



FEHA FAIR HOUSING REGULATIONS

Harassment and Retaliation

Article 12, 2 C.C.R. Sections 12120-12130

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GENERAL ISSUES

Send questions to: Shalineer.hunter@dfeh.ca.gov

For MCLE credit: Send name, bar number, address, and phone number to

DFEHMCLEProvider@dfeh.ca.gov

Regulations are on DFEH website:

<https://www.dfeh.ca.gov/legal-records-and-reports/laws-and-regulations/>

Citation example: 2 C.C.R. section 12005 (2020)





WHAT WE WILL COVER:

1. What is harassment?
 - a. Quid pro quo harassment
 - b. Hostile environment harassment
2. What is retaliation?
 - a. Protected activities
 - b. Adverse action
 - c. Proving retaliation
 - d. Retaliation in evictions
3. Q&A





POLL # 1

How much experience do you have with fair housing?

- A. Expert
- B. Some knowledge
- C. New to fair housing





POLL #2

Which of the following describes you/your interest in this presentation?

- A. Tenant lawyer/advocate;
- B. Landlord lawyer/advocate;
- C. Tenant;
- D. Landlord;
- E. Fair Housing Counselor;
- F. Condo Owner/Attorney;
- G. State or Local Government; or
- H. Other





WHAT IS HARASSMENT?

§ 12120; GOV. CODE § 12927(C)

FEHA prohibits harassment against anyone based on membership in a protected class in connection with a housing accommodation. Harassment is considered a form of discrimination.

Examples:

1. Manager harassing tenant or applicant
2. Maintenance or other rental staff harassing tenant or applicant
3. HOA board harassing resident or buyer/applicant
4. Resident harassing another resident





WHO IS PROTECTED FROM HARASSMENT? § 12120(E)

Anyone who is subjected to harassment in connection with a housing accommodation is protected if the harassment is based on:

1. The person's protected class status
2. A perception that the person is a member of a protected class
3. The person has helped or encouraged someone else to exercise their rights under FEHA





TYPES OF HARASSMENT

§ 12120 (A)

There are two types of harassment:

1. Quid Pro Quo (QPQ)
2. Hostile environment

Some situations involve both types of harassment.





TYPES OF HARASSMENT: QPQ § 12120(A)(1)

Quid pro quo = this for that

1. Unwelcome request or demand to do something
2. Because of protected class status
3. In exchange for a benefit regarding housing





SOME EXAMPLES OF QPQ HARASSMENT (1 OF 2)

Most, but not all, QPQ harassment is sexual harassment:

1. Owner tells applicant he will lower security deposit if she “dates” him
2. Manager offers to allow tenant to keep her pet if she gives him nude photos
3. Owner tells tenant he will not evict her for non-payment of rent if she engages in sex act





SOME EXAMPLES OF QPQ HARASSMENT (2 OF 2)

4. Bank loan officer tells an applicant that her home mortgage application is “borderline,” but he can “pull a few strings” if the applicant agrees to have sex with him

NOTE: Constitutes harassment even if tenant/applicant agrees (§ 12120 (a)(1))





TYPES OF HARASSMENT: HOSTILE ENVIRONMENT (§ 12120(A)(2))

Unwelcome conduct that is:

1. Sufficiently severe or pervasive
2. As to interfere with housing in some way
 - Interferes with use or enjoyment of housing;
 - Creates different terms or conditions; or
 - Constitutes an adverse action





HOSTILE ENVIRONMENT FACTORS

Look at totality of circumstances, including:

1. Nature of conduct
2. Context of incident(s)
3. Severity, frequency, duration, location
4. Relationships between alleged harasser and alleged victim





REASONABLE PERSON STANDARD

Whether harassment is sufficiently severe or pervasive to constitute a hostile environment is viewed using an **objective** standard:

Would a reasonable person in the victim's position consider the harassment severe or pervasive enough to interfere with use or enjoyment of housing?





TYPES OF CONDUCT THAT MAY CONSTITUTE HARASSMENT (§ 12120(C))

1. **Written harassment**, such as sexually explicit photos, racial epithets
2. **Verbal harassment**, such as derogatory comments, sexually explicit jokes, sexual remarks or demands
3. **Physical harassment**, such as gestures, touching, following, trying to kiss or hug, impeding, spying
4. **Revealing private info** or threatening to reveal
5. Any forms of **interference, coercion, intimidation** because of protected class





HOW MANY INCIDENTS? (§ 12120(D))

Even one incident may be sufficient to constitute unlawful harassment

1. One QPQ demand or request will nearly always constitute harassment
2. One incident may also constitute hostile environment harassment if it sufficiently severe
 - Sexual assault
 - Racial epithets or slurs





DEFENSES?

1. The absence of evidence of psychological or physical harm is NOT a defense (§ 12120 (a)(2)(A)(ii))
2. Title VII (employment) affirmative defenses re vicarious liability are NOT applicable (§ 12120 (b))





QUIZ 1: TERESA (1 OF 2)

Facts: Teresa rents out the basement apartment in a house. The owner lives in the main house. The owner has asked her to go on a date with him, or “party” with him many times. She is 22 years old. He is 48. She always says no. He told her that she is not allowed to have boyfriends over. Several times, he has commented about her body and how it looks in her clothes. (“Your butt looks sexy in those pants.”) She has seen him peeping into her windows.





QUIZ 1: TERESA (2 OF 2)

Teresa put up window blinds to try to block his view. But he can still see in between the window frame and the blinds. She always changes clothes in the bathroom now. She covered her mirror so that he cannot see her reflection when he looks inside. She has been trying to move out, but she can't find another place that is affordable.

Is the owner's conduct illegal harassment?





QUIZ 1 – CHOICES

- A. This does not constitute illegal harassment.
- B. This constitutes illegal harassment based on sex, and it's quid pro quo harassment.
- C. This constitutes illegal harassment based on sex, and it's hostile environment harassment.





QUIZ 1 – ANSWER (1 OF 2)

This constitutes illegal harassment because the owner has created a hostile environment based on sex.

- Teresa did not welcome the conduct.
- The conduct was sufficiently severe or pervasive that it interfered with Teresa’s use and enjoyment of her apartment.
- Teresa’s actions show that it interfered with her use and enjoyment. And a reasonable woman in her position would likely agree.





QUIZ 1 – ANSWER (2 OF 2)

- Also, harassment was frequent and over a long period of time, in and around her home, perpetrated by someone much older and in a position of power over her.

22 § CCR 12120 (2) and (2)(A)





WHO MAY BE LIABLE FOR HARASSMENT? (§ 12010) (1 OF 2)

1. The harasser
2. If the harasser is an employee or agent of the owner or a management company, the owner or management company may be liable too:
 - **Direct liability** if the principal knew or should have known and failed to correct or end conduct promptly
 - **Vicarious liability** in nearly all circumstances





WHO MAY BE LIABLE FOR HARASSMENT? (§ 12010) (2 OF 2)

In the case of harassment by a third-party, *such as another resident or an outside service provider*, the housing provider or management company may be liable if:

1. *The provider/company knew or should have known about harassment;*
2. *Had power to correct it; and,*
3. *Failed to take prompt action to correct or end harassment.*





QUIZ 2: OSCAR (1 OF 2)

Facts: Oscar is a tenant of Latino origin in an apartment complex operated by ABC Management Company and owned by Larry Landlord (LL). LL has an agreement with ABC to employ resident managers. ABC hired a manager named Igor. Igor has used ethnic slurs toward Oscar. Igor told Oscar he will be evicted if he does not keep his friends from visiting him, and used a derogatory slur to describe Oscar's Latino friends. Igor says they are giving the building a bad reputation because they look like "gang bangers."





QUIZ 2: OSCAR (2 OF 2)

Oscar emailed ABC management to tell them about Igor's conduct. ABC did not respond. Oscar did not contact the owner. Oscar does not know how to reach the owner.





QUIZ 2: CHOICES

Who is liable for harassment, if anyone?

- A. Only Igor is liable for harassment
- B. Igor and ABC Management are liable
- C. Igor, ABC, and LL are liable
- D. No one is liable, because this does not constitute harassment





QUIZ 2: ANSWER

The answer is C:

1. Igor is directly liable for his own QPQ and hostile environment harassment (§ 12010(a)(1)(A))
2. ABC is directly liable, because it is Igor's employer. ABC knew of the harassment but failed to take prompt action to end it. (§ 12010(a)(1)(B))
3. LL is either directly or vicariously liable. He may be directly liable if facts support it ("case-by-case basis") (§§ 12010(a)(1)(B) and (b))





§ 12130(A): WHAT IS RETALIATION?

It is unlawful for any person to take adverse action when a purpose for the adverse action is retaliation for engaging in protected activity.

FEHA prohibits retaliation against individuals who exercise their rights to be free from discriminatory or harassing housing practices.





§ 12130(B): WHO IS PROTECTED?

Any person who alleges that they have been subject to adverse action because they engaged in a protected activity.

For purposes of a retaliation claim, the person does not need to fall within a protected class or have a claim under any other provision of the Act.

If you engage in activity to protect others under the Act, you can be covered.





§ 12130(C): WHAT IS A PROTECTED ACTIVITY?

Protected activities include any exercise of rights to be free from discrimination or harassment.

It is a broad definition. The Regulations provide numerous examples, but other conduct may also be protected activity.





§ 12130(C): EXAMPLES OF PROTECTED ACTIVITY (1 OF 3)

-Making a complaint, testifying, assisting or participating in any proceeding under any law addressing fair housing or housing discrimination.

This includes FEHA, the ADA, the federal Fair Housing act, Section 504 of the Rehabilitation Act, the Unruh Act, or any similar federal, state or local law.

-Opposing any housing practice you believe to be discriminatory or unlawful.





§ 12130(C): EXAMPLES OF PROTECTED ACTIVITY (2 OF 3)

- Informing law enforcement or government agencies about any housing practice you believe to be discriminatory or unlawful.
- Asserting rights protected by any fair housing laws.
- Aiding or encouraging someone to exercise their fair housing rights.
- Meeting with others to address potential or actual violations of fair housing laws. This including joining or supporting an organization or organizing to protect fair housing rights.





§ 12130(C): EXAMPLES OF PROTECTED ACTIVITY (3 OF 3)

- Requesting reasonable accommodations or modifications for yourself or others, regardless of the outcome.
- Any other action related to access to statutory or constitutional remedies for violations of fair housing laws or laws prohibiting housing discrimination.





§ 12005(B): WHAT IS AN ADVERSE ACTION?

“Adverse action” means any action that harms or has a negative effect on an aggrieved person. It is a broad definition. The Regulations provide numerous examples, but other conduct may also be protected.

The adverse action need not be related directly to the dwelling or housing opportunity. For example, filing false allegations about a tenant with a tenant's employer may constitute adverse action.

For adverse action to be retaliatory, it must be in response to a protected activity.





§ 12005(B): EXAMPLES OF ADVERSE ACTION IN RENTAL HOUSING (1 OF 4)

- Failing or refusing to rent or lease property or to continue to rent or lease the property
- Failing or refusing to add a household member
- Reducing a tenant subsidy
- Increasing the rent or reducing services
- Changing any terms, conditions or privileges
- Threatening to or filing false reports with tenant reporting agencies





§ 12005(B): EXAMPLES OF ADVERSE ACTION IN RENTAL HOUSING (2 OF 4)

- Locking individuals out of or restricting access to all or part of the premises;
- Taking any action prohibited by Article 24 regarding the consideration of criminal history information.





§ 12005(B): EXAMPLES OF ADVERSE ACTION IN RENTAL HOUSING (3 OF 4)

- Harassment
- Termination, notices to quit or evictions
- Failing to provide a reasonable accommodation or modification
- Any other discriminatory housing practice.





§ 12005(B): EXAMPLES OF ADVERSE ACTION IN RENTAL HOUSING (4 OF 4)

- Making inquiries about, threatening to report citizenship status, or filing reports about citizenship with government agencies in retaliation (unless required by a federal program.) This incorporates conduct forbidden by Cal. Civil Code sections 1940.2(a), 1940.3(b), 1940.35, 1942.5, and Cal. Code of Civ. Pro 1161.4(a)





§ 12005(B): OTHER EXAMPLES OF ADVERSE ACTION

Adverse action is not limited to landlord-tenant issues. The following can also constitute adverse action:

- Refusing to sell a dwelling or residential real estate or otherwise failing or refusing to enter into a residential real estate related transaction;
- Refusing to provide financial assistance related to a dwelling or residential real estate; or
- Taking any other action that has an adverse effect on an aggrieved person.





§ 12005(D): PROVING RETALIATION: BURDEN SHIFTING RULE (1 OF 2)

To prove a *prima facie* case, an aggrieved person must show 3 things:

1. The person was engaged in a protected activity
2. The respondent subjected the person to an adverse action, and
3. There is a causal link between the protected activity and the adverse action.





§ 12005(D): PROVING RETALIATION: BURDEN SHIFTING RULE (2 OF 2)

If an aggrieved person establishes a *prima facie* case, the respondent must show that there is a legitimate, non-discriminatory reason for the adverse action.

If the respondent offers a legitimate, non-discriminatory reason, the aggrieved person must show that the proffered reason is pretextual or false.





§ 12005(E): PURPOSE

Retaliation does not need to be the only motivating factor for a retaliatory action. So long as it formed some non-trivial or remote factor basis for the adverse action, it is sufficient to show retaliation.

Evidence showing that the adverse action was closely related in time to the protected activity can create an inference of retaliation, but it is not the only way to show retaliation.





§ 12005(F): UNLAWFUL DETAINERS (EVICTIONS)

Retaliation can be raised as an affirmative defense to an unlawful detainer.

Raising retaliations as a good faith affirmative defense does not in and of itself constitute an impermissible delay of an unlawful detainer action.





QUIZ 3

John, a white man, has become friends with a neighbor in the building, Akeem. Bill, the manager, has been asking questions about Akeem's immigration status and hinting that he will call ICE if Akeem doesn't produce proof of citizenship. John complains about this to Bill and provides him a DFEH brochure. The next week, John gets a 3 day notice, alleging continual lease violations for doing laundry later than permitted. John has lived in the building for 2 years, and while he sometimes does do his laundry late due to his work schedule, Bill has never mentioned a problem before.

Is the notice retaliatory?





QUIZ 3 - CHOICES

- A. No, because John is not a member of a protected class.
- B. No, because John admittedly violated the lease provision about laundry.
- C. No, because John did not file a complaint with DFEH.
- D. Yes, this is presumptively retaliatory.





QUIZ 3 – ANSWER

Answer D, Yes, is correct. The Notice is likely to be retaliatory. You do not have to be a member of a protected class to raise a retaliation claim so long as you engage in a protected activity. John engaged in protected activity when he acted on behalf of a member of a protected class to assert Fair Housing rights. The timing of the notice raises an inference that it is retaliatory. The landlord may argue that it was based on the laundry violation, but if any part of the motive was based on Bill's provision of DFEH materials it will be considered retaliatory.





QUIZ 4

Mary and Alejandra approach Real Estate Agency to buy a house together. Real Estate Agency is one of the few reputable agencies in their small town. The assigned agent makes comments about “2 girls” being married, and wants proof of Alejandra’s citizenship. Mary and Alejandra ask to speak to the Manager and complain about the comments, and then ask Real Estate Agency to provide a different agent to assist them. Real Estate Agency refuses, says the agent’s comments were misunderstood, and tells them to go elsewhere.

Is Real Estate Agency’s refusal to help Mary and Alejandra retaliatory?





QUIZ 4 - CHOICES

- A. No, because Real Estate Agency didn't do anything wrong, and the agent's comments had nondiscriminatory explanations.
- B. No, because all Mary and Alejandra did was talk to the manager of Real Estate Agency.
- C. No, because Real Estate Agency is not required to provide services to someone who complains about its staff.
- D. Yes.





QUIZ 4 - ANSWER

Correct Answer is D, yes. Refusal to serve someone is an adverse action. Complaining to management about comments perceived as discriminatory, even if they were not intended as discriminatory, is a protected activity. The adverse action occurred closely in time to the protected activity, thus creating an inference of retaliation. Even if Real Estate Agency also acted to protect its staff, the action is retaliatory if one of the motives was to retaliate against Mary and Alejandra for raising concerns about discrimination.





RESOURCES

Department of Fair Employment & Housing

Website: www.dfeh.ca.gov

DFEH Housing Provider Section in new website:

<https://www.dfeh.ca.gov/housing/providerresources/>

Fair Chance Housing Video:

<https://www.youtube.com/watch?v=fSXlxl-acM0&feature=youtu.be>





UPCOMING REGULATIONS

Background information and rationale for adopted regulations and new proposed fair housing regulations can be found on the Fair Employment and Housing Council page of the DFEH website:

<https://www.dfeh.ca.gov/fehouncil/>

Upcoming proposed Fair Housing Regulations include reasonable modifications, intentional discrimination, discriminatory advertisements and statements, and more.





UPCOMING WEBINARS/MCLE

Specific Practices Related to Land Use: May 13, 2020

– Registration info at:

https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2020/01/FEHA_RegulationsSeries.pdf

For MCLE credit: Send name, bar number, address, and phone number to

DFEHMCLEProvider@dfeh.ca.gov

