Fair Employment & Housing Act 132 OVERLAP

By Donald Barthel

Bradford & Barthel, LLP

Before we get started…

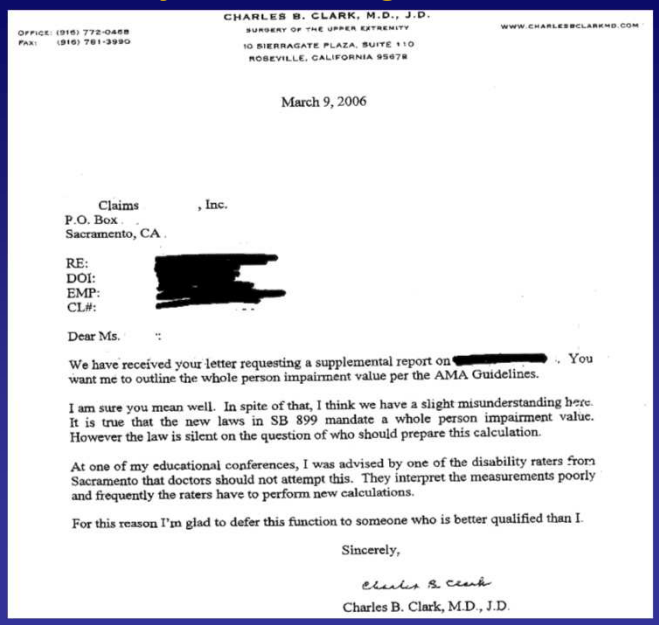
Sign up for the B&B BLOG!

Are you overpaying PD?

"Who ya gonna call?"

Cell (916) 996-1263

Are you kidding me…?



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WWW.CHARLESBCLARKMD.COM

March 9, 2006

Claims , Inc.
P.O. Box
Sacramento, CA

RE:
DOI:
EMP:
CL#:

Dear Ms. :

We have received your letter requesting a supplemental report on . You want me to outline the whole person impairment value per the AMA Guidelines.

I am sure you mean well. In spite of that, I think we have a slight misunderstanding here. It is true that the new laws in SB 899 mandate a whole person impairment value. However the law is silent on the question of who should prepare this calculation.

At one of my educational conferences, I was advised by one of the disability raters from Sacramento that doctors should not attempt this. They interpret the measurements poorly and frequently the raters have to perform new calculations.

For this reason I'm glad to defer this function to someone who is better qualified than I.

Sincerely,

Charles B. Clark

Charles B. Clark, M.D., J.D.

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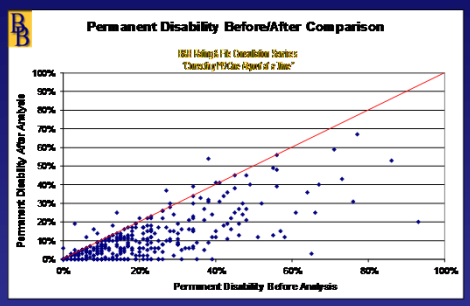
"Correcting PD One Report at a Time"

Misapply the AMA *Guides* for "Fun & Profit"



- Thousands of reports analyzed
- Statewide
- Dossier maintained
- Quick turn-around

CALIFORNIA
Fair Employment & Housing Act
1959 | 2009
Dept of Fair Employment & Housing

http://www.dfeh.ca.gov/DFEH/default/

I *gotta* know…

SB 227?

SB 228?

SB 899?

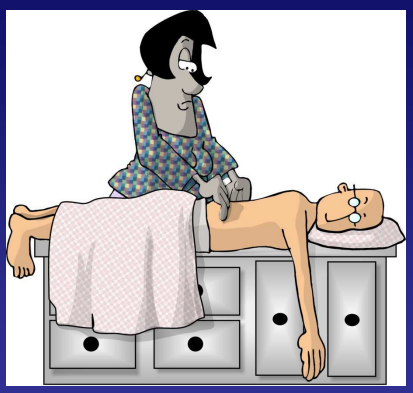
SB863

Almaraz/Guzman?

Ogilvie?

…and *now* FEHA!!!!

RELAX…



We'll figure this out…

Why does a great *WORKERS COMP ADJUSTER* like you…

….need to know FEHA?

FEHA DANGERS LURK EVERYWHERE!

LURKING FEHA DANGERS…

EXAMPLE

Facts:

1. IW *claims* back injury lifting a box
2. Reports first thing Monday am
3. Investigation: co-ee witnessed injury *Sunday afternoon*
4. Adjuster timely denies

LURKING FEHA DANGERS…

EXAMPLE

ER looks for some

ER: "Anything I should do?"

Adjuster: "Nope. Claim denied. All benefits denied. Just get ready for WCAB trial."

Don't YOU

GIVE BAD ADVICE!

ONE "the Denial notice tolls *workers comp* obligations"
TWO "you *may* have obligations under other laws"
THREE "I'm not a lawyer"
FOUR "Feel free to:
* contact Dept of Fair Employ. & Housing
(phone number in 'Help in Returning to Work' pamphlet)

* consult an attorney .... !!!!"

LURKING FEHA DANGERS…

WRONG ANSWER!

ER open to civil liability!

You open to civil liability!

LURKING FEHA DANGERS…

EXAMPLE

denial notice tolls ***wc obligations***

BUT FEHA does not distinguish between:

industrial
vs.
non-industrial injuries

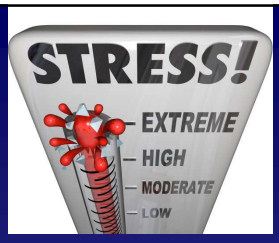
EXAMPLE

If IW's injury gives rise to disability

and

IW asks ER for an accommodation…

ER must evaluate request



What *is* FEHA

California's **F**air

Employment &

Housing

Act

FEHA (Gov. Code 12900 et seq) is the *leading* state civil rights law in the nation.

DFEH Complaints in 2015 – 66,288

Retaliation	14,043
Disability – Mental and Physical	**8,507**
Sex – Gender	5,832
Race	4,957
Age – 40 or Over	4,845
Sexual Harassment	4,822
Family Care or Medical Leave (CFRA)	4,591
Genetic Information of Char.	4,548
Medical Cond. – Cancer/Genetic Info.	3,850
Color	2,543
National Origin	2,445
Assoc. with Member of Protected Class	1,894
Other	1,646
Ancestry	1,366
Sex – Pregnancy	1,359
Sexual Orientation	1,036

HOW MUCH

Green v. State of California
(Super.Ct.No. RCV 60816)

FACTS:

- correctional facility EE
- long term care for:
  non-aoe/coe Hep C
  &
  2 aoe/coe back injuries
- job description: heavy lifting
- common practice: have inmates do heavier work
- Interferon treatments (for Hep.) caused fatigue
- physician: light duty; ER accommodated
- '99, injury:
  - restriction: light duty
  - later placed on leave b/c light duty limited = 120 days

FACTS:

- released to full duty for back injury
- needed light duty for Interferon

ER: "EE doesn't meet 'heavy lifting' qualification"

ER commences disability retirement

EE files complaint w/DFEH

AWARD

Compensatory = $597,000

Punitive = $2,000,000

$2,000,000 *was*
Reduced to…
$1.8 million

You can…

…worry now!

Reason for damages…

(1) ER didn't discuss EE's ability to perform his job w/ him
(2) ER made a unilateral decision
(3) No attempt to evaluate:
*availability, and
*effectiveness of job accommodations
(i.e., reasonable accommodations)

Testimony revealed:

EE had effectively w[illegible]s limitations for years!

Here's the rest of the story on Green…

The employer got VERY lucky…

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Green v. State of California

S137770 (8/23/2007)

CA S Ct.

Facts:

7/00= EE full-duty work

RTW coordinator reviewed EE's w.c. file; wc doctor approved only light-duty

Informed EE: if not cleared for full duty, can't RTW

Trial judge did not admit WCJ's ruling or w.c. doctor's report recommending light duty

CA S Ct: (4-3 vote)

Burden of proof on EE to prove:

"can perform the ***essential functions*** of the job with or without reasonable accommodation"

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Green v. State of California

"FEHA prohibits discrimination against any person with a disability but…allows the employer to discharge an employee with a physical disability when that employee is unable to perform the essential duties of the job even with reasonable accommodation."

HISTORY LESSON

1959: FEPA – originally the "Fair *Employment* Practices Act"

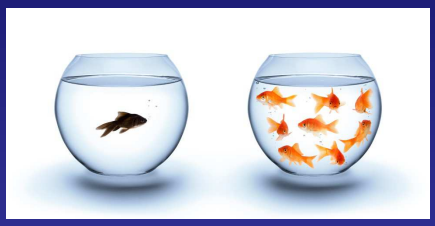
1963: "Rumford Fair *Housing* Act" enacted

1980: FEPA & Rumford Act combined, resulting in…

FEHA

Aim:

Protect Californians from



Employment

&

Housing Discrimination

DISCRIMINATION

1/01 Changes: Prudence K Poppink Act

CA's version of Americans with Disabilities Act ("ADA")…

… on steroids!

(Gov Code 12926.1)

Expressly provides ADA is a "floor"

12926.1(a)…Although *the [ADA] provides a floor of protection, [CA's] law has always*, even prior to passage of the federal act, *afforded additional protections*.

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FEHA (CA) vs ADA (fed)

FEHA predates ADA

FEHA amended (1992) to look like ADA

- strengthened FEHA where weaker than ADA
- retained FEHA where stronger than ADA

Pleading ADA and FEHA?

Cts often interpret laws using same analysis

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ADA vs FEHA

FEHA is greater protection…

Interpretation:

ER wins under ADA?

Don't assume a FEHA win!

Sometimes it's good to be discriminating…

…BUT

Sometimes it's not:

Race/Color

Religious Creed

National Original

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DISCRIMINATION

Sometimes it's not ok:

Physical Disability

Mental Disability

Medical Condition

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DISCRIMINATION

Sometimes it's not ok:

Marital Status

Gender

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DISCRIMINATION

Sometimes it's not ok:

Age

Sexual Orientation

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WIDE, WIDE COVERAGE

Covers Discrimination on basis of:

"Physical disability"

&

"Mental disability"

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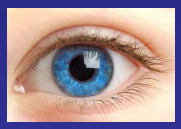
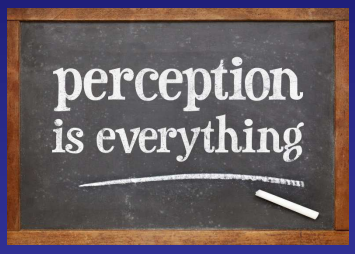
WIDE, WIDE COVERAGE

"Actual"
Or
"Perceived"

That is…
Disabling,
Potentially disabling, or

Perceived  as:



Disabling, or
Potentially disabling

Gov Code 12926.1(b)

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WIDE, WIDE COVERAGE

Physical/Mental Disabilities *expressly* include
("but are not limited to")

chronic or episodic conditions such as…

- HIV/AIDS
- Hepatitis
- Epilepsy
- Seizure disorder

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WIDE, WIDE COVERAGE

Physical/Mental Disabilities *expressly* include
("but are not limited to")

Clinical depression

Bipolar disorder

Multiple sclerosis

Heart disease

Gov Code 12926.1(c)

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"physical disability" and "mental disability"

Require: "limitation" on ***major life activity***

Not *"**substantial limitation**"* (like ADA)

= Broader coverage than ADA

"Major life activities" shall be "broadly construed"…

….shall include:

Physical activities,
Mental activities,
Social activities, and
Work
(somewhat like ADLs)
What's the exception?

Gov't Code §§ 12926(i)(1)(C), (k)(1)(B)(iii)

"Major life activities" *means* just *applicant's* work?

NOPE!

"work" = "major life activity"…

"…regardless of whether the actual or perceived working limitation implicates a":

a. particular employment, or

b. "class or broad range of employments"

"***major life activity"*** assessment

Determined *without* respect to "mitigating measures"

Such as:

Meds,

Assistive devices,

Prosthetics, or

Reasonable accommodations…

"…*unless* the mitigating measure itself limits a major life activity."

Gov Code §§ 12926(i)(1)(A), (k)(1)(B)(i)

Anything ***not*** covered?

"**Mental”** and **“Physical disability**" does not include:

Sexual behavior disorders

Compulsive gambling

Kleptomania

Anything ***not*** covered?

"**Mental”** and **“Physical disability**" does not include:

Pyromania

Psychoactive substance use disorders caused by “current unlawful use of controlled substances or other drugs.”

"**Physical Disability**" *also* includes:

* Health impairment requiring special ed or related services
* Having a record or history of a:
  - Disease
  - Disorder
  - Condition
  - Cosmetic disfigurement
  - Anatomical Loss
  - Health impairment…

OR being *perceived* or *treated* by ER as having one or more…

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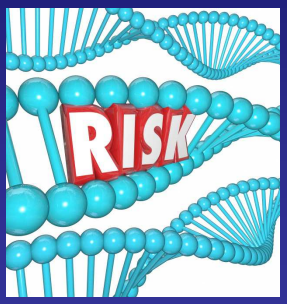
GENETIC TESTING

UNLAWFUL for employers to:

"directly or indirectly"

TEST

Any: employee
applicant
"other person"



For any "genetic characteristic"

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GOT DISABILITY?

If there is a covered disability involved:

Employer must provide

"***reasonable accommodation"***

Unless "accommodation" = "**undue hardship**"

New Regs Emphasize Prevention

FEHA amendments (eff 4/1/16)

1. Mandate ERs
   a. have a written discrimination, harassment and retaliation prevention policy
   b. distributed policy to all Ees
   c. with an acknowledgment of receipt

FEHA amendments (eff 4/1/16)

2. Require ERs est a complaint process in written policy that includes:
   a. info on how to bring a complaint
   b. ER's investigatory process
   c. supervisor reporting requirements

FEHA amendment (eff 4/1/16)

3. Create new obligations for mandatory supervisor training for ERs w/ 50 or more EEs

Evaluating potential **REASONABLE ACCOMMODATIONS…**

TEST:

Will reasonable accommodation permit applicant/EE obtain/maintain employment?

Castro-Ramirez v Dependable Highway Express

246 Cal.App.4th 180 (2016)

Facts:

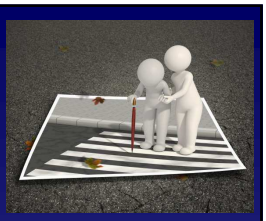
- before accepting job, EE advised need to be home early...operate son's dialysis machine
- accommodated
- new supervisor, "Junior", failed to accommodate
- EE complained...ER told "Junior" to "work with" EE
- "Junior" denied requests for earlier (available) routes
- on one occasion, assigned route wld prevent helping son

Castro-Ramirez

Facts:

- EE asked for earlier route OR day off
- denied...if don't take route = fired
- attempted to RTW 3 days in a row
  - "Junior" wouldn't give assignments
  - 3rd day another manager advised:
    - hadn't worked 3 days - now terminated
    - ER processed as "voluntary resignation"

Castro-Ramirez



"associational disability"

=

Holding: duty to provide "reasonable accommodating" applies not only to disabled EEs...also applies to <u>non-disabled EEs</u> who are <u>associated with a disabled person</u>

Good faith

Interactive process

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Interactive Process Steps

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Step 1: Determine "essential functions" of job

- does position exist to perform *that* function?
- are there a limited # of EEs to whom *that* function can be distributed?
- is *that* function highly specialized?

Evidence "function" is "essential":

*written job description prepared *before:*
advertising
interviewing
*amount of time performing function
*consequences of not requiring EE perform
*terms of CBA
*experiences of *past* incumbents
*experiences of *current* incumbents in similar jobs

Interactive Process Steps

Step 2: Determine "reasonable accommodation" options

Must be:

Good Faith

Interactive with EE

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"Reasonable Accommodation"

Any appropriate measure allowing EE to perform "essential functions"

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“Reasonable Accommodation”

Includes:

- Making facilities accessible
- Restructuring job
- Modifying work schedule
- Buying/modifying equipment
- Modifying exams/policies
- ETC

Example:

Carpal Tunnel?

"Interactive" Process?

BAD IDEAS!

"Interactive" Process?

BETTER IDEA!

Consult with EE to determine:

- Precise job limitations
- ID potential accommodations
- Assess accommodations effectiveness

EE's *preferences* should be considered…

BUT…

Reasonable Accommodation implemented should be "most appropriate"

for:

EE

&

ER

"Good Faith"?

communicate directly

ER shows "cooperative behavior" promoting id'ing of appropriate accommodation

EXCEPTIONS….

…to "reasonable accommodation"

ER may:

refuse to accommodate, or
a request for
reasonable accommodation…
if…

"Unreasonable Hardship"

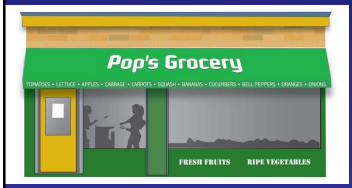
"Unreasonable Hardship"

TEST: accommodation requires significant difficulty or expense, when considered in light of:

* facility's overall $$$ resources
* # of EEs at facility
* impact on ER's operation
* ER's overall financial resources

"Unreasonable Hardship"

* ER's overall financial resources



OR

?

"Unreasonable Hardship"

TEST: accommodation requires significant difficulty or expense, when considered in light of:

- type of operation (composition, structure, function of workplace)
- geographic separation, admin or fiscal relationship of facility(ies)

EXAMPLE:

-near-blind job applicant

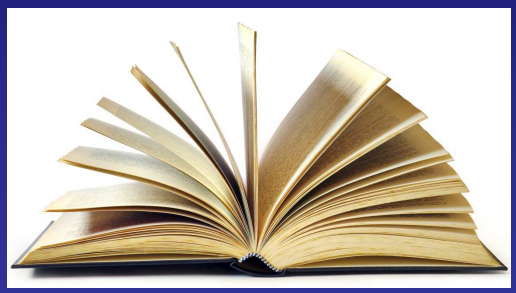
-ER = four EEs

-applicant requires full-time assistant to work register

"Unreasonable Hardship" Defense

Big Problem…

Financials become an…



Questions you *can* ask!

DEPENDS...

Applicant?

Or

Employee?

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Questions you ***can't*** ask!

Pre-Employment:

Do NOT:

*require med/psych exam
*make med/psych inquiry
*make med/psych disability inquiry
*make med condition inquiry re:
-current
-past
*inquire about severity of condition

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Questions you ***can*** ask!

After offer is made…but prior to start date:

May…

*Require med/psych **exam,** or*

*Make med/psych **inquiry**…*

So long as…

a. job related,

b. consistent with "business necessity", and

*c. **all** new EES in same job classification are subject to the **same exam/inquiry***

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Questions you ***can*** ask!

Post-hire:

*voluntary med exams, including voluntary med histories (where part of EE health program available to EEs at worksite)

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REMEDIES...

= tough medicine!

FEHA orders to:

"Cease & Desist"

Training/Policy Changes

Rehire/Reinstate

Out-of-pocket losses

Award Damages, "including but not limited to…"

- Lost wages/out-of-pocket losses
- Emotional distress
- Admin fines

REMEDIES...

= tough medicine!

Emotional distress damages + Admin fines = $150,000 (max)

(Civ Code 51.7)

REMEDIES...

= tough medicine!

Removed to Superior Court?

Remedies identical, except:

- emotional distress damages –

Removed to Superior Court?

- admin fines replaced by punis – no limits
- prevailing party may recover:
  - atty fees
  - expert witness fees
  - costs

When Discrimination (allegedly) occurs…

1. EE to address issue with immediate supervisor
2. Contact ER's "reasonable accommodation coordinator"
3. EE/ER engage in "good faith interactive process" towards resolution

When Discrimination (allegedly) occurs…

4. No solution? EE may
   a. contact DFEH (*anytime* during process)

   b. file complaint

When Discrimination (allegedly) occurs…

DEADLINE for filing…

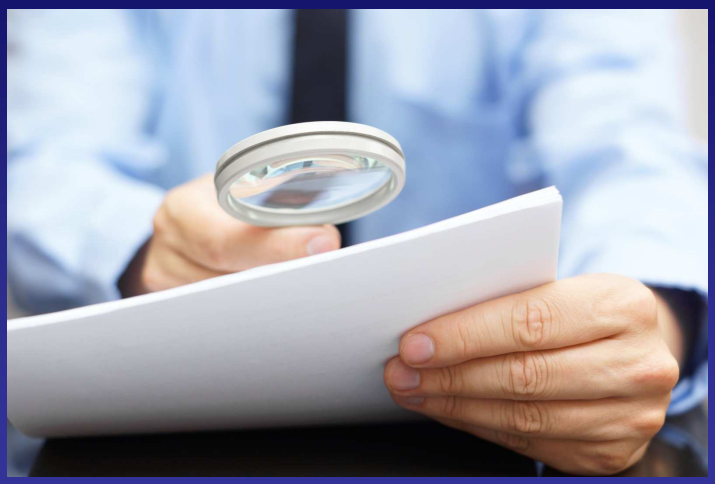
ONE YEAR from date of:

*denial of accommodation

*discharge

*etc.

Does C&R Resolve Potential FEHA Exposure?



Including everything— including the kitchen sink— in C&R

Corrales v. Kimpton Hotel (Panel Decision)
2016 Cal. Wrk. Comp. P.D. LEXIS 144
March 29, 2016

Corrales

FACTS:

OA issues

C&R Addendum:

"This agreement is limited to settlement of the body parts, conditions, or systems and for the dates of injury set forth in Paragraph No. 1 and further explained in Paragraph No. 9 despite any language to the contrary elsewhere in this document or any addendum."

"parties...settle any future unknown injuries that may arise to body parts not included in the C&R including claims that may exist outside the jurisdiction of the State of California."

"confidentiality provision notwithstanding the fact that the C&R and addendum are both publically accessible as a filed court document."

IW Petitions to Set Aside

HOLDING: "rescinded to consider...request to rescind" parties... may agree on an addendum, "so long as the terms of said addendum are within the jurisdiction of the [WCAB] and permissible under the law."

Corrales

Don't Despair, My Friend!

Mere panel decision...

...it's right...

...but reality it's WORSE

Labor Code 5001 "No release of liability or compromise agreement is valid unless it is approved by the appeals board or referee."

EITHER: (1) one settlement agreement approved by BOTH the civil court and WCAB; or (2) separate settlement agreements (conditioned upon both being approved)—one approved in civil court and the other approved by WCAB.

it's WORSE!

Claxton v. Ray Waters
California Supreme Court
69 Cal. Comp. Cases 895 (2004)

HOLDING: language in preprinted form releases only claims within scope of workers' comp; does not apply to claims asserted in separate civil actions

extrinsic evidence: not admissible to show release to harassment claims outside w/c system

intended settlement of claims outside w/c system must be reflected in a separate document

it's WORSE!

What do we do to settle BOTH civil and w/c claims?

EITHER:

1) one settlement agreement approved by BOTH the civil court and WCAB; or
2) separate settlement agreements (conditioned upon both being approved)—one approved in civil court and the other approved by WCAB.

(no chance of "sneaking it through")

Albertson's Inc. v. FEHC B175816(1/20/06), DCA

FACTS:

ER req'd IW prove she could RTW

IW told ER: able to perform duties several months post-surgery req'd infrequent assistance (heavy pallets)

IW sent ER: PTP

AME

ER = no response

Albertson's Inc.

HOLDING & AWARD

ALJ: Albertson's discriminated

Ordered:

Reinstatement

Back wages

Posting of compliance notices

Albertson's appealed

Albertson's Inc.

FACTS (con't)

- Albertson's appealed
- DCA upheld the DFEH finding

HOLDING

- Albertson's chose to recognize only its wc obligations
- Albertson's has concurrent obligation to meet IW (interactive process) to:
  - discuss discrepancies between med reports
  - assess IW's RTW options

Albertson's Inc.

Likely cost?

***at least $200,000 in back wages

***at least $100,000 in legal fees

Albertson's Inc.

Cost of Prevention?

RTW assessment

Outside consultants

…less than 1% of costs to defend

…maybe

How employers shoot ***themselves*** in the foot…

"Our company has a policy that modified work is not offered after 90 days."

modified work may = "reasonable accommodation"

…removing "reasonable accommodation" options?

…without mandated interactive process?

How employers shoot ***themselves*** in the foot…

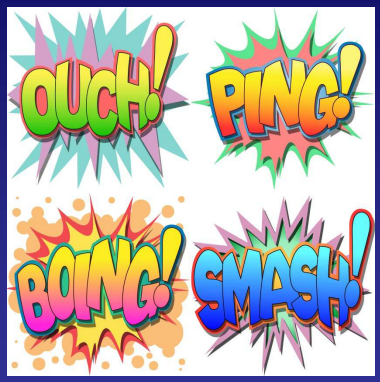
"Our company does not offer temporary transitional light-duty assignments for more than 60 days."

FEHA (and ADA) asks:

"What is reasonable accommodation?"

"What is an undue burden?"

No calendar limits on “reasonable accommodation”



That’s going to leave a mark!

Shooting Yourself in the Foot…At the WCAB!!!

Don’t Get Burned By Stipulations

What is “admitted” in WC can be “Exhibit A” in a civil case

Dufresne v. City of Hayward

(1st DCA, 2009, unpublished)

FACTS:

City building inspector files w.c. psyche injury:

"prolonged discrimination and harassment"

-accepted

-City's answer: causation not an issue

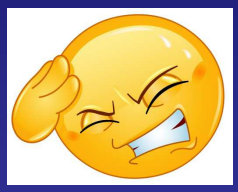
-stips agreed "there is no issue of apportionment or good faith personnel action defense"

FEHA **Trial Court…**

…allowed into evidence ER's w.c. admissions

Jury says?

$472,389



DCA: "when the city in this case admitted [the w.c.] claim was compensable, it was necessarily acknowledging…plaintiff had presented sufficient objective evidence of harassment and that harassment was the predominate [sic] cause of her injury."

FUN IN FOOTNOTES

"Had the city wished to settle plaintiff's workers' compensation claim and at the same time avoid making such an admission, the city could have drafted such an agreement" by C&R.

Learn to be "Flexible"

EEOC v. Sears, Roebuck (N.D. Ill., 9/29/09)

FACTS: Sears automatically terminated EEs on W/C leave after 1 year

EEOC says, "BE FLEXIBLE"

"accommodations could have included an extension…or returning the employee to work with an accommodation."

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Consent decree says… Pay $6.2 million, and…

…revise wc leave policies

…send certified letter to IWs informing of right to request reasonable accommodation to RTW

…agree not to terminate any EE on w.c. leave w/out the approval of new centralized leave management team

…provide "final notice" letter to unresponsive EEs 10 days before termination

…report to EEOC on compliance efforts

…provide ADA training

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Reasonable Accommodation (it only ***seems*** like forever…)

Williams v. County of San Bernardino
4th DCA, E043035
(3/13/08)

Facts:

- AOE/COE back injury
- Unable to perform job duties (probation officer)
- Placed in mod position (clerical worker) during recovery
- EE terminated per policy allowing "recurrent" EEs up to 1,600 hours in mod duty

ISSUE: Does FEHA require ER to keep EE in a modified position ***indefinitely*** when EE is no longer able to perform job duties for which she was hired?

Reasonable Accommodation (it only ***seems*** like forever…)

Williams

HOLDING: No

REASONING:

- EE acknowledged unable to do officer duties
- ER went through interactive process
- No evidence ER terminated EE for any reason other than could not longer work as officer "with or without reasonable accommodation"

"While the county allowed plaintiff to work in a clerical modified position after her injury, the county was not required to employ her in the position indefinitely, particularly when it was clear she would never be able to return to her job as a probation officer…"

Reasonable Accommodation?

Ross v. Raging Wire Communications

S138130, 2008

CA Sup Ct…

(Yeah, yeah…our **HIGH** court!!!)

Reasonable Accommodation?

Facts:

-tested positive during a pre-employment drug screening

-results arrived after started working

-EE told ER:

"doctor had recommended marijuana use for chronic low back pain"

&

"I never smoke at work"

"You're Fired!"

Reasonable Accommodation?

Holding: FEHA does not require ERs to retain EEs who use marijuana

Even though CA approved use of medicinal pot (Compassionate Use Act, 1996)

"No state law could completely legalize marijuana for medical purposes [b/c] the drug remains illegal under federal law…,even for medical users."

Pot & W/C

Are you high?

Health and Safety Code 11362.785(d)

"Nothing in this article shall require a governmental, private, or any other health insurance provider or health care service plan to be liable for any claim for reimbursement for the medical use of marijuana."

Rest of the story?

Who knows?

WCAB has taken a puff (but didn't inhale!)

Cockrell v. Farmers Insurance, 2012 Cal. Wrk. Comp. P.D. LEXIS 456

Facts: AME agreed with medical marijuana
IW "self-procured"

WCJ held: entitled to reimbursement!!!!

Cockrell

WCAB says...

Remand for consideration of Health and Safety Code 11362.785(d)

WCJ says...

"Dude! No worries! Health & Safety Code ain't no biggie, man!"

Cockrell (con't)

WCAB says...

WCJ's order rescinded

WCJ failed to determine whether w/c carrier = "health insurance provider" for the purposes of Health and Safety Code

(If a "health insurance provider", EE's claim may be nixed by Health and Safety Code)

WCJ to analyze whether any rational basis for treating occ and non-occ insurers differently re pot

PHYSICAL DISABILITY

Arteaga v. Brink's Inc.
2nd DCA, No. B194082
(5/28/08)

FACTS:

Armored transport service driver

1999: DOH

2003: Questioned re $12,000 shortage

2003: Suspended - failure to timely deliver $20,000 shipment

3/1/04: Began investigation re more "shortages"

3/17/04: DWC-1 "a combination of 'pain' and 'numbness' in…arms, fingers, shoulders, and feet."

Same Day: ER accompanied EE to his physician: "okay"; RTW

PHYSICAL DISABILITY

Facts:

3/18/04: EE asks ER for demotion so no longer responsible for deposits

ER declines

3/22/04: EE complains of rash

3/23/04: Doctor says "non-industrial"

3/23/04:

"You're Fired!"

Reasonable Accommodation?

- Termination letter: "shortages totaling $7,668 from ATMs you serviced"
- Later diagnosed with CTS
- EE files FEHA;

HOLDING: injuries not a "physical disability" under FEHA

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PHYSICAL DISABLITY

Arteaga v. Brink's Inc. (con't)
2nd DCA, No. B194082
(5/28/08)

REASONING:

"During his…years at Brink's, [EE] never exhibited any signs of a medical problem. Nor did his supervisors ever see him suffering from any medical condition."

ER had a legitimate reason for termination

"Although temporal proximity, by itself, may be sufficient to establish a prima facie case of discrimination or retaliation, it does not create a triable fact as to pretext once the employer has offered evidence of a legitimate, nonprohibited reason for its action. This is especially so where the employer raised questions about the employee's performance before he engaged in protected activity, and the subsequent discharge was based on those performance issues."

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132a?

FEHA?

ADA?

What is 132a?

"It is the declared policy of this state that there should not be discrimination against workers who are injured in the course and scope of their employment."

Point?

Can't take action against EE solely b/c of injury aoe/coe

ERs who discharge,

- threaten to discharge or
- in any manner discriminates against EE b/c EE has filed or
- made known an intention to file wc claim...

May be liable for:

civil penalties

criminal penalties

How much?

civil penalty = 50% increase in EE's compensation award (up to $10,000)

+

costs and expenses (up to $250)

+

reinstatement (yuck!)

+

reimbursement for lost wages and benefits (cha ching!)

+

criminal penalty = misdemeanor

FEHA/ADA

Fights discrimination based on disability

Some 132a actions deal with discrim based on disability

AND

some do not!

Ex. ER discriminates against EE for filing w/c claim

Ex. ER discriminates against w on behalf of EE

Both violate132a

Neither violates ADA/FEHA

(not discrimination on basis of disability)

Rule of Thumb...

Got a 132a?

Watch out for ADA/FEHA!

Side by Side Comparison

Prestructured RTW Programs

- Easy – "If this, then that"
- Save $ on W/C exposure (reduced TD)
- Ensure Risk Mgr/Super. buy-in

Individualized "Accommodations"

- Interactive Process requires individualized evaluations
- Creates civil liability exposure for "one size fits all"
- Mgr/Super. not fully vested

Side by Side Comparison

WC – Medical Restrictions

- CA Med Inf Act (CMIA) contains exception for med disclosures directly related to existing w/c claim if necessary for resolution of that claim
- Status report content limited to diagnosis, TD status, work restrictions

ADA – Workplace Capabilities

- ADA/FEHA requires review of "capabilities" (not limitations)
- 100% Permanently Disabled (means nothing)

Side by Side Comparison

W/C Med Control

- 30 day medical control
- More control w/ MPN
- Med status (45 day max reporting) – better compliance w/in MPN
- Less likely to overpay TD

ADA Right to Independent Physician

- EE has right to have Work Capabilities Evaluated by Personal Doctor
- ER may be "Trapped" by W/C doc's analysis

Feeling more relaxed?

Questions? Call

We’re done! But don’t forget…

Signed up for the B&B BLOG?

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More Information about Bradford & Barthel, LLP

Donald R. Barthel has dedicated his legal career to the defense of employers' rights in the arenas of labor law, employment law and workers' compensation. During the last quarter century, his practice has exclusively focused on workers' compensation defense. With many years' experience in southern and northern California, he has appeared at virtually every WCAB District Office in the state.

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