LGBTQ Anti-Discrimination Law in California: Some Authorities

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*NOTE. This list compiles California cases mentioned during today's training and a sampling of other cases. It is **not** intended as an exhaustive compilation of LGBTQ-related caselaw. Advocates should conduct their own legal research and confer with outside counsel. For questions, additions to the list, or concerns, please contact David Nahmias (dnahmias@impactfund.org)*.

FEHA and Employment Discrimination

Gov. Code § 12926. *Definitions*
Gov. Code § 12940. *FEHA – Prohibition against discrimination in employment*.
Gov. Code §§ 12950-12950.1. *FEHA – Sexual harassment trainings.*
Cal. Code Regs., tit. 2, §§ 11030-34. *FEHA – regulations on transgender rights.*

Legal Standard

- *Brooks v. City of San Mateo*, 229 F.3d 917, 924 (9th Cir. 2000) ("Title VII and FEHA operate under the same guiding principles.").
- *Lyle v. Warner Brothers Television Prods.*, 38 Cal. 4th 264, 278 (2000) ("California courts frequently seek guidance from Title VII decisions when interpreting the FEHA and its prohibitions against sexual harassment.").
- *Franks v. City of Santa Ana*, 735 Fed. App'x 305, 307 (9th Cir. 2018) ("To show that harassment is related to gender or sexual orientation for purposes of FEHA, a plaintiff must show that (1) the plaintiff's gender or sexual orientation is "a substantial factor in the discrimination" and (2) if the plaintiff had a different gender or sexual orientation, the plaintiff would not have been treated in the same manner.").

Akoidu v. Greyhound Lines, Inc., No. B147046, 2002 WL 399476 (Cal. Ct. App. 2002)

- Affirmed summary judgment for defendant; plaintiff failed to establish that homophobic comments were directed at him "because he was a man or because of any sexual attraction," but "simply a reflection of personal animosity" toward him.

Hope v. Cal. Youth Academy, 134 Cal. App. 4th 577 (Ct. App. 2006)

- Issue: Do ongoing "derogatory remarks based on [employee's] sexual orientation" amount to a hostile work environment in violation of FEHA? *See id.* at 580.
- Holding: Yes. "We conclude that substantial evidence supports the jury's determinations that Hope was subjected to harassment because of his sexual orientation." *Id.* at 589.
- Of Note: The plaintiff also alleged harassment based on HIV status, but the court did not discuss this ground as "we ultimately conclude that the evidence supports liability on that theory." *Id.* at 589 n.1.

Husman v. Toyota Motor Credit Corp., 12 Cal. App. 5th 1168 (Ct. App. 2017).

- Issue: Does workplace harassment related to a gay employee's sexual orientation violate FEHA if it was based on "invidious sex or gender stereotyping related to his sexual orientation—the perception that he was 'too gay'"? *Id.* at 1173.
- Holding: Yes. "Husman has established a triable issue of material fact as to whether invidious sex or gender stereotyping related to his sexual orientation was a substantial motivating factor for his termination." *Id.* at 1192 n.12.
- Of Note: "Although perhaps less flagrantly offensive than the criticisms offered by Price Waterhouse partners, these [homophobic] remarks reveal the same kind of stereotypical thinking that led those partners not to promote Ann Hopkins." *Id.* at 1191.

Kovatch v. Cal. Cas. Mgmt. Co., 65 Cal. App. 4th 1256 (Ct. App. 1998)

- Issue: Could a jury find that constructive discharge occurred where a supervisor's repeated homophobic and derogatory remarks created work conditions that were "intolerable based on sexual orientation discrimination?"
- Holding: Yes. There was a "triable issue of fact as to whether a reasonable employee in Kovatch's position would have found the conditions in [defendant's] office intolerable because of harassment on the basis of sexual orientation." *Id.* at 1270.
- Of Note: Evidence showed that the supervisor "harbored anti-gay sentiments, that he disliked Kovatch because Kovatch was gay, and that he was determined to end Kovatch's employment because of Kovatch's sexual orientation." *Id.* at 1270. Moreover, the repeated evidence of "antigay bias" could show a continuous pattern of discrimination. *Id.* at 1270-71. *Note that this case arose under the Labor Code, but FEHA has since incorporated those provisions.*

Pearl v. City of Los Angeles, 36 Cal. App. 5th 475 (Ct. App. 2019)

- Upholds jury verdict for plaintiff; includes *perceived* sexual orientation as protected characteristic.

Terris v. Cty. of Santa Barbara, No. B268849, 2017 WL 4683778 (Ct. App. Oct. 19, 2017) (unpublished)

- Issue: Can a lesbian employee claim sexual orientation discrimination if her employer did not know of her sexual orientation when making homophobic comments, and she came out later? *See id.* at *4.
- Holding: No. "[A] huge gap in the causal nexus" between derogatory remarks and an adverse employment action and the fact that the employer "did not know Terris's sexual orientation and his 'stray remarks' were not directed at her" renders no triable issue of fact as to sexual orientation discrimination. *See id.*
- Of Note: "[B]igoted language alone does not support a FEHA case," *id.* at *4, and "proof of 'discriminatory animus' is necessary," *id.*

Scotch v. Art Inst. of Cal., 173 Cal. App. 4th 986 (Ct. App. 2009)

- Issue: Does an HIV-positive employee's failure to have adequate credentials amount to a legitimate nondiscriminatory reason to reduce his schedule and thus avoid employer liability for disability discrimination under FEHA? *See id.* at 1005.
- Holding: Yes. Although it was undisputed that the plaintiff "was HIV-positive and therefore have a physical disability under the FEHA," *id.* at 1006, he did not establish that the employer's

nondiscriminatory reason was pretext giving rise to an inference that it "discriminate[d] against him for being HIV-positive," *id.* at 1010.

Healthcare Access

- *Minton v. Dignity Health*, 39 Cal. App. 5th 1155 (Ct. App. 2019) (Unruh Act bars religious hospital from denying gender-affirming care as discrimination based on gender identity).

- *N. Coast Women's Care Med. Grp., Inc. v. Super. Ct.* (Ct. App. 2008) (Free exercise does not guarantee right to deny fertility treatment to unmarried lesbian parents).

- *Flack v. Wis. Dep't of Health Serv.*, 328 F. Supp. 3d 931, 950 (W.D. Wis. 2018) (holding that state Medicaid exclusion barring gender affirmation care is "textbook discrimination based on sex" prohibited by Title IX and Section 1557, as well as unconstitutional under equal protection).

- *Tovar v. Essentia Health*, No. 16-100, 2018 WL 4516949, at *3 (D. Minn. 2018) (holding that a private healthcare plan that categorically excludes all health services related to gender transition as violating Section 1557).

- *Prescott v. Rady Children's Hosp.-San Diego*, 265 F. Supp. 3d 1090, 1099 (S.D. Cal. 2017) (holding that, "Because Title VII, and by extension Title IX, recognize that discrimination on the basis of transgender identity is discrimination on the basis of sex, the Court interprets the ACA to afford the same protections.").

Additional California Civil Rights Statutes

- *Duronslet v. Cty. of Los Angeles*, 266 F. Supp. 3d 1213, 1217 (C.D. Cal. 2017) (Unruh Act) (finding that "The Act defines "sex" discrimination to include discrimination based on gender identity").

- *Koebke v. Bernardo Heights Country Club*, 36 Cal. 4th 824, 846 (2005) (Unruh Act) (finding that "discrimination against registered [same-sex] domestic partners in favor of married couples is a type of discrimination that falls within the ambit of the Act").

- *Donovan v. Poway Unified Sch. Dis.*, 167 Cal. App. 4th 567 (Ct. App. 2008) (Ed. Code § 220) (upholding jury verdict that school district showed deliberate indifference and failed to peer sexual orientation harassment).

Some Historical, Superseded LGBTQ Cases in California

- *In re Marriage Cases*, 43 Cal. 4th 757 (2008) (finding sexual orientation a suspect class subject to strict scrutiny and striking down Family Code designation of marriage to opposite-sex couples). *Superseded by Proposition 8, which was later struck down by Hollingsworth v. Perry, 570 U.S. 693 (2013).*

- *Hubert v. Williams*, 133 Cal. App. 3d Supp. 1, 5 (Ct. App. 1982) (finding "homosexuals to be a class protected by the Unruh Act."). *Superseded and affirmed by amendments to the Unruh Act*.

- *Gay Law Students Ass'n v. Pac. Tel & Tel. Co.*, 24 Cal. 3d 458, 488 (1979) (finding that "struggle of the homosexual community for equal rights, particularly in the field of employment, must be protected as a political activity," including coming out, and protected by the Labor Code). *Superseded by amendments to Cal. Labor Code § 1102.1, later repealed by the FEHA amendments.*

- *G.B. v. Lackner*, 80 Cal App. 3d 64, 71 (Ct. App. 1978) (finding that Medi-Cal cannot deny coverage for gender affirmation surgery because "[i]t is clearly impossible to conclude that transsexual surgery is cosmetic surgery"); *J.D. v. Lackner*, 80 Cal. App. 3d 90 (Ct. App. 1978) (same). *Superseded and affirmed by the Insurance Gender Nondiscrimination Act (2005)*.

Federal Law

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)

- Issue: Is an employer's reliance on sex stereotypes in part to make an adverse employment action discrimination "because of . . . sex" in violation of Title VII?
- Holding: Yes. "As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for '[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'" *Id.* at 251.
- Of Note: The plurality held that that the plaintiff must show that "her gender played a motivating part in an employment decision." *Id.* at 258.

Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998)

- Issue: Does workplace harassment violate Title VII "when the harasser and the harassed employee are of the same sex"? *Id.* at 76.
- Holding: Yes. "[W]e conclude that sex discrimination consisting of same-sex sexual harassment is actionable under Title VII." *Id.* at 82.
- Of Note: "[M]ale-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Id.* at 79. Also, "harassing conduct need not be motived by sexual desire to support an inference of discrimination on the basis of sex." *Id.* at 80.

E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018), *cert. granted* 139 S. Ct. 1599 (2019).

- Issue: Does termination of a transgender employee (1) "because of her failure to conform to sex stereotypes" *and* (2) "on the basis of her transgender and transitioning status" both violate Title VII? *See id.* at 571.
- Holding: Yes. (1) "[A]n employer engages in unlawful discrimination even if it expects both biologically male and female employees to conform to certain notions of how each should behave." *Id.* at 574. Also, (2) because "it is analytically impose to fire an employee based on that employee's status as a transgender person without being motivated, at least in part, by the employee's sex," *id.* at 575, and "Title VII protects transgender persons because of their

transgender or transitioning status, because transgender or transitioning status constitutes an inherently gender non-conforming trait," *id.* at 577.

- Of Note: The court also rejected the defendant's affirmative defense under RFRA. *See id.* at 581-600. The Supreme Court granted certiorari but limited to the following questions: "Whether Title VII prohibits discrimination against transgender people based on (1) their status as transgender (2) sex stereotyping under *Price Waterhouse v. Hopkins*[.]" 139 S. Ct. 1599.
- See also: *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005); *Smith v. City of Salem*; 378 F.3d 566 (6th Cir. 2004).

Schwenk v. Hartford, 204 F.3d 1187 (9th Cir. 2000) (GMVA)

- Issue: Under the Gender Motivated Violence Act (part of the Violence Against Women Act), can a crime committed against a transgender amount to "gender-motivated" violence?
- Holding: Yes. "[U]nder *Price Waterhouse*, 'sex' under Title VII encompasses both sex—that is, the biological differences between men and women—*and* gender." *Id.* at 1202. Under Title VII and the GMVA, "the terms 'sex' and 'gender' have become interchangeable." *Id.*
- Of Note: "The initial judicial approach taken in cases such as *Holloway* [*v. Arthur Anderson & Co.*, 566 F.2d 659 (9th Cir. 1977), holding that Title VII does not cover transgender status] has been overruled by the logic and language of *Price Waterhouse*." *Id.*
- See also: *Kastl v. Maricopa Cty. Comm. College*, 325 F. App'x 492 (9th Cir. 2009) (unpublished) (in Title VII and Title IX action, holding, "After *Hopkins* and *Schwenk*, it is unlawful to discriminate against a transgender (or any other) person because he or she does not behave in accordance with an employer's expectations for men or women.").

Hively v. Ivy Tech Comm. Coll. of Indiana, 853 F.3d 339 (7th Cir. 2017) (en banc)

- Issue: Is "discrimination on the basis of sexual orientation . . . a form of sex discrimination"? *Id.* at 341.
- Holding: Yes. "[A] person who alleges that she experienced employment discrimination on the basis of her sexual orientation has put forth a case of sex discrimination for Title VII purposes." *Id.* at 351-52.
- Of Note: "Viewed through the lens of the gender non-conformity line of cases, Hively represents the ultimate case of failure to conform to the female stereotype . . . : she is not heterosexual." *Id.* at 346.

Zarda v. Altitude Express, 883 F. 3d 100 (2d Cir. 2018) (en banc), *cert. granted*, 139 S. Ct. 1599 (2019).

- Issue: Are "sexual orientation claims . . . cognizable under Title VII"? *See id.* at 107.
- Holding: Yes. "We no hold that Title VII prohibits discrimination on the basis of sexual orientation as discrimination 'because of . . . sex.'" *Id. at* 108.
- Accord: *Somers v. Digital Realty Tr.*, No. 14-cv-05180, 2018 WL 3730469, at *7 (Chen, J.) (finding that absent Ninth Circuit rulings on the matter, *Hively* and *Zarda* are "persuasive" and "Plaintiff may invoke the protections of Title VII against sex-based discrimination, specifically with respect to his sexual orientation.").
- But see: *Bostock v. Clayton Cty. Bd. of Comm'rs*, 723 Fed. App'x 964 (11th Cir. 2018) (mem.) (rejecting Title VII claim of sexual orientation discrimination as sex discrimination), *cert. granted sub nom. Bostock v. Clayton Cty., Ga.*, 139 S. Ct. 1599 (2019); *Evans v. Georgia Reg. Hosp.*, 850 F.3d 1248 (11th Cir. 2017), *cert. denied*, 138 S. Ct. 557 (2017) (same).

Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061 (9th Cir. 2002) (en banc).

- Issue: Does a gay employee's claim of sexual harassment based on sexual harassment "assert[] a viable claim of discrimination based on under sex under Title VII"? *Id.* at 1063.
- Holding: Yes. Because "an employee's sexual orientation is irrelevant for purposes of Title VII . . . [i]t is enough that the harasser have engaged in severe or pervasive unwelcome physical conduct of a sexual nature." *Id.* at 1063-64.
- See also: *Nichols v. Azteca Restaurant Enter., Inc.*, 256 F.3d 864, 869 (9th Cir. 2001) (holding that verbal harassment of an employee "because he was effeminate and did not meet [harassers'] views of a male stereotype" was actionable

Karnoski v. Trump, 926 F.3d 1180, 1201 (9th Cir. 2019)

- Applying "something more than rational basis but less than strict scrutiny," *i.e.*, intermediate scrutiny, to transgender people in context of transgender military ban).
- *See also Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.,* 858 F.3d 1034, 1050-54 (7th Cir. 2017) (holding that "the School District's policy cannot be stated without referencing sex" and is "inherently based upon a sex-classification and heightened scrutiny applies."), *cert. dismissed*, 138 S. Ct. 1260 (2018); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) (applying "heightened scrutiny" to case of gender identity discrimination because it is based on gender stereotypes).

SmithKline Beecham Corp. v. Abbott, 740 F.3d 471, 484 (9th Cir. 2014)

- Applying "heightened scrutiny to classifications based on sexual orientation for purposes of sexual orientation" and ruling peremptory strikes based on sexual orientation are unconstitutional)
- *Accord Latta v. Otter*, 771 F.3d 456, 464-65 (9th Cir. 2014) (applying *SmithKline* and heightened scrutiny to strike down bans on same-sex marriage).