



May 15, 2019

Via E-mail: [civiljuryinstructions@jud.ca.gov](mailto:civiljuryinstructions@jud.ca.gov).

Mr. Bruce Greenlee  
Advisory Committee on Civil Jury Instructions  
Judicial Council of California  
455 Golden Gate Avenue  
San Francisco, CA 94102

re: Invitation to Comment—CACI 19-02

Dear Mr. Greenlee:

The Jury Instructions Committee of the California Lawyers Association’s Litigation Section has reviewed the proposed revisions to civil jury instructions (CACI 19-02) and appreciates the opportunity to submit these comments.

## 1. Harassing Conduct

The proposed revisions to CACI Nos. 2521A, 2521C, 2522A, and 2522C effectively define “harassing conduct” to include creating a hostile, intimidating, offensive, oppressive, or abusive workplace. The proposed revisions to these instructions also change the elements from requiring that a reasonable person would have considered the *work environment to be hostile or abusive* to requiring that a reasonable person would have considered the *conduct to be harassing*.

We believe this shift in focus from the work environment to the harassing conduct, defined to include a hostile work environment, is undesirable. The instruction should clearly delineate two separate requirements: (1) harassing conduct that (2) creates a hostile, etc. work environment. Harassing conduct is conduct that is hostile, intimidating, offensive, oppressive, or abusive, but not all harassing conduct creates a work environment that is hostile, intimidating, offensive, oppressive, or abusive.

## 2. A Reasonable Person Would Have Considered

A hostile or abusive work environment is a work environment that plaintiff considered and a reasonable person would have considered hostile or abusive. (Gov. Code, § 12923,

subd. (a), adopting *Harris v. Forklift Systems* concurrence; *Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 129-130.)

We believe the elements should directly address this requirement by requiring the jury to find a hostile, etc. work environment, rather than address this requirement indirectly by requiring the jury to find harassing conduct, defined to include a hostile, etc. work environment.

### **3. Legislative Declaration**

The legislative declaration of intent in Government Code section 12923, subdivision (a) includes language we find significant and helpful to the jury and would add to the elements instructions. That statutory language states harassing conduct creates a hostile, offensive, oppressive, or intimidating work environment if the conduct “sufficiently offends, humiliates, distresses, or intrudes upon its victim, so as to disrupt the victim’s emotional tranquility in the workplace, affect the victim’s ability to perform the job as usual, or otherwise interfere with and undermine the victim’s personal sense of well-being.”

### **4. Severe or Pervasive**

The committee is divided regarding the language “severe or pervasive.” We present both positions here for the benefit of the Advisory Committee.

A majority believes “severe or pervasive” simply means created a hostile, intimidating, offensive, oppressive, or abusive work environment, as stated in CACI No. 2524. Rather than use the language “severe or pervasive,” which is familiar to lawyers but unfamiliar to jurors, and then define that language, the majority believes the elements instructions should forego the defined term, refer to a hostile, etc. work environment, and in CACI No. 2524 set forth the factors to consider in determining whether the conduct created a hostile, etc. work environment.

A minority believes “severe or pervasive” is an essential requirement because that language is used in Government Code section 12923 and in case law as the test for a hostile work environment under both FEHA and Title VII. (See *Miller v. Dept. of Corrections* (2005) 36 Cal.4th 446, 462.) The language “severe or pervasive,” as defined in CACI No. 2524, is helpful to the jury and should be retained.

### **5. Proposed Revisions**

Deleting “severe or pervasive” (with similar changes in the other instructions):

CACI No. 2521A, Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant (Gov. Code, §§ 12923, 12940(j))

[*Name of plaintiff*] claims that [he/she] was subjected to harassment based on [his/her] [*describe protected status, e.g., race, gender, or age*] at [~~*name of defendant*~~ *place of employment*]. ~~For purposes of this claim, h~~Harassing conduct is conduct that ~~creates a work~~

~~environment that~~ is hostile, intimidating, offensive, oppressive, or abusive. To establish this claim, [name of plaintiff] must prove all of the following:

1. That [name of plaintiff] was [an employee of/a person providing services under a contract with/an unpaid intern with/a volunteer with] [name of defendant];
2. That [name of plaintiff] was subjected to ~~unwanted~~ harassing conduct because [he/she] was [protected status, e.g., a woman];
- ~~3. That the harassing conduct was severe or pervasive;~~
43. That a reasonable [e.g., woman] in [name of plaintiff]'s circumstances would have considered the ~~conduct to be harassing~~ work environment to be hostile, intimidating, offensive, oppressive, or abusive;
54. That [name of plaintiff] considered the ~~conduct to be harassing~~ work environment to be hostile, intimidating, offensive, oppressive, or abusive;
65. [Select applicable basis of defendant's liability]  
[That a supervisor engaged in the conduct;]  
[That [name of defendant] [or [his/her/its] supervisors or agents] knew or should have known of the conduct and failed to take immediate and appropriate corrective action;]
76. That [name of plaintiff] was harmed; and
87. That the conduct was a substantial factor in causing [name of plaintiff]'s harm.

Deleting "severe and pervasive" would require revisions to CACI No. 2524:

#### CACI No. 2524, "~~Severe or Pervasive~~" Explained Hostile, Intimidating, Offensive, Oppressive, or Abusive Work Environment

~~"Severe or pervasive" in the context of a harassment claim means conduct that alters the conditions of employment and creates a work environment that is hostile, intimidating, offensive, oppressive, or abusive.~~

Harassing conduct created a hostile, intimidating, offensive, oppressive, or abuse work environment if it offended, humiliated, distressed, or intruded upon [name of plaintiff] so as to disrupt [his/her] emotional tranquility in the workplace, affect [his/her] ability to perform the job as usual, or otherwise interfered with and undermined [name of plaintiff]'s personal sense of well-being.

In determining whether the harassing conduct was severe or pervasive created a hostile, intimidating, offensive, oppressive, or abusive work environment, you should consider all the circumstances, including any or all of the following:

- (a) The nature of the misconduct;
- (b) How often, and over what period of time, the conduct occurred;
- (c) The circumstances under which the conduct occurred;
- (d) Whether the conduct was physically threatening or humiliating.

[Name of plaintiff] does not have to prove that [his/her] productivity has declined. It is sufficient to prove that a reasonable person who was subjected to the harassing conduct would find that the conduct so altered working conditions as to make it more difficult to do the job.

[A single incident can be ~~sufficiently severe or pervasive to constitute harassment~~create a hostile, intimidating, offensive, oppressive, or abusive work environment.]

Alternatively, a minority would retain “severe and pervasive” in the instructions.

**6. Nazir v. United Airlines, Inc.**

We would reject the proposed revision to the Sources and Authority for CACI No. 2521A adding the quote from *Nazir* stating that hostile work environment cases are rarely appropriate for summary judgment. The court does not instruct the jury on the summary judgment standard, and the quote is irrelevant to any jury instruction.

Sincerely,

Reuben A. Ginsburg  
Chair, Jury Instructions Committee of the  
California Lawyers Association’s  
Litigation Section