

When your client's injury leads to an employment case

PI clients often run into problems at work when their employer won't accommodate their new limitations

By Tom Feher & Stephen Wiard

As personal-injury lawyers, clients often come to us in pain after a traumatic incident. They need someone to fight for them while they attempt to put their lives back together. Our clients sometimes undergo extensive medical treatment in the hopes of recovering or, at the very least, to help manage the new reality caused by their physical (and mental) injuries. But what happens to a client's job after they are injured?

While some of our clients are so catastrophically injured that they'll never be able to work again, many can return to work with the proper support from their employers. Fortunately, California law provides some of the best protections in the country for employees with disabilities. This article will cover some common scenarios and issues that arise when your injured client goes back or attempts to go back to work.

What is a disability?

Among other things, California's Fair Employment and Housing Act

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("FEHA") prohibits employers from discriminating against employees on account of their disability or perceived disability. (Gov. Code, § 12940 et seq.) So, what is a "disability" under the law? While employers might only consider an employee to have a disability if they have an obvious, visible injury or limitation (e.g., they are blind or use a wheelchair), the definition of a disability under the FEHA is far more expansive. First, the FEHA covers both an employee's "physical disability" and "mental disability." Second, the definition of each covers far more than what a lay person might consider to be a disability.

"'Physical disability' includes, but is not limited to, all of the following: (1) Having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following: (A) Affects one or more of the following body systems: neurological, immunological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine. [and] (B) Limits a major life activity…" (Gov. Code, § 12926, subd. (m).)

"'Mental disability' includes, but is not limited to, all of the following: (1) Having any mental or psychological disorder or condition, such as intellectual disability, organic brain syndrome, emotional or mental illness, or specific learning disabilities, that limits a major life activity." (Gov. Code, § 12926, subd. (j).)

As you can see, with very few exceptions, so long as your client's injury or condition "limits a major life activity," it is likely a covered disability under the law. What does it mean to limit a major life activity? "A physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss limits a major life activity if it makes the achievement of the major life activity difficult." (Gov. Code, § 12926, subd. (m).) "'Major life activities' shall be broadly construed and includes physical, mental, and social activities and working." (Gov. Code, § 12926, subd. (m).)

In other words, if your client's injury or condition has made their life more difficult (including impacting their ability to work), they likely have a covered disability under California law. This includes not only their physical disabilities, but also mental disabilities. For example, if your client is suffering from depression, anxiety, or Post-Traumatic Stress Disorder (PTSD) following the incident that led to their injury, this could qualify as a mental disability under the FEHA, and they would be entitled to protection under the law, even if their disability is not outwardly visible.

What is an employer's duty to your client with a disability?

Once you have determined that your client has a disability under California law, the next question becomes: What obligations does your client's employer have to your injured client? The FEHA makes it an unlawful employment practice for an employer to "fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee." (Gov. Code, § 12940, subd. (m).) This obligation to accommodate an employee with a disability so that they can continue to work applies unless an employer can demonstrate that doing so would create an "undue hardship." (*Ibid.*) In order to determine what accommodations are likely to be reasonable and effective, an employer must engage in a "timely, good faith, interactive process" with an employee with a disability. (Gov. Code, § 12940, subd. (n).)

So, what does this look like in practice? Obviously, the accommodations your injured client may require in order to do their job will depend on a number of factors including, but not limited to, your client's specific disability, the restrictions placed on them by their doctor, their essential job duties, and the resources of their employer. Your client and their employer should have an open dialogue about the various factors at issue and provide each other with the necessary information needed to facilitate the interactive process.

This may include your client providing reasonable medical documentation to confirm the existence of their disability, their need for accommodation, and describing any physical or mental limitations they may have. (Cal. Code Regs. tit. 2, § 11069, subd. (d)(1).) While your client may wish to disclose the precise nature of their disability, they are not required to do so. (*Ibid.*) Your client's employer should carefully analyze your client's request for accommodation, your client's job duties, and should identify potential accommodations that they believe might enable your client to perform the essential functions of their job. (*Id.* at subd. (c).)

What is a "reasonable accommodation"?

"Reasonable accommodation" is, generally speaking, "a modification or adjustment to the workplace that enables the employee to perform the essential functions of the job held or desired." (*Nadaf-Rahrov v. Neiman Marcus Grp., Inc.* (2008) 166 Cal.App.4th 952, 974.) "'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." (Gov. Code, § 12926, subd. (p).) With this definition in mind, some examples of reasonable accommodations include the following:

- Moving an employee's desk to an area more easily accessible by wheelchair if the employee now utilizes such assistance

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- Providing an ergonomic keyboard or mouse to an employee with carpal tunnel syndrome or an ergonomic chair to an employee with a spinal injury
- Allowing an employee with a back injury to sit while working, even if others doing the same job ordinarily standing
- Providing lifting assistance (from a device or coworkers) to an employee with a lifting restriction
- Providing time off to attend doctor's appointments or receive other medical care (e.g., physical therapy)

While these examples of potential accommodations may seem obvious and an easy way to allow a valued employee to continue working after an injury, you would be surprised to discover how many employers refuse to take these reasonable, common-sense steps. Often, an employer simply refuses to accommodate an employee with a disability because they don't want to be bothered to modify their workspace or pay for equipment to make the employee's workplace more accessible.

Sometimes an employer will refuse an accommodation because they feel it is "unfair" to an employee's non-disabled coworkers to modify the job duties of an employee with a disability. These are not sufficient justifications to deny a reasonable accommodation request. (See EEOC, Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA (2002).)

An employee may have unique needs

Employers often claim to apply their policies evenly to all employees. While this sounds like a good idea in the abstract, this fails to account for the unique needs of an employee with a disability. An employee with a disability may need a modification or even exemption from an employer's policies to be able to continue performing the essential functions of their job. As long as that modification or exemption does not create an "undue hardship" on the employer, they should grant it.

For example, some employers have attendance policies where an employee accumulates "points" for every absence, regardless of the reason. After accumulating a specified number of points within a set period of time, the employee can be disciplined, including being terminated. This type of policy may seem reasonable on its face, but what happens when an employee with a disability needs to miss work due to their disability or in order to receive medical care? The law is clear, employers are required to modify their policy and make exceptions for the employee with the disability under these circumstances so as not to punish them for their disability. While altering policies for one individual may seem "unfair" to non-disabled coworkers, "the law often does provide more protection for individuals with disabilities. Unlike other types of discrimination where identical treatment is the gold standard, identical treatment is often not equal treatment with respect to disability discrimination." (*Gambini v. Total Renal Care, Inc.* (9th Cir. 2007) 486 F.3d 1087, 1095. See also *U.S. Airways, Inc., v. Barnett* (2002) 535 US 391, 397-398.)

Leaves of absence

Another common example of a reasonable accommodation is a temporary leave of absence. While some employers may be willing to work with an employee with a disability to modify their duties or workspace to allow them to continue working, sometimes the only effective accommodation is a complete cessation of work altogether. A client's doctor may recommend that they stop working for a period of time in order to rest and recover from their injuries. A client's doctor may recommend time off from work to have surgery or to undergo other intensive medical treatment. Sometimes a client is simply unable to perform the essential functions of their job at the moment due to their weakened and injured state, but their doctor anticipates them recovering enough in the future to be able to return to work. This is where the temporary leave of absence comes in as a crucial form of reasonable accommodation.

While an employer may not want to allow their injured employee extended time off from work, the law is clear that "a finite leave can be a reasonable accommodation under FEHA, provided it is likely that at the end of the leave, the employee would be able to perform his or her duties." (*Hanson v. Lucky Stores, Inc.* (1999) 74 Cal.App.4th 215, 226.) The FEHA regulations also explicitly list a leave of absence as a possible reasonable accommodation: "When the employee cannot presently perform the essential functions of the job, or otherwise needs time away from the job for treatment and recovery, holding a job open for an employee on a leave of absence or extending a leave provided by the CFRA, the FMLA, other leave laws, or an employer's leave plan may be a reasonable accommodation provided that the leave is likely to be effective in allowing the employee to return to work at the end of the leave, with or without further reasonable accommodation, and does not create an undue hardship for the employer." (Cal. Code Regs. tit. 2, § 11068, subd. (c).)

The duty to accommodate an employee with a disability exists regardless of the employee's eligibility for other types of leave such as that permitted under the Family Medical and Leave Act (FMLA) or the California Family Rights Act (CFRA). Accordingly, even if an employee has only worked for their employer for a short period of time or is a part-time employee, they would still be eligible for a disability-related leave of absence if that was what is required to reasonably accommodate the employee.

Often, an employee with a disability may need extensions of their original leave of absence. When their recovery doesn't go as planned or a complication arises, a client's doctor may suggest that they take more time off than previously

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anticipated. This sometimes leads to frustration from an employer who may have been willing to weather an employee's absence for a specified period, but who does not want to give time off beyond what was called for in the original doctor's note.

"Although an employer need not provide repeated leaves of absence for an employee who has a poor prognosis of recovery, the mere fact that a medical leave has been repeatedly extended does not necessarily establish that it would continue indefinitely. In some circumstances, an employer may need to consult directly with the employee's physician to determine the employee's medical restrictions and prognosis for improvement or recovery." (*Nadaf-Rahrov v. Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 988-989, internal citations omitted.) While an employer need not provide "indefinite leave," the simple fact that a client's leave was extended multiple times does not make their leave "indefinite," particularly where their injuries are "the type of injury from which people generally heal in the foreseeable future. As explained in *Humphrey v. Mem'l Hosps. Ass'n*, 239 F.3d 1128, 1136 (9th Cir. 2001, "[T]he ADA does not require an employee to show that a leave of absence is certain or even likely to be successful to prove that it is a reasonable accommodation." Hence, an employee only needs "to satisfy the minimal requirement that a leave of absence could plausibly have enabled [her] adequately to perform her job." (*Ibid.*)

Even lengthy leaves of absence can be reasonable depending on the circumstances. For example, if your client works a non-specialized job for a large employer (e.g., a packer at an Amazon warehouse), it will be difficult for their employer to claim that even a lengthy leave of absence creates any type of undue hardship for them. While your client's need for leave may annoy their supervisor, that is not a justification to deny this request for reasonable accommodation. Because each request for accommodation requires an individualized assessment, so-called "maximum leave" policies, where an employer predetermines an arbitrary limit to the amount of leave they will allow (e.g., one year), are also prohibited. (See EEOC, Employer-Provided Leave and the Americans with Disabilities Act (May 9, 2016).)

While a client's leave of absence from work may create legitimate challenges for some employers, there are others who attempt to weaponize the leave of absence accommodation in the interactive process. These employers do not want to accommodate an injured employee or an employee with a disability by providing any type of accessibility equipment or modifications to their job. Instead of simply providing the necessary devices or adjusting a client's job duties slightly to allow them to continue working despite their disability, these unscrupulous employers will attempt to force employees with disabilities out on a leave of absence. These employers will claim that they cannot accommodate an employee's work restrictions and that they have no option but to have the employee go out on leave or be terminated.

This creates a difficult choice for the client. Do they pretend to be completely healed in order to continue working and receiving full pay, even if that means violating their doctor-prescribed work restrictions and potentially worsening their condition? Do they go out on a leave of absence (despite their ability to work with accommodations) and greatly reduce their income? Do they face termination if they refuse this suggested accommodation? Once again, the FEHA regulations provide some guidance: "When an employee can work with a reasonable accommodation other than a leave of absence, an employer may not require that the employee take a leave of absence." (Cal. Code Regs. tit. 2, § 11068, subd. (c).) When an employer ignores this prohibition on forcing an employee out on leave unnecessarily, they expose themselves to potential litigation.

Remote work

During the COVID-19 pandemic, many employers were forced to shut down completely. Others were able to keep operating by having their employees work from home. When many pandemic-era restrictions were lifted, some employers allowed their employees to continue working from home while others required a return to the office. This has obviously created much debate over the benefits and drawbacks of remote work, but what about those who do not simply prefer remote work, but may need to work from home due to their disability?

"Working at home is a reasonable accommodation when the essential functions of the position can be performed at home and a work-at-home arrangement would not cause undue hardship for the employer." (*Humphrey v. Memorial Hospitals Ass'n* (9th Cir. 2001) 239 F.3d 1128, 1136.) Government Code § 11065, subd. (p)(2)(L), provides examples of reasonable accommodation, which include "permitting an employee to work from home." Likewise, the EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA (2002) states, "An employer must modify its policy concerning where work is performed if such a change is needed as a reasonable accommodation . . . ."

While remote work was a possible reasonable accommodation long before 2020, the COVID-19 pandemic made clear that many jobs could be performed remotely without creating an undue burden on the employer. Accordingly, if your injured client could perform the essential functions of their job from home, they should consider that as a possible accommodation to remain in the workforce even if they have other limitations that might otherwise prevent them from doing so (e.g., they are unable to drive).

Reassignment to a vacant position

If there are no other good options, another form of reasonable accommoda-

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tion can be a reassignment to a vacant position. "Reassignment is the reasonable accommodation of last resort and is required only after it has been determined that: (1) there are no effective accommodations that will enable the employee to perform the essential functions of his/her current position, or (2) all other reasonable accommodations would impose an undue hardship. However, if both the employer and the employee voluntarily agree that transfer is preferable to remaining in the current position with some form of reasonable accommodation, then the employer may transfer the employee." (EEOC, Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA (2002).)

When considering reassignment as a reasonable accommodation, it is important to note that "[t]he employee with a disability is entitled to preferential consideration of reassignment to a vacant position over other applicants and existing employees." (Cal. Code Regs. tit. 2, § 11068, subd. (d).) Therefore, if your client can no longer work in their old position due to their injuries/disability, they do have the option (and their employer has the obligation) to be transferred to a vacant position for which they are qualified.

Conclusion

When a client is injured, they should focus on their medical treatment and recovery. The last thing they should have to worry about is whether their job is secure or their employer is going to work with them and any new restrictions they may have. While no one wants to see their injured client's pain made worse by a discriminatory firing or an employer's failure to accommodate them, it is important to know that California law provides robust protections to employees with disabilities.


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