

The DFEH Investigative Process, and Similarities/Differences in Disability Discrimination under the FEHA and ADA



Presented by

Tim Muscat | Chief of Enforcement
Department of Fair Employment and Housing
www.dfeh.ca.gov

***Overview of the DFEH
Investigative Process***



Administrative Complaint

- Any person claiming to be aggrieved by an alleged unlawful employment practice may file a verified complaint for investigation with the DFEH. (Gov. Code, §§ 12960, 12963.)
- Filing an administrative complaint with the DFEH within one year of an alleged unlawful practice (Gov. Code, § 12960, subd. (d)), and receipt of a right-to-sue (Gov. Code, § 12965, subd. (b)), are prerequisites to filing a civil action for employment discrimination under the FEHA.

Exhaustion of Administrative Remedy

- An aggrieved party may forgo having his or her complaint investigated by the DFEH and instead request an immediate right-to-sue from the Department.
- An immediate right-to-sue may be obtained from the DFEH online at www.dfeh.ca.gov.
- Only complainants represented by counsel are encouraged to obtain a right-to-sue online.



New Appointment & Intake Procedures

- Before the DFEH can accept a complaint for investigation, a complainant must undergo an intake interview.
- An appointment for an intake interview can be made online at www.dfeh.ca.gov or by calling 800-884-1684.
- Telephonic intake interviews have replaced in-person intake interviews.



Investigative Discovery

The DFEH has unilateral discovery rights during the investigative process which permit the DFEH to issue subpoenas (Gov. Code, § 12963.1), serve written interrogatories and requests for production of documents (Gov. Code, §§ 12963.2, 12963.4) and depose witnesses (Code, § 12963.3).



Court Order Compelling Response to Investigative Discovery

If an individual or organization fails to comply with a subpoena, interrogatory, request for production, or examination under oath by refusing to respond fully or providing only objections, the DFEH may file a petition with a superior court for an order compelling compliance with the discovery, naming the individual or organization that failed to comply as the respondent. (Gov. Code § 12963.5.)



Pre-Accusation Resolution Opportunities

- Predetermination Settlement Negotiations
- Ongoing settlement discussions
- Conciliation Conferences
- Mediation Division



Accusation



- If, after investigation, the DFEH determines there is sufficient evidence to prove a violation of the FEHA and the complaint has not been resolved, the DFEH files an accusation with the FEHC. (Gov. Code, §12965.)
- The respondent has a statutory right to a hearing within 90 days of the filing of the accusation, unless the respondent and the DFEH stipulate to a longer time frame. (Gov. Code, §§ 12968; Cal. Code Regs, tit. 2, § 7429, subd. (c) (1).)

***Disability Discrimination under
the FEHA***

Keys to the FEHA's Broad Disability Protections (Part I)

- **Floor Not Ceiling:** California disability law provides protections independent from the ADA. The federal law provides a floor of protection to Californians with disabilities, but not a ceiling.

Keys to the FEHA's Broad Disability Protections (Part II)



- **Definition of Disability:** A physical or mental disability is legally cognizable under the FEHA if it “limits” a major life activity (MLA). A condition limits a MLA if it makes the achievement of the MLA major life activity at issue difficult.
- **Different from ADA:** Rejects the ADA’s “substantially limit” language.
- **Mitigating Measures Not Considered:** Whether an individual’s disability limits a MLA must be made without regard to the beneficial effects of mitigating or corrective measures.

Keys to the FEHA's Broad Disability Protections (Part III)

- **Major Life Activities:** Broadly construed to include physical, mental and social activities and working.
- **Perception of Disability:** Persons without disabilities are protected from discrimination resulting from an employer's perception that they are, or might be, disabled.



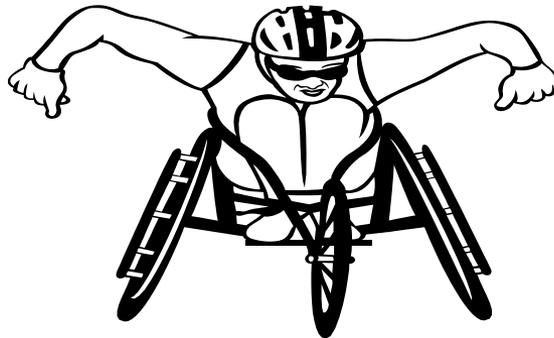
Keys to the FEHA's Broad Disability Protections (Part IV)

- **Interactive Process**: An employer is required to engage in a good faith, interactive process to determine an appropriate reasonable accommodation. Failing to do so constitutes an independent FEHA violation.



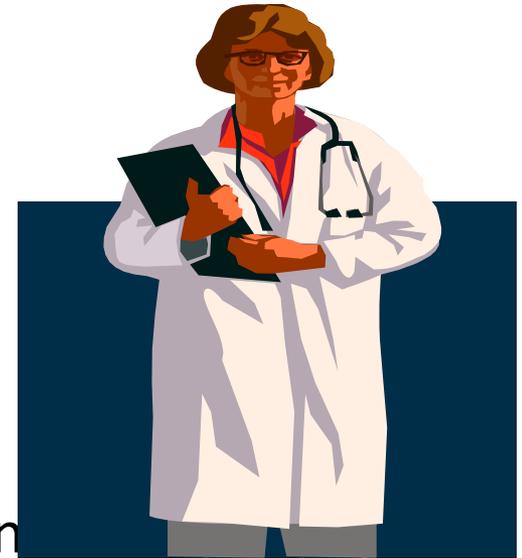
What is a FEHA Disability?

- A physiological disease, a disorder, a condition, a cosmetic disfigurement or an anatomical loss that,
- “affects one or more body system,” and
- “limits a major life activity.” (Gov. Code, section 12926, subd. (k).)



Examples of FEHA Disabilities

- AIDS virus
- Depression
- Asthma
- Hypersensitivity to tobacco smoke
- Long-term heart disease
- High blood pressure
- Chronic or episodic conditions such as migraine
- Injuries that prevent an employee from working, regardless of whether the injury occurred on the job



So What Does FEHA Reasonable Accommodation Mean Today?

- **Essential Functions:** An employer may, however, refuse to hire or may discharge an employee if, even with reasonable accommodation, the employee, because of his or her disability, either is unable to perform the essential duties or cannot perform them without endangering the health or safety of the employee or others. (Gov. Code, section 12940, subd. (a)(1), (2).
- **Undue Hardship:** The FEHA provides that an employer must provide reasonable accommodation for the known physical or mental disability of an applicant or employee unless to do so would create undue hardship for the employer. (Gov. Code, section 12940, subd. (m).)

What Accommodations are Reasonable under the FEHA?

- Job restructuring or re-allocation of duties.
- Adjustment of work hours.
- Providing tools, equipment, supplies, etc.
- Modifying policies.
- Leave of absence.
- Reassignment to vacant position. If reassignment is needed, the employer must take affirmative steps to determine whether a position is available – the employer is in the best position to know this information. (*Spitzer v. Good Guys, Inc.* (2000) 80 Cal.App.4th 1376, 1389.)

Unreasonable Accommodations under the FEHA

- Create a new job.
- Move another employee.
- Promote the disabled employee.
- Violate another employee's rights.
- Reassign the disabled employee to a position that is not funded and not vacant. (*Raine v. City of Burbank* (2006) 135 Cal.App.4th 1215, 1223.)

The FEHA's Timely, Good Faith, Interactive Process

- **Timely**: Applies to both the employee and employer, neither can delay.
- **Good Faith**: Direct communication between the employer and employee, with a willingness to exchange essential information.
- **Interactive**: The employer consults with the employee to ascertain the precise job-related limitations, and how these limitations can be effectively overcome with a reasonable accommodation.

What Would Trigger the FEHA Interactive Process?

- An employee directly asking for an accommodation (either orally or in writing).
- The employee's representative asking on the employee's behalf (such as the employee's doctor, spouse or union rep.).
- Employee states he's having difficulty getting to work on time because of the medical treatment of his health condition.
- Employee's spouse calls and tells employer that employee has had a medical emergency because of his cancer and needs to take five weeks off.
- Employee's doctor sends a letter stating that employee can't lift more than 50 pounds.

What Would Not Trigger the FEHA Interactive Process?

- Employee mentions disability but does not inform employer of any specific limitation (and none is readily apparent to employer).
- Employee requests an accommodation but doesn't mention any disability (and employer has no reason to know of the disability).
- Employee mentions inability to perform specific task, but does not request an accommodation or mention that inability is tied to a disability.
- Employee makes threats of violence against a supervisor or co-worker.

Challenges Under the ADA

The ADA: Narrow Supreme Court Interpretations on what constitutes a Disability (Part I)

- **Mitigating Measures:** The Supreme Court held that under the ADA mitigating measures should be considered in determining whether a person has an ADA qualifying disability.

The ADA: Narrow Supreme Court Interpretations on what constitutes a Disability (Part II)

- **Regarded as Disabled:** Burden on plaintiff to show that discriminating employer believed him or her to be both unable to perform the job applied for, and unable to perform a broad range of jobs.

The ADA: Narrow Supreme Court Interpretations on what constitutes a Disability (Part III)

- **Substantially Limits:** The Supreme Court strictly applied the definition of “substantially limits” and held that “major life activity” meant “activities that are of central importance to most people’s daily lives.”

Impact of Narrow Court Interpretations on the ADA (Part I)

- Unlike the FEHA, focus of ADA litigation became whether plaintiff possessed a qualifying disability.
- Wide range of conditions commonly found as disabilities under the FEHA were rejected by the federal courts. These conditions include cancer, epilepsy, multiple sclerosis, diabetes, arthritis, hypertension, and schizophrenia.

Impact of Narrow Court Interpretations on the ADA (Part II)

- By considering mitigating measures, the federal court's permitted discrimination against worker's with disabilities who controlled their conditions through medications and other treatments.
- Academic studies showed that plaintiff's were losing ADA employment discrimination claims 97% of the time.

Solutions from the ADAAA

ADAA Regulations Effective Today

- The ADA Amendments Act (ADAAA) was passed with broad bipartisan support in 2008.
- The EEOC's implementing regulations were published in the *Federal Registrar* in March and took effect in May, 2011.

Major Objective of ADAAA

- Stop obsessing about whether an employee has a disability, and instead focus on the merits of the requested reasonable accommodation.

ADAAA Regulatory Solutions: New Rules of Statutory Construction - Substantially Limits (Part I)

- Broadly construed and not meant to constitute a demanding standard.
- The impairment need not prevent or severely restrict a major life activity.
- Whether an impairment substantially limits a major life activity should not demand extensive analysis. Instead, the primary objective is whether discrimination occurred.

ADAAA Regulatory Solutions: New Rules of Statutory Construction - Substantially Limits (Part II).

- Determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures.
- An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

ADAAA Regulatory Solutions: New Rules of Statutory Construction - Substantially Limits (Part III)

- An impairment has to substantially limit only one major life activity.
- Temporary impairments (lasting fewer than six months) can be substantially limiting.

ADAAA Regulatory Solutions: List of Standard Impairments

- The regulations indicate that the following impairments will virtually always result in a determination of disability:
- Deafness
- Blindness
- Intellectual disabilities
- Missing limbs
- Use of wheelchair
- Autism
- Cancer
- Bipolar disorder
- Schizophrenia
- Cerebral palsy
- Diabetes
- Epilepsy
- HIV Infection
- Multiple sclerosis
- Muscular dystrophy
- Major depressive disorder
- Post-traumatic stress disorder
- Obsessive compulsive disorder

Positive Impacts of ADAAA

- Focus on merits of claims, not level of disability.
- Require more reasonable accommodations.
- Produce outcomes similar to FEHA.
- Might become helpful in FEHA litigation.

Common FEHA Mistakes by Employers

Common Employer Reasonable

Accommodation Mistakes (Part I)

- Assuming worker's compensation is the exclusive remedy for work related injuries. (*City of Moorpark v. Superior Court* (1998) 18 Cal.4th 1143.)
- Following a "100%" healthy rule before an employee can return to work.
- Failure to consider vacant positions.

Common Employer Reasonable

Accommodation Mistakes (Part II)

- Claiming that an employee cannot perform the essential functions of the job when in fact, the employee was performing the job either with or without an accommodation.
- Refusal to grant a reasonable accommodation due to an inflexible reliance on company rules.

Common Employer Reasonable Accommodation Mistakes (Part III)

- Asserting an essential functions defense based on a job description that does not accurately reflect the employee's actual job.
- Asserting an essential functions defense without considering the ease of certain accommodations, such as assistance from co-workers or tools.

DFEH Class Action Cases

Verizon Class Settlement

- Class action challenging Verizon's CFRA policies.
- Settled for \$6,011,190.
- Settlement has received preliminary court approval, and currently in claims process.
- Final court approval anticipated by end of this year.



Verizon Settlement Tiers

- **Tier 1:** Claimant denied CFRA leave, but not disciplined or terminated. Will receive \$3,000.
- **Tier 2:** Claimant denied CRFA leave and disciplined, but not terminated. Will receive \$6,000.
- **Tier 3:** Claimant terminated or constructively terminated. Will receive \$25,000.
- DFEH may increase any claimant's award by up to 20%.



Questions ?

Thank you for attending!



www.dfeh.ca.gov