

AMENDED IN ASSEMBLY MARCH 26, 2003

CALIFORNIA LEGISLATURE—2003–04 REGULAR SESSION

ASSEMBLY BILL

No. 196

Introduced by Assembly Member Leno
(Coauthors: Assembly Members Berg, *Diaz*, Goldberg, Hancock,
Kehoe, Koretz, Laird, ~~Lieber, and Longville~~–Levine, Lieber,
***Longville, Lowenthal, and Yee*)**
(Coauthor: Senator Kuehl)

January 27, 2003

An act to amend Section 12926 of, and to add Section 12949 to, the Government Code, relating to discrimination.

LEGISLATIVE COUNSEL'S DIGEST

AB 196, as amended, Leno. Discrimination.

Existing law prohibits various types of discrimination and harassment based on sex, as defined, in housing and employment.

This bill would expand the prohibition on sexual discrimination and harassment by including gender, as defined, in the definition of sex. The bill would permit employers to require employees to comply with reasonable workplace appearance, grooming, and dress standards consistent with state and federal law, provided that employees are allowed to appear or dress consistently with their gender identity.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. Section 12926 of the Government Code is amended to read:

12926. As used in this part in connection with unlawful practices, unless a different meaning clearly appears from the context:

(a) “Affirmative relief” or “prospective relief” includes the authority to order reinstatement of an employee, awards of backpay, reimbursement of out-of-pocket expenses, hiring, transfers, reassignments, grants of tenure, promotions, cease and desist orders, posting of notices, training of personnel, testing, expunging of records, reporting of records, and any other similar relief that is intended to correct unlawful practices under this part.

(b) “Age” refers to the chronological age of any individual who has reached his or her 40th birthday.

(c) “Employee” does not include any individual employed by his or her parents, spouse, or child, or any individual employed under a special license in a nonprofit sheltered workshop or rehabilitation facility.

(d) “Employer” includes any person regularly employing five or more persons, 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, except as follows:

“Employer” does not include a religious association or corporation not organized for private profit.

(e) “Employment agency” includes any person undertaking for compensation to procure employees or opportunities to work.

(f) “Essential functions” means the fundamental job duties of the employment position the individual with a disability holds or desires. “Essential functions” does not include the marginal functions of the position.

(1) A job function may be considered essential for any of several reasons, including, but not limited to, any one or more of the following:

(A) The function may be essential because the reason the position exists is to perform that function.

(B) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed.

1 (C) The function may be highly specialized, so that the
2 incumbent in the position is hired for his or her expertise or ability
3 to perform the particular function.

4 (2) Evidence of whether a particular function is essential
5 includes, but is not limited to, the following:

6 (A) The employer's judgment as to which functions are
7 essential.

8 (B) Written job descriptions prepared before advertising or
9 interviewing applicants for the job.

10 (C) The amount of time spent on the job performing the
11 function.

12 (D) The consequences of not requiring the incumbent to
13 perform the function.

14 (E) The terms of a collective bargaining agreement.

15 (F) The work experiences of past incumbents in the job.

16 (G) The current work experience of incumbents in similar jobs.

17 (g) "Labor organization" includes any organization that exists
18 and is constituted for the purpose, in whole or in part, of collective
19 bargaining or of dealing with employers concerning grievances,
20 terms or conditions of employment, or of other mutual aid or
21 protection.

22 (h) "Medical condition" means either of the following:

23 (1) Any health impairment related to or associated with a
24 diagnosis of cancer or a record or history of cancer.

25 (2) Genetic characteristics. For purposes of this section,
26 "genetic characteristics" means either of the following:

27 (A) Any scientifically or medically identifiable gene or
28 chromosome, or combination or alteration thereof, that is known
29 to be a cause of a disease or disorder in a person or his or her
30 offspring, or that is determined to be associated with a statistically
31 increased risk of development of a disease or disorder, and that is
32 presently not associated with any symptoms of any disease or
33 disorder.

34 (B) Inherited characteristics that may derive from the
35 individual or family member, that are known to be a cause of a
36 disease or disorder in a person or his or her offspring, or that are
37 determined to be associated with a statistically increased risk of
38 development of a disease or disorder, and that are presently not
39 associated with any symptoms of any disease or disorder.

(i) “Mental disability” includes, but is not limited to, all of the following:

(1) Having any mental or psychological disorder or condition, such as mental retardation, organic brain syndrome, emotional or mental illness, or specific learning disabilities, that limits a major life activity. For purposes of this section:

(A) “Limits” shall be determined without regard to mitigating measures, such as medications, assistive devices, or reasonable accommodations, unless the mitigating measure itself limits a major life activity.

(B) A mental or psychological disorder or condition limits a major life activity if it makes the achievement of the major life activity difficult.

(C) “Major life activities” shall be broadly construed and shall include physical, mental, and social activities and working.

(2) Any other mental or psychological disorder or condition not described in paragraph (1) that requires special education or related services.

(3) Having a record or history of a mental or psychological disorder or condition described in paragraph (1) or (2), which is known to the employer or other entity covered by this part.

(4) Being regarded or treated by the employer or other entity covered by this part as having, or having had, any mental condition that makes achievement of a major life activity difficult.

(5) Being regarded or treated by the employer or other entity covered by this part as having, or having had, a mental or psychological disorder or condition that has no present disabling effect, but that may become a mental disability as described in paragraph (1) or (2).

“Mental disability” does not include sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from the current unlawful use of controlled substances or other drugs.

(j) “On the bases enumerated in this part” means or refers to discrimination on the basis of one or more of the following: race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation.

(k) “Physical disability” includes, but is not limited to, all of the following:

(1) Having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following:

(A) Affects one or more of the following body systems: neurological, immunological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine.

(B) Limits a major life activity. For purposes of this section:

(i) “Limits” shall be determined without regard to mitigating measures such as medications, assistive devices, prosthetics, or reasonable accommodations, unless the mitigating measure itself limits a major life activity.

(ii) A physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss limits a major life activity if it makes the achievement of the major life activity difficult.

(iii) “Major life activities” shall be broadly construed and includes physical, mental, and social activities and working.

(2) Any other health impairment not described in paragraph (1) that requires special education or related services.

(3) Having a record or history of a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment described in paragraph (1) or (2), which is known to the employer or other entity covered by this part.

(4) Being regarded or treated by the employer or other entity covered by this part as having, or having had, any physical condition that makes achievement of a major life activity difficult.

(5) Being regarded or treated by the employer or other entity covered by this part as having, or having had, a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment that has no present disabling effect but may become a physical disability as described in paragraph (1) or (2).

(6) “Physical disability” does not include sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from the current unlawful use of controlled substances or other drugs.

(l) Notwithstanding subdivisions (i) and (k), if the definition of “disability” used in the Americans with Disabilities Act of 1990 (Public Law 101-336) would result in broader protection of the civil rights of individuals with a mental disability or physical

1 disability, as defined in subdivision (i) or (k), or would include any
2 medical condition not included within those definitions, then that
3 broader protection or coverage shall be deemed incorporated by
4 reference into, and shall prevail over conflicting provisions of, the
5 definitions in subdivisions (i) and (k).

6 (m) “Race, religious creed, color, national origin, ancestry,
7 physical disability, mental disability, medical condition, marital
8 status, sex, age, or sexual orientation” includes a perception that
9 the person has any of those characteristics or that the person is
10 associated with a person who has, or is perceived to have, any of
11 those characteristics.

12 (n) “Reasonable accommodation” may include either of the
13 following:

14 (1) Making existing facilities used by employees readily
15 accessible to, and usable by, individuals with disabilities.

16 (2) Job restructuring, part-time or modified work schedules,
17 reassignment to a vacant position, acquisition or modification of
18 equipment or devices, adjustment or modifications of
19 examinations, training materials or policies, the provision of
20 qualified readers or interpreters, and other similar
21 accommodations for individuals with disabilities.

22 (o) “Religious creed,” “religion,” “religious observance,”
23 “religious belief,” and “creed” include all aspects of religious
24 belief, observance, and practice.

25 (p) “Sex” includes, but is not limited to, pregnancy, childbirth,
26 or medical conditions related to pregnancy or childbirth. “Sex”
27 also includes, but is not limited to, a person’s gender, as defined
28 in Section 422.76 of the Penal Code, except that, for purposes of
29 this part, the reference in that definition to the “victim” shall mean
30 the employee or applicant and the reference in that definition to the
31 “defendant” shall mean the employer or other covered entity or
32 person subject to applicable prohibitions under this part.

33 (q) “Sexual orientation” means heterosexuality,
34 homosexuality, and bisexuality.

35 (r) “Supervisor” means any individual having the authority, in
36 the interest of the employer, to hire, transfer, suspend, lay off,
37 recall, promote, discharge, assign, reward, or discipline other
38 employees, or the responsibility to direct them, or to adjust their
39 grievances, or effectively to recommend that action, if, in
40 connection with the foregoing, the exercise of that authority is not



1 of a merely routine or clerical nature, but requires the use of
2 independent judgment.

3 (s) “Undue hardship” means an action requiring significant
4 difficulty or expense, when considered in light of the following
5 factors: ~~(1) the~~

6 *(1) The nature and cost of the accommodation needed,* ~~(2) the~~.

7 *(2) The overall financial resources of the facilities involved in*
8 *the provision of the reasonable accommodations, the number of*
9 *persons employed at the facility, and the effect on expenses and*
10 *resources or the impact otherwise of these accommodations upon*
11 *the operation of the facility,* ~~(3) the~~.

12 *(3) The overall financial resources of the covered entity, the*
13 *overall size of the business of a covered entity with respect to the*
14 *number of employees, and the number, type, and location of its*
15 *facilities,* ~~(4) the~~.

16 *(4) The type of operations, including the composition,*
17 *structure, and functions of the workforce of the entity,* ~~and (5) the~~.

18 *(5) The geographic separateness, administrative, or fiscal*
19 *relationship of the facility or facilities.*

20 SEC. 2. Section 12949 is added to the Government Code, to
21 read:

22 12949. Nothing in this part relating to gender-based
23 discrimination affects the ability of an employer to require an
24 employee to adhere to reasonable workplace appearance,
25 grooming, and dress standards not precluded by other provisions
26 of state or federal law, provided that an employer shall allow an
27 employee to appear or dress consistently with the employee’s
28 gender identity.