

Senate Bill No. 655

Passed the Senate September 12, 2013

Secretary of the Senate

Passed the Assembly September 11, 2013

Chief Clerk of the Assembly

This bill was received by the Governor this _____ day
of _____, 2013, at _____ o'clock ____M.

Private Secretary of the Governor

CHAPTER _____

An act to amend Section 12965 of, and to add Section 12940.5 to, the Government Code, relating to employment.

LEGISLATIVE COUNSEL'S DIGEST

SB 655, Wright. Fair Employment and Housing Act: unlawful practices.

Existing law, the California Fair Employment and Housing Act, protects and safeguards the right and opportunity of all persons to seek, obtain, and hold employment, participate in a labor organization, and participate in employment training or apprenticeship programs without discrimination or abridgment on account of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, or sexual orientation. Existing law authorizes a person claiming to be aggrieved by an alleged unlawful practice under these provisions to file a complaint with the Department of Fair Employment and Housing and authorizes the department to bring a civil action on the behalf of the person in the case of a failure to eliminate an unlawful practice under these provisions.

This bill would provide that, in a claim of discrimination or retaliation under these provisions, the person claiming to have been aggrieved shall prevail if he or she has proven that a protected characteristic or activity was a substantial motivating factor, as defined, in the employment action or decision. If an employer pleads and proves that it would have made the same employment action or decision at the same time, without considering the protected characteristic or activity, the remedies available to the employee would be limited as specified. In addition, if an employer pleads and proves that it would have made the same employment action or decision at the same time without considering the protected characteristic or activity, the bill would authorize injunctive relief and attorney's and expert's fees against the employer and would require a specified civil penalty to be paid by that employer to the employee.

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

SECTION 1. Section 12940.5 is added to the Government Code, to read:

12940.5. (a) For purposes of a claim of discrimination or retaliation under this article, the person claiming to be aggrieved shall prevail if he or she has proven to the trier of fact that the protected characteristic or activity was a substantial motivating factor in the employment action or decision.

(b) For purposes of this section, “substantial motivating factor” means a factor that contributed to the employment action or decision. It shall be more than a remote or trivial factor, but need not be the only or main cause of the employment action or decision. Evidence that the person claiming to be aggrieved had a protected characteristic at the time of the employment action or decision is not, by itself, sufficient proof that the protected characteristic was a substantial motivating factor.

(c) Once an individual proves a claim of discrimination or retaliation under this article, if an employer pleads and proves that it would have made the same employment action or decision at the same time without considering the protected characteristic or activity, the remedies available to the employee shall be limited to the remedies provided in paragraph (2) of subdivision (b) of Section 12965.

SEC. 2. Section 12965 of the Government Code is amended to read:

12965. (a) In the case of failure to eliminate an unlawful practice under this part through conference, conciliation, mediation, or persuasion, or in advance thereof if circumstances warrant, the director in his or her discretion may bring a civil action in the name of the department on behalf of the person claiming to be aggrieved. Prior to filing a civil action, the department shall require all parties to participate in mandatory dispute resolution in the department’s internal dispute resolution division free of charge to the parties in an effort to resolve the dispute without litigation. In any civil action, the person claiming to be aggrieved shall be the real party in interest and shall have the right to participate as a party and be represented by his or her own counsel. The civil action shall be brought in any county in which unlawful practices are alleged to have been committed, in the county in which records relevant to

the alleged unlawful practices are maintained and administered, or in the county in which the person claiming to be aggrieved would have worked or would have had access to public accommodation, but for the alleged unlawful practices. If the defendant is not found in any of these counties, the action may be brought within the county of the defendant's residence or principal office.

For any complaint treated by the director as a group or class complaint for purposes of investigation, conciliation, mediation, or civil action pursuant to Section 12961, a civil action shall be brought, if at all, within two years after the filing of the complaint. For any complaint alleging a violation of Section 51.7 of the Civil Code, a civil action shall be brought, if at all, within two years after the filing of the complaint. For all other complaints, a civil action shall be brought, if at all, within one year after the filing of a complaint. If the director determines, pursuant to Section 12961, that a complaint investigated as a group or class complaint under Section 12961 is to be treated as a group or class complaint for purposes of conciliation, mediation, or civil action as well, that determination shall be made and shall be communicated in writing within one year after the filing of the complaint to each person, employer, labor organization, employment agency, or public entity alleged in the complaint to have committed an unlawful practice.

(b) (1) If a civil action is not brought by the department within 150 days after the filing of a complaint, or if the department earlier determines that no civil action will be brought, the department shall promptly notify, in writing, the person claiming to be aggrieved that the department shall issue, on his or her request, the right-to-sue notice. This notice shall indicate that the person claiming to be aggrieved may bring a civil action under this part against the person, employer, labor organization, or employment agency named in the verified complaint within one year from the date of that notice. If the person claiming to be aggrieved does not request a right-to-sue notice, the department shall issue the notice upon completion of its investigation, and not later than one year after the filing of the complaint. A city, county, or district attorney in a location having an enforcement unit established on or before March 1, 1991, pursuant to a local ordinance enacted for the purpose of prosecuting HIV/AIDS discrimination claims, acting on behalf of any person claiming to be aggrieved due to HIV/AIDS

discrimination, may also bring a civil action under this part against the person, employer, labor organization, or employment agency named in the notice. The superior courts of the State of California shall have jurisdiction of those actions, and the aggrieved person may file in these courts. An action may be brought in any county in the state in which the unlawful practice is alleged to have been committed, in the county in which the records relevant to the practice are maintained and administered, or in the county in which the aggrieved person would have worked or would have had access to the public accommodation but for the alleged unlawful practice, but if the defendant is not found within any of these counties, an action may be brought within the county of the defendant's residence or principal office. A copy of any complaint filed pursuant to this part shall be served on the principal offices of the department. The remedy for failure to send a copy of a complaint is an order to do so. Those actions may not be filed as class actions or may not be maintained as class actions by the person or persons claiming to be aggrieved where those persons have filed a civil class action in the federal courts alleging a comparable claim of employment discrimination against the same defendant or defendants.

(2) In a civil action brought pursuant to this subdivision, if, under subdivision (c) of Section 12940.5, an individual proves a claim of discrimination or retaliation under this article, but an employer pleads and proves that it would have made the same employment action or decision at the same time without considering the protected characteristic or activity, the employee shall not be entitled to reinstatement, back pay, compensatory damages, or declaratory relief. The employee may recover injunctive relief and attorney's fees and costs, including expert witness fees, pursuant to subdivision (d). The court shall also grant a statutory penalty of up to twenty-five thousand dollars (\$25,000) to be awarded directly to the employee. This paragraph shall not affect the rights and remedies provided under this section if an employer fails to plead and prove that it would have made the same employment action or decision at the same time without considering the protected characteristic or activity.

(c) A court may grant as relief in any action filed pursuant to subdivision (a) any relief a court is empowered to grant in a civil action brought pursuant to paragraph (1) of subdivision (b), in

addition to any other relief that, in the judgment of the court, will effectuate the purpose of this part. This relief may include a requirement that the employer conduct training for all employees, supervisors, and management on the requirements of this part, the rights and remedies of those who allege a violation of this part, and the employer's internal grievance procedures. In addition, in order to vindicate the purposes and policies of this part, a court may assess against the defendant, if the civil complaint or amended civil complaint so prays, a civil penalty of up to twenty-five thousand dollars (\$25,000) to be awarded to a person denied any right provided for by Section 51.7 of the Civil Code, as an unlawful practice prohibited under this part.

(d) In a civil action brought under this section, the court may award to the prevailing party, including the department, reasonable attorney's fees and costs, including expert witness fees.

(e) (1) Notwithstanding subdivision (b), the one-year statute of limitations, commencing from the date of the right-to-sue notice by the Department of Fair Employment and Housing, to the person claiming to be aggrieved, shall be tolled when all of the following requirements have been met:

(A) A charge of discrimination or harassment is timely filed concurrently with the Equal Employment Opportunity Commission and the Department of Fair Employment and Housing.

(B) The investigation of the charge is deferred by the Department of Fair Employment and Housing to the Equal Employment Opportunity Commission.

(C) A right-to-sue notice is issued to the person claiming to be aggrieved upon deferral of the charge by the Department of Fair Employment and Housing to the Equal Employment Opportunity Commission.

(2) The time for commencing an action for which the statute of limitations is tolled under paragraph (1) expires when the federal right-to-sue period to commence a civil action expires, or one year from the date of the right-to-sue notice by the Department of Fair Employment and Housing, whichever is later.

(3) This subdivision is intended to codify the holding in *Downs v. Department of Water and Power of City of Los Angeles* (1997) 58 Cal.App.4th 1093.

(f) (1) Notwithstanding subdivision (b), the one-year statute of limitations, commencing from the date of the right-to-sue notice

by the Department of Fair Employment and Housing, to the person claiming to be aggrieved, shall be tolled when all of the following requirements have been met:

(A) A charge of discrimination or harassment is timely filed concurrently with the Equal Employment Opportunity Commission and the Department of Fair Employment and Housing.

(B) The investigation of the charge is deferred by the Equal Employment Opportunity Commission to the Department of Fair Employment and Housing.

(C) After investigation and determination by the Department of Fair Employment and Housing, the Equal Employment Opportunity Commission agrees to perform a substantial weight review of the determination of the department or conducts its own investigation of the claim filed by the aggrieved person.

(2) The time for commencing an action for which the statute of limitations is tolled under paragraph (1) shall expire when the federal right-to-sue period to commence a civil action expires, or one year from the date of the right-to-sue notice by the Department of Fair Employment and Housing, whichever is later.

Approved _____, 2013

Governor