

Civil Processes Under the WC Umbrella

132(a) Discrimination & S&W Quasi Crime

Claims Crossover: RTW, Layoff, Performance Issues

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What is Discrimination?

Definition



- **Discrimination** simply defined is **unjust or prejudicial treatment of categories of people**
- Further Defined under:
 - **Fair Employment & Housing Act (FEHA)**
 - **Americans with Disability Act (ADA)**
 - **Workers' Compensation California under LC 132(a)**



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The California Fair Employment & Housing Act (FEHA)

- **FEHA is a California State Law**
- **Its Purpose is to Protect Employees from Harassment or Discrimination by their Employer**

Included: age (**40 and over**), ancestry, color, creed, **denial of family and medical care leave, disability (mental and physical) including HIV and AIDS**, marital status, **medical condition (cancer and genetic characteristics)**, national origin, race, religion, sex, pregnancy, military services, and sexual orientation



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FEHA

FEHA's definition of disability and broadened inclusion of classes of people goes beyond the Federal established ADA law

Gov. Code, 12940 subd. (j) Prohibits harassment on the basis of a person's disability



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FEHA Inclusions of Disability (Foundationally the same as Workers' Compensation)

FEHA inclusions:

- **Both Physical and Mental Disabilities**

Physical Disabilities:

Included: Affects one or more body systems, (Neurology, immunological, musculoskeletal, special sense organs, respiratory, speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic, lymphatic, skin and endocrine)



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FEHA Inclusions

Mental Disabilities:

Included: **Mental or Psychological disorder**, such as mental retardation, organic brain syndrome, **emotional or mental illness**, and specific learning disabilities that limit a major life activity or having a history of such impairment or being regarded as having or having had such an impairment



FEHA and Workers' Compensation Overlap

Limits a major life activity (ADL) without regard to mitigating measures, such as medications, assistive devices, prosthetics, or **Reasonable Accommodations (RTW)**

BINGO!!!



FEHA Also Includes Medical Conditions

Medical Conditions being referred to are:

Any health impairment related to a **diagnosis of cancer** or a **record or history of cancer** and **Genetic Characteristics**

Fire Fighters (skin cancer) or the use of **BRCA1 or BRCA2** DNA test to identify genes for breast or ovarian cancer

Gov. Code 12926 subd. (h) and 12940, subd. (a)



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Americans with Disability Act (ADA) U.S. Department of Labor

Prohibits discrimination against people with disabilities in Several Areas:

- **Employment**
- Transportation
- Public Accommodations
- Communications
- Access to state and local government' programs and Services



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Difference Between FEHA and ADA

FEHA requires all employers with **five employees** or more to **“Reasonably Accommodate Employees who have Disability”**

ADA applies to employers with **15 or more employees** and **requires** an employer to **“Reasonably Accommodate a “Qualified Employee with Disability”**



FEHA Jurisdiction and Court Process

- FEHA is enforced by **California Department of Fair Employment and Housing (DFEH)**
- Prior to October 10, 2019 the **Statute of Limitations was one year**
- On and **after October 10, 2019** when **AB 9** took affect, the **Statute of Limitations is now three years**
- The process is to file a charge with the DFEH within three years from the date of the discrimination
- DFEH must issue a Right-to-Sue letter prior to taking the matter to court



ADA Jurisdiction and Court Process

- **ADA** is under the guidance of the **U.S. Equal Employment Opportunity Commission (EEOC)**
- **EEOC** must issue a **Right-to-Sue** letter and the lawsuit can **only be filed in the Federal Court**
- **ADA** has a **stricter Statute of Limitations of 180 days of the date of discrimination**



Take Aways from our History Lesson?

- The foundation of a 132(a) petition, are based on the protections and definitions of disability under California's FEHA laws and Federal ADA laws
- **Vulnerable areas in your claim process are:**
- RTW
- Lay Off
- Employees with Performance Issues



RTW- Interactive Process

- Employers are responsible to make an active and good faith search for RTW through an Interactive Process
- Interactive process is the way employers and employees determine whether “reasonable accommodations” can be made



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RTW- Interactive Process

- Interactive process steps
- Recognizing an Accommodation Request
- Gathering Information
- Exploring Accommodation Options
- Choosing an Accommodation
- Implementing the Accommodation
- Monitoring the Accommodation



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RTW- SJDB is Due Unless Timely Offer

- LC 4658.7 on or after January 2013 SJDB of \$6,000 due 20 days after the expiration of time for making an offer unless:
- Offer for regular, modified, or alternative work within 60 days after claims receipt of the MMI of PTP, QME, or AME.
- (a) Claims needs to provide the reporting doctor with a job description of regular work, proposed modified work or alternative, the physician will report on appropriateness of proposed job (form 10133.36 physicians return-to-work & voucher report)



RTW- Forms

- (b) Claims to forward form to the employer to inform them of restrictions
- Employer/Claims to send out regular offer on form DWC AD 10118
- Employer/Claims to send out modified or alternative offer on form DWC AD 10133.53
- Not timely or on the correct form, SDJB Voucher Due



Layoff-Rules Your Employer May Not Know

- Cal-WARN Act
- LC 1400-1408- Generally, an employer may not order a mass layoff, relocation, or termination unless, 60 days before the order takes affect, they give written notice of the order to the employees and EDD
- There are substantial penalties for failure to give this written notification
- If your employer gives notice and the employee files a claim, is that post termination?



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Performance Issues-Termination

- This is when your employer needs to follow the process of documenting performance issues, counseling the employee, and documenting a series of write ups and assistance by the managers to improve (Some employers do a better job than others)
- Employee is more likely to file preventative claim(s) to preserve employment
- Harder to terminate after a claim is filed and more vulnerable to 132(a) claim



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Performance Issues-Termination

- More likely to start seeking treatment from private health care if they have it, and mentioning harassment by employer, or injury and body parts (Building a case) (Overcoming post term defense and CT issues)
- If terminated more likely to file retaliatory post term cases, (likely multiple cases)
- Create the picture of employer is out to get me so every turn of the corner is thought to be discrimination and Vulnerable to filing a 132(a), along with FEHA or ADA cases



IMPACT ON CLAIMS RTW, Layoff, Performance Issues

- Angry employees might want the employer to pay (revenge) within the limits of WC claim
- AA goal is to build the value of his or her case
- Protracted litigation and possible multiple QME's
- More likely to go after 5814 penalties
- Harder to settle the case with an angry employee
- If a discrimination case is filed, the monetary value is up to a sum certain determined by the ultimate value of compensation paid, and increased by what claims disputed and didn't pay (TD)



In the Workers' Compensation Arena 132(a) Discrimination

LC 132(a)

- A **Declared policy in California** that there **should not be discrimination against workers** who are **injured in the course and scope** of their **employment**



What Does That Mean Exactly?

(1) Any employer who **discharges, or threatens to discharge, or in any manner discriminates** against an **employee because** he or she **has filed or made known** his or her **intention to file a claim** for compensation or **an application**



Or because the employee has received a rating, award, or settlement

If proven

Is Guilty of a Misdemeanor



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(2) Any insurer who threatens or directs an insured under penalty of cancelation, raise premiums to discharge an employee who either did or made known they were going to file a claim is also subject to a **Misdemeanor** and subject to an increase of up to \$10,000, reinstatement, and reimbursement of lost wages and benefits



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(3) Any employer who discharges, or threatens to discharge, or in any manner to discriminate against an employee who intends to testify in another employee's case, is guilty of a misdemeanor



(4) Any insurer that advises, directs, or threatens and insured under penalty of cancelation or a raise in premium because an employee testified in another employee's case is guilty of a misdemeanor



Penalties for 132(a)

Penalties include:

Increase of the employee's compensation by **one-half**, but in no more than **\$10,000**, plus **Costs and expenses not in excess of \$250**



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Penalties for 132(a)

- The **REAL** costs?
- **Entitled to Reinstatement**
- **Reimbursement for lost wages and benefits**



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Proceedings for Increase Compensation

Reinstatement and Reimbursement for lost wages and work benefits, are to be instituted by filing a 132(a) petition with the WCAB

Statute of limitations for filing is one year from the discriminatory act or date of termination of the employee



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WCAB's Jurisdiction

- **WCAB as has the full power, authority, and jurisdiction to try and determine all matters in this section subject only to judicial review**
- **WCAB has no jurisdiction over a misdemeanor charge**
- **WCAB may refer and the worker may complain of suspected violations of criminal misdemeanor to the Labor Standards Enforcement or directly to the office of public prosecutor**



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- This case involves 19 employees who were laid off
- One of the employees refused to sign the severance agreement
- Underlying case and 132(a) has been going on since 2015



Serious & Willful (S&W)

- What is Serious & Willful Misconduct?
- Intentional disregard, knowing act or omission, beyond mere negligence, Quazi Criminal
- Cal OSHA involved- Violations



Serious & Willful (S&W)

Statute of Limitations is one year from the date of injury or death

S&W petition can only be filed if there is a pending workers' compensation case before the WCAB



LC 4553.1

In order to support a holding of S&W misconduct by an employer based on a violation of a safety order, the WCAB must specifically find ALL of the following:

(1) The **specific manner** in which the **order was violated**



LC 4553.1

(2) That the **violation of the safety order** did **proximately cause the injury or death**, and the **specific manner** in which the **violation constituted the proximate cause**



LC 4553.1

(3) That the **safety order**, and the **conditions making the safety order applicable**, were **KNOWN** to, and **violated by**, a particular named person, either the **employer**, or a representative designated by Section 4553, or that the **condition making the safety order applicable** was **OBVIOUS**, created a **probability of serious injury**, and that the **failure of the employer**, or a representative designated by Section 4553, to **correct the condition constituted a reckless disregard for the probable consequences**



LC 4553 Penalties S&W Misconduct

- **The amount of Compensation recoverable by the applicant or dependents shall be increased by one-half**
- **Together with costs and expenses not to exceed \$250**



LC 4553 S&W Misconduct by a Named Person

- **Where the employee is injured by reason of S&W Misconduct of any of the following Person's:**
- (a) **The employer, or his managing representative**
- (b) **If the employer is a partnership, on the part of one of the partners or a managing representative or general superintendent**



LC 4553 S&W Misconduct by a Named Person

(c) If the **employer is a corporation**, on the part of an **executive, managing officer, or general superintendent**



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S&W Example

- Rolling gate fell on Worker after a weld broke resulting in death
- S&W based upon CAL-OSHA citation, failure to ensure gate stop was of sufficient strength to hold gate in place
- Also, Wrongful Death civil case has been filed



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Labor code section 4551

“Willful Misconduct of injured employee”



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