

**SENATE JUDICIARY COMMITTEE**  
**Senator Thomas Umberg, Chair**  
**2023-2024 Regular Session**

SB 1137 (Smallwood-Cuevas)

Version: April 1, 2024

Hearing Date: April 9, 2024

Fiscal: Yes

Urgency: No

AWM

**SUBJECT**

Discrimination claims: intersectionality of characteristics

**DIGEST**

This bill clarifies that the Unruh Civil Rights Act, the provisions of the Education Code prohibiting discrimination in public education, and the California Fair Employment and Housing Act (FEHA) prohibit discrimination on the basis not just of individual protected traits, but also on the basis of the intersection of two or more protected traits.

**EXECUTIVE SUMMARY**

California's civil rights laws protect against discrimination against others in housing, employment, education, and public accommodations on the basis of a range of characteristics, including race, sex and gender, religion, and sexual orientation. These statutes do not, however, expressly state that discrimination on the basis of prejudices that arise from the interplay between multiple protected characteristics. This interplay is known as "intersectionality," a term coined and popularized by legal scholar Professor Kimberlé Williams Crenshaw.

Although it seems obvious that the civil rights laws already extend to discrimination on the basis of intersectional protected characteristics – there is no articulable rationale for allowing discrimination on the basis of multiple characteristics under the law, when each characteristic on its own is protected – the sponsors of the bill report that some courts have resisted recognizing the possibility of intersectional discrimination claims. This bill is intended to eliminate any lingering ambiguity by clarifying that the civil rights laws protect against discrimination on the basis of the intersection between two or more protected characteristics.

This bill is sponsored by the California Employment Lawyers Association, Equal Rights Advocates, and Legal Aid at Work, and is supported by over 30 organizations,

including civil rights organizations, labor organizations, and religious organizations, and one individual. The Committee has not received timely opposition to this bill.

### **PROPOSED CHANGES TO THE LAW**

Existing law:

- 1) Establishes the Unruh Civil Rights Act, which provides that all persons in California are free and equal, and regardless of a person's actual or perceived sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status, everyone is entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments. (Civ. Code, § 51.)
- 2) Provides that it is the policy of this State to afford all persons in public schools equal rights and opportunities in the educational institutions of this state, regardless of their actual or perceived disability, gender, gender identity, gender expression, nationality, race or ethnicity, religion, sexual orientation, immigration status, or association with a person or group with one or more of these actual or perceived characteristics. (Ed. Code, §§ 200, 210.2.)
- 3) Establishes the Fair Employment and Housing Act (FEHA), which prohibits discrimination in housing and employment on the basis of a person's actual or perceived race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status, subject to specified exceptions. (Gov. Code, §§ 12920 et seq.)

This bill:

- 1) States that the Legislature finds and declares all of the following:
  - a) It is the intent of the Legislature to hereby recognize the concept of intersectionality in California's civil rights laws. Intersectionality is an analytical framework that sets forth that different forms of inequality operate together, exacerbate each other, and can result in amplified forms of prejudice and harm. The framework and term "intersectionality," coined and popularized by legal scholar Professor Kimberlé Williams Crenshaw, captures the unique, interlocking forms of discrimination and harassment experienced by individuals in the workplace and throughout society, particularly Black women, as compared to Black men and White women.
  - b) The Legislature hereby declares that the Unruh Civil Rights Act, the California Fair Employment and Housing Act, and the Educational Equity Chapter of the Education Code prohibit discrimination not just because of

- one protected basis, but also because of the intersection of two or more protected bases.
- c) The Legislature recognizes that federal law affords similar protection, as articulated by the United States Equal Employment Opportunity Commission in its interpretative guidance of Title VII of the Civil Rights 1964 (Public Law 88-352, as amended) pertaining to discrimination and harassment.
  - d) The Legislature recognizes that where two or more bases for discrimination or harassment exist, they cannot be neatly reduced to distinct components. The attempt to bisect a person's identity at the intersection of multiple protected characteristics often distorts or ignores the particular nature of their experiences. When a person claims multiple bases for discrimination or harassment, it may be necessary to determine whether the discrimination or harassment occurred on the basis of a combination of those factors, not just based on any one protected characteristic by itself. In this regard, the Legislature affirms the decision of the Ninth Circuit Court of Appeals in *Lam v. University of Hawai'i* (9th Cir. 1994) 40 F.3d 1551.
  - e) The amendments to Section 51 of the Civil Code, Sections 200 and 210.2 of the Education Code, and Sections 12920 and 12926 of the Government Code do not constitute a change in, or diminishment of, existing protections and obligations, but are declaratory of existing law.
- 2) Clarifies that, under the Unruh Civil Rights Act, sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status includes: any intersection or combination of those characteristics; a perception that a person has any intersection or combination of those characteristics; or a perception that a person is associated with a person who has, or who is perceived to have, any intersection or combination of those characteristics.
  - 3) Clarifies that, within the antidiscrimination provisions of the Education Code (item 2) in the "Existing law" section), the purpose of the provisions includes prohibiting discrimination, and providing remedies for discrimination, not just because of one protected trait, but also because of the intersection of two or more protected bases.
  - 4) Clarifies that, within the antidiscrimination provisions of the Education Code, disability, gender, gender identity, gender expression, nationality, race or ethnicity, religion, sexual orientation, or any other characteristic that is set forth in Section 422.55 of the Penal Code includes: any intersection or combination of those characteristics; a perception that a person has any intersection or combination of those characteristics; or a perception that a person is associated with a person who has, or who is perceived to have, any intersection or combination of those characteristics.

- 5) States that it is the intent of FEHA to provide effective remedies that will eliminate enumerated discriminatory practices, including discrimination not just because of one protected trait, but also because of the intersection of two or more protected bases.
- 6) States that, under FEHA, race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, age, sexual orientation, reproductive health decisionmaking, or veteran or military status includes: any intersection or combination of those characteristics; a perception that a person has any intersection or combination of those characteristics; or a perception that a person is associated with a person who has, or who is perceived to have, any intersection or combination of those characteristics.

### COMMENTS

#### 1. Author's comment

According to the author:

Statewide legislation specifically acknowledging and addressing the existence of intersectional discrimination claims is not only necessary, but overdue. California has long been at the forefront of defining and redressing conditions that manifest unjust outcomes for its citizens, in the workplace and beyond. Our laws need to reflect best practices, empirical data, and comprehensive solutions to longstanding and multidimensional problems. SB 1137 accomplishes this by clarifying existing law to specifically recognize discrimination based on more than one protected class – such as both race and gender, gender and age, or gender and disability – under FEHA and the Unruh Civil Rights Act. This change will allow plaintiffs who have experienced overlapping forms of discrimination to more successfully pursue justice and ensure that the application of our anti-discrimination laws is consistent with legislative intent.

The framework and term “intersectionality” was coined and popularized by legal scholar Professor Kimberlé Williams Crenshaw. The term captures the unique, interlocking forms of discrimination and harassment experienced by individuals in the workplace and throughout society, particularly Black women, as compared to Black men and white women. Intersectionality is an analytical framework which sets forth that different forms of inequality operate together, exacerbate each other, and can result in amplified forms of prejudice and harm.

Under existing law, Plaintiffs may allege concurrent forms of discrimination based on multiple protected classes recognized under the Fair Employment and Housing Act (FEHA) and the Unruh Civil Rights Act. However, few California courts have spoken directly on intersectional claims under these statutes, and in

practice, courts and juries treat these types of claims inconsistently. In many cases, factfinders analyze each claim individually, failing to take into account the specific and unique harm a plaintiff experienced due to intersecting forms of discrimination based on more than one protected characteristic.

## 2. What is intersectionality?

The concept of intersectionality refutes the tendency to “think about subordination as disadvantage occurring along a single categorical axis.”<sup>1</sup> This means recognizing that, when focusing on a disadvantaged group, attention must be paid to all of the members of that group, not just the members who otherwise share characteristics with the dominant group. Otherwise, “[t]his focus on the most privileged group members marginalizes those who are multiply-burdened and obscures claims that cannot be understood as resulting from discrete sources of discrimination.”<sup>2</sup> Legal scholar Kimberlé Williams Crenshaw is credited with the introduction of the term “intersectionality” to describe how the interaction of multiple traits is necessary to avoid excluding individuals from discussions around, and solutions for combatting, discrimination:

Consider an analogy to traffic in an intersection, coming and going in all four directions. Discrimination, like traffic through an intersection, may flow in one direction, and it may flow in another. If an accident happens in an intersection, it can be caused by cars traveling from any number of directions and, sometimes, from all of them.<sup>3</sup>

Crenshaw is one of many scholars to note that, particularly in discussions of race- and gender-based discrimination, the experiences of Black women are often ignored because “[w]hen black people are talked about, the focus tends to be on black *men*; when women are talked about, the focus tends to be on *white* women.”<sup>4</sup> Negative stereotypes that arise from an intersection of characteristics exist for wide range of identities, including Black men, Latinas and Asian women, Muslim men, gay men, and older women.

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<sup>1</sup> Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics* (1989) 1989 U. Chi. Legal F. 139, 140.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Id.* at p. 149.

<sup>4</sup> hooks, *Ain't I A Woman: Black Women and Feminism* (1981) p. 21 (emphases in original); *see also, e.g., id., passim*; Bailey, *Misogynoir Transformed: Black Women's Digital Resistance* (2021), *passim*; Lorde, “The Master's Tools Will Never Dismantle the Master's House” (1984), in *Sister Outsider Essays and Speeches* (2007) p. 110.

3. This bill clarifies that California’s civil rights laws prohibit discrimination on the basis of the intersection of two or more protected traits

The Unruh Civil Rights Act “is this state’s bulwark against arbitrary discrimination in places of public accommodation.”<sup>5</sup> The statute enumerates several prohibited bases for discrimination – including race, sex, sexual orientation, disability, and religion – which are illustrative of characteristics protected from discrimination, rather than restrictive.<sup>6</sup> “The Legislature’s desire to banish such practices from California’s community life has led [the California Supreme Court] to interpret the Act’s coverage ‘in the broadest sense reasonably possible.’ ”<sup>7</sup>

Within the field of education, California affords students in public schools equal rights and opportunities in the educational institutions of the state and prohibits discrimination based characteristics including disability, gender, nationality, and race or ethnicity.<sup>8</sup> Thanks to those laws, public schools in California “have an affirmative duty to protect public school students from discrimination and harassment engendered by race, gender, sexual orientation or disability.”<sup>9</sup>

FEHA protects Californians’ civil rights at work and in obtaining and maintaining housing. FEHA “is a comprehensive scheme for the realization of the state’s public policy ‘to protect and safeguard the right and opportunity of all persons to seek, obtain and hold employment without abridgement on account of’” enumerated characteristics,<sup>10</sup> and provides greater protection than federal law against discrimination in housing.<sup>11</sup> The protected characteristics under FEHA are largely the same as those enumerated in the Unruh Civil Rights Act, and like the Unruh Civil Rights Act, “FEHA is to be ‘construed liberally.’ ”<sup>12</sup>

While all of these statutory regimes expressly prohibit discrimination on the basis of a number of enumerated traits, neither expressly states that discrimination on the basis of the intersection or combination of multiple covered traits is prohibited.<sup>13</sup> And while it may seem obvious that intersectional discrimination should be included under the courts’ liberal interpretation of these statutes – why would impermissible discrimination become permissible when the discrimination is motivated by multiple prejudices rather than a single prejudice? – the bill’s sponsors report that litigants

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<sup>5</sup> *Isbister v. Boys’ Club of Santa Cruz, Inc.* (1985) 40 Cal.3d 72, 75.

<sup>6</sup> *In re Cox* (1970) 3 Cal.3d 205, 212.

<sup>7</sup> *Isbister, supra*, 40 Cal.4d at pp. 75-76.

<sup>8</sup> Ed. Code, §§ 200, 210.2. A “public” school covered by the policy includes any private institution that accepts public funding, exempting an educational institution controlled by a religious organization if the principles are inconsistent with the religious tenets of that organization. (*Id.*, §§ 200, 210.2.)

<sup>9</sup> *Hector F. v. El Centro Elementary School Dist.* (2014) 227 Cal.App.4th 331, 333.

<sup>10</sup> *State Personnel Bd. v. Fair Employment & Housing Com.* (1985) 39 Cal.3d 422, 428.

<sup>11</sup> *Brown v. Smith* (1997) 55 Cal.App.4th 767, 780.

<sup>12</sup> *Auburn Woods I Homeowners Assn. v. Fair Employment & Housing Com.* (2004) 121 Cal.App.4th 1578, 1590.

<sup>13</sup> Civ. Code, § 51(b); Ed.Code, § 210.2; Gov. Code, § 12920.

alleging intersectional discrimination sometimes encounter resistance in some courts. This resistance can take the form of denials of summary judgment when the litigant cannot establish discrimination on the basis of a single trait – say, because the employer can establish that they hired Black men as a defense to the race-based discrimination claim brought by a Black woman – and in crafting jury instructions. Research also indicates that employment claims alleging intersectional discrimination are less likely to prevail in court, perhaps due to a lack of clarity in the law.<sup>14</sup>

Rather than wait for a published opinion holding that intersectional discrimination is not prohibited, this bill clarifies that yes, the state’s civil rights laws prohibit discrimination on the basis of the intersection of two or more traits that are already protected by those statutes. This simple clarification should ensure that Californians who are unjustly subjected to discrimination on the basis of the intersection of protected characteristics can vindicate their rights in court.

As the bill’s findings and declarations recognize, this intersectional approach to antidiscrimination laws has been a part of federal law for decades. As the Ninth Circuit Court of Appeals has stated in connection with a hiring discrimination case under Title VII,<sup>15</sup> “where two bases for discrimination exist, they cannot neatly be reduced to distinct components. [Citation.] Rather than aiding the decisional process, the attempt to bisect a person’s identity at the intersection of race and gender often distorts or ignores the particular nature of their experiences.”<sup>16</sup>

#### 4. Arguments in support

According to the sponsors of the bill, the California Employment Lawyers Association, Equal Rights Advocates, and Legal Aid at Work:

While federal and state laws, including the California Fair Employment and Housing Act (FEHA), protect employees from discrimination, few California courts (if any) have spoken directly on intersectional claims under FEHA. In practice, courts and factfinders treat these types of claims inconsistently. Empirical studies demonstrate plaintiffs making intersectional claims are less than half as likely to win their cases as are other plaintiffs (15 percent compared to 31 percent). Research suggests that there are three main reasons why intersectional claims might disadvantage plaintiffs: (1) the categorical nature of discrimination law creates doctrinal barriers to intersectional claims, (2) there are evidentiary hurdles to demonstrating intersectional discrimination, and (3) judicial skepticism or lack of understanding about intersectional claims may

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<sup>14</sup> See, e.g., Best, et al., *Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation* (2011) *Law & Society Rev.* Vol. 45, No. 4, pp. 1009-1014, 1018-1019.

<sup>15</sup> 42 U.S.C. §§ 2000 et seq.

<sup>16</sup> *Lam v. University of Hawai’i* (9th Cir. 1994) 40 F.3d 1551, 1562.

make plaintiffs who have experienced overlapping forms of discrimination or harassment less likely to win their cases...

By codifying the framework of intersectionality under California's anti-discrimination laws, SB 1137 will help provide guidance to the courts and other decision-makers to ensure that plaintiffs' full experience and harm is recognized. Specifically, SB 1137 will amend the Fair Employment and Housing Act (FEHA), Cal Gov't Code §§ 12940 et seq., and the Unruh Civil Rights Act, Civ. Code § 51, to clarify that these laws protect against discrimination and harassment based not just on one protected characteristic enumerated within the statute, but also because of the intersection or combination of two or more protected bases.

### SUPPORT

California Employment Lawyers Association (co-sponsor)  
Equal Rights Advocates (co-sponsor)  
Legal Aid at Work (co-sponsor)  
ACCESS REPRODUCTIVE JUSTICE  
Alliance for Boys and Men of Color  
Alliance for Reparations, Reconciliation, and Truth  
Asian Americans Advancing Justice Southern California  
Asian Americans and Pacific Islanders for Civic Empowerment  
CA Domestic Workers Coalition  
California NOW  
California Rural Legal Assistance Foundation  
California Women's Law Center  
California Work & Family Coalition  
Californians for Safety and Justice  
Child Care Law Center  
Church-State Council  
Consumer Attorneys of California  
Courage California  
Disability Rights California  
Equality California  
Faculty Association of California Community Colleges  
Fund Her  
GRACE/End Child Poverty California  
Initiate Justice  
Lawyers' Committee for Civil Rights of the San Francisco Bay Area  
Lutheran Office of Public Policy - California  
Mujeres Unidas y Activas  
NAACP California Hawaii State Conference  
National Council of Jewish Women California  
Planned Parenthood Affiliates of California



Sanford Heisler Sharp, LLP  
SEIU California  
TechEquity Collaborative  
The California Commission on the Status of Women and Girls  
Voices for Progress  
Women’s Foundation of California  
One individual

**OPPOSITION**

None received

**RELATED LEGISLATION**

Pending Legislation: SB 1022 (Skinner, 2024) clarifies the applicability of certain timelines for FEHA class complaints filed by the CRD and the counties in which the CRD may file FEHA complaints. SB 1022 is pending before this Committee.

Prior Legislation:

SB 403 (Wahab, 2023) would have clarified that discrimination on the basis of caste is prohibited under the existing prohibition against discrimination on the basis of ancestry. SB 403 was vetoed by Governor Newsom, who stated in his veto message that “In California, we believe everyone deserves to be treated with dignity and respect, no matter who they are, where they come from, who they love, or where they live. That is why California already prohibits discrimination based on sex, race, color, religion, ancestry, national origin, disability, gender identity, sexual orientation, and other characteristics, and state law specifies that these civil rights protections shall be liberally construed. Because discrimination based on caste is already prohibited under these existing categories, this bill is unnecessary.”

SB 188 (Mitchell, Ch. 58, Stats. 2019) defined “race” within FEHA and the Education Code to include traits historically associated with race, including, but not limited to, hair texture and protective hairstyles, as defined.

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