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The California Supreme Court holds that a disabled employee bears the burden of proving under the California Fair Employment & Housing Act that he or she is a "qualified individual" capable of performing "essential" job functions with or without "reasonable accommodation."

## California Edition

A Littler Mendelson California-specific Newsletter

### California Disability Discrimination Law - Employees Must Show They Can Do the Job

By Rod M. Fliegel and Gayle Lynne Gonda

The text of the California Fair Employment & Housing Act (FEHA) states, in so many words, that California employers do not have to hire or continue to employ "disabled" individuals who cannot perform "essential job functions" even with "reasonable accommodation." In *Green v. State of California*, No. S137770 (Cal. Aug. 23, 2007) a majority of the California Supreme Court was asked to decide whether the plaintiff employee must prove he or she can perform "essential" job functions, either with or without "reasonable accommodation," or whether the employer had to prove the plaintiff is unable to do so. The court held the burden is on the plaintiff employee, not the employer, and reversed a contrary decision by the court of appeal. In so holding, the court resolved a split of authority among the appellate courts. The court also endorsed the proposition that, even in California, an employer does not have to continue to employ a worker who cannot perform "essential job functions" with "reasonable accommodation." To force employers to do so, the court explained, "would defy logic and establish a poor public policy in employment matters."

The court's decision certainly is a victory for employers and will be of the most assistance to employers who make *several* correct determinations on their way to the ultimate decision. Oftentimes, the predicate determinations present thorny issues for employers. Making informed personnel decisions is necessary to safeguard against the associated legal risks. Moreover, aside from the accommodation obligation, FEHA imposes a *separate* obligation to "engage in a timely, good faith interactive process with the employee or applicant to determine effective reasonable

accommodations, if any, in response to a request for reasonable accommodation." Cal. Gov't Code § 12940(n).

#### Summary of the Case

Dwight Green worked as a stationary engineer for a California correctional institute (Institute) beginning in 1987. His duties included, among other things, maintenance and repair of equipment and mechanical systems. Although Green was diagnosed with hepatitis C in 1990, which he presumably contracted while working at the Institute, he did not have any work restrictions due to the illness nor did he lose any time from work until 1997. In fact, Green's supervisor stated that Green was one of his best stationary engineers.

In 1997, Green's physician began treating him with drug injections as treatment for hepatitis C, which resulted in negative side effects including fatigue, headaches and body aches. As requested by Green's physician, Green's supervisor accommodated Green with light duty work for the next few months. In all other respects, Green continued to perform his duties. In 1999, Green injured his back for reasons unrelated to his injection treatments and he was again put on light duty pursuant to his doctor's recommendation. After Green exhausted the period for light duty allowed by the Institute's policy, the Institute placed him on disability leave. Eight months later, Green returned to work cleared for full duty.

Upon review of Green's personnel file, the Institute's return to work coordinator noticed a 1997 doctor's report prepared by the qualified medical examiner (QME) in the workers'

compensation proceedings. The QME report recommended Green for light duty only. Based on this report, the coordinator concluded that Green should not have been cleared for full duty work, and told Green that he was incapable of performing his duties and could not return to work. A few months later, the Institute denied Green's request for permission to return to work because of findings that he suffered a work-related injury.

Green subsequently filed a charge with the Department of Fair Employment and Housing and then a complaint for damages in superior court alleging disability discrimination. Green prevailed at trial. The jury awarded him almost \$600,000 in economic damages and \$2 million in noneconomic damages. On appeal, the court of appeal affirmed the judgment in Green's favor and held that, under FEHA, the element of proving that a plaintiff is incapable of performing his essential duties with reasonable accommodation is an affirmative defense—*i.e.*, it is the defendant's burden to prove.

The California Supreme Court disagreed and held that the burden of proof is on a *plaintiff* to show that he or she is a qualified individual under FEHA (*i.e.*, that he or she can perform the "essential" functions of the job with or without "reasonable accommodation"). The court reasoned that FEHA's plain meaning is clear and unambiguous, because "[b]y its terms, section 12940 makes it clear that drawing distinctions on the basis of physical or mental disability is not forbidden discrimination *in itself*. Rather, drawing these distinctions is prohibited *only if* the adverse employment action occurs because of a disability *and* the disability would not prevent the employee from performing the essential duties of the job, at least not with reasonable accommodation."

In addition, the court reasoned that the burden of proof requirement—*i.e.*, requiring a plaintiff employee who seeks relief under FEHA to bear the burden of proving that the defendant employer engaged in impermissible disability discrimination against him or her as a "qualified individual"—is the same under the Americans With Disabilities Act (ADA) (FEHA's federal counterpart) and is consistent with the general evidence rule in California that a party must prove the existence or non-existence of each fact that is essential to the

claim for relief that he is asserting (Cal. Evid. Code. § 500).

Next, the court reasoned that the legislative intent behind FEHA to provide plaintiffs with broader substantive protection does not affect the legislative intent to place upon a plaintiff the burden to prove that he or she can perform the essential functions of the job.

Finally, the court reasoned that, even if the California Code of Regulations arguably creates ambiguity about the element of proof of a disability discrimination claim, the Legislature's intent prevailed in supporting defendant's position.

The court did not consider whether Green was "disabled" under FEHA, did not address any disputes over whether certain job functions were "essential," and did not discuss whether Green could be reasonably accommodated in his current job or by reassignment. The interactive process was not mentioned at all.

## Recommendations for Employers

As noted above, the court's holding will be of the most assistance to employers who make *several* correct determinations on their way to the ultimate decision. Oftentimes, the predicate determinations present thorny issues for employers. Employers also have to be mindful of the chance a jury will second-guess their decisions if a case actually gets to trial.

To begin with, the court did not discuss the standard for a "disability" under FEHA. The standard is much less stringent than the standard under the ADA. Although the court aligned the FEHA with the ADA on the technical legal issue, the court did not comment on other salient differences between the statutes. Meaningfully assessing whether the applicant or employee has a "disability," and therefore is protected by FEHA, is a crucial first step in the evaluation process, especially when there is a corresponding claim for workers' compensation benefits. Disputes over workers' compensation benefits typically precipitate the development of *conflicting* medical information. Factual conflicts present challenges for employers seeking summary judgment.

The court also did not comment on the standard for distinguishing "essential" job

functions from marginal ones. Differentiating between the two is not always easy. The written job description is a starting point, but is no more conclusive in FEHA cases than independent contractor and wage and hour misclassification disputes. In FEHA litigation, the parties oftentimes have conflicting positions on whether certain tasks truly are "essential". Again, this is pertinent to summary judgment motions.

The court also did not discuss where the line is between reasonable and unreasonable accommodations. This is a fact-specific determination that takes into account the duties and responsibilities of the *specific* position at issue and the nature of the employer's particular enterprise. In FEHA litigation, the parties rarely agree on whether a given accommodation was "reasonable". The court also did not comment on when employers must consider reassigning a disabled employee to a different job. This can be a very important part of the analysis.

Finally, the court did not offer any guidance concerning affirmative defenses available to employers under FEHA, including "undue hardship" and the "direct threat" defense. (Note that the employer *does have* the burdens of proof and persuasion as to these defenses.)

In sum, making and documenting informed predicate decisions before implementing a final decision is prudent to safeguard against the risks associated with refusing to hire, or separating an individual who is mentally or physically unable to perform essential job functions. Some of the questions employers should be considering based on the court's opinion are as follows:

- Does the company have written and defensible job descriptions? Do the job descriptions reflect truly essential job functions?
- Does the company have adequate procedures for administering requests for reasonable accommodation, including measures for gathering and evaluating pertinent medical information, for evaluating potential accommodations and for monitoring accommodations once they have been made?
- Does the company have a procedure to review separations of employment to

assure compliance with the disability discrimination (and other equal employment opportunity) laws?

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