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UNDERSTANDING THE DISABILITY LAWS AFFECTING CALIFORNIA EMPLOYERS

By Dee H. Stasnopolis

On the five-year anniversary of California's enactment of its disability protection laws, it is appropriate that we look back at the cases that have interpreted this statute to give guidance to employers regarding their obligations under that act. This is especially true in light of the conflicting news announcements regarding interpretations of the disability law. Many times these reports pertain to the Federal ADA. As will be seen, employers in California should look, in essence, solely to the California disability laws, given the fact that they are more expansive and place more obligations on employers than their federal counterpart.

On January 1, 2001, AB222 became part of the California Fair Employment Housing Act (FEHA). This law veered away from the requirements of federal law which were more restrictive, pursuant to interpretations by federal courts. In contrast to federal law, which provides that to be considered a disability, a mental or physical limitation must "substantially limit" one or more life activities, California disability law provides that a disability is a mental or physical condition "which in any way limits" one or more major life activities. A condition will sufficiently limit a major life activity if it makes the achievement of the activity "more difficult." Unlike federal law, major life activities are to be construed broadly under the California Disability Act. Under California law, major life activities include working, as well as physical, mental and social activities. In contrast, federal law delineates that the "major life activity" of working, is in reference to a broad class of jobs. Thus, under federal law, a person must be disabled for a broad class of jobs. Under FEHA, a person can be disabled even if limited in performing a single job.

California also broadens what constitutes physical and mental disabilities to include, but not limit itself to, chronic or episodic conditions such as HIV/AIDS, hepatitis, epilepsy, seizure disorders, multiple sclerosis and heart disease. Moreover, the "potential effect" of an impairment is sufficient to meet the definition of a disability under California law, not the "actual effect."

Clearly, California has broadened the application of disability protection and requires a showing that the impairment simply makes the performance of work related activity "more difficult." Once this is established,

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an employer has an obligation to treat an employee as though disabled and subject to the protections under the FEHA.

The primary obligation of employers is reaching a "reasonable accommodation" once an employee requests an accommodation based upon a perceived disability. Numerous California decisions have interpreted the application of the "reasonable accommodation" rule. In *Bagati v. Department of Rehabilitation* (2002), the California Court of Appeal ruled that an employer's refusal to accommodate an employee's difficulty in walking long distances was a violation of FEHA. In *Humphrey v. Memorial Hospital Association* (2002), the Court of Appeal held that meeting once with an employee was not sufficient to satisfy the employer's requirement to make a "reasonable accommodation." This should be contrasted to federal law which has held that a single meeting can be sufficient. In the recent case of *Claudio v. Regents of the University of California* (2005), the Court of Appeal held that it was improper for the employer to refuse to negotiate the reasonable accommodation with its employee through his appointed attorney. That refusal was a violation of FEHA in that case.

In the recent decision of *Raine v. Burbank* (2006), the Court of Appeal held that an employer who reassigns an employee to a temporary light-duty position to accommodate the employee's injury on a short-term basis, does not have an affirmative obligation under FEHA to continue to keep a short-term light-duty position available to an employee who is disabled, if there is no full-time position of equivalence. In essence, the *Raine* court held that an employer does not have any form of obligation to create a new job for a disabled employee. However, this should be contrasted with other decisions that have held that an employer has an obligation to make reasonable accommodations to relieve the burden of certain nonessential job functions from a disabled employee. Thus, an employee who has a bad back, may not be required to lift heavy files or only perform that task in a safe position, such as, standing upright. In this situation, an employer may have an obligation to assign the task of lifting the files to lower shelves or filing cabinets, to another. This would relieve the impact on the disabled employee, freeing them up to perform the other essential job duties necessary to complete their employment task. It is significant to note that the accommodation can be structural, in terms of the physical condition that the employee meets, whether this be widening doors, hallways, providing easier access to structures, closer parking, etc. Additionally, alternate hours, working part-time rather than full-time, etc., are all considerations that should be had between the employer the employee in determining a reasonable accommodation.

What we have been discussing, so far, are accommodations relative to nonessential job duties. What occurs when the employee's disability interferes with his performance of essential job duties? This can result in the right to terminate, if efforts to reach a reasonable accommodation have been unsuccessful. There is no doubt that an employer is entitled to define the essential job functions of a particular job position. *Webster v. Methodist Occupational Health Centers, Inc*. (7th Cir. 1998). The essential job duties should, generally, be set forth in a written job description and establish the physical requirements essential to a job function. Such documentation and conditions are given "substantial deference" in the decisional process of an employer, if ever reviewed by a court. The primary issue will be whether the essential job duties are truly "essential" and are actually related to the performance of the job task. Once established, great deference is given to the prior determination by the employer.

Even under FEHA, if an employee is unable to perform essential job duties, due to their disability, and modifying the job duties by way of a reasonable accommodation is not a viable alternative, termination of the employee can occur. However, it should be emphasized that the court will look closely to determine if there were any reasonable alternatives available to termination if that situation arises.

A clear ground for termination exists when an applicant or employee cannot perform essential job functions without endangering the health and safety of others, to a greater extent than a non-disabled person would. This is set forth within Government Code section 12940(a)(1). Although not specifically addressed, it is anticipated that the application of this doctrine would also include the risks and dangers associated with injury to the employee who is disabled, which is the position that federal law has taken.

When confronted with an employee who requests a reasonable accommodation, it is essential that the employer follow a prescribed documented response. This should include the following

* The initial conference requiring the employee or his representative to detail in writing what the disability is and how it interferes with his ability to perform his job function. Medical documentation from the employee's physician on this issue may be requested.
* An evaluation of how the disability interferes with any essential job functions versus non-essential job functions.
* Developing protocols to attempt a reasonable accommodation with the employee to alter the job so as to accommodate the employee's disability, if possible.
* Meet with the employee to discuss alternatives.

All of the actions referenced above must be fully documented. Resorting to experts in the field such as a physician to consult with relative to the alleged disability and its impact on the employee, an industrial engineer who might analyze the physical condition encountered by the employee relative to his job and considering the employee's requests all must be considered and the options and eventual decision should be documented and their basis set forth. Many times an agreement can be reached with the employee regarding a particular accommodation. It would be extremely beneficial to have both the employer and employee agree in a single document as to the proposed reasonable accommodation, thereafter revisiting this situation at set intervals in the future to determine its effectiveness. Remember, a single attempt at reasonably accommodating a disabled person is insufficient to constitute compliance with the California Disability Act, unless there is no reasonable accommodation that can be made for the employee's alleged disability and that disability eliminates the employee's ability to perform an essential job function.

Many unique situations can arise during the reasonable accommodation phase. Employees and most certainly unions are now, routinely, requesting that an attorney on their behalf represent them in any negotiations over a reasonable accommodation for their disability. Employers, whenever faced with a potential reasonable accommodation situation, should immediately gather as much information as possible, fully comply with its written obligations in its policies and procedures manual and consider involving an employment law attorney to evaluate the accommodation proposals and the processes involved in order to avoid any exposure under the California Disability Act.

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Caliver Body Works, Inc. v. Superior Court (2005). In this case, an employer challenged the superior court's overruling of its demurrer to a wage an hour action brought by employees. The Court of Appeal held that the employees did not allege that they had satisfied the pre-filing notice and exhaustion requirements as set forth within Labor Code section 2699.3(a), before initiating their lawsuit, and their complaint made no reference to the Labor Code Private Attorneys' General Act of 2004, Labor Code section 26989 et seq. The Appellate Court held that the employees, therefore, could not maintain a private action under Labor Code section 2699, to the extent that they sought civil penalties. The court held that the pre-filing notice and exhaustion requirements were mandatory as to causes of action that allege a violation of one

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of the provisions listed in Labor Code section 2699.5, and that sought recovery of civil penalties assessable by the California Labor and Work Force Development Agency. The court held that the employees could, however, maintain causes of action for unpaid wages, statutory penalties, and unfair and unlawful business practices, which were not subject to the notice and exhaustion requirements. Procedurally, the court also held that the appropriate way of attacking the pleadings was not by way of demurrer, but by way of motion to strike. The court granted the petition sought by the employer.

Frank Armentia v. Osmose, Inc. (2005). This case involved an employer who sought review of a judgment of the superior court which rewarded respondent former employees' unpaid minimum wages, liquidated damages, waiting time penalties under Labor Code section 203 and attorneys' fees and costs. The case arose under the terms of a Collective Bargaining Agreement negotiated with the employee's union. The employees were to be paid hourly wages within a certain range, depending on whether they were crew members or foremen. The Court of Appeal held that the trial court correctly determined that the employer violated Labor Code section 1194, by failing or refusing to pay for drive time and time spent by foremen processing paperwork. The Federal Labor Standards Act model of averaging all hours worked in any work week to compute an employee's minimum wage obligation under California law was held inapplicable and an inappropriate way of calculating wages. The minimum wage standard effects to each hour worked by the employees for which they were paid was the appropriate standard to be applied. The court held that because the employees were claiming a violation of the minimum wage law, penalties under Labor Code section 203 had to be assessed by arriving at a daily wage using the minimum wage claim by each employee.

Debra Mills v. Bed, Bath & Beyond (2006). This case involved an employee who had filed a class action against its employer on behalf of herself and other employees for back wages and penalties. At the Court of Appeal, the employee argued that because the money due her under section 226.7 of the Labor Code constituted wages that were not timely paid or properly accounted for in her wage statements, the employer was further liable to her for penalties under the California Labor Code. The Court of Appeal held that the statute imposed a penalty on employers who failed to ensure mandated break periods were provided to their employees. Thus, the payments under section 226.7 for missed breaks did not compensate the employee for additional services rendered. Instead, the payments were fixed sums that became due the moment a break period was missed, regardless of the amount of time wrongly worked during a break period. The payments, therefore, were not wages subject to an additional penalty.

National Steel and Shipbuilding Co. v. Superior Court (2006). This case involved an employer who sought review of the trial court's order allowing penalties for missed meal or rest periods pursuant to Labor Code section 226.7. The employer argued that the one additional hour of pay required by section 226.7 was a penalty subjecting the employees to a one-year statute of limitations. The Appellate Court held that the payment under 226.7 was an obligation created by statute, other than a penalty, and therefore was subject to a three-year statute of limitations period under Code of Civil Procedure section 338. The court held that the payment under Labor Code section 226.7 was both a penalty of wage to the employee, because the Labor law statutes were to be construed in favor of the employees. Therefore, the Court of Appeal held that the three-year statute of limitations should apply to this payment obligation of the employer.

Albert Cicairos v. Summit Logistics (2005). Plaintiff workers' appealed a summary judgment which ruled in favor of the defendant, their former employer, in an action for violation of the Labor Code statutes relating to meal periods, rest breaks and itemized wage statements. The workers, who are truck drivers, presented evidence that the employer did not schedule rest breaks or meal periods and did not include an activity code for rest breaks or meal periods in the computerized system that was used to determine wages. Moreover, their earning statements did not provide an accurate statement of hours worked, but instead, always listed 40 hours per week. The workers did not file grievances or seek arbitration under their Collective Bargaining Agreement. The Court of Appeal, in reversing the lower court, concluded that the trial court improperly relied on case law involving overtime claims when it applied the motor carrier exemption of California Code of Regulations, Title 8, Section 11090, Subdivision 3(L). The Appellate Court held that the term "section" in the exemption referred only to the section governing hours of service, and did not refer to the entire wage order. Moreover, the Collective Bargaining Agreement did not require arbitration of the statutory claims and the employee's claims were not preempted. The court reversed the trial court's judgment in the case noting that the wage statements did not comply with Labor Code section 226 because they did not show hours worked or the employer's name and address. The employer's evidence did not prove that it gave the workers the required meal breaks.

Stanley Macisac v. Waste Management (2005). In this case, the plaintiff employee sued their employer, a waste management company, alleging that prior to a mass layoff the employer failed to provide the notice required by California Worker Adjustment and Retraining Notification Act (WARN). The trial court granted summary judgment for the employer. The Appellate Court affirmed the trial court's decision, holding that there was no "mass layoff" triggering the WARN acts notice requirements, when the employer sold the remainder of a city contract to another company, impacting 62 employees. Of those employees, 42 were transferred to the purchasing company. Inasmuch as the employees were not separated from their positions and continued to perform the same functions at the new employer's business, that they had performed at the old employer's business, there was no "mass layoff" as contemplated under that Act.

Colleen Patten v. Grant Joint Union High School (2005). The plaintiff in this case sued the school district alleging that she was transferred to a different school after disclosing four legal violations and that her transfer was retaliation within the meaning of Labor Code section 1102.5. The trial court granted summary judgment and the employee appealed. In affirming the summary judgment as to causes of action for constructive discharge in violation of free speech, but reversing the judgment in all other aspects, the Appellate Court held that the employee raised a triable issue of material fact regarding whether there was retaliation for disclosure relative to internal administrative matters, not legal violation. More importantly, the Court of Appeal held that the employee's transfer, as compared to a demotion, could be an "adverse employment action" even though the employee's wages, benefits and duties were substantially the same. The court reasoned that this was because there was evidence that her material responsibilities were significantly diminished through this transfer to a different school.

State Personnel Board v. Department of Personnel Administration (2005). In this case, the Court of Appeal held that the statute allowing members of certain public employee bargaining units to challenge disciplinary actions by pursuing an alternative grievance/arbitration procedure, bypassing State Personnel Board review, violates constitutional provisions, that the State Personnel Board shall review disciplinary actions taken against state civil service employees. As such, the statute was held to be unconstitutional.

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