

CALIFORNIA FAIR EMPLOYMENT AND HOUSING ACT, AND FEDERAL AMERICANS WITH
DISABILITIES ACT REASONABLE ACCOMMODATION REQUIREMENT: OVERVIEW AND SELECT
CURRENT PERPLEXING ISSUES.
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The federal Americans with Disabilities Act (ADA) and the California Fair Employment and Housing Act (FEHA) both prohibit employer disability discrimination in the workplace, and require an employer to engage in an interactive process with a qualified individual (employee or prospective employee) to evaluate the nature of that person's disability(s) and to explore reasonable workplace accommodations that might be available for the employer to provide to that individual. See 42 U.S.C. §§12112(a) and (b)(5); Cal. Gov. Code §§12940(a), (n) and (m); and California Civil Jury Instruction (CACI) Nos. 2540-2542. The ADA applies to employers that have 15 or more employees. The FEHA applies to employers that have 5 or more employees. However, on an issue that at times can be related to disability discrimination, the FEHA workplace harassment prohibition applies to all employers regardless of the number of employees.

In this paper I have placed more emphasis on citations to California authorities because the paper pertains to venue in California, and some provisions of the FEHA are more expansive and contain more broad prohibitions than do the ADA provisions. For example, the FEHA definition of the term "disability" is more broad than as defined under the ADA; however, California law holds that if a disability or prohibition is defined or interpreted more broadly under the ADA, then on a similar claim under the FEHA the more broad ADA definition or interpretation will be applied. See, e.g., Cal. Gov. Code §§12926(l) and 12926.1 You will also note from the below discussion that there are potential issues pertaining to the reasonable accommodation requirement have not yet been addressed by the various authorities, and the actions that an employer must or might take to comply with the reasonable accommodation requirement remain unclear in many important circumstances.

This is a rapidly changing area of law in which developments can occur on an almost weekly basis. Thus, the below comments do not pertain to any particular person, entity, employer or situation; do not constitute advice, legal representation or solicitation to provide legal representation; are only a summary of a complicated area of law; and should not be relied upon for your situation. If you have a situation or question involving these issues, contact competent legal counsel who can review your entire situation and provide advice specific to that situation.

1. Who is a “qualified individual”?

A qualified individual is a person (individual, employee or prospective employee) with a disability, who, with or without reasonable accommodation, can perform the essential job functions of the employment position that the person holds or desires.

Williams v. Genentech (2006, California Court of Appeal).

Dark v. Curry County (2006, U.S. Ninth Circuit Court of Appeals).

See also, CACI Nos. 2540 and 2541.

2. What is the definition of a disability?

A physical or mental disability is a condition that limits (that is, makes more difficult) a major life activity, without regard to such things as medications, assistive devices, or reasonable accommodations.

Life activities include physical, mental and social activities, and working. Generally, a physical disability is a physiological condition, whereas a mental disability includes but is not limited to any mental or psychological disorder or condition, and the definitions of both physical and mental disability include being regarded or treated by the employer as having or having had a disability or a condition that may become a physical or mental disability. Generally, the prohibition against discrimination or harassment relating to a medical condition includes a health impairment related to a diagnosis of or a record of a history of cancer; or any scientifically or medically identifiable genetic characteristic (gene or chromosome), or inherited characteristics.

42 U.S.C. §12102(2)(A).

Cal. Gov. Code §12926(i) (mental disability).

Cal. Gov. Code §12926(k) (physical disability).

Cal. Gov. Code §12926.1 (mental and physical disability).

Cal. Gov. Code §12926(h) (medical condition).

Gelfo v. Locke Martin Corporation (2006, California Court of Appeal).

The employer considered Gelfo to be physically disabled, whereas the employer was mistaken and Gelfo was in fact not physically disabled. Based on a physician’s report, Locke determined that Gelfo would be unable to perform the essential functions of the new employment position and denied him employment for the new position based on that basis. Locke in part

argued that since Gelfo was not disabled, it was not possible to find Locke in violation of disability discrimination under the FEHA. The Court held that Gelfo could at least state a legal claim that Locke acted in violation of the FEHA because Locke denied employment based on disabilities, although those disabilities were erroneously perceived and did not in fact exist. Further, the Court held that Gelfo could at least state an additional legal claim that Locke failed to adequately engage in the reasonable accommodation process.

3. What are some examples of reasonable accommodation?

The following discussion provides examples of possible reasonable accommodations that may or may not apply in a particular circumstance. The items listed are not exhaustive; nor are they necessarily mandated.

2 Cal. Code Regs. §7293.9.

Any employer or other covered entity shall make reasonable accommodation to the disability of any individual with a disability if the employer or other covered entity knows of the disability, unless the employer or other covered entity can demonstrate that the accommodation would impose an undue hardship.

- (a) Examples of Reasonable Accommodation. Reasonable accommodation may, but does not necessarily, include, nor is it limited to, such measures as:
 - (1) Accessibility. Making existing facilities used by employees readily accessible to and usable by individuals with disabilities;
 - (2) Job Restructuring. Job restructuring, reassignment to a vacant position, part-time or modified work schedules, acquisition or modification of equipment or devices, adjustment or modification of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar actions.

The Department of Fair Employment and Housing web page (<http://www.dfeh.ca.gov>), provides that reasonable accommodation can include but is not limited to:

Changing the job duties.

Changing the work shift.

Providing leave for medical care.

Accommodating work schedules.

Relocating the work area.

Providing mechanical or electrical aids (or modifications).

Reasonable accommodation includes but is not limited to providing interpreters or readers, acquiring or modifying equipment, furniture or devices, restructuring job schedules or responsibilities, and making facilities accessible to and usable by people with disabilities.

Cal. Gov. Code §12926(n).

"Reasonable accommodation" may include either of the following:

- (1) Making existing facilities used by employees readily accessible to, and usable by, individuals with disabilities.
- (2) Job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

Dark v. Curry County (2006, U.S. Ninth Circuit Court of Appeals).

The employee has the burden of showing the existence of a reasonable accommodation that would have enabled him to perform the essential functions of an available job. However, the employee need only show that an accommodation seems reasonable on its face, ordinarily or in the run of cases. In *Dark v. Curry County*, the employee requested an accommodation either through a temporary change in his duties, a reassignment to a new position, or the use of accumulated sick leave or medical leave without pay.

See also, CACI No. 2542.

4. Why are the essential job functions and the employer's description of the essential job functions important (for an existing or current job position, and for a possible alternate accommodation job position)?

An employee or prospective employee must be able to perform the essential job functions of the current or potential employment position, either with or without reasonable accommodation.

Cal. Gov. Code §§12940(a)(1).

The FEHA does not prohibit an employer from refusing to hire or discharging an employee with a disability where the employee, because of his or her disability is unable to perform his or her essential job functions even with reasonable accommodation.

Albertson's Inc. v. Department of Fair Employment and Housing (2006, California Court of Appeal).

The employee suffered a workplace injury and filed a workers' compensation claim. Ultimately the claim was settled, and the employee signed a written Compromise and Release, which also waived Cal. Civ. Code §1542. After the settlement, the employee sought reinstatement of her position as a stock clerk at Albertson's.

In pertinent part, the Court held that the burden is on the defendant to establish that the employee is incapable of performing her essential duties with reasonable accommodation. The Court further held that Albertson's failed to return the employee to her job based on her disability and failed to take steps to investigate whether any accommodation was possible to enable the employee to return to the workplace. There was substantial evidence to support a conclusion that the employee's disability was a factor in Albertson's failure to return the employee to her job.

The case is important to show the interaction or possible lack of interaction between a workers' compensation claim and a disability claim under the FEHA. Settlement of the workers' compensation claim did not bar the employee from filing a claim for discrimination under the FEHA.

Dark v. Curry County (2006, U.S. Ninth Circuit Court of Appeals).

An employee is a qualified individual under the ADA if he can perform the essential functions of a reassignment position, with or without reasonable accommodation, even if he cannot perform the essential functions of the current position.

Regulations under the ADA provide that job restructuring may be a reasonable accommodation required of the employer. However, the ADA does not require an employer to

exempt an employee from performing essential functions or to reallocate essential functions to another employee.

The term “essential functions” refers to the fundamental job duties of the employment position that the individual with a disability holds or desires. It does not include the marginal functions of the position.

Consideration should be given to the employer’s judgment as to what functions of the job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, that description shall be considered evidence of the essential functions of the job.

Government Code section 12926(f).

- (1) A job function may be considered essential for any of several reasons, including, but not limited to, any one or more of the following:
 - (A) The function may be essential because the reason the position exists is to perform that function.
 - (B) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed.
 - (C) The function may be highly specialized, so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.
- (2) Evidence of whether a particular function is essential includes, but is not limited to, the following:
 - (A) The employer's judgment as to which functions are essential.
 - (B) Written job descriptions prepared before advertising or interviewing applicants for the job.
 - (C) The amount of time spent on the job performing the function.
 - (D) The consequences of not requiring the incumbent to perform the function.

- (E) The terms of a collective bargaining agreement.
- (F) The work experiences of past incumbents in the job.
- (G) The current work experience of incumbents in similar jobs.

See also, *Williams v. Genentech, Inc.* (2006, California Court of Appeal).
See also, CACI No. 2543.

5. When is the employer requirement to provide reasonable accommodation triggered?

Different authorities suggest different answers to this question. There is no bright line test. For example, Cal. Gov. Code §12940(m) and some cases state or suggest that there must first be a request for reasonable accommodation by the employee. However, other sources such as the Department of Fair Employment and Housing, the U.S. Equal Employment Opportunity Commission October 2002 Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, and various cases at least hedge the answer by using the term “generally”, or state that it is when the employer knows or has reason to know that the employee is experiencing workplace problems because of a disability. In circumstances where the answer to this question is not clear, the employer will be required to make a judgment call about how and when to proceed.

Cal. Gov. Code §12940(n).

It is unlawful for an employer or other entity covered by this part to fail 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 by an employee or applicant with a known physical or mental disability or known medical condition.

Cal. Gov. Code §12940(m).

It is unlawful for an employer or other entity covered by this part to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee. Nothing in this subdivision or in paragraph (1) or (2) of subdivision (a) shall be construed to require an accommodation that is demonstrated by the employer or other covered entity to produce undue hardship to its operation.

2 Cal. Code Regs. §7293.9.

Any employer or other covered entity shall make reasonable accommodation to the disability of any individual with a disability if the employer or other covered entity knows of the

disability, unless the employer or other covered entity can demonstrate that the accommodation would impose an undue hardship.

Prilliman v. United Air Lines, Inc. (1997, California Court of Appeal).

The employer also has an affirmative duty to inform a disabled employee of other existing job opportunities, and to investigate whether the employee is interested in or qualified for the other opportunities, if the employer can do so without undue hardship, offers similar assistance or benefit to other employees (whether disabled or not), or has a policy of offering that assistance or benefit to other employees.

See also, *Gelfo v. Locke Martin Corporation* (2006, California Court of Appeal), applying employer responsibility and liability where the employer perceives, incorrectly, that the employee has a covered disability.

Williams v. Genentech, Inc. (2006, California Court of Appeal).

Under the FEHA, physical disability, mental disability and mental condition are construed broadly so that applicants and employees are protected from discrimination due to an actual or perceived physical or mental impairment that is disabling, potentially disabling, or perceived as disabling or potentially disabling. (Cal. Gov. Code §12926.1(b)).

See also, the U.S. Equal Employment Opportunity Commission, October 17, 2002, Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, holding that an employer has a responsibility when the employer knows or has reason to know that the employee is experiencing workplace problems because of a disability.

6. Are sick time off, vacation time off, or time off without pay considered possible reasonable accommodation?

Yes, they can be, but it also depends upon the facts and circumstances, including, but not limited to the employer's policies, and the employer's past patterns and practices of handling similar situations.

See, e.g., *Williams v. Genentech, Inc.* (2006, California Court of Appeal).

7. For how long must an employer continue to look for reasonable accommodation (or to look for a new or different reasonable accommodation)?

There is no definitive answer to this question. The answer depends upon the existing case law and other authorities, as applied to the facts and circumstances of each case. See also the related discussions at questions 8 through 12 below.

Dark v. Curry County (2006, U.S. Ninth Circuit Court of Appeals).

An extended medical leave or an extension of an existing leave period may be a reasonable accommodation if it does not pose an undue hardship on the employer.

A reasonable accommodation could include permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment. It may not be necessary for an employee to show that the medical leave is certain or even likely to be successful.

Although recovery time of unspecified duration may not be a reasonable accommodation (primarily where the employee will not be able to return to his former position and can not state when and under what circumstances he could return to work at all), the employer was obligated to consider this option under the particular circumstances of the case.

Williams v. Genentech, Inc. (2006, California Court of Appeal).

Holding a job opened for an employee who needs time to recuperate or heal is in itself a form of reasonable accommodation and may be all that is required where it appears likely that the employee will be able to return to an existing position at some time in the foreseeable future. Reasonable accommodation does not require the employer to wait indefinitely for an employee's medical condition to be corrected (citing *Hanson v. Lucky Stores, Inc.*). A finite leave of absence may be a reasonable accommodation under the FEHA where it is likely that at the end of the leave the employee will be able to perform his or her employment duties.

See also, CACI No. 2545 (Undue Hardship).

8. Is an opening for a different current job, or for a different job in the future considered reasonable accommodation?

Yes, they can be, but it also depends upon the facts and circumstances.

Dark v. Curry County (2006, U.S. Ninth Circuit Court of Appeals).

Reasonable accommodation may include reassignment to a vacant position. Certain positions had become available since the employee's employment was terminated, but they were not available at the time of termination. The court held that the duty to accommodate is a continuing duty that is not exhausted by one effort, and that it is also contemplated within the EEOC Guidelines that reassignment is reasonable if the position is vacant within a reasonable amount of time which should be determined in light of the totality of the circumstances.

In considering reassignment as a reasonable accommodation an employer must consider not only those contemporaneously available positions but also those that will become available within a reasonable period.

An extended medical leave or an extension of an existing leave period may be a reasonable accommodation if it does not pose an undue hardship on the employer.

A reasonable accommodation could include permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment. It may not be necessary for an employee to show that the medical leave is certain or even likely to be successful.

Although recovery time of unspecified duration may not be a reasonable accommodation (primarily where the employee will not be able to return to his former position and can not state when and under what circumstances he could return to work at all), the employer was obligated to consider this option under the particular circumstances of the case.

Williams v. Genentech, Inc. (2006, California Court of Appeal).

An employer has an affirmative duty to reasonably accommodate an employee's disability only if the employer can do so without undue hardship.

An employer has an affirmative duty to make known to the employee other suitable job opportunities with the employer and to determine whether the employee is interested in and qualified for those positions if the employer can do so without hardship or if the employer offers similar assistance or benefit to other disabled or non-disabled employees or has a policy of offering such assistance or benefit to other employees.

The employer's duty to engage in the interactive process is a continuing one, and extends beyond the first attempt at accommodation and continues when the employee asks for a different accommodation or where the employer is aware that the initial accommodation is failing and further accommodation is needed. Also citing *Spitzer* (holding that where employer's supervisor is aware that earlier job restructuring was unsuccessful, a triable issue of fact existed as to whether further accommodation was necessary).

However, see also *Williams v. Genentech*, at question 7 above, holding that reasonable accommodation does not require the employer to wait indefinitely for an employee's medical condition to be corrected.

9. If the employer provides temporary reasonable accommodation, for how long must an employer continue to make that accommodation available?

There is no definitive answer to this question. The answer depends upon the facts and circumstances of each case, and existing case law and other authorities. See the discussion below at question 12.

10. Is the employer required to make a part-time reasonable accommodation position available as a permanent position?

No.

Raine v. City of Burbank (2006, California Court of Appeal).

An injured police officer was reassigned to a temporary light duty position at the front desk of the department to accommodate his injury. After six months at that position the officer's personal physician informed the department that the injury was permanent and that the officer would never be able to perform the essential functions of a patrol officer. After investigation, the department informed the officer that it had no available position for an officer with his qualifications and physical limitations. The officer brought suit and basically argued that the department was required to make the front desk position permanent to accommodate his physical limitation. The front desk position was permanently staffed by civilians called police technicians who were paid substantially less and provided far fewer benefits than sworn police officers, and was reserved as a temporary light duty assignment for police officers recovering from injuries. Non-injured officers also fill in temporary at the front desk when a police technician is unavailable or unable to complete a particular report. The department did offer the officer a position at the desk as a police technician at the lower pay, but the officer declined. The Court held that like the ADA, the FEHA does not require an employer to create a new position to

accommodate an employee, at least not when the employer does not regularly offer such assistance to disabled employees. The officer in this case sought to have the employer create a new position, to make his long term temporary assignment permanent.

11. What is the undue hardship exception?

An employer must make reasonable accommodation, unless the employer can establish that doing so would cause the employer an undue hardship. The employer has the burden of proof; the employee need not initially establish lack of hardship. Undue hardship is defined as an accommodation that requires significant difficulty or expense in light of the nature and cost of the accommodation; the financial resources of the facility, the number of people employed at the facility and the impact of the accommodation on the facility operations; the employer's overall financial resources, size, number of employees, and location and nature of facilities; and the employer's type of operations and functions of its workforce. There is little definitive legal guidance about the undue hardship exception.

Cal. Gov. Code §12940(m).

It shall be unlawful for an employer or other entity covered by this part to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee. Nothing in this subdivision or in paragraph (1) or (2) of subdivision (a) shall be construed to require an accommodation that is demonstrated by the employer or other covered entity to produce undue hardship to its operation.

Prilliman v. United Air Lines, Inc. (1997, California Court of Appeal).

An employer who knows of the disability of an employee has an affirmative duty to make known to the employee other suitable job opportunities with the employer and to determine whether the employee is interested in, and qualified for, those positions, if the employer can do so without undue hardship or if the employer offers similar assistance or benefit to other disabled or nondisabled employees or has a policy of offering such assistance or benefit to any other employees.

Spitzer v. Good Guys, Inc. (2000, California Court of Appeal).

Under the FEHA an employer is relieved of the duty to reassign a disabled employee whose limitations cannot be reasonably accommodated in his or her current job only if reassignment would impose an 'undue hardship' on its operations or if there is no vacant position for which the employee is qualified.

Cal. Gov. Code §12926(s).

“Undue hardship” means an action requiring significant difficulty or expense, when considered in light of the following factors:

- (1) the nature and cost of the accommodation needed,
- (2) the overall financial resources of the facilities involved in the provision of the reasonable accommodations, the number of persons employed at the facility, and the effect on expenses and resources or the impact otherwise of these accommodations upon the operation of the facility,
- (3) the overall financial resources of the covered entity, the overall size of the business of a covered entity with respect to the number of employees, and the number, type, and location of its facilities,
- (4) the type of operations, including the composition, structure, and functions of the workforce of the entity, and
- (5) the geographic separateness, administrative, or fiscal relationship of the facility or facilities.

2 Cal. Code Regs. §7293.9.

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- (b) "Undue hardship" means an action requiring significant difficulty or expense, when considered in light of the following factors:
 - (1) the nature and cost of the accommodation needed.
 - (2) the overall financial resources of the facilities involved in the provision of the reasonable accommodations, the number of persons employed at the facility, and the effect on expenses and resources or the impact otherwise of these accommodations upon the operation of the facility.
 - (3) the overall financial resources of the covered entity, the overall size of the business of a covered entity with respect to the number of employees, and the number, type, and location of its facilities.

- (4) the type of operations, including the composition, structure, and functions of the workforce of the entity.
- (5) the geographic separateness, administrative, or fiscal relationship of the facility or facilities.

See also, CACI No. 2545 (Undue Hardship).

12. When is an employer's responsibility to continue looking for a first-time or new reasonable accommodation, or to continue with a temporary reasonable accommodation, terminated, such that the employer can thereafter treat the person the same as the employer would treat any new employee applicant who is applying for a new job?

The answer to this question is not clear. There is no bright line test. It depends upon the facts and circumstances, as applied to the case law and other authorities existing at the time. The employer will be required to make a judgment call about how and when to proceed. Based upon the authorities discussed above, the employer might want to consider whether a version of the following summary approach provides an appropriate chronological process to follow under the circumstances (of course, it is not possible to outline a process that covers all circumstances and possibilities that might exist in any particular situation):

Investigate and evaluate the employee's status, and the workplace circumstances (for that employee and overall, including possible undue hardship), and offer reasonable accommodation available, if any, for the current employment position if, with or without accommodation, the employee can continue to perform the essential job functions of that position. Consider flexible hour or part-time (less than the hours required by the essential job functions for that position) accommodation. If the employee temporarily cannot continue to perform the essential job functions, consider time off such as accrued sick time, vacation time, and other available time off benefits. Also consider the employer's policies, the employer's past patterns and practices in similar situations. Consider any contractual, collective bargaining, or other terms or provisions that might apply.

If needed, consider the possibility of time off without pay. Also consider the employer's policies, the employer's past patterns and practices in similar situations.

Further consider the employee's disability status, and the possible timing of the employee's ability to return to performing all of the essential job functions, with or without accommodation. Consider the workplace circumstances (for that employee and overall). Also consider the employer's policies, the employer's past patterns and practices in similar situations.

Consider other reasonable accommodation employment positions currently available, and positions for which it is known or reasonably believed that there will be an opening in the near future, and the employee's possible ability to perform the essential job functions of those positions, with or without reasonable accommodation. Consider the workplace circumstances (for that employee and overall). Also consider the employer's policies, the employer's past patterns and practices in similar situations.

After performing the above steps, reevaluate the entire situation again for employee status, reasonable accommodation available, and workplace circumstances, including possible undue hardship.

After consideration of the above steps, and depending upon options then available, if any, the employer's policies, and the employer's past patterns and practices, evaluate whether the employee's employment should be terminated. If the employee's employment is terminated, continue to follow employer's policies, and past patterns and practices.

13. If the employer is able to offer an alternative employment position, how does the employer handle the possible issue of priority, or job position priority as between the employee with the disability and other employees or applicants who also desire the alternative employment position?

It depends upon the facts and circumstances, including the employer's policies and past patterns and practices, and contract, collective bargaining, etc., requirements or provisions that might apply. For a brief discussion and example, see also, the U.S. Equal Employment Opportunity Commission October 2002 Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act.

14. Can the employer choose or select between different reasonable accommodations that are available?

Yes. The employer has the discretion to choose between different, effective accommodations, and is not necessarily required to choose the accommodation desired by the employee, or the "best" accommodation.

Hanson v. Lucky Stores, Inc. (1999, California Court of Appeal).
Williams v. Genentech, Inc. (2006, California Court of Appeal).

15. Is a “disability” a possible defense to past or current employee misconduct?

Yes, depending upon the facts and circumstances, it is a possible defense, but also consider *Dark v. Curry County* and *Josephs v. Pacific Bell*, below.

Dark v. Curry County (2006, U.S. Ninth Circuit Court of Appeals).

Termination of employment for alleged misconduct relating to the employee’s disability generally is unavailable as a defense for the employer. With few exceptions, conduct resulting from a disability is considered to be part of the disability, rather than a separate basis for determination. In *Dark*, in the morning, prior to work, the employee suffered an aura which would indicate a risk for seizure later in the day; the employee failed to take necessary precautions, reported to work, and then suffered a seizure.

Josephs v. Pacific Bell (2005, U.S. Ninth Circuit Court of Appeals).

An employee of Pacific Bell answered on his employment application that he had never been convicted of and was not awaiting trial for a felony or misdemeanor. After being hired, Pacific Bell obtained the employee’s criminal history indicating that he had been arrested for attempted murder and was found not guilty by reason of insanity, and he had previously spent time in a mental hospital and board and care mental health facility. Eventually Josephs’ employment was terminated for fraudulent entries on his application and his attempt to withhold information concerning his past, in direct violation of Pacific Bell’s code of conduct. Josephs and Pacific Bell proceeded through a three-step grievance process as required by the collective bargaining agreement. There was at least some disagreement between Pacific Bell supervisors regarding whether Josephs had been a good employee, and whether he should be reinstated. Thus, there was evidence that some supervisors supported his position, while others did not. There also was testimony about Josephs’ past successful employment as a service technician, and evidence regarding Josephs’ ten years of experience performing a similar job with another company.

Pacific Bell took the position that Josephs was dishonest and withheld information on his employment application, and that Pacific Bell considered Josephs to be unemployable because he had spent time in a mental facility, his past violent acts made him unqualified for any position at Pacific Bell, he might go off on a customer, and his mental disorder substantially limited his ability to work on a broad range of jobs.

The jury, and subsequently the Appellate Court determined that Pacific Bell’s termination of Josephs’ employment for dishonesty on his employment application was not discriminatory, but that Pacific Bell violated the FEHA in its failure to reinstate Josephs or to consider

reasonable accommodations to reinstate Josephs following the grievance proceedings. The Court apparently was of the belief that Josephs' past criminal activities and possible related mental disabilities did not necessarily justify denying Josephs reinstatement or a reasonable accommodation.

16. Can the employer terminate or refuse to hire an individual, and not be required to evaluate reasonable accommodations if the employee or job applicant cannot perform the essential duties of the job without endangering the health and safety of others or of the individual, even with an accommodation?

Yes, depending upon the facts and circumstances, but also consider *Dark v. Curry County*, below.

Cal. Gov. Code §12940(a)(1).

See also, CACI No. 2544.

Dark v. Curry County (2006, U.S. Ninth Circuit Court of Appeals).

Under the ADA an employer is entitled to defend the adverse employment action on the ground that an individual poses a direct threat to the health or safety of other individuals in the workplace. However, that defense also incorporates a requirement that the qualifications standard be incapable of modification through a reasonable accommodation that would permit the disabled employee to meet those standards. There remained an issue of material fact as to whether a reasonable accommodation, such as temporary reassignment or the use of medical leave, could have eliminated the need for the application of the "seizure-free" requirement resulting in the employee's termination.

17. Does a workers' compensation settlement with a Cal. Civ. Code §1542 waiver bar a separate civil action for disability discrimination under the FEHA?

Surprisingly, perhaps not. See *Albertson's Inc. v. Department of Fair Employment and Housing* (2006, California Court of Appeal), discussed above at question 4.

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