²⁸

Hostile Work Environment

Elements of the Cause of Action for FEHA Hostile Work Environment:¹²⁹

As under Title VII, an employee may have a claim for sexual harassment under a “hostile work environment” theory if they encounter sexual conduct in their workplace that interferes with their work performance or creates an intimidating, hostile, or offensive working environment. The elements of the cause of action mirror the Title VII elements:

1. The employee is a member of a ***protected category***;
2. The employee was subjected to ***unwelcome sexual advances, conduct, or comments***;
3. The unwelcome conduct complained of was ***because of the employee’s sex***; and
4. The conduct was ***sufficiently severe or pervasive*** to alter the conditions of the employee’s employment and create a hostile or abusive work environment.

Protected Category: Like Title VII, FEHA prohibits discrimination and harassment against individuals based on a protected category. These categories include ***sex, gender, gender identity, gender expression, and sexual orientation***, as well as race, color, religion, national origin, age, etc.¹³⁰

Unwelcome sexual advances, conduct, or comments: The same types of behavior may constitute unwelcome advances, conduct, or comments under either FEHA or Title VII. These behaviors may include, but are not limited to:

- **Sexual Advances or Propositions:** Sexual advances or requests for sexual favors may give rise to a claim for hostile environment harassment.
- **Unwanted Touching:** This may include intentional and repeated rubbing up against another's body or touching them in an offensive manner.
- **Verbal Harassment:** This may include offensive sexual remarks, offensive nonsexual but discriminatory comments, or unwelcome sexually-connoted comments about someone's appearance or body.¹³¹
- **Nonsexual Hostile Conduct:** This refers to hostile conduct that is not sexual in nature, but that is directed at an employee because of their sex or gender.¹³²

Because of employee's sex: The harassment complained of must be based on the plaintiff's sex (i.e., the plaintiff's gender).¹³³

- **Sex/gender does not need to be the sole reason:** As with Title VII claims, the unwelcome conduct may be motivated by factors other than sex or gender.
- **Generally vulgar language is not necessarily "because of sex":** As under federal law, the general use of vulgar gender-related language in the workplace, when not directed at the plaintiff, is not necessarily "because of sex."¹³⁴
- **"Because of sex" applies to any gender:** Harassment because of sex is not limited to women.¹³⁵

Sufficiently Severe or Pervasive: California courts adopt the definitions of "severe" and "pervasive" developed under Title VII.¹³⁶ The harassment must have been either so severe or so pervasive so as to alter the conditions of the victim's employment and create an abusive environment.¹³⁷

- There is no bright-line rule as to what specific conduct satisfies the threshold for severe or pervasive.¹³⁸ However, unless a physical assault (or threat of a physical assault) is involved, isolated incidents of objectionable conduct are generally not held to be sufficiently pervasive.¹³⁹ Rather, the court will look at the totality of the circumstances to make this determination.¹⁴⁰
- In evaluating the totality of the circumstances, courts have looked at the following factors:¹⁴¹
 - Frequency of the discriminatory conduct;
 - Severity of the conduct;
 - Whether it is physically threatening or humiliating or merely offensive; and
 - Whether it unreasonably interferes with an employee's work performance.
- As under Title VII, it is not enough that the victim perceives the sexual conduct as severe or pervasive. The objective severity of harassment must also be determined from the perspective of a reasonable person in the victim's position.¹⁴²

Examples:

- Conduct may be sufficiently pervasive when it conveys a negative message about a woman's role in the workplace, or when it conveys that women must engage in sexual conduct to succeed in the workplace. A manager promised and granted unfair employment benefits to female subordinates who were his sexual partners. These benefits were not granted to the plaintiffs, who were also female. This was relevant to show conduct pervasive enough to create a hostile work environment.¹⁴³
- An employee at a hospital said she had seen a doctor sexually harass three fellow employees but did not describe the incidents or allege a repeated or routine pattern of behavior. As pleaded, the doctor's conduct was not sufficiently severe or pervasive to create a hostile work environment for the employee herself.¹⁴⁴
- An employee complained that her coworkers made sexual comments about other women's bodies outside their presence on five to nine occasions over four months. This was held not to be sufficiently severe or pervasive.¹⁴⁵

Quid Pro Quo Harassment

Elements of the Cause of Action for Quid Pro Quo Harassment:¹⁴⁶

California adopts Title VII case law for quid pro quo harassment claims, and the elements of the cause of action are equivalent to Title VII's:

1. The employee is a member of a protected group;
2. The employee is subjected to unwelcome sexual advances, conduct, or comments;
3. The unwelcome conduct complained of was because of employee's sex; and
4. The employee's reaction to the sexual conduct affected tangible aspects of the employee's compensation, terms, conditions, or privileges of employment.

Example:

- A supervisor proposed to his employee that they have an affair, telling her that if she consented she could have any job she wanted when the company was reorganized.¹⁴⁷

When Is an Employer Liable?

Under either theory of FEHA workplace sexual harassment, an employer may be liable for harassment of an employee by their supervisor or by a non-supervising coworker.¹⁴⁸

An employer is liable for failure to prevent sexual harassment when:

1. There is actionable harassment by employees or non-employees;
2. The employer failed to take all reasonable steps to prevent harassment from occurring;
3. There is legal causation; and
4. The plaintiff suffers harm and damages.¹⁴⁹

The statutory language, in pertinent part, states the following:

“[E]mployer” means any person regularly employing one or more persons or regularly receiving the services of one or more persons providing services pursuant to a contract, or any person acting as an agent of an employer, directly or indirectly, the state, or any political or civil subdivision of the state, and cities.¹⁵⁰

It is an unlawful employment practice . . . [f]or an employer, labor organization, employment agency, apprenticeship training program, or any training program leading to employment, to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring.¹⁵¹

As under Title VII, an employer can escape liability for some damages if it took reasonable steps to prevent workplace harassment and the employee unreasonably failed to use preventive and corrective measures that the employer provided, if those measures would have prevented some of the employee's harm.¹⁵²

Example:

- An employee did not report her harassment by her supervisor to management until it had continued for two years. The employer was still liable for the supervisor's harassment, but the employee's damages were limited because she had not reasonably taken advantage of the reporting policies put in place by the employer.¹⁵³

Supervisory Harassment: As under Title VII, when an employee is harassed by their supervisor, their employer can be held strictly liable, even if the employer was unaware of the harassment.¹⁵⁴

- The FEHA definition of “supervisor” is broader than under Title VII and includes anyone whom the employer gives authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust their grievances.¹⁵⁵

- An employer is not liable for a supervisor's harassment when it occurs outside the scope of employment.¹⁵⁶ However, the employer may be liable for harassment that takes place outside working hours if (a) it expressly or implicitly endorsed the conduct, and (b) the conduct was a customary incident of the employment relationship.¹⁵⁷

Examples:

- An employee's direct supervisor harassed her with inappropriate comments and unwanted touching. For example, the supervisor told the employee he would overlook her attendance problems if she would let him touch her vagina, then grabbed her crotch. The employer was strictly liable even though it did not find out about the supervisor's harassing behavior until it had been going on for two years.¹⁵⁸
- A supervisor made unwanted sexual advances, including physical groping, toward his employee in his car, at his home, and at informal social gatherings not sponsored by the employer. He also called her many times at her home and on her cell phone after business hours. The employer was not liable because the supervisor's sexual conduct was *outside the scope of his employment*.¹⁵⁹
- A casting director sexually harassed the plaintiff, who was seeking employment as an actor, at the casting director's own home on a Sunday. Because the harassment occurred in the context of the plaintiff's seeking employment, it was sufficiently work-related that the casting director's employer could be held liable.¹⁶⁰

Coworker Harassment: California law provides that when an employee is harassed by an employee who is not their supervisor, their employer can only be held liable if:¹⁶¹

1. The employer knew or should have known of the harassing conduct; and
2. The employer failed to take immediate and appropriate corrective action.

Examples:

- In response to an employee's report that she was harassed by her coworker, the employer referred the complaint to a bogged-down investigative process, cautioned the employee to protect herself, and told the coworker to leave the employee alone. This did not meet the requirement of immediate and corrective action, and the employer could be held liable.¹⁶²
- An employee complained to her employer about her coworker's harassment only after the harassing behavior had stopped. The employer promptly investigated the complaint. When the employer reported the findings to the employee, she said the situation had calmed down and made no further complaints. Because the employer took immediate corrective action once it learned of the behavior, it was not liable.¹⁶³

Harassment by a Non-Employee: The same standard may apply when an employee is harassed in the workplace by a non-employee, such as a client or customer, if the employer (1) knew or should have known of the harassment and (2) failed to take immediate corrective action.¹⁶⁴

Example:

- An employee worked as a nurse in a residential facility for disabled veterans. She was harassed by a resident, who made inappropriate remarks about her body and falsely told other residents that he had sex with her. After the employee reported the harassment to her supervisor, the resident received some counseling, but continued his behavior. The court held that the employer could be held liable for failing to take corrective action.¹⁶⁵

Exhaustion of Administrative Remedies/Statute of Limitations

A plaintiff must file a charge with the Department of Fair Employment and Housing (DFEH) prior to commencing a civil action.¹⁶⁶ A complaint under the FEHA must be filed with the DFEH within three years of the last act of harassment.¹⁶⁷ The DFEH will issue a Notice of Right to Sue if it determines that there are

grounds for a discrimination claim. Once the “right to sue” letter is received, a lawsuit must be filed within one year.¹⁶⁸

2. *FEHA: Retaliation (Cal. Gov’t Code § 12940(h))*

*It is unlawful for an employer to “discharge, expel, or otherwise discriminate against any person because the person has opposed any [discriminatory or harassing] practices” forbidden by the FEHA, “or because the person has filed a complaint, testified, or assisted” in any FEHA proceedings.*¹⁶⁹

Elements of the Cause of Action for Retaliation:¹⁷⁰

The elements of the cause of action for retaliation are substantially similar to the elements for retaliation under Title VII:

1. The employee engaged in *protected activity*;
2. The employee was subjected to a *material adverse employment action* by their employer after engaging in the protected activity;
3. There was a *causal link* between the protected activity and the adverse employment action; and

Protected activity: As under Title VII, FEHA protected activities fall into two main categories:

- Complaining of or opposing workplace conduct that the employee reasonably believes to be discriminatory, even if a court later determines the conduct complained of was lawful.¹⁷¹
- Participating in any FEHA proceedings regarding workplace discrimination or harassment, even if it ultimately turns out that the conduct under investigation was lawful.¹⁷²

Material Adverse Employment Action: As is the case under federal law, California considers an adverse employment action to be one that materially and adversely affects the terms, conditions, or privileges of employment.¹⁷³

Examples:

- An employee’s allegations of a months-long pattern of systemic retaliation by the employer, including solicitation of negative performance feedback from the employee’s subordinates and implied threats of termination, constituted adverse employment action.¹⁷⁴
- An employee, a deputy district attorney, was transferred out of her unit after notifying her supervisors that she was pregnant. Subsequently, she received a negative performance review and counseling memo accusing her of dishonesty and incompetence. In her profession, this could reasonably prevent her from being promoted, so it constituted an adverse employment action.¹⁷⁵

Causal Link: A causal link can be inferred from circumstantial evidence. A causal link can be established by circumstances surrounding the adverse employment action and the protected activity, such as (a) the employer’s knowledge that the employee engaged in protected activity, (b) proximity in time between the protected activity and the employment action,¹⁷⁶ or (c) a pattern of conduct consistent with an intent to retaliate, such as hostile or exclusionary treatment.¹⁷⁷

- A causal link likely does not exist if the adverse employment action is consistent with a policy or pattern adopted before the employee engaged in protected activity.¹⁷⁸

Examples:

- An employee filed a discrimination claim with the EEOC in 1999 and was denied what should have been a routine promotion between 2002 and 2003. Even though several years had passed, a causal link could be inferred because in the interim, the employee was treated with coldness and was not invited to serve on management committees.¹⁷⁹
- An employee’s retaliation claim against her employer did not prevail because the employee did not establish a causal link. The alleged retaliatory acts occurred six months before the employee’s decision to not testify on behalf of her employer.¹⁸⁰

Exhaustion of Administrative Remedies/Statute of Limitations

A plaintiff must file a charge with the Department of Fair Employment and Housing (DFEH) prior to commencing a civil action.¹⁸¹ A complaint under the FEHA must be filed with the DFEH within three years of the last act of harassment.¹⁸² The DFEH will issue a Notice of Right to Sue if it determines that there are grounds for a discrimination claim. Once the “right to sue” letter is received, a lawsuit must be filed within one year.¹⁸³

4. Harassment in Business Relationships (Cal. Civ. Code § 51.9)

In California, sexual harassment in the context of a “business, service, or professional relationship” is unlawful. This provision does not apply to traditional employment relationships, which are already covered by the FEHA.

Elements of the Cause of Action:¹⁸⁴

1. There is a ***business, service, or professional relationship*** between the plaintiff and defendant, OR the defendant holds himself as being able to help the plaintiff establish a business, service, or professional relationship;
2. The defendant makes sexual advances, or engages in other sexual conduct, that are based on gender and are unwelcome AND ***pervasive or severe***; and
3. The plaintiff has suffered or will suffer ***harm***.

Business, service, or professional relationship: Examples of applicable relationships include, but are not limited to, the relationship between a plaintiff and their:¹⁸⁵

- Physician, therapist, or dentist
- Attorney
- Social worker
- Banker
- Real estate agent
- Accountant
- Landlord
- Teacher

Pervasive or Severe: California courts apply the same standards for “pervasive” and “severe” as under Title VII and the FEHA for workplace sexual harassment.¹⁸⁶ Conduct is considered “pervasive or severe” when it significantly alters the conditions of the underlying business relationship.¹⁸⁷

- Isolated incidents are not necessarily pervasive or severe. A single instance of harassing behavior is usually not enough to qualify as “pervasive”; instead, there must be a repeated or routine pattern of harassment. However, a single incident may be “severe” if it consists of a physical assault or threat of physical assault.¹⁸⁸

Examples:

- The trustee of the plaintiff’s husband’s estate made unwelcome sexual advances toward her, suggesting that he would vote to authorize a payment from the trust if she would be “nice” to him and saying that he would “get [her] on [her] knees eventually” and “f— [her] one way or another.” The trustee’s conduct was not sufficiently pervasive or severe because the advances were only made during a single day.¹⁸⁹
- Building manager entered the tenant’s home while on duty, using a key provided by the landlord, and sniffed underwear in the tenant’s dresser drawer. This was not “pervasive” enough to satisfy the statute because the tenant could only identify one occasion of the conduct.¹⁹⁰

Harm: Harm in this context may include, but is not limited to, economic loss or disadvantage, personal injury, emotional distress, or violation of another statutory or constitutional right.¹⁹¹

Statute of Limitations

Courts are divided as to whether the statute of limitations is two years (as for personal injury) or three years (as for liability created by statute).¹⁹²

4. Ralph Act (Cal. Civ. Code § 51.7)

California recognizes the right of all persons to be safe from violence or threats of violence committed against them because of certain characteristics, including sex, gender, marital status, pregnancy, and sexual orientation. The Ralph Act provides a civil remedy for such violent acts or threats.

The statutory language, in pertinent part, states the following:

All persons within the jurisdiction of this state have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property . . . on account of any characteristic listed or defined [below] . . . or because another person perceives them to have one or more of those characteristics.¹⁹³

“Sex” includes, but is not limited to, pregnancy, childbirth, or medical conditions related to pregnancy or childbirth. “Sex” also includes, but is not limited to, a person’s gender. “Gender” means sex, and includes a person’s gender identity and gender expression. “Gender expression” means a person’s gender-related appearance and behavior whether or not stereotypically associated with the person’s assigned sex at birth.¹⁹⁴

Elements of the Cause of Action:¹⁹⁵

1. The defendant threatened or committed an **act of violence** against the plaintiff or the plaintiff’s property;
2. The defendant was **motivated by their perception that the plaintiff had a protected characteristic** (including gender, sex and sexual orientation);
3. The plaintiff was harmed; and
4. The defendant’s conduct was a substantial factor in causing the harm.

Act of Violence: Refers to a physical, destructive act.¹⁹⁶

Motivated by a perception that plaintiff had a protected characteristic: “Protected characteristics” under the Ralph Act include sex and gender.¹⁹⁷ The victim’s sex or gender does not need to be the only, or even the main, reason for defendant’s violent threats or actions.¹⁹⁸

Examples:

- A building manager forcibly grabbed the plaintiff’s breast and buttock. These were violent acts under the Ralph Act.¹⁹⁹
- A coworker threatened violence against a fellow employee, saying, “chick, you better walk faster or I am going to hurt you again,” and kicked her on at least one occasion, causing her severe injury. The plaintiff-employee was the only woman in their group. The court concluded that the coworker’s violent acts were motivated substantially by the employee’s sex and national origin, even if there were other possible motivations.²⁰⁰
- After an employee rejected her supervisor’s verbal sexual advances, he became increasingly aggressive. One day the supervisor walked into the room where the employee was working and grabbed her. He squeezed and rubbed against her, placed his arm around her neck, and bit her. The supervisor’s violent acts were determined to be motivated by his perception of her sex.²⁰¹

Statute of Limitations

An action under the Ralph Act must be filed within three years of the alleged conduct.²⁰²

III. Sexual Assault and Other Sexual Misconduct

Sexual assault is any type of sexual activity or contact that a person does not consent to. It includes physical acts, such as rape, sexual contact, or unwanted touching, and verbal, visual, or non-contact acts, such as voyeurism, exhibitionism, or forcing someone to look at or pose for sexual pictures.

It is anything that forces a person to engage in sexual contact against their will or without their affirmative consent, no matter whom it is with. “Sexual assault [is not deemed] less serious just because the perpetrator and victim began the evening on a ‘date.’”²⁰³

A. Sexual Assault Under Federal Law: Civil Causes of Action

1. Title IX: Education Amendments Act of 1972 (20 U.S.C. § 1681)

Title IX prohibits schools that receive federal funds from discriminating on the basis of sex.²⁰⁴ Sexual violence in the form of sexual assault or rape can constitute sexual harassment for purposes of Title IX.²⁰⁵

Elements of the Cause of Action for Student-on-Student or Faculty-on-Student Sexual Assault.²⁰⁶

1. The school exercised **substantial control** over both the perpetrator and the context in which the assault occurred;
2. The plaintiff suffered assault that was **severe, pervasive, and objectively offensive**;
3. The assault was committed on the basis of sex;
4. The school had **actual knowledge** of the harassment;
5. The school acted with **deliberate indifference** to the assault; and
6. The school’s deliberate indifference subjected the plaintiff to further assault or made the plaintiff liable or vulnerable to it.

Substantial Control: A school exercises substantial control where the assault occurred during school hours or on school grounds, or where the perpetrator was under the school’s disciplinary authority.²⁰⁷

Example:

- Although instances of assault and harassment took place at a different school, a defendant high school was found to have had substantial control because it sponsored and promoted the football camp where the incidents took place and because its football coaches and teachers supervised the camp. Players were transported to the camp by the defendant school’s buses, and the camp was governed by the camp’s administrative and disciplinary procedures.²⁰⁸

Severe, Pervasive, and Objectively Offensive: Conduct under Title IX must be so severe, pervasive, and objectively offensive that it deprives the plaintiff of access to educational opportunities or benefits provided by the school.²⁰⁹

- A single occurrence of sexual assault may satisfy this requirement where “sufficiently serious” or particularly severe.²¹⁰
- To show deprivation of access, it is not necessary to show that a victim was physically excluded from educational opportunities or benefits. Sufficient evidence may include demonstrating dropping grades, being diagnosed with behavioral and/or anxiety disorders, or becoming homebound or hospitalized due to harassment, physical violence, or sexual assault.²¹¹

Examples:

- A football player was sexually assaulted with an air hose, hit with a pillow carrying a foreign object, and called homosexual epithets, among other forms of harassment, which amounted to sufficiently severe and pervasive conduct to bring a claim under Title IX.²¹²

- Repeated instances of harassment followed by an alleged rape were sufficient to state a claim under Title IX.²¹³

Actual Knowledge: An institution can be held liable under Title IX only where it had actual knowledge of the harassment.²¹⁴ An appropriate school official, who had authority to take remedial measures, must have had knowledge of the harassment.²¹⁵ The official must respond to the misconduct “in a manner that is not clearly unreasonable.”²¹⁶

Example:

- An institution’s awareness of a “general problem of sexual violence against its students,” combined with deficient corrective measures, was not sufficient to establish actual knowledge or deliberate indifference for a Title IX claim.²¹⁷

Deliberate Indifference: A plaintiff must prove that the institution’s response amounted to deliberate indifference.²¹⁸ A school district is deemed to act with deliberate indifference when, after notice of the sexual harassment, either its actions are grossly inadequate, or it does not take any action at all, and through its inadequate action or its lack of action, it effectively causes the student damage.²¹⁹

- A plaintiff must show that the university’s response was deficient, rather than merely negligent, lazy, or careless.²²⁰
- The university’s deliberate indifference must have subjected the plaintiff to further assault or made the plaintiff liable or vulnerable to it.²²¹ The plaintiff does not need to show additional affirmative acts of sexual assault happened after informing the institution of the initial incident.²²² But the plaintiff must still “plead *something* regarding what happened after the school was put on notice.”²²³

Examples:

- A school’s nine-month delay—without more—in convening a hearing on Title IX allegations was insufficient to show deliberate indifference.²²⁴
- The fact that a victim took it upon herself to avoid further harassment by not setting foot on campus did not absolve the institution of its responsibility to take reasonable measures.²²⁵

Note: Courts often look to cases interpreting the Civil Rights Act statute, Section 1983, on which Title IX was based, in determining what constitutes “deliberate indifference” in specific cases.²²⁶

Statute of Limitations

Because Title IX does not expressly provide a statute of limitations, the appropriate statute of limitations is that of comparable personal injury actions in the relevant state.²²⁷ In California, a person must file a Title IX claim within two years of a discriminatory act.²²⁸

B. Sexual Assault Under Federal Law: Criminal Causes of Action

Federal sexual abuse statutes generally apply only in specific situations under federal control, such as in federal prisons or in maritime or territorial jurisdictions. Generally, state law is applicable to such crimes.

The federal crimes of sexual abuse (18 U.S.C. § 2242), sexual abuse of a minor (18 U.S.C. § 2243), and aggravated sexual abuse (18 U.S.C. § 2241) all require different elements. Because they are not mutually exclusive, it is possible for a defendant to be convicted of all three crimes.

1. Sexual Abuse (18 U.S.C. § 2242)

Sexual abuse involves forced sexual activity.

Elements of Sexual Abuse Through Threats of Fear:²²⁹

1. The defendant **knowingly**
2. Caused another person to engage in a sexual act²³⁰ by
 - a. Threatening the other person, OR
 - b. Placing the other person in fear (any type of fear besides fear of kidnapping, serious bodily injury, or death).²³¹

Elements of Sexual Abuse of an Incapable Victim:²³²

1. The defendant **knowingly**
2. Engaged in a sexual act²³³ with another person who is
 - a. **Mentally incapable** of understanding what is happening and cannot form the necessary consent, OR
 - b. **Physically incapable** of resisting the assault, i.e., cannot physically resist the sexual act or verbally articulate unwillingness to engage in the sexual act.

Knowingly: The Eighth Circuit has held that the mens rea of “knowingly” extends to the victim’s incapacity or inability to consent.²³⁴

Mentally Incapable: Evidence of mental incapability includes “mental limitations, developmental delay, and lack of knowledge about sex.”²³⁵

Physically Incapable: The victim does not have to be “physically helpless,” i.e., lack the physical ability to do anything.²³⁶ The victim may have “had some awareness of the situation and – while not completely physically helpless – was physically *hampered* due to sleep, intoxication, or drug use and thereby rendered physically incapable.”²³⁷

Example:

- The occurrence of the criminal conduct was sufficiently corroborated by the victim’s testimony that she had passed out after drinking with the defendant and other young men, and that the next morning she woke up in her home with soreness in her vagina and anus. There was also blood in her underwear.²³⁸

Statute of Limitations

None.²³⁹

2. Sexual Abuse of a Minor (18 U.S.C. § 2243)

Elements of a Cause of Action:²⁴⁰

1. The defendant knowingly
 - a. Note: It is not necessary to prove that the defendant knew the age of the other person or knew the requisite age difference existed.
2. Engaged in a sexual act²⁴¹
3. With a minor between the ages of 12 and 16, AND
4. An age difference of at least four years between the defendant and the minor

Example:

- There was sufficient evidence for conviction under 18 U.S.C. § 2243 where the victim was 14 years old and the defendant was 18 when the acts of sexual abuse occurred. The victim had fallen asleep next to the defendant. She awoke to find that her pants and underwear had been removed and that the defendant was on top of her, penetrating her vagina with his penis.²⁴²

Statute of Limitations

None.²⁴³

3. *Aggravated Sexual Abuse (18 U.S.C. § 2241)*

The violence or force element of aggravated sexual abuse distinguishes it from sexual abuse.²⁴⁴ Additionally, it is not necessary to provide evidence of the victim's lack of consent or resistance.²⁴⁵

Elements of Aggravated Sexual Abuse by Force or Threat:²⁴⁶

The defendant knowingly caused another person to engage in a sexual act:²⁴⁷

1. By the use of force against that person OR
2. By threatening or placing that other person in fear that any person will be subjected to death, *serious bodily injury*, or kidnapping.

Serious bodily injury: Bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.²⁴⁸

Examples:

- The defendant caused the victim to engage in a sexual act by using a cucumber to penetrate her vagina. He used force in sexually abusing her, by holding her against the bed, with his knees on her shoulders, and by head-butting her on the nose. The court held that this was sufficient evidence for a conviction under 18 U.S.C. § 2241.²⁴⁹
- The victim knew that the defendant was violent and that he would not hesitate to hurt her because she saw the abuse perpetrated against her brothers and dogs. These acts served as the major basis for her fear and belief that the defendant would kill her, her brothers or mother if she told the police about their sexual relations. The Ninth Circuit reversed and remanded based on the district court's consideration of these facts of aggravated sexual abuse, as the defendant had obtained a plea bargain which forbade consideration of conduct relating to aggravated sexual abuse.²⁵⁰

Elements of Aggravated Sexual Abuse by Other Means:²⁵¹

The defendant knowingly engaged in a sexual act with another person by

1. Rendering that person unconscious OR
2. Administering to that other person a drug, intoxicant, or similar substance
 - a. By force or threat of force, or without that person's knowledge or permission and
 - b. Substantially impaired that person's ability to appraise or control conduct

Elements of Aggravated Sexual Abuse of Children:²⁵²

1. The defendant knowingly engaged in a sexual act
2. With a minor under 12 years old.
 - a. Note: It is not necessary to prove that the defendant knew that the other person had not attained the age of 12 years²⁵³

OR

1. The defendant knowingly engaged in a sexual act
2. Under the circumstances described in "Aggravated Sexual Abuse by Force or Threat" and "Aggravated Sexual Abuse by Other Means" (see above)
3. With another person who was between the ages of 12 and 16 and at least four years younger than the defendant.

Examples:

- A defendant was 13 years old when he began sexually abusing a 10-year-old. The abuse continued for two years, until the defendant was 15 and the victim was 12. Had the defendant been an adult at the time of the abuse, the charges to which he pleaded “true” would have been the federal crime of aggravated sexual abuse.²⁵⁴
- There was sufficient evidence of aggravated sexual abuse where the defendant was 14 years old when he sexually abused a 5-year-old victim by digitally penetrating her genital opening.²⁵⁵

Statute of Limitations

None.²⁵⁶

4. Abusive Sexual Contact (18 U.S.C. § 2244)

*Sexual abuse (as described above) requires skin-to-skin contact, penetration, or contact of genitalia.*²⁵⁷ *Contrastingly, abusive sexual contact encompasses intentional touching of another (e.g., the genitalia, breast, or inner thigh) with the intent to “abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.”*²⁵⁸ *Abusive sexual contact may occur over or under clothing.*²⁵⁹

Elements of the Cause of Action:²⁶⁰

1. The defendant knowingly engaged in sexual contact with another person
2. Without that other person’s permission.²⁶¹

Statute of Limitations

None.²⁶²

Examples:

- An employee on a cruise ship (departing from and returning to an American port) fondled a 12-year-old girl while aboard the ship by touching her breasts and buttocks through her clothing. This was sufficient evidence of abusive sexual contact.²⁶³
- There was sufficient evidence of abusive sexual contact where, while conducting bed checks, a house parent at a group home for children entered the bedroom of an 11-year-old girl and rubbed her genital area both over and under her underwear.²⁶⁴

5. Interstate Stalking (18 U.S.C. § 2261A)

*Interstate stalking creates fear or emotional distress in victims or a victim’s close relations, though it does not necessarily require direct contact with the victim(s).*²⁶⁵

Elements of the Cause of Action:²⁶⁶

1. The defendant traveled interstate;
2. With the intent to kill, injure, harass, intimidate, or place under surveillance; and
3. In the course of, or as a result of, such travel or communications engaged in a **course of conduct** that
 - a. Placed someone in reasonable fear of the death of, or serious bodily injury to (i) that person, (ii) that person’s immediate family, (iii) that person’s spouse or intimate partner, or (iv) the pet, service animal, emotional support animal, or horse of that person OR
 - b. Caused, attempted to cause, or would be reasonably expected to cause substantial emotional distress to (i) that person, (ii) that person’s immediate family, or (iii) that person’s **spouse or intimate partner.**

Course of conduct: A pattern of conduct composed of two or more acts, evidencing a continuity of purpose.²⁶⁷

Spouse or intimate partner:²⁶⁸ In addition to a spouse or former spouse of the stalking target, this may include:

- A person who shares a child in common with the target of the stalking
- A person who cohabits or has cohabitated as a spouse with the target of the stalking
- A person who is or has been in a social relationship of a romantic or intimate nature with the target of the stalking, as determined by:
 - The length of the relationship
 - The type of the relationship, and
 - The frequency of interaction between the persons involved in the relationship

Examples:

- Sufficient evidence of intent was shown by the defendant: (1) stating an intention to kill or harm the victims on multiple occasions; (2) hacking into the victims' email accounts and collecting information; and (3) knocking on door to the victims' apartment, with a notebook containing notes and lists that could be reasonably interpreted as a plan to kill the victims.²⁶⁹
- Victims experienced a reasonable fear or substantial emotional distress as a result of the defendant's interstate travel even though it was the police that informed the victims of the defendant's actions. This is because it was reasonably foreseeable that the police, once informed of the defendant's actions, would warn the victims and that the victims would experience reasonable fear or substantial emotional distress as a result.²⁷⁰
- A defendant visited the school where he believed the victim was in attendance and delivered a note addressed to the victim's teacher, along with a picture of the victim and a pair of the victim's socks. The victim stated that she was afraid of being kidnapped or killed by the defendant. Sufficient evidence established a violation of 18 U.S.C. § 2261A.²⁷¹

Interstate stalking amounts to cyberstalking when a defendant uses e-mail or other forms of electronic communication.

Elements of a Cause of Action for Cyberstalking:²⁷²

1. The defendant used e-mail, Internet, or an electronic communication service
2. With the intent to kill, injure, harass, intimidate, or place a person under surveillance
3. And in the course of, or as a result of, such travel or communications engages in a course of conduct that
 - a. Places someone in reasonable fear of the death of, or serious bodily injury to (i) that person, (ii) that person's immediate family, (iii) that person's spouse or intimate partner, or (iv) the pet, service animal, emotional support animal, or horse of that person OR
 - b. Causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress to (i) that person, (ii) that person's immediate family, (iii) that person's spouse or intimate partner.

Examples:

- The defendant who sent threatening and sexually explicit texts, emails, and photographs of a former girlfriend to the former girlfriend, her coworkers and friends was convicted of interstate stalking. He also used the Internet to create a Facebook page in a name similar to her name to post suggestive and explicit photos of her and demeaning statements, purportedly made by her.²⁷³
- When defendant's girlfriend broke up with him after suffering a miscarriage, he sent her 22 threatening e-mails and 50 threatening text messages, which included photographs of dead and dismembered women as well as a photograph of a dead infant. He was convicted for cyberstalking.²⁷⁴

Statute of Limitations

Five years.²⁷⁵

6. Interstate Domestic Violence (18 U.S.C. § 2261)

Interstate domestic violence encompasses violence committed against a spouse, intimate partner, or dating partner incidental to interstate travel.

Elements of Interstate Domestic Violence via Travel or Conduct of Offender:²⁷⁶

1. The defendant traveled interstate
2. With the intent to kill, injure, harass, or intimidate
3. A *spouse, intimate partner, or dating partner*, and
4. In the course of or as a result of such travel or presence, commits or attempts to commit a crime of violence against
5. That spouse, intimate partner, or dating partner

Spouse, Intimate Partner, or Dating Partner:²⁷⁷ In addition to a spouse or former spouse of the abuser, this may include:

- A person who shares a child in common with the abuser
- A person who cohabits or has cohabited as a spouse with the abuser
- A person who is or has been in a social relationship of a romantic or intimate nature with the abuser, as determined by:
 - The length of the relationship
 - The type of relationship, and
 - The frequency of interaction between the persons involved in the relationship

Elements of Interstate Domestic Violence via Causing Travel of Victim:²⁷⁸

1. The defendant caused a spouse, intimate partner, or dating partner
2. To travel interstate
3. By force, *coercion*, duress, or fraud, and
4. In the course of, as a result of, or to facilitate such conduct or travel, commits or attempts to commit a crime of violence against
5. That spouse, intimate partner, or dating partner

Coercion: Does not require that the defendant maintain constant physical control or oversight of their victim.²⁷⁹ Whether the victim is subject to coercion or duress or has reasonable opportunity to escape must be evaluated from the perspective of a reasonable person in the victim's position, considering all of the circumstances, including the victim's gender.²⁸⁰

Examples:

- Coercion and duress were found where, even though the victim was sometimes free from the defendant's supervision and was able to talk with others who could have provided help, there was no reasonable opportunity for her to escape from her abuser. She was intimidated from years of physical, sexual, and psychological abuse and also feared being implicated in harboring a fugitive.²⁸¹
- The defendant was convicted of interstate domestic violence where he subjected the victim, a woman he was romantically involved with, to numerous instances of physical and psychological abuse, e.g., beating and raping her, and threatening to kill her and her family, as they traveled through Montana, Colorado, and Utah.²⁸²

Statute of Limitations

Five years.²⁸³

7. Interstate Violation of a Protection Order (18 U.S.C. § 2262)

Violation of a protection order may occur when a defendant travels across state lines or when a defendant forces another person to do so.

Elements of Interstate Violation of a Protection Order: Travel or Conduct of Offender:²⁸⁴

1. The defendant traveled interstate
2. With the intent to engage in conduct that
3. Violates the portion of a protection order that prohibits or provides protection against violence, threats, or harassment against, contact or communication with, or physical proximity to, another person or the pet, service animal, emotional support animal, or horse of that person; and
4. Subsequently engaged in such conduct.

Elements of Interstate Violation of a Protection Order: Causing Travel of Victim:²⁸⁵

1. The defendant caused another person to travel interstate
2. By force, coercion, duress, or fraud, and
3. In the course of, as a result of, or to facilitate such conduct or travel
4. Engaged in conduct that violated the portion of a protection order that prohibits or provides protection against violence, threats, or harassment against, contact or communication with, or physical proximity to, another person or the pet, service animal, emotional support animal, or horse of that person.

Example:

- The defendant crossed a state line with the intent to violate a protection order and subsequently violated that order. His visit to the victim's school constituted an attempt to contact and send messages to the victim and her family, which the protection order prohibited. Further, the school that the defendant visited was a place of work for the victim's mother, thus his visit also violated the protection order's command that he stay away from the mother's place of work.²⁸⁶

Statute of Limitations

Five years.²⁸⁷

B. Sexual Assault Under California Law: Civil Causes of Action

1. Sexual Battery (Cal. Civ. Code § 1708.5)

Elements of a Cause of Action:²⁸⁸

1. The defendant acted with the intent to cause (1) a harmful or offensive contact with the **intimate part** of another, (2) a harmful or offensive contact with another by use of their intimate part; or acted to cause the imminent apprehension of such conduct **and**
2. A **sexually offensive contact** with that person directly or indirectly resulted; or the defendant
3. Caused contact between (1) a sexual organ from which a condom has been removed, and the intimate part of another who did not verbally consent to the condom being removed; or (2) an intimate part of the person and a sexual organ of another from which the person removed a condom without verbal consent.

Intimate part: The sexual organ, anus, groin, or buttocks of any person, or the breast of a female.²⁸⁹

Sexually Offensive Contact: Contact that offends a reasonable sense of personal dignity.²⁹⁰

Examples:

- The defendant went to the victim's apartment to repair a water leak in her shower, when he thereafter called her into the bathroom, and proceeded to put his arm around her. The victim pushed him away, and he grabbed her breast, and, after being pushed away again, grabbed her buttock as she walked away from him. Such acts, if proven, would constitute sexual battery.²⁹¹
- A husband and wife brought an action against a church and pastor on sexual battery, arising out of the wife's sexual relationship with the pastor. Evidence that the wife resisted the pastor's advances or, at times, told him to stop, was accompanied by her statements that she was afraid they would be caught, not that she found his advances offensive or unwelcome. Therefore, non-consent of the wife was not found.²⁹²
- The defendant grabbed the plaintiff from behind, kissed her neck, and pursued her when she tried to escape. Though the defendant did not touch any of the plaintiff's "intimate parts," he caused her to feel imminent apprehension that he would. This constituted sexual battery.²⁹³

Employer liability

An employer is liable for the sexual misconduct of an employee only where the misconduct occurred in the scope of the perpetrator's employment.²⁹⁴

Example:

- An ultrasound technician sexually assaulted a patient while conducting an ultrasound exam at a hospital. The patient sued the technician and the hospital that contracted with the technician's employer for provision of ultrasound services. The court held the hospital was not liable under doctrine of respondeat superior for the technician's sexual assault because the sexual battery was not "foreseeable from the employee's duties." Although the assault would not have occurred but for the employment by the hospital, it was not "engendered by the employment" or motivated by "work events or conditions."²⁹⁵

Statute of Limitations²⁹⁶

1. Two years; or
2. If the victim was a minor at the time of the alleged misconduct, eight years after the plaintiff reached majority or within three years of the plaintiff discovering (or of when the plaintiff should have reasonably discovered) the psychological injury or illness occurring after the age of majority—whichever date occurs later.

2. Gender Violence (Cal. Civ. Code § 52.4)

Gender violence is a form of sex discrimination and consists of any gender-motivated hate conduct, sexual assault/battery or other conduct at least based in part on gender.

Elements of a Cause of Action:²⁹⁷

1. Gender-motivated hate conduct: One or more acts that would constitute a criminal offense under state law that has as an element the use, attempted use, or threatened use of physical force against the person or property of another; OR physical intrusion or invasion of a sexual nature under coercive condition.
2. Committed at least in part based on the gender of the victim, whether or not those acts would have resulted in criminal charges, prosecution, or conviction.

Comparison with Other California Laws

Given the abundance of other civil liability statutes covering the same or similar misconduct, the need for § 52.4 may not be readily apparent. Distinguishing features include:

1. Longer statute of limitations than a Ralph Act claim for plaintiffs victimized as minors.²⁹⁸
2. Longer statute of limitations for non-minors than a claim for sexual battery under Cal. Civ. Code § 1708.5,²⁹⁹ in addition to the availability of attorneys' fees for a prevailing plaintiff.³⁰⁰

3. Prohibits some misconduct that the sexual harassment in Cal. Civ. Code § 51.9 and the torts of domestic violence and stalking do not, such as a sexual assault not arising out of a business or intimate partner relationship.³⁰¹

Statute of Limitations³⁰²

1. Three years; or
2. If the victim was a minor at the time of the alleged misconduct, eight years after the plaintiff reached majority or within three years of the plaintiff discovering (or of when the plaintiff should have reasonably discovered) the psychological injury or illness occurring after the age of majority—whichever date occurs later.

3. Stalking (Cal. Civ. Code § 1708.7)

Stalking encompasses willfully, maliciously, and repeatedly following or harassing another, as well as making credible threats with intent to place another in reasonable fear for their own safety or the safety of their immediate family.

Elements of the Cause of Action:³⁰³

1. The defendant engaged in a **pattern of conduct** intended to follow, alarm, surveil, or harass;
2. As a result of the pattern of conduct:
 - a. The plaintiff reasonably *feared for their safety* or the safety of an immediate family member; OR
 - b. The plaintiff suffered **substantial emotional distress**.
3. The defendant made a **credible threat** with either the intent to place the plaintiff in reasonable fear for their safety (or safety of immediate family member) or with reckless disregard for the safety of the plaintiff (or the safety of immediate family member), OR the defendant *violated a restraining order*.

Pattern of Conduct: Conduct composed of a series of acts over a period of time, *however short*, evidencing a *continuity* of purpose.³⁰⁴

Substantial Emotional Distress: “Substantial emotional distress” does not equal “severe emotional distress,”³⁰⁵ and does not require a showing of physical manifestations of emotional distress.³⁰⁶ “[I]t requires the evaluation of the totality of the circumstances to determine whether the defendant reasonably caused the plaintiff substantial fear, anxiety, or emotional torment.”³⁰⁷

Credible Threat: Verbal or written threat or a threat implied by a pattern of conduct made with the intent and apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for their safety or the safety of their immediate family.³⁰⁸

Cyberstalking occurs when a defendant uses e-mail or other forms of electronic communication to stalk someone.

Elements of the Cause of Action:³⁰⁹

1. The defendant engaged in a pattern of conduct intended to follow, alarm, surveil, or harass.
2. As a result of the pattern of conduct:
 - a. The plaintiff reasonably *feared for their safety* or the safety of an immediate family member; OR
 - b. The plaintiff suffered substantial emotional distress.
3. The defendant made a **credible threat** with either the intent to place the plaintiff in reasonable fear for their safety (or safety of immediate family member) or with reckless disregard for the safety of the plaintiff (or the safety of immediate family member), OR the defendant *violated a restraining order*.

Credible Threat: Threat communicated via electronic communication, made with the intent and apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for their safety or the safety of their immediate family.³¹⁰

Statute of Limitations

Two years.³¹¹

C. Sexual Assault Under California Law: Criminal Causes of Action

1. Assault with Intent to Rape (Cal. Penal Code § 220)

For attempted rape, the focus shifts from the element of penetration to the requisite intent. Unlike the completed crime of rape, it is the state of mind of the defendant, not the victim, that is at issue.

Elements of a Cause of Action:³¹²

1. The defendant willfully and knowingly
2. Did an act that by its nature would directly and probably result in the application of force to a person
3. With intent to commit mayhem, rape, sodomy, oral copulation, or any lewd or lascivious acts.

The defendant's state of mind can be inferred from their conduct and the surrounding circumstances.³¹³

Examples:

- The defendant used force to induce the victim to submit to attempted sexual acts. The victim resisted and managed to escape. The defendant claimed that he was intoxicated and was incapable of rape. Court upheld conviction. Inability to commit rape because of intoxication is not a defense to the crime of assault with intent to commit rape.³¹⁴ Also, force does not require bodily harm, but the physical power under the circumstances to overcome another's resistance.³¹⁵
- The defendant broke into a hotel window at night and had sex with the victim. The defendant argued that he did not use force. There was evidence that the defendant forcibly entered the victim's bedroom, removed the victim's underwear, and stuck his finger in her vagina while she was asleep; "the offense is complete if at any moment during the assault the accused intends to use whatever force may be required."³¹⁶ Unlawful use of force includes any harmful or offensive touching.³¹⁷
- The defendant pulled a 14-year-old girl into his house, held her down on the floor, pulled up her shirt and bra, and unsnapped and unzipped her pants, despite her attempts to prevent him from doing so. The defendant claimed that at some time, he abandoned intent to have forcible sexual intercourse with the girl. Regardless, the court held that if at any point during the incident, the defendant entertains the intent to have sexual intercourse with his victim by force, the crime of assault with intent to commit rape is complete.³¹⁸
- The defendant pushed the victim into a bedroom and on to the bed. The victim kicked and struggled. The defendant released her only when she claimed that someone was coming. "The absence of an immediate outcry" does not conclusively bar a finding of assault with intent to commit rape.³¹⁹

Statute of Limitations³²⁰

1. Where the victim is 18 years of age or older, three years.³²¹
2. When the victim is under 18, six years.³²²
3. When the assault with intent to rape occurs in the commission of a burglary of the first degree, there is no statute of limitations.³²³

2. Rape (Cal. Penal Code §§ 261–262)

An act of sexual intercourse, or penetration done against a person's will through "force, violence, duress, menace, or fear of immediate and unlawful bodily injury" on that person or another person.

Elements of a Cause of Action³²⁴

1. Act of **sexual intercourse**;
2. The victim did not consent to the intercourse;
3. Under any of these circumstances:
 - a. **Incapacity** to give **consent**;
 - b. Accomplished by **use of force**, violence, duress, menace, fear, or threat (including threat to retaliate in the future or to use authority to incarcerate, arrest or deport someone);
 - c. Where a person is prevented from resisting by any intoxicating, anesthetic, or controlled substance; or
 - d. Where a person is unconscious, asleep, or unaware that the act occurred due to the perpetrator's fraudulent representations.

Sexual intercourse: Any penetration, no matter how slight.³²⁵

Consent: To consent, a person must act freely and voluntarily and know the nature of the act.³²⁶ Evidence that the victim requested that the defendant use a condom or other birth control device is not sufficient evidence of consent.³²⁷ Evidence that the defendant and the victim dated, were currently married, or had been married is not by itself enough to constitute consent.³²⁸

Withdrawal of Consent: A person who initially consents to an act of intercourse may change their mind during the act and withdraw consent by communicating an objection through words or acts that a reasonable person would understand as showing a lack of consent.³²⁹

- Clear withdrawal of consent nullifies any earlier consent and forcible persistence in what then becomes nonconsensual intercourse constitutes rape. It is immaterial at what point the victim withdraws consent, so long as that withdrawal is communicated to the perpetrator and they ignore it.³³⁰
- A withdrawal of consent is assumed after a defendant expressly or impliedly threatens the victim; the victim need not expressly withdraw consent at that point.³³¹

Examples:

- The victim first impliedly consented to have sex with the defendant. Later she resisted and expressed that she did not want to have intercourse, but the defendant continued despite the objection. The defendant was found guilty of rape.³³²
- Sex workers agreed to have sex with the defendant. The defendant then communicated the express or implied threat that, if the victims did not continue to cooperate after he produced the knife and held it to their throats, he would do them harm. Each victim's continued participation in the sexual encounter was nonconsensual after that point.³³³

Incapacity: A person is incapacitated where a mental disorder or developmental or physical disability renders them incapable of giving consent.³³⁴ No expert testimony is required to prove incapacity.³³⁵ It is required that a defendant either knew or should have known that the victim was so mentally impaired so as to be incapable of giving legal consent.³³⁶

Example:

- A group home for the developmentally disabled hired the defendant to help care for its residents, including the victim. The defendant sexually violated the victim, who was developmentally disabled and thus not capable of giving legal consent.³³⁷

Use of Force:³³⁸ Establishing use of force requires showing “the defendant used physical force of a degree sufficient to support a finding that the act of sexual intercourse was against the will” of the victim.³³⁹ “Force” in a forcible rape prosecution does not have a substantially different meaning from or require anything substantially greater than “the physical force normally inherent in an act of consensual sexual intercourse.”³⁴⁰

Example:

- The defendant pinned the victim’s arms to the floor and penetrated her against her will. This was sufficient to support the jury’s determination that this constituted force.³⁴¹

Statute of Limitations

None, for crimes committed on or after January 1, 2017, or crimes for which the statute of limitations had not run as of January 1, 2017.³⁴²

3. Statutory Rape (Cal. Penal Code § 261.5)

Sexual intercourse with a person under 18 years of age who is not the spouse of the perpetrator.

Elements of the Cause of Action:

1. Act of sexual intercourse;
2. Accomplished with a person not the spouse of the perpetrator; and
3. The person is a minor (under the age of 18).

Note: Two minors who engage in sexual intercourse with each other can both be punished under the statute.

Example:

- The defendant had sexual intercourse with a 15-year-old. The court held that neither a lack of consent, nor the use of force, nor a showing of resistance on the part of the victim are necessary elements for a finding of statutory rape.³⁴³

Statute of Limitations³⁴⁴

1. Three years; or
2. If the minor is no more than three years older or younger than the perpetrator, the perpetrator is guilty of a misdemeanor, and the statute of limitations is one year.

3. Stalking (Cal. Penal Code § 646.9)

Stalking encompasses willfully, maliciously, and repeatedly following or harassing another, as well as making credible threats with intent to place another in reasonable fear for their own safety or the safety of their immediate family. (See also Cal. Civ. Code § 1708.7 above.)

Elements of a Cause of Action:

1. Willful, malicious, and repeated following or willful and malicious **harassment** of another person
2. **Credible threat** made with intent to place that person in reasonable fear for their safety or safety of an immediate family member

Harassment: Knowing and willful behavior that “seriously alarms, annoys, torments, or terrorizes” another person and serves no legitimate purpose.³⁴⁵

Credible Threat: Threat that is verbal, written, communicated electronically or implied by a pattern of conduct, made with intent to place another person in reasonable fear for their safety or the safety of their family.³⁴⁶

- While the threat must be made with the apparent ability to carry out the threat, it is not necessary to prove the defendant's intent to carry out the threat.³⁴⁷

Examples:

- The defendant wrote letters that discussed his “obsessive desire” to spend eternity with the victim, his wish to engage in sexual acts with her, and his skill with a rifle. He included pornography and threats to commit violence. It was inferred that the defendant credibly intended to cause the victim to fear him, because he insisted on maintaining contact with the victim despite her attempts to avoid him and warnings from the police, the court, and the victim's husband.³⁴⁸
- The defendant was charged for stalking, after damaging a telephone line, trespassing, disturbing the peace, and making annoying telephone calls. The defendant contended the stalking conviction could not stand because the evidence was insufficient to show repeated harassment, as all the actions occurred within the space of a few hours on a single evening. The court held that the words “willfully, maliciously and repeatedly” only modify “following.” The statute does *not require that harassment be repeated*.³⁴⁹
- While the victim was away from his residence, the defendant broke into the victim's place several times with a plan to rape the victim. When the victim learned of these things later, he became concerned about the safety of himself and his family. For the defendant to violate the statute prohibiting stalking, the victim's fear need not be contemporaneous with the defendant's threats and harassment.³⁵⁰
- The accused was obsessed with the victim for 12 years. He was previously arrested and ordered to stay away from the victim. He kept calling the victim and sent her letters. This was sufficient evidence of stalking.³⁵¹

Cyberstalking³⁵² is a technology-based version of stalking. It may include “threatening, obscene, or hateful” emails, faxes, or voice mail messages.³⁵³ Cyberstalking can lead to offline incidents of violent crime.³⁵⁴

Elements of a Cause of Action:³⁵⁵

1. The use of the Internet, e-mail, or other telecommunication technologies (including, but not limited to, computers, fax machines, and cellular telephones³⁵⁶)
2. To make a credible threat with intent to place that person in reasonable fear for their safety or safety of an immediate family member.

Examples:

- The defendant's conduct, which included sending “multiple messages on Facebook,” was found to constitute a credible threat.³⁵⁷

Statute of Limitations

The crime of stalking is punishable by imprisonment in county jail, a fine, or imprisonment in state prison.³⁵⁸ Actions must be commenced within one year if punishable by fine or county jail³⁵⁹ and within three years if punishable by imprisonment in state prison.³⁶⁰

5. Indecent Exposure (Cal. Penal Code § 314)

Willful exposure of one's private parts to another person, for the purpose of either gratifying oneself or offending the other person.

Elements of Cause of Action:³⁶¹

1. Willful and lewd **exposition** of one's person, or private parts thereof;
2. In any public place or place where there are present other persons to be offended or annoyed thereby; OR
3. Procuring, counseling, or assisting any person so to expose himself or take part in any model artist exhibition, or to make any other exhibition of himself to public view, or the view of any

number of persons, such as is offensive to decency, or is adapted to excite to vicious or lewd thoughts or acts.

Exposition: There are three types of “sexually motivated” exposure. A person may be convicted for exposing themselves (1) for their own sexual gratification, (2) for the sexual gratification of the viewer, or (3) to offend the viewer in a sexual way.³⁶²

- Indecent exposure does not require that the “victim” be harmed or bothered by the conduct. The offender’s motivation must have been “sexual” in a way they should have known could be offensive.³⁶³

Note: The first conviction of indecent exposure is a misdemeanor while subsequent offenses are felonies punishable by a maximum of three years’ imprisonment.

Example:

- A man sunbathed in the nude on an isolated beach. A conviction of indecent exposure would require proof beyond a reasonable doubt that the actor not only meant to expose himself, but intended by his conduct to direct public attention to his genitals for purposes of sexual arousal, gratification, or affront.³⁶⁴

Statute of Limitations:³⁶⁵

1. One year for misdemeanors.
2. Three years for felonies.³⁶⁶

6. Hate Crimes (Cal. Penal Code § 422.6)

Crimes committed to interfere with a person’s civil liberties or to intimidate.

Elements of the Cause of Action:³⁶⁷

1. To willfully injure, intimidate, interfere with, oppress, or threaten any other person in the free exercise or enjoyment of any right or privilege; OR
2. To deface, damage, or destroy the real or personal property of any other person for the purpose of intimidating or interfering with the free exercise or enjoyment of any right or privilege
3. In whole or in part because of their actual or perceived gender (or because of any of the following: disability, nationality, race or ethnicity, religion, sexual orientation, or association with a person or group with one or more of these actual or perceived characteristics).

Example:

- The defendant wrote racially motivated words on a classroom door and a building at a public school. Despite the claim that the defaced surface was not the property of the victims (a teacher and a particular group of students), the defendant was found to have violated Cal. Penal Code § 422.6. The phrase “property of another person” did not require that victim to own the property. As long as the property was regularly and openly used or occupied by the victim, it fell within the statutory scope.³⁶⁸

Statute of Limitations

One year.³⁶⁹

7. Revenge Porn (Cal. Penal Code § 647(j)(4))

The intentional distribution of sexual images that were expected to be kept private, of another person with the intent to cause them emotional distress.

Elements of the Cause of Action:³⁷⁰

1. **Intentional distribution** of an image of
 - a. the **intimate body part**(s) of another identifiable person; OR
 - b. a person engaging in a sexual act (including masturbation);
2. Where the parties agreed or understood that the image was to remain private;
3. The person distributing the image knew or should have known that distribution of the image would cause **serious emotional distress**; and
4. The person depicted suffers this emotional distress.

Intentional Distribution: A person intentionally distributes an image when they personally distribute the image, or arrange, specifically request, or intentionally cause another person to distribute that image.³⁷¹

Intimate body part: Any portion of the genitals, the anus, or the breasts below the top of the areola (for females only), that is either uncovered or clearly visible through clothing.³⁷²

Serious Emotional Distress: In this context, serious emotional distress is not intended to have a technical legal definition, but rather is to be understood based on common use and common knowledge.³⁷³

Example:

- The defendant was convicted where he posted a picture of his ex-girlfriend's bare breasts on her company's Facebook page. It was understood between the two of them that the photo was meant to be private. The court clarified that even if a specialized legal definition of "serious emotional distress" were used, the victim's state of mind would qualify: the victim testified that she was embarrassed, worried about losing her job, believed she needed psychological help, and told her mother that she wanted to "get in the car and go kill [herself]."³⁷⁴

Statute of Limitations

One year.³⁷⁵

¹ 42 U.S.C. § 2000e, et seq.

² *Cordova v. State Farm Ins. Cos.*, 124 F.3d 1145, 1148–1149 (9th Cir. 1997).

³ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

⁴ *Id.*

⁵ *Cordova v. State Farm Ins. Cos.*, 124 F.3d at 1148–1149.

⁶ *EEOC v. Boeing Co.*, 577 F.3d 1044, 1050 (9th Cir. 2009).

⁷ *Guz v. Bechtel Nat. Inc.*, 24 Cal. 4th 317, 355 (2000); see also *McDonnell Douglas Corp.*, 411 U.S. at 802 and *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253–54 (1981).

⁸ *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 206 (1991).

⁹ See *Stout v. Potter*, 276 F.3d 1118, 1122 (9th Cir. 2002).

¹⁰ *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) ("The touchstone is business necessity.").

¹¹ *Id.* at 430.

¹² *Ernst v. City of Chicago*, 837 F.3d 788, 805 (7th Cir. 2016).

¹³ *Stout v. Potter*, 276 F.3d 1118, 1122 (9th Cir. 2002).

¹⁴ *Scott v. Gino Morena Enters., LLC*, 888 F.3d 1101, 1108 (9th Cir. 2018); see 42 U.S.C. § 2000e-5(f)(1).

¹⁵ 42 U.S.C. § 2000e-5(e)(1).

¹⁶ 42 U.S.C. § 2000e-5(f)(1).

¹⁷ 20 U.S.C. § 1681(a).

¹⁸ 20 U.S.C. § 1681(c); 34 C.F.R. § 106.41(a).

¹⁹ 20 U.S.C. § 1681(a).

²⁰ *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173–74 (2005).

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- ²¹ *Id.*
- ²² *Id.* at 180–81.
- ²³ *Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 858–59 (9th Cir. 2014).
- ²⁴ *Stanley v. Trs. of Cal. State Univ.*, 433 F.3d 1129, 1135–36 (9th Cir. 2006) (Title IX suit against state university trustees governed by California’s personal injury statute of limitations).
- ²⁵ *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 247 (2009).
- ²⁶ See 29 U.S.C. § 206(d)(1).
- ²⁷ *Hein v. Or. Coll. of Educ.*, 718 F.2d 910, 913 (9th Cir. 1983).
- ²⁸ *Gunther v. Cnty. of Wash.*, 623 F.2d 1303, 1309 (9th Cir. 1989).
- ²⁹ *Id.* at 1309–10.
- ³⁰ *Rizo v. Yovino*, 887 F.3d 453, 456–57 (9th Cir. 2018).
- ³¹ 29 U.S.C. § 255(a).
- ³² *McLaughlin v. Richland Show Co.*, 486 U.S. 128, 133 (1988).
- ³³ *Taylor v. Nabors Drilling USA, LP*, 222 Cal. App. 4th 1228, 1240 (2014).
- ³⁴ See *Sandell v. Taylor-Listug, Inc.*, 188 Cal. App. 4th 297, 307 (2010).
- ³⁵ *Dinslage v. City & Cnty. of San Francisco*, 5 Cal. App. 5th 368, 378 (2016).
- ³⁶ See *Lelaind v. City & Cnty. of San Francisco*, 576 F. Supp. 2d 1079, 1095, 1097–99 (N.D. Cal. 2008).
- ³⁷ *Hardin v. Wal-Mart Stores, Inc.*, 604 F. App’x 545, 547 (2015).
- ³⁸ *City and Cnty. of San Francisco v. Fair Employment & Hous. Comm’n*, 191 Cal. App. 3d 976, 989–90 (1987).
- ³⁹ California Civil Jury Instructions (2020) No. 2502. Disparate Impact – Essential Factual Elements (Gov. Code, § 12940(a)).
- ⁴⁰ See *Terry v. City of San Diego*, 380 F. App’x 591, 592–93 (9th Cir. 2010).
- ⁴¹ *Id.* at 593.
- ⁴² Cal. Gov’t Code § 12960(e).
- ⁴³ Cal. Gov’t Code § 12960(e)(6)(A).
- ⁴⁴ Cal. Labor Code § 1197.5(a).
- ⁴⁵ *Id.*
- ⁴⁶ *Green v. Par Pools Inc.*, 111 Cal. App. 4th 620, 629 (2003).
- ⁴⁷ *Id.* at 632.
- ⁴⁸ Cal. Labor Code § 1197.5(i).
- ⁴⁹ Cal. Civ. Code § 51(b).
- ⁵⁰ See California Civil Jury Instructions (2020) No. 3060. Unruh Civil Rights Act – Essential Factual Elements (Civ. Code, §§51, 52); see also *Angelucci v. Century Supper Club*, 41 Cal. 4th 160, 167 (2007).
- ⁵¹ *Koire v. Metro Car Wash*, 40 Cal. 3d 24, 35–36 (1985).
- ⁵² *Angelucci*, 41 Cal. 4th at 168.
- ⁵³ *Id.* at 175.
- ⁵⁴ *Semler v. Gen. Elec. Capital Corp.*, 196 Cal. App. 4th 1380, 1387 (2011); compare Cal. Civ. Proc. Code § 335.1 with Cal. Civ. Proc. Code § 338(a).
- ⁵⁵ 29 C.F.R. § 1604.11(a); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986).
- ⁵⁶ 2 Cal. C. Regs. § 11019(b)(2).
- ⁵⁷ 42 U.S.C. § 2000e-2(a).
- ⁵⁸ *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65–66 (1986) (“[I]n 1980 the EEOC issued Guidelines specifying that ‘sexual harassment,’ as there defined, is a form of sex discrimination prohibited by Title VII... Since the Guidelines were issued, courts have uniformly held, and we agree, that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment.”).
- ⁵⁹ 29 C.F.R. § 1604.11(a).
- ⁶⁰ 42 U.S.C. § 2000e(b).
- ⁶¹ *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993).
- ⁶² *Henson v. City of Dundee*, 682 F.2d 897, 903–04 (11th Cir. 1982).
- ⁶³ See *Harris*, 510 U.S. at 21.
- ⁶⁴ See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 60 (1986).
- ⁶⁵ *Harvill v. Westward Commc’ns, L.L.C.*, 433 F.3d 428, 436 (5th Cir. 2005).
- ⁶⁶ *Kaytor v. Elec. Boat Corp.*, 609 F.3d 537, 552 (2d Cir. 2010).
- ⁶⁷ *Howley v. Town of Stratford*, 217 F.3d 141, 154 (2d Cir. 2000).
- ⁶⁸ *Gorski v. New Hampshire Dep’t of Corr.*, 290 F.3d 466, 472 (1st Cir. 2002).
- ⁶⁹ *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21–22 (1993).

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- ⁷⁰ See *Cumpiano v. Banco Santander Puerto Rico*, 902 F.2d 148, 155 (1st Cir. 1990); *Morrison v. Carleton Woolen Mills, Inc.*, 108 F.3d 429, 443 (1st Cir. 1997).
- ⁷¹ See *Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798, 809 (11th Cir. 2010).
- ⁷² *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982).
- ⁷³ *Harris*, 510 U.S. at 22–23.
- ⁷⁴ See generally *Kortan v. Cal. Youth Auth.*, 217 F.3d 1104, 1111 (9th Cir. 2000).
- ⁷⁵ *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993).
- ⁷⁶ *Id.*
- ⁷⁷ *Id.* at 21–22.
- ⁷⁸ *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 62 (1986).
- ⁷⁹ *Henson v. City of Dundee*, 682 F.2d 897, 909 (11th Cir. 1982).
- ⁸⁰ See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 753–54 (1998) (finding that when a plaintiff can demonstrate that “a tangible employment action resulted from a refusal to submit to a supervisor’s sexual demands, he or she establishes that the employment decision itself constitutes a change in the terms and conditions of employment that is actionable under Title VII”).
- ⁸¹ *Id.* at 745.
- ⁸² *Reynaga v. Roseburg Forest Prods.*, 847 F.3d 678, 689 (9th Cir. 2017).
- ⁸³ See *Henson*, 682 F.2d at 910.
- ⁸⁴ See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 60, 67 (1986).
- ⁸⁵ See *Clark Cnty. Sch. Dist. v. Breedon*, 532 U.S. 268, 269–270 (2001).
- ⁸⁶ *Scott v. Gino Morena Enters., LLC*, 888 F.3d 1101, 1108 (9th Cir. 2018); 42 U.S.C. § 2000e-5(f)(1).
- ⁸⁷ 42 U.S.C. § 2000e-5(e)(1); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974); *Martin v. Nevada Employment Sec. Div.*, 99 F. App’x 832, 833 (9th Cir. 2004).
- ⁸⁸ *Scott*, 888 F.3d at 1108; see 42 U.S.C. § 2000e-5(f)(1).
- ⁸⁹ 42 U.S.C. § 2000e-3(a).
- ⁹⁰ *Lyons v. England*, 307 F.3d 1092, 1118 (9th Cir. 2002).
- ⁹¹ 42 U.S.C. § 2000e-3(a).
- ⁹² *Id.*
- ⁹³ *Magyar v. Saint Joseph Reg’l Med. Ctr.*, 544 F.3d 766, 771 (7th Cir. 2008) (“[T]o succeed on a retaliation claim, [the plaintiff] need not prove that the underlying conduct she perceived as sexual harassment actually was serious enough to constitute a Title VII violation. Instead, she need only show that, when instituting her grievance, she had a ‘sincere and reasonable belief’ that she was opposing an unlawful practice.”).
- ⁹⁴ *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57 (2006).
- ⁹⁵ *Dawson v. Entek Int’l*, 630 F.3d 928, 936 (9th Cir. 2011).
- ⁹⁶ *Clark Cnty. Sch. Dist. v. Breedon*, 532 U.S. 268, 273 (2001).
- ⁹⁷ *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).
- ⁹⁸ See *Burlington N. & Santa Fe Ry. Co.*, 548 U.S. at 71.
- ⁹⁹ See *Lyons v. England*, 307 F.3d 1092, 1118 (9th Cir. 2002).
- ¹⁰⁰ 42 U.S.C. § 2000e-5(e)(1); see *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974); *Martin v. Nevada Employment Sec. Div.*, 99 F. App’x 832, 833 (9th Cir. 2004).
- ¹⁰¹ *Scott v. Gino Morena Enters., LLC*, 888 F.3d 1101, 1108 (9th Cir. 2018); see 42 U.S.C. § 2000e-5(f)(1).
- ¹⁰² See, e.g., *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 639–641 (1999).
- ¹⁰³ *Id.* at 651.
- ¹⁰⁴ *Id.* at 644–45.
- ¹⁰⁵ *Id.* at 646.
- ¹⁰⁶ *Roe v. Gustine Unified Sch. Dist.*, 678 F. Supp. 2d 1008, 1025 (E.D. Cal. 2009).
- ¹⁰⁷ *Davis*, 526 U.S. at 650.
- ¹⁰⁸ *T.Z. v. City of New York*, 634 F. Supp. 2d 263, 271 (E.D.N.Y. 2009).
- ¹⁰⁹ *Roe*, 678 F. Supp. 2d at 1028.
- ¹¹⁰ *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 650 (1999).
- ¹¹¹ *Reese v. Jefferson Sch. Dist. No. 14J*, 208 F.3d 736, 739 (9th Cir. 2000); *Lopez v. Regents of the Univ. of Cal.*, 5 F. Supp. 3d 1106, 1122 (N.D. Cal. 2013); but see *Karasek v. Regents of Univ. of California*, 500 F. Supp. 3d 967, 987 (N.D. Cal. 2020) (“In [] post-assault cases, an appropriate school official would need to know of the harassment, or the failure to respond to it could not fairly be attributed to the school but instead to its employees. [Citation]. But in this pre-assault case, [the plaintiff] does not have to demonstrate that any particular official was aware of any

particular past instance of conduct; she must simply present enough evidence to plausibly demonstrate that there was a policy of deliberate indifference to reports generally.”).

¹¹² *Davis*, 526 U.S. at 648–49.

¹¹³ *Karasek v. Regents of the Univ. of Cal.*, No. 15-cv-03717-WHO, 2015 WL 8527338, at *10 (N.D. Cal. Dec. 11, 2015).

¹¹⁴ *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 277 (1998).

¹¹⁵ *Hunter ex rel. Hunter v. Barnstable Sch. Comm.*, 456 F. Supp. 2d 255, 265 (D. Mass. 2006); see also *Davis*, 526 U.S. at 642–43.

¹¹⁶ *Oden v. N. Marianas Coll.*, 440 F.3d 1085, 1089 (9th Cir. 2006).

¹¹⁷ *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 649 (1999).

¹¹⁸ See *Gebser*, 524 U.S. at 291.

¹¹⁹ See *Roe v. Gustine Unified Sch. Dist.*, 678 F. Supp. 2d 1008, 1038 (E.D. Cal. 2009).

¹²⁰ See *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290–91 (1998) (noting that considerations “comparable” to those underlying Title IX violations “led to our adoption of a deliberate indifference standard for claims under § 1983 ...”); *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 69 (1992) (looking to Section 1983 in holding that private plaintiffs could seek monetary damages against a school under Title IX for intentional discrimination); *Doe v. Willits Unified Sch. Dist.*, 473 F. App’x 775, 776 (9th Cir. 2012) (relying on Section 1983 case law in discussing the deliberate indifference standard under Title IX).

¹²¹ *Stanley v. Trs. of Cal. State Univ.*, 433 F.3d 1129, 1135–36 (9th Cir. 2006) (Title IX suit against state university trustees governed by California’s personal injury statute of limitations).

¹²² Cal. Civ. Proc. Code § 335.1.

¹²³ *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 255 (2009).

¹²⁴ Cal. Gov’t Code § 12940(i)(1).

¹²⁵ *Taylor v. Nabors Drilling USA, LP*, 222 Cal. App. 4th 1228, 1240 (2014); *Kohler v. Inter-Tel Techs.*, 244 F.3d 1167, 1172 (9th Cir. 2001) (“California’s intermediate appellate courts have adopted the federal definition of both types of harassment [hostile work environment and quid pro quo].”).

¹²⁶ Cal. Gov’t Code § 12940(i), (h).

¹²⁷ *Hirst v. City of Oceanside*, 236 Cal. App. 4th 774, 791 (2015).

¹²⁸ *Mogilefsky v. Super. Ct.*, 20 Cal. App. 4th 1409, 1418 (1993).

¹²⁹ California Civil Jury Instructions (2020) No. 2521A. Hostile Work Environment Harassment – Conduct Directed at Plaintiff – Essential Factual Elements – Employer or Entity Defendant (Gov. Code, §§ 12923, 12940(i)).

¹³⁰ Cal. Gov’t Code § 12940(i).

¹³¹ See, e.g., *Hirst v. City of Oceanside*, 236 Cal. App. 4th 774, 778 (2015); *Accardi v. Super. Ct.*, 17 Cal. App. 4th 341, 348–349 (1993).

¹³² See, e.g., *Hall v. Gus Const. Co.*, 842 F.2d 1010, 1012 (8th Cir. 1988).

¹³³ See CACI No. 2521A, *supra* note 129.

¹³⁴ See, e.g., *Lyle v. Warner Bros. Television Prods.*, 38 Cal. 4th 264, 295 (2006) (“FEHA is ‘not a civility code’ and is not designed to rid the workplace of vulgarity.”).

¹³⁵ See, e.g., *Singleton v. U.S. Gypsum Co.*, 140 Cal. App. 4th 1547, 1562 (2006).

¹³⁶ *Aguilar v. Avis Rent A Car Sys., Inc.*, 21 Cal. 4th 121, 130 (1999).

¹³⁷ *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982).

¹³⁸ *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22–23 (1993).

¹³⁹ See generally *Kortan v. Cal. Youth Auth.*, 217 F.3d 1104, 1111 (9th Cir. 2000).

¹⁴⁰ *Id.* at 1114.

¹⁴¹ *Harris*, 510 U.S. at 23; California Civil Jury Instructions (2020) No. 2524. “Severe or Pervasive” Explained.

¹⁴² California Civil Jury Instructions (2020) No. 2521A. Hostile Work Environment Harassment – Conduct Directed at Plaintiff – Essential Factual Elements – Employer or Entity Defendant (Cal. Gov’t Code §§ 12923, 12940(i)).

¹⁴³ *Miller v. Dep’t of Corr.*, 36 Cal. 4th 446, 451 (2005).

¹⁴⁴ *Fisher v. San Pedro Peninsula Hosp.*, 214 Cal. App. 3d 590, 614 (1989).

¹⁴⁵ *McCoy v. Pac. Mar. Ass’n*, 216 Cal. App. 4th 283, 293–94 (2013).

¹⁴⁶ *Beyda v. City of Los Angeles*, 65 Cal. App. 4th 511, 516–17 (1998); California Civil Jury Instructions (2020) No. 2520. Quid pro quo Sexual Harassment – Essential Factual Elements.

¹⁴⁷ *Bihun v. AT&T Info. Sys., Inc.*, 13 Cal. App. 4th 976, 987 (1993), disapproved on other grounds by *Lakin v. Watkins Assoc. Indus.*, 6 Cal. 4th 644, 664 (1993).

¹⁴⁸ *State Dep’t of Health Servs. v. Super. Ct.*, 31 Cal. 4th 1026, 1040–42 (2003).

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- ¹⁴⁹ *Trujillo v. No. Cnty. Transit Dist.*, 63 Cal. App. 4th 280, 287 (1998).
- ¹⁵⁰ Cal. Gov't Code § 12940(i)(4)(A).
- ¹⁵¹ Cal. Gov't Code § 12940(k).
- ¹⁵² *State Dep't of Health Servs.*, 31 Cal. 4th at 1044.
- ¹⁵³ *Id.* at 1044–45.
- ¹⁵⁴ *Id.* at 1042.
- ¹⁵⁵ Cal. Gov't Code § 12926(t).
- ¹⁵⁶ See *Myers v. Trendwest Resorts, Inc.*, 148 Cal. App. 4th 1403, 1422–23 (2007).
- ¹⁵⁷ *Capitol City Foods, Inc. v. Super. Ct.*, 5 Cal. App. 4th 1042, 1049 (1992).
- ¹⁵⁸ *Dep't of Health Servs. v. Super. Ct.*, 31 Cal. 4th 1026, 1041–42 (2003).
- ¹⁵⁹ *Myers*, 148 Cal. App. 4th at 1428–29.
- ¹⁶⁰ *Doe v. Capital Cities*, 50 Cal. App. 4th 1038, 1052 (1996).
- ¹⁶¹ Cal. Gov't Code § 12940(i)(1).
- ¹⁶² *Bradley v. Cal. Dep't of Corr. & Rehab.*, 158 Cal. App. 4th 1612, 1630–34 (2008).
- ¹⁶³ *Mathieu v. Norrell Corp.*, 115 Cal. App. 4th 1174, 1184–85 (2004).
- ¹⁶⁴ Cal. Gov't Code § 12940(i)(1).
- ¹⁶⁵ *Carter v. Cal. Dep't of Veterans Affairs*, 38 Cal. 4th 914, 919 (2006).
- ¹⁶⁶ *Martin v. Lockheed Missiles & Space Co.*, 29 Cal. App. 4th 1718, 1724 (1994).
- ¹⁶⁷ Cal. Gov't Code § 12960(e)(5).
- ¹⁶⁸ Cal. Gov't Code § 12965(b).
- ¹⁶⁹ Cal. Gov't Code § 12940(h).
- ¹⁷⁰ See California Civil Jury Instructions (2020) No. 2505. Retaliation – Essential Factual Elements (Gov. Code, § 12940(h)).
- ¹⁷¹ *Yanowitz v. L'Oreal USA, Inc.*, 36 Cal. 4th 1028, 1043 (2005).
- ¹⁷² Cal. Gov't Code § 12940(h); *Yanowitz*, 36 Cal. 4th at 1047 (“[protected opposing activity] must oppose activity the employee reasonably believes constitutes unlawful discrimination”) (emphasis added).
- ¹⁷³ See California Civil Jury Instructions (2020) No. 2059. “Adverse Employment Action” Explained.
- ¹⁷⁴ *Yanowitz*, 36 Cal. 4th at 1049–51.
- ¹⁷⁵ *Akers v. Cnty. of San Diego*, 95 Cal. App. 4th 1441, 1456 (2002).
- ¹⁷⁶ *Fisher v. San Pedro Peninsula Hosp.*, 214 Cal. App. 3d 590, 615 (1989).
- ¹⁷⁷ *Wysinger v. Auto. Club of S. Cal.*, 157 Cal. App. 4th 413, 421 (2007).
- ¹⁷⁸ *McCaskey v. Cal. State Auto. Ass'n*, 189 Cal. App. 4th 947, 989 (2010).
- ¹⁷⁹ *Wysinger*, 157 Cal. App. at 421.
- ¹⁸⁰ *Salter v. Washington Twp. Health Care Dist.*, 260 F. Supp. 2d 919, 929 (N.D. Cal. 2003), *aff'd in part, rev'd in part*, 112 F. App'x 557 (9th Cir. 2004) (affirming summary judgment on the plaintiff's retaliation claim).
- ¹⁸¹ *Martin v. Lockheed Missiles & Space Co.*, 29 Cal. App. 4th 1718, 1724 (1994).
- ¹⁸² Cal. Gov't Code § 12960(e)(5).
- ¹⁸³ Cal. Gov't Code § 12965(b).
- ¹⁸⁴ See California Civil Jury Instructions (2020) No. 3065. Sexual Harassment in Defined Relationship – Essential Factual Elements (Civ. Code, § 51.9).
- ¹⁸⁵ Cal. Civ. Code § 51.9.
- ¹⁸⁶ *Hughes v. Pair*, 46 Cal. 4th 1035, 1043–1044 (2009).
- ¹⁸⁷ *Clark Cnty. Sch. Dist. v. Breedon*, 532 U.S. 268, 270 (2001).
- ¹⁸⁸ *Hughes*, 46 Cal. 4th at 1043.
- ¹⁸⁹ *Id.* at 1048.
- ¹⁹⁰ *Ramirez v. Wong*, 188 Cal. App. 4th 1480, 1487–1488 (2010).
- ¹⁹¹ Cal. Civ. Code § 51.9(a)(3).
- ¹⁹² *Semler v. Gen. Elec. Capital Corp.*, 196 Cal. App. 4th 1380, 1387 (2011); see also *Kemp v. Regents of Univ. of Cal.*, No. C-09-4687 PJH, 2010 WL 2889224, at *6 (N.D. Cal. July 22, 2010); compare Cal. Civ. Proc. Code § 335.1 with Cal. Civ. Proc. Code § 338(a).
- ¹⁹³ Cal. Civ. Code § 51.7(b)(1).
- ¹⁹⁴ Cal. Civ. Code § 51(e)(5).
- ¹⁹⁵ See California Civil Jury Instructions (2020) No. 3063. Acts of Violence – Ralph Act – Essential Factual Elements (Civ. Code, § 51.7).
- ¹⁹⁶ *Campbell v. Feld Ent., Inc.*, 75 F. Supp. 3d 1193, 1205–1206 (N.D. Cal. 2014).
- ¹⁹⁷ Cal. Civ. Code § 51(b).

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- ¹⁹⁸ *In re M.S. v. A.G.*, 10 Cal. 4th 698, 719–20 (1995).
- ¹⁹⁹ *Beliveau v. Caras*, 873 F. Supp. 1393, 1399–1400 (C.D. Cal. 1995).
- ²⁰⁰ *Winarto v. Toshiba Am. Elecs.*, 274 F.3d 1276, 1290 (9th Cir. 2001).
- ²⁰¹ *Ventura v. ABM Indus., Inc.*, 212 Cal. App. 4th 258, 270–71 (2012).
- ²⁰² Cal. Civ. Code § 52(b)(2).
- ²⁰³ *United States v. Morgan*, 164 F.3d 1235, 1239 (9th Cir. 1999).
- ²⁰⁴ 20 U.S.C. § 1681(a).
- ²⁰⁵ *Lopez v. Regents of the Univ. of Cal.*, 5 F. Supp. 3d 1106, 1124–25 (N.D. Cal. 2013) (“Given the inherently sexual nature of rape and sexual assault, it is reasonable to conclude from such incidents that the perpetrator was motivated, at least in part, by victim’s sex.”).
- ²⁰⁶ *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 633, 642, 645 (1999).
- ²⁰⁷ *Roe v. Gustine Unified Sch. Dist.*, 678 F. Supp. 2d 1008, 1025 (E.D. Cal. 2009) (citing *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 646 (1999)).
- ²⁰⁸ *Id.* at 1025.
- ²⁰⁹ *Davis*, 526 U.S. at 650.
- ²¹⁰ *T.Z. v. City of New York*, 634 F. Supp. 2d 263, 271 (E.D.N.Y. 2009).
- ²¹¹ *Roe*, 678 F. Supp. 2d at 1028.
- ²¹² *Id.* at 1026.
- ²¹³ *H.B. v. State Bd. of Educ.*, No. 4:14-CV-204-BO, 2015 WL 2193778, at *6 (E.D.N.C. May 11, 2015).
- ²¹⁴ *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 650 (1999).
- ²¹⁵ *Reese v. Jefferson Sch. Dist. No. 14J*, 208 F.3d 736, 739 (9th Cir. 2000); *Lopez v. Regents of the Univ. of Cal.*, 5 F. Supp. 3d 1106, 1122 (N.D. Cal. 2013).
- ²¹⁶ *Davis*, 526 U.S. at 648–49.
- ²¹⁷ *Karasek v. Regents of the Univ. of Cal.*, No. 15-cv-03717-WHO, 2015 WL 8527338, at *10 (N.D. Cal. Dec. 11, 2015).
- ²¹⁸ *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 277 (1998).
- ²¹⁹ *Hunter ex rel. Hunter v. Barnstable Sch. Comm.*, 456 F. Supp. 2d 255, 265 (D. Mass. 2006); see also *Davis*, 526 U.S. at 642–43.
- ²²⁰ *Oden v. N. Marianas Coll.*, 440 F.3d 1085, 1089 (9th Cir. 2006).
- ²²¹ *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 645 (1999).
- ²²² *Karasek*, 2015 WL 8527338, at *14.
- ²²³ *Id.*
- ²²⁴ *Oden*, 440 F.3d. at 1089.
- ²²⁵ *Takla v. Regents of the Univ. of Cal.*, No. 2:15-cv-04418-CAS(SHX), 2015 WL 6755190, at *5 (C.D. Cal. Nov. 2, 2015).
- ²²⁶ See *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290–91 (1998) (noting that considerations “comparable” to those underlying Title IX violations “led to our adoption of a deliberate indifference standard for claims under § 1983”); *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 69 (1992) (looking to Section 1983 in holding that private plaintiffs could seek monetary damages against a school under Title IX for intentional discrimination); *Doe v. Willits Unified Sch. Dist.*, 473 F. App’x 775, 776 (9th Cir. 2012) (relying on Section 1983 case law in discussing the deliberate indifference standard under Title IX).
- ²²⁷ *Stanley v. Trs. of Cal. State Univ.*, 433 F.3d 1129, 1135–36 (9th Cir. 2006) (Title IX suit against state university trustees governed by California’s personal injury statute of limitations).
- ²²⁸ Cal. Civ. Proc. Code § 335.1.
- ²²⁹ 18 U.S.C. § 2242(1).
- ²³⁰ See 18 U.S.C. § 2246(2) for definition of “sexual act.”
- ²³¹ *United States v. Sneezer*, 983 F.2d 920, 923 (9th Cir. 1992).
- ²³² 18 U.S.C. § 2242(2).
- ²³³ See 18 U.S.C. § 2246(2) for definition of “sexual act.”
- ²³⁴ *United States v. Bruguier*, 735 F.3d 754, 758 (8th Cir. 2013).
- ²³⁵ *United States v. James*, 810 F.3d 674, 686 (9th Cir. 2016).
- ²³⁶ *Id.* at 679.
- ²³⁷ *Id.* at 681.
- ²³⁸ *United States v. Armstrong*, 166 F. App’x 949, 952 (9th Cir. 2006).
- ²³⁹ 18 U.S.C. § 3299.

240 18 U.S.C. § 2243(a).
241 See 18 U.S.C. § 2246(2) for definition of “sexual act.”
242 *United States v. Wilcox*, 487 F.3d 1163, 1168–69 (8th Cir. 2007).
243 18 U.S.C. § 3299.
244 *United States v. Chatlin*, 51 F.3d 869, 872 (9th Cir. 1995).
245 *United States v. Rivera*, 43 F.3d 1291, 1298 (9th Cir. 1995).
246 18 U.S.C. § 2241(a).
247 See 18 U.S.C. § 2246(2) for definition of “sexual act.”
248 18 U.S.C. § 2246(4).
249 *United States v. Papakee*, 573 F.3d 569, 576 (8th Cir. 2009).
250 *United States v. Chatlin*, 51 F.3d 869, 872 (9th Cir. 1995).
251 18 U.S.C. § 2241(b).
252 18 U.S.C. § 2241(c).
253 18 U.S.C. § 2241(d).
254 *United States v. Juvenile Male*, 564 U.S. 932, 933 (2011).
255 *United States v. Norman T.*, 129 F.3d 1099, 1101 (10th Cir. 1997).
256 18 U.S.C. § 3299.
257 *United States v. Galindo-Galindo*, No. CR 08–872–TUC–CKJ (CRP), 2009 WL 166935, at *16 (D. Ariz. Jan. 23, 2009).
258 18 U.S.C. § 2246(3).
259 *Id.*
260 18 U.S.C. § 2244.
261 *United States v. Price*, 921 F.3d 777, 785 (9th Cir.), *opinion amended and superseded on denial of reh’g*, 980 F.3d 1211 (9th Cir. 2019).
262 18 U.S.C. § 3299.
263 *United States v. Neil*, 312 F.3d 419, 420–23 (9th Cir. 2002).
264 *United States v. Wetchie*, 207 F.3d 632, 634 (9th Cir. 2000).
265 *United States v. Hile*, 626 F. App’x 674, 678 (9th Cir. 2015).
266 18 U.S.C. § 2261A(1)–(2).
267 18 U.S.C. § 2266(2).
268 18 U.S.C. § 2266(7).
269 *United States v. Hile*, 626 F. App’x at 678.
270 *Id.*
271 *United States v. Veal*, 138 F. App’x 902, 903–04 (9th Cir. 2005).
272 18 U.S.C. § 2261A(2).
273 *United States v. Osinger*, 753 F.3d 939, 952 (9th Cir. 2014).
274 *United States v. Grob*, 625 F.3d 1209, 1212 (9th Cir. 2010).
275 18 U.S.C. § 3282.
276 18 U.S.C. § 2261(a)(1).
277 18 U.S.C. § 2266(7).
278 18 U.S.C. § 2261(a)(2).
279 *United States v. Dowd*, 417 F.3d 1080, 1087 (9th Cir. 2005).
280 *Id.* at 1089.
281 *Id.* at 1087.
282 *Id.* at 1084–86.
283 18 U.S.C. § 3282.
284 18 U.S.C. § 2262(a)(1).
285 18 U.S.C. § 2262(a)(2).
286 *United States v. Veal*, 138 F. App’x 902, 903–04 (9th Cir. 2005).
287 18 U.S.C. § 3282.
288 Cal. Civ. Code § 1708.5(a).
289 Cal. Civ. Code § 1708.5(d)(1).
290 Cal. Civ. Code § 1708.5(d)(2).
291 *Beliveau v. Caras*, 873 F. Supp. 1393, 1395–98 (C.D. Cal. 1995).
292 See *Jacqueline R. v. Household of Faith Family Church, Inc.*, 97 Cal. App. 4th 198, 207–08 (2002).
293 *Andrade v. Arby’s Rest. Group, Inc.*, 225 F. Supp. 3d 1115, 1130 (N.D. Cal. 2016).

²⁹⁴ *Lisa M. v. Henry Mayo Newhall Mem'l Hosp.*, 12 Cal. 4th 291, 296 (1995).

²⁹⁵ *Id.* at 298–301.

²⁹⁶ See Robert D. Links, § 10:17 Gender-Based Discrimination: Discovery, Remedies, and Statute of Limitations (Cal. Civ. Prac.: Cal. Civ. Rights Litigation 2017) (“Section 1708.5 does not specify the limitations period governing claims brought pursuant to the section [T]he applicable limitations statute is the two-year statute for battery claims codified at Code Civ. Proc. § 335.1 If the sexual battery was committed when the plaintiff was a minor, then Code Civ. Proc. § 340.1, the statute of limitations for childhood sexual abuse, provides the limitations period.”).

²⁹⁷ See Cal. Civ. Code § 52.4(c)(1).

²⁹⁸ Compare Cal. Civ. Code § 52(b)(2) with Cal. Civ. Code § 52.4(b).

²⁹⁹ Compare the two year statute of limitations for § 1708.5 (*supra*) with the three year statute of limitations for Cal. Civ. Code § 52.4(b).

³⁰⁰ Cal. Civ. Code § 52.4(a).

³⁰¹ See Cal. Civ. Code § 51.9.

³⁰² Cal. Civ. Code § 52.4(b).

³⁰³ Cal. Civ. Code § 1708.7(a).

³⁰⁴ Cal. Civ. Code § 1708.7(b)(1).

³⁰⁵ Cal. Civ. Code § 1708.7(b)(7).

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ Cal. Civ. Code § 1708.7(b)(2).

³⁰⁹ Cal. Civ. Code § 1708.7(a).

³¹⁰ Cal. Civ. Code § 1708.7(b)(2).

³¹¹ Cal. Civ. Proc. Code § 335.1.

³¹² CALJIC No. 890.

³¹³ See *People v. Bradley*, 15 Cal. App. 4th 1144, 1154 (1993).

³¹⁴ See *People v. Peckham*, 249 Cal. App. 2d 941, 944–46 (1967).

³¹⁵ *Id.* at 945.

³¹⁶ *People v. Leal*, 180 Cal. App. 4th 782, 790 (2009), citing *People v. Maury*, 30 Cal. 4th 342, 399–400 (2003) (internal citations omitted).

³¹⁷ *Id.* at 791.

³¹⁸ *People v. Trotter*, 160 Cal. App. 3d 1217, 1222–23 (1984).

³¹⁹ *People v. Meichtry*, 37 Cal. 2d 385, 389 (1951).

³²⁰ The statute of limitations period is based on the maximum punishment prescribed by statute for the offense. Cal. Penal Code § 805. When the victim is 18 or over, assault with intent to rape is punishable by imprisonment in the state prison for two, four, or six years. When the victim is under 18, it is punishable by imprisonment for five, seven, or nine years. When the offense occurs in the commission of a burglary of the first degree, it is punishable by imprisonment in state prison for life with the possibility of parole. Cal. Penal Code § 220(a)–(b).

³²¹ Cal. Penal Code § 801.

³²² Cal. Penal Code § 800.

³²³ Cal. Penal Code § 799.

³²⁴ Cal. Penal Code § 261.

³²⁵ Cal. Penal Code § 263.

³²⁶ Cal. Penal Code § 261.6.

³²⁷ Cal. Penal Code § 261.7.

³²⁸ Cal. Penal Code § 261.6.

³²⁹ See *People v. Ireland*, 188 Cal. App. 4th 328, 336–37 (2010).

³³⁰ *In re John Z.*, 29 Cal. 4th 756, 758 (2003).

³³¹ See *People v. Ireland*, 188 Cal. App. 4th at 338 .

³³² *In re John Z.*, 29 Cal. 4th at 762.

³³³ *People v. Ireland*, 188 Cal. App. 4th at 337–40.

³³⁴ Cal. Penal Code § 261.

³³⁵ *People v. Thompson*, 142 Cal. App. 4th 1426, 1437 (2006).

³³⁶ Cal. Penal Code § 261.

³³⁷ *People v. Thompson*, 142 Cal. App. 4th at 1440.

³³⁸ “Force” in § 261 has the common usage meaning, rather than any specialized legal definition. *People v. Griffin*, 33 Cal. 4th 1015, 1024 (2004).

³³⁹ *Id.* at 1023 (quoting *People v. Young*, 190 Cal. App. 3d 248, 257–58 (1987)).

³⁴⁰ *Id.*

³⁴¹ *Id.* at 1029.

³⁴² Cal. Penal Code § 799(b)(1)–(2).

³⁴³ See *People v. Johns*, 173 Cal. App. 2d 38, 46–47 (1959).

³⁴⁴ Cal. Penal Code §§ 801, 802.

³⁴⁵ Cal. Penal Code § 646.9(e).

³⁴⁶ Cal. Penal Code § 646.9(g).

³⁴⁷ *Id.*

³⁴⁸ *People v. Falck*, 52 Cal. App. 4th 287, 298–99 (1997).

³⁴⁹ *People v. McCray*, 58 Cal. App. 4th 159, 169–71 (1997).

³⁵⁰ *People v. Norman*, 75 Cal. App. 4th 1234, 1240 (1999).

³⁵¹ *People v. Falck*, 52 Cal. App. 4th at 291–93.

³⁵² A technology-based stalking charge may be accompanied by other statutes such as Cal. Penal Code § 422 (criminal threats), Penal Code § 653.2 (use of electronic communication to instill fear or to harass).

³⁵³ *People v. Gonzalez*, 2 Cal. 5th 1138, 1143 (2017).

³⁵⁴ The term “cyberstalking” is not explicitly mentioned under § 646.9.

³⁵⁵ See Cal. Penal Code § 646.9.

³⁵⁶ Cal. Civ. Code § 1708.7(b)(3); see also the definition of “electronic communication” in 18 U.S.C. § 2510(12).

³⁵⁷ *People v. Lopez*, 240 Cal. App. 4th 436, 452–53 (2015), as modified on denial of reh’g (Sept. 30, 2015).

³⁵⁸ Cal. Penal Code § 646.9(a)–(c).

³⁵⁹ Cal. Penal Code § 802.

³⁶⁰ Cal. Penal Code § 801.

³⁶¹ Cal. Penal Code § 314.

³⁶² *Nunez v. Holder*, 594 F.3d 1124, 1134 (9th Cir. 2010).

³⁶³ *Id.* at 1135.

³⁶⁴ *In re Smith*, 7 Cal. 3d 362, 366 (1972).

³⁶⁵ Cal. Penal Code §§ 801, 802.

³⁶⁶ A person convicted of exposing themselves in a public place (satisfying element 2 *supra*) is guilty of a felony for each subsequent conviction under this element. If convicted, they are also guilty of a felony if they have a previous conviction under Cal. Penal Code § 288 (Lewd or lascivious acts involving children). Otherwise, it is a misdemeanor. See Cal. Penal Code § 314.

³⁶⁷ See Cal. Penal Code § 422.6.

³⁶⁸ *In re Michael M.*, 86 Cal. App. 4th 718, 725–726 (2001).

³⁶⁹ Cal. Penal Code § 802(a).

³⁷⁰ Cal. Penal Code § 647(i)(4)(A).

³⁷¹ Cal. Penal Code § 647(i)(4)(B).

³⁷² Cal. Penal Code § 647(i)(4)(C).

³⁷³ *People v. Iniguez*, 247 Cal. App. 4th Supp. 1, at *9 (2016).

³⁷⁴ *Id.* at *11.

³⁷⁵ Cal. Penal Code § 802.