DISABILITY DISCRIMINATION Under The California Fair Employment and Housing Act

by Kristine E. Kwong

Introduction
California employers with five or more employees must comply with the California Fair Employment and Housing Act which prohibits discrimination on a multitude of protected categories such as race, sex, gender, religion, age, national origin and disability. This article focuses on disability discrimination, and when an employer is required to accommodate a qualified individual with a disability.

The California Fair Employment and Housing Act (FEHA) (Government Code Section 12900 et seq.) prohibits employment discrimination on the basis of physical disability, mental disability and medical conditions. The purpose of FEHA is to provide remedies to eliminate any type of discrimination on this basis. Although there is a federal statute that prohibits discrimination, known as the Americans With Disabilities Act, California’s version gives broader protection to employees.

For example, FEHA applies to employers with five or more employees while the Americans With Disabilities Act applies to employers with 15 or more employees (42 USC Section 12112(a); Government Code Section 12926(d)).

What Disabilities Are Covered?
A person with a disability may be considered a qualified individual if the disability limits a major life activity. Government Code Section 12926.1(c), (d)(2). The protections of FEHA are very broad and one could qualify as a protected individual even based on the employer’s perception that the employee is disabled and thus, the Act would cover an employee who is “erroneously or mistakenly believed” to have or have had a physical or mental condition that limits a major life activity. Government Code Section 12926.1(d)(3); 2 California Code of Regulations Section 11065(d)(5), (6). The question arises as to what types of disabilities would constitute a physical disability, mental disability or medical condition.

Under the Act, a medical condition can mean cancer, genetic characteristics, physiological and anatomical conditions and conditions that would limit an individual’s ability to participate in major life activities. Government Code Section 12926(m)(1); 2 California Code of Regulations Section 11065(d)(2)(A), (B). The following are examples of “physical disabilities”:

- HIV/AIDS;
- Hepatitis;
- Epilepsy;
- Seizure disorder;
- Diabetes;
- Multiple sclerosis; and
- Heart disease.

(Government Code Section 12926.1(c); 2 California Code of Regulations Section 11065(d)(2)(C).

This is not an exclusive list and the Courts have found other impairments to constitute “physical disabilities” under the particular facts of the case.

As such, each situation must be analyzed on a case-by-case basis. In practical effect, California employers may not ask the employee for a diagnosis to determine whether or not the employee is disabled within the meaning of the Fair Employment and Housing Act because this would invade the employee’s constitutional rights of privacy. The employer, however, may ask the employee for information regarding the employee’s functional limitations.

In addition to having a physiological condition or impairment, an individual is not a qualified individual with a disability unless the condition “limits a major life activity.” This means that the limitation makes the achievement of a major life activity difficult.

Government Code Section 12926(m)(1)(B) (ii); 2 California Code of Regulations Section 11065(l)(3). The key issue is that the employee’s impairment “limits” a major life activity when compared to a “normal” or “average” person that does not have the impairment.

In addition to the above, the Fair Employment and Housing Act also defines “a physical disability” to also cover individuals that have a record or a history of physical disability or the employer regards the employee with having a physical disability. Government Code Section 12926(m)(4).

Mental Disabilities
In addition to physical disabilities, FEHA also protects individuals with “mental disabilities.” This term includes any mental or psychological disorder, such as an intellectual disability, organic brain syndrome, emotional or mental illness, or specific
The regulations to the Fair Employment and Housing Act identify the following as mental disabilities:

- Emotional or mental illness;
- Intellectual or cognitive disability;
- Organic brain syndrome;
- Specific learning disabilities;
- Autism spectrum disorders;
- Schizophrenia;

Chronic or episodic conditions such as post-traumatic stress disorder and obsessive compulsive disorder.

2 California Code of Regulations Section 11065(d)(1). As with physical disabilities, FEHA also extends “mental disability” to individuals that have a record or history of a condition that is known to the employer and being regarded as having a mental disability. Government Code Section 12926(j)(3), (5); 2 California Code of Regulations Section 11065(d), (5), (6).

Conditions excluded from the definition of disability are “mild” conditions that do not limit a major life activity and this is determined and analyzed on a case-by-case basis. For example, these are conditions with little or no residual effect such as common colds, minor cuts, bruises, abrasions, non-migraine headaches and minor and nonchronic gastrointestinal disorders.

2 California Code of Regulations Section 11065(d)(9)(B). Of particular note, although sexual behavior identity disorders are not disabilities under FEHA, the California employer must allow transsexual and transvestite employees to appear or dress in a manner consistent with their chosen gender identity, whether or not it is their gender identity of birth. Government Code Section 12949.

**Accommodating employees with disabilities**

Once an employee is a qualified individual with a disability and is unable to perform the essential functions of the position, the Act requires the employer to make good faith reasonable efforts to accommodate the employee in order to afford the employee the opportunity to perform the essential functions of the job.

This obligation requires employers to reasonably accommodate for the known disabilities unless doing so would produce an undue hardship to the employer’s operations. Government Code Section 12940(m); 2 California Code of Regulations Section 11068. Under this requirement, employers have an affirmative duty to accommodate employees. The issue that always presents itself is how the employer is to have notice that there is a need for an accommodation.

The most obvious is through the employee’s direct supervisor. If the supervisor has knowledge of the employee’s disability, the employer would have an affirmative duty to make reasonable accommodations for the disability.

This obligation exists even if the employee did not ask for an accommodation. 2 California Code of Regulations Section 11068(a). This obligation to reasonably accommodate an employee exists even when the employer regards the employee as disabled when in fact the employee is not actually disabled.

**Types of Accommodations**

Once it is determined that an individual is a qualified individual under the Act and is unable to perform the essential functions of the job, the employer has an obligation to accommodate the employee through a variety of accommodations.

Selecting the right accommodation is determined on a case-by-case basis depending on the employee’s functional limitations. The Act and its promulgated regulations provide a nonexhaustive list of possible accommodations as follows:

- Making facilities rarely accessible to and usable by disabled individuals;
- Job restructuring;
- Offering part-time or modified work schedules;
- Reassigning to a vacant position;
- Acquiring or modifying equipment or devices;
- Adjusting or modifying examinations, training materials or policies;
- Providing qualified readers or interpreters;
- Allowing assistive animals on the work site;
- Altering when and/or how an essential function is performed;
- Modifying supervisory methods;
- Providing additional training;
- Permitting an employee to work from home;
- Providing paid or unpaid leave for treatment or recovery;
- Other similar accommodations for individuals with disabilities.

Government Code Section 12926(p); 2 California Code of Regulations Section 11065(p)(2).

**Assistive Animals as an Accommodation**

Recently, an issue that has surfaced is whether or not employees have the right under the Act to bring assistive animals to work as a form of an accommodation.

The regulations to the Act provide for assistance animals in the workplace as a reasonable accommodation. 2 California Code of Regulations Section 11065(p)(2)(B). Assistive animals include guide or signal or service dogs or support dogs or animals that provide emotional or other support to the disabled person including those suffering from traumatic brain injuries and mental disabilities such as major depression. 2 California Code of Regulations Section 11065(a)(1).

In order to allow employees to bring assistive animals to the workplace as a form of a reasonable accommodation, the employer may require the employee to produce a letter from a health care provider indicating that the employee has a disability and to explain why the assistive animal is needed in the workplace.

In addition, the employer may require the employee to provide confirmation that
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Leaves of Absences as an Accommodation

Another difficult form of an accommodation to process is granting an employee a paid or unpaid leave of absence for purposes of treatment and/or recovery. Generally speaking, a finite leave of absence may be considered a reasonable accommodation if, after the exhaustion of the leave, the employee can resume his or her duties. 2 California Code of Regulations Section 11065(c).

On the other hand, it is not reasonable to require the employer to hold the position indefinitely for the employee’s medication to be corrected or allowing the employee to fully recover. However, there is no minimum under the leave as to the fixed duration of the leave of absence.

As such, employers are cautioned to analyze any request for a leave on a case-by-case basis to determine whether or not the requested duration would impose undue hardship to the employer’s operations.

By contrast, even though granting a short term leave of absence may be a form of a reasonable accommodation, if the employee can work with a reasonable accommodation other than a leave of absence, the employer may not require that the employee take a leave of absence.

2 California Code of Regulations Section 11068(c).

Reassignment as an Accommodation

Reassignment to a vacant position may also be a reasonable accommodation even if the position pays less than what the employee is currently earning if the employee can no longer perform the current job duties.

Government Code Section 12926(p); 2 California Code of Regulations Section 11065(p)(2)(N). On the other hand, the employer is not mandated under the Act to promote or to create a new position to accommodate a disabled employee. 2 California Code of Regulations Section 11068(d)(4).

The Good Faith Interactive Process

As part of the accommodation requirements, the employer is required to engage in a “timely, good faith interactive process” in responding to a request for a reasonable accommodation by an employee with a known physical or mental disability or known medical condition.

Government Code Section 12940(n); 2 California Code of Regulations Section 11069(a).

Under the FEHA regulations, the employer must initiate this process if the employee asks for reasonable accommodation, the employer becomes aware of the need for the accommodation, the employer becomes aware of the possible need for accommodation because the employee has exhausted their leave of absence under law or under the employer’s leave policy and the employee or employee’s health care provider states that a further accommodation is necessary for recuperation or to allow the employee to perform the essential job functions.

The employee also has obligations in participating in this accommodation process. The employee is responsible to initiate the process by asking for reasonable accommodation. The employee must cooperate in good faith with the employer by providing medical documentation when the disability or need for accommodation is not obvious.

2 California Code of Regulations Section 11069. This interactive process contemplates that both parties, the employer and employee, will talk directly with each other to exchange information about what is necessary to accommodate the employee.

However, even though direct communication is the preferred method, it is not absolutely required. 2 California Code of Regulations Section 11069(d)(4). As part of the accommodation process, the employer is required to give consideration to the employee’s preference.

Conclusion

The California Fair Employment and Housing Act has evolved to require employers to take proactive steps in identifying and initiating the good faith interactive process. Failure to do so may result in a violation of the Act.

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