



# Disability discrimination

## *The most popular employment-discrimination claim in California*

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*It was once said that the moral test of government is how that government treats those who are in the dawn of life, the children; those who are in the twilight of life, the elderly; and those who are in the shadows of life – the sick, the needy and the handicapped.*

– Hubert H. Humphrey

*Prejudice is a far greater problem than any impairment; discrimination is a bigger obstacle to overcome than any disability.*

– Paul K. Longmore

The public policy of the State of California embraces the employment of those who suffer from a physical or mental disability. Numerous legislative protections exist to promote their inclusion in a diverse and productive workforce. Given this strong public policy, it is no wonder that a large number of complaints filed with California's Department of Fair Employment and Housing (DFEH) are brought by employees who believed that they were discriminated against or mistreated because of a disability. In 2014, according to the California Department of Fair Employment and Housing, 17,632 employment complaints were filed with the DFEH. 11,060 of those complaints – over 60 percent of all employment complaints filed – alleged discrimination in employment on the basis of a disability. Similarly, in 2014, 31.2 percent of the 6,363 discrimination charges filed with the Equal Employment Opportunity Commission (EEOC) in the State of California related to disability discrimination.

The increase in disability discrimination employment disputes corresponds with the expansion of rights for disabled employees. As new laws are passed, and existing laws are given varying degrees of judicial interpretation, the protections afforded to disabled employees are becoming more nuanced. Cases involving other employment disputes, whether grounded in other acts of discrimination, wage and hour violations, or whistleblower retaliation, often present associated disability accommodation and medical leave issues. This makes it all the more necessary for practitioners to stay apprised of the developments in disability discrimination law, and the myriad of ways that employers are exposed to liability for failing to accommodate the needs of their disabled employees.

### **Affirmative duty to accommodate disabled employees**

California's public policy promoting the employment of disabled employees requires a "reasonable accommodation for a known physical or mental disability of an applicant or employee"



unless the employer can demonstrate an "undue hardship" which is a high bar for employers in California.<sup>1</sup> When analyzing disability discrimination claims, practitioners should closely scrutinize when the employee qualified as a disabled person, when the need for a workplace accommodation arose, and when, or if, the employer became aware of both circumstances. An employer's duty to accommodate is an affirmative one and exists even in the absence of a specific request from an employee.<sup>2</sup> Even where an employee fails to notify an employer of his or her disability or need for an accommodation, an employer that is aware of both circumstances nonetheless must offer a disabled employee an accommodation, if it can do so without undue hardship.

In light of an employer's unambiguous duty to accommodate disabled employees, a number of questions should be asked when evaluating a failure to accommodate case. When did the employee become disabled? Was the employer aware of the disability? Did the employee communicate the disability to a supervisor? How does the disability manifest itself? Is it visible? What kind of accommodation would have allowed the employee to perform his or her job? Should the employer have known of the need for an accommodation? Examining the attendant circumstances of an employee's disability, his or her need for an accommodation, and the employer's knowledge of both factors is of paramount importance. An employer's single failure to offer an accommodation, even if past accommodations were made, can expose the employer to liability.<sup>3</sup>



## Many different workplace accommodations

Because California recognizes so many diverse avenues for the successful accommodation of an employee's disability, practitioners should examine each way that the employer could have successfully accommodated an employee's disability. FEHA requires employers to do much more than make existing facilities readily accessible to disabled employees. Reasonable accommodations include restructuring positions and job duties, offering part-time or modified work schedules, reassigning jobs, purchasing or modifying workplace equipment, providing readers or interpreters, and adjusting workplace policies and procedures, among other things.<sup>4</sup>

While employers are not required to offer accommodations that would pose an undue hardship, this is a relatively high standard for an employer to meet. An employer's duty to accommodate is to be interpreted flexibly, and employers are required to carefully examine and, if necessary, restructure their business practices to make an accommodation possible.<sup>5</sup> For example, employees in an office environment should be permitted to work from home if it would allow them to do their job without posing an undue hardship to the employer.<sup>6</sup> Practitioners should also keep in mind that an employer's judgment, standing alone, is not determinative of whether a job function is "essential."<sup>7</sup> Importantly, the extent to which a job function can be easily transferred to others can bolster an employee's argument that the job function was not an essential one.<sup>8</sup>

A careful examination of an employee's entitlement to statutory leave, in addition to leave under an employer's written policies, should also be undertaken. There is often interplay between an employee's need for an accommodation and the amount of job-protected leave available under applicable leave statutes, such as the California Family Rights Act (CFRA) and the Family and Medical Leave Act (FMLA). In many instances, employers

operate under the misconception that disabled employees are only entitled to the amount of job leave provided under federal and state leave statutes such as a maximum of twelve weeks under the FMLA. On the contrary, California's vigorous public policy favoring disabled individuals' participation in the workforce requires employers to offer job-protected leave as a reasonable accommodation, so long as it does not impose an undue hardship. This may include a job-protected leave of absence of no statutorily fixed duration, and can extend to a leave duration that is inconsistent with state and federal leave statutes.<sup>9</sup>

In addition to allowing a disabled employee to take an indefinite leave of absence, a reasonable accommodation may also require an employer to hold a job open for a disabled employee if it appears reasonable that the employee will be able to resume his or her employment within the foreseeable future.<sup>10</sup>

If existing employees must be reassigned to accommodate a disabled employee, FEHA entitles the disabled employee to "preferential consideration" in such reassignments.<sup>11</sup> Therefore, even when an employee seeks a leave of absence beyond any entitlement under applicable leave statutes, practitioners should carefully examine the circumstances surrounding the employee's leave of absence. If an employee was terminated while on leave, or not offered her or his former position, or a substantially similar position, the employer may be exposed to liability for failing to reasonably accommodate the employee's disability.

## A good faith, interactive process

Employers must engage in a timely, good faith, interactive process to determine whether an effective accommodation can be made.

Much as employers are duty-bound to offer disabled employees reasonable accommodations that do not pose an undue hardship on the employer's

business operations, they are also required to engage in a timely, good faith, interactive process to determine whether a reasonable accommodation is feasible. The interactive process is the backbone of FEHA's disability accommodation framework and essential to accomplishing its goal of promoting the employment of disabled employees. It is a vital mechanism through which an employer should determine whether a capable employee with a physical or mental impairment can continue to contribute to a productive workforce.

The onus is on the employer to initiate the interactive process, and the duty is triggered whenever the employer becomes aware of an employee's medical condition which may be a disability.<sup>12</sup> It is a low bar for placing an employer on notice of the duty to engage in an interactive process with an employee. There are no magic words – such as "reasonable accommodation" – that an employer must hear in order to trigger the process.<sup>13</sup> An employer should initiate the interactive process absent an employee's specific request. The process should initiate once the employer is made aware, through words, observations, or otherwise, that a disabled employee may require an accommodation to continue performing his or her job.<sup>14</sup> An employer falls short of its duty when it fails to communicate with a disabled employee in good faith to explore possible accommodations, or flatly rejects an employee's proposed accommodation without offering practical alternatives.<sup>15</sup> Most employers whose employees bring disability discrimination complaints either fail to make any effort to engage in the required ongoing interactive process or accommodate the employee at all.

A few employers make one reluctant minimal effort before terminating disabled employees, making the cases ripe for successful and productive litigation.

Even where an employer takes some steps to determine whether reasonable accommodations are available, it still



faces liability if it was responsible for a breakdown in the process.<sup>16</sup> Ongoing communication, even beyond the first or second accommodation attempt, is a hallmark of the interactive process, which should continue in earnest if necessary to allow an employee to continue working. If an employer learns that a prior accommodation is not working, or that a different accommodation is needed, it must continue to explore – and exhaust – all alternatives.<sup>17</sup> An employer is exposed to liability when the facts establish that an accommodation plausibly could have worked, even if it was not discussed or acknowledged during the communications with the employee.<sup>18</sup>

Given the overwhelming importance of the functional communication that is required when an employer becomes aware of an employee's disability, practitioners should pay close attention to the timing surrounding an employee's need for an accommodation. Particular attention should be paid to when the employer became aware, or should have been aware, of the employee's medical condition, disability and accommodation needs. An employer's efforts to find suitable arrangements – whether in the form of a modified or alternative work schedule, reassignment of job duties, deviation from company policies, or purchase of workplace equipment – should be thoroughly examined. All communications that take place between an employer and an employee are materially relevant when determining whether an employer failed to initiate and follow through on its interactive process duties. A failure to faithfully engage in an interactive process and explore accommodations for a disabled employee exposes the employer to liability, regardless of whether the employer was ultimately able to accommodate an employee's disability.

### **FEHA's anti-retaliation protections and reasonable accommodation**

FEHA's robust anti-retaliation language protects employees from suffering

adverse employment actions because they opposed, or refused to participate in, conduct that the employee reasonably believed violated FEHA. In January 2016, the California legislature amended FEHA and clarified that an employee's mere request for a reasonable accommodation for a disability qualifies as a protected activity under FEHA. The amendment addresses negative judicial precedent regarding the application of FEHA's anti-retaliation protections to requests for reasonable accommodations, and unquestionably expands the workplace rights of disabled employees.

In 2013, a California appellate court held that an employee's request for medical leave to undergo a kidney operation did not rise to the level of protected activity under FEHA.<sup>19</sup> The appellate court concluded that there was no support in the regulations or case law for the notion that an employee's request for an accommodation – standing alone – was a protected activity upon which a FEHA retaliation claim could be premised. The appellate court reasoned that an employee's mere request for an accommodation failed to “demonstrate some degree of opposition to or protest of the employer's conduct or practices based on the employee's reasonable belief that the employer's action or practice is unlawful.”<sup>20</sup>

In response to this negative precedent, the California legislature amended FEHA and clarified that an employee's request for a reasonable accommodation for a disability constitutes protected activity under FEHA. California Government Code Section 12940(m) now makes it an unlawful employment practice to “retaliate or otherwise discriminate against a person for requesting accommodation ... regardless of whether the request was granted.”<sup>21</sup> The legislature's amendment to FEHA is meaningful because it creates liability even where an employer has a legitimate defense for failing to reasonably accommodate an employee's disability.

Although an employer might be able to establish that an employee's request

for a disability was not “reasonable,” or was lawfully denied because it posed an “undue hardship” on an employer's business, an employee can successfully pursue a FEHA retaliation claim by proving that the employer subjected the employee to adverse treatment because he or she sought a reasonable accommodation. Because the amendment clarifies that an employer's granting of an employee's accommodation request is irrelevant, an employer cannot defend against a retaliation claim by producing evidence that it accommodated an employee's disability. Practitioners should be prepared to analyze whether adverse actions taken against an employee were motivated by an employee's request for a reasonable accommodation, and should assert retaliation claims separate and apart from any accommodation claims associated with an employee's disability.

### **Accommodations for family needs**

Does an employer have to reasonably accommodate a non-disabled employee? Until very recently, employees were not entitled to reasonable accommodations based on the disability of someone who they associated with, such as a spouse, child, or family member. In *Castro-Ramirez v. Dependable Highway Express*, the Second District Court of Appeal expanded an employer's duty to reasonably accommodate employees based on their relationships with non-employees. In a case of first impression, the appellate court held that an employer has a duty to reasonably accommodate a non-disabled employee who is associated with a disabled person.<sup>22</sup>

*Castro-Ramirez* addressed a factual scenario where the plaintiff, a truck driver, advised his employer that his disabled son required a kidney transplant and the daily administration of dialysis. Initially, the employer allowed the plaintiff to work earlier routes so that he could be home with his son in the evenings, when dialysis would be administered. However, following a change in management, the plaintiff's schedule was



changed such that he was no longer allowed to be home with his son in the evenings. The plaintiff protested the change, requested a schedule that allowed him to tend to his disabled son, and was terminated shortly thereafter.

The plaintiff brought a lawsuit against his employer for associational disability discrimination in violation of FEHA, alleging that his employer was substantially motivated to terminate him because of his association with his disabled son. He also brought claims alleging that his employer retaliated against him for asserting his rights under FEHA, failed to take reasonable steps to prevent discrimination, and wrongfully terminated his employment in violation of public policy. After the trial court entered summary judgment for the employer, the plaintiff appealed.

On appeal, the plaintiff abandoned his reasonable accommodation cause of action and focused on his other FEHA claims. Nonetheless, the appellate court squarely addressed his associational failure to accommodate claim and created new law that, if left unchallenged, significantly expands an employer's duty to reasonably accommodate, which now extends to non-disabled employees who are associated with disabled persons. The appellate court unambiguously held that the plain language of FEHA establishes this right:

Moreover, it is not at all clear under FEHA that employers have no duty to provide reasonable accommodations in the associational disability context. No published California case has determined whether employers have a duty under FEHA to provide reasonable accommodations to an applicant or employee who is associated with a disabled person. *We hold that FEHA creates such a duty according to the plain language of the Act.*<sup>23</sup>

Under the holding in *Castro-Ramirez*, non-disabled employees are entitled to reasonable accommodations, such as modified work schedules, even where the

accommodation is based on the needs of a disabled family member or other person associated with the employee. So long as the employee can establish that the accommodation will allow the employee to adequately perform all job functions without posing an undue burden to the employer, the accommodation should be provided. While the *Castro-Ramirez* decision is certainly subject to the further appellate review, if left undisturbed, it presents yet another area where employers must tread carefully when presented with an employee's request for an accommodation, even when the employee making the request is not disabled.

Practitioners should be prepared to analyze fact patterns involving employees who seek workplace accommodations to assist disabled family members. For example, employees who are not eligible for any time off to care for a family member may now be entitled to time off if the family member suffers from a disability. Employers may have to allow non-disabled employees to restructure their work schedules to meet the needs of a disabled loved one. Moreover, these types of scenarios will also trigger an employer's duty to engage in a good faith interactive process to determine what reasonable accommodations are available to employees who are associated with disabled persons. Under the recent legislative amendments to FEHA, employers are prohibited from retaliating against employees who seek these types of accommodations.

### Conclusion

With each legislative amendment and significant development in case law, the available protections for disabled employees, and employees who are associated with disabled persons, continue to morph and take on new and different meanings. These expanding protections play a central role in the analysis of disability discrimination claims. Given the number of disability related cases filed each year, these issues are often relevant

to the prosecution of secondary claims in employment discrimination lawsuits, and practitioners should continue to examine the changes in existing laws, and the manner in which employers can face significant liability for ignoring California's efforts to encourage the inclusion and participation of disabled employees in the workforce.

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### Endnotes

- Gov. Code § 12940(m).
- 2 Cal. C. Regs. § 11068(a); *Prilliman v. United Air Lines, Inc.* (1997) 53 CA 4th 935, 950-51 (holding that employer who knows of employee's disability has an affirmative duty to make other suitable job opportunities with the employer known to employee and determine whether the employee is interested in and qualified for those positions).
- A.M. v. Albertsons, LLC* (2009) 178 Cal.App.4th 455, 465.
- Gov. Code, § 12926(p)(2); 2 Cal. C. Regs. § 11065(p)(2).
- Sargent v. Litton Systems, Inc.* (N.D. Cal. 1994) 841 F.Supp. 956, 961; *McAlindin v. County of San Diego* (9th Cir. 1999) 192 F.3d 1226, 1237.
- Sargent*, 841 F.Supp. at 962; *Humphrey v. Memorial Hospitals Ass'n* (9th Cir. 2001) 239 F.3d 1128, 1136.
- Cripe v. City of San Jose* (9th Cir. 2001) 261 F.3d 877, 887.
- Gov. Code § 12926(f)(1)(B), (f)(2)(D).
- Sanchez v. Swissport, Inc.* (2013) 213 Cal.App.4th 1331, 1338.
- Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 263; *Hansen v. Lucky Stores, Inc.* (1999) 74 Cal.App.4th 215, 226.



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<sup>11</sup> 2 Cal. C. Regs. § 11068(d)(5); *Jensen v. Wells Fargo Bank* (2000) 85 CA4th 245, 265.)

<sup>12</sup> 2 Cal. C. Regs. § 11069(b).

<sup>13</sup> *Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 62.

<sup>14</sup> *Norris v. Allied-Sysco Food Services* (N.D. Cal. 1996) 948 F.Supp 1419, 1436.

<sup>15</sup> *Barnett v. U.S. Air* (9th Cir. 2000) 228 F.3d 1105, 1114-16.

<sup>16</sup> *Nadal-Rahrov v. Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 985.

<sup>17</sup> *Humphrey v. Memorial Hospitals Association* (9th Cir. 2001) 239 F.3d 1128, 1138.

<sup>18</sup> *Barnett*, 228 F.3d at 116.

<sup>19</sup> *Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal.App.4th 635.

<sup>20</sup> *Rope*, 220 Cal.App.4th at 652-653.

<sup>21</sup> Cal. Gov't Code 12940(m).

<sup>22</sup> *Luis Castro-Ramirez v. Dependable Highway Express*, Case Nos. B261165 and B262524 (April 4, 2016).

<sup>23</sup> *Luis Castro-Ramirez v. Dependable Highway Express*, Case Nos. B261165 and B262524 (April 4, 2016).



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