

Returning Injured Employees to Work While Complying With the ADA & FEHA

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ADA/FEHA Basics

- Individual with a disability (FEHA/ADA)
- Essential functions of the job
- Interactive Process
- Reasonable Accommodation v. Undue Hardship
- Time frames
 - Immediately Following Injury & Prior to P&S
 - After P&S determination
- Document, document, document

Understanding How the “Interactive Process” Works and When it is Triggered

- ERs need to understand their obligations under the ADA/FEHA – worker compensation is only one statutory scheme.
- Employers are required to engage in the “interactive process” to determine whether a “reasonable accommodation” is available for the injured worker.

Understanding the Overlap

Today’s Query:

What is **Your** Role in this Process?

Remarks That Lead to Litigation ... How Does an Employer Un-Ring These Bells?"

- "Our company has a policy that modified work is not offered after 90 days ..."
 - *As Distinguished From ...* "Our company does not offer temporary, transitional light duty assignments for more than 60 days"
- "Our company has a policy that an EE must be released to return to full duty before he/she can be reinstated."
- "Our company has a policy that the EE must be 100% before returning to work."
- "The injured employee has been declared permanent & stationary and *still* cannot perform his former job."

Consider the Comments Made by Employers ...

- None of them even mention:
 - The ADA or FEHA
 - The Interactive Process
 - Identification of a Reasonable Accommodation
 - Only 1 of the comments even focuses on the specific injured employee!
- This is the "GAP!"

ADA & FEHA

- An EE who sustains an industrial injury may be considered “disabled” under state and/or federal law.
- **Pending Federal Legislation:** ADA Restoration Act (ADARA, S. 1881, H.R. 3195)
 - Removes “substantially” from the ADA test
 - Transient injuries or temporary adjustment problems appear to be covered
 - Legislation includes impairments that are "episodic, in remission or latent."
 - Includes "emotional illness"

Comparison of WC & ADA/FEHA

WORKERS COMPENSATION

Focuses on What an Injured Worker
Can No Longer Do

ADA/FEHA

Seeks to Explore Through the “Interactive
Process” What the Employee is Still
Capable of Doing

Analysis of the Injured Worker's Former Position

OVERLAP

Can the injured worker perform the essential functions of his/her former position (i.e., usual and customary work) with a reasonable accommodation?

Analysis of Alternative Positions for the Injured Worker

WC

- Position lasting at least 12 months
- Wages & compensation offered are at least 85% of what was paid at the time of injury
- Job is within reasonable commuting distance
- Form: DWC- AD 10133.53

ADA/FEHA

- Identify all vacant positions in the organization for which the injured worker is qualified and can perform *with or without* an accommodation
 - No specific requirements re compensation
 - No specific requirements re duration but must be a bona fide position
 - Look for jobs in reasonable commuting distance, but explore all options with EE EE may be interested in relocating at his/her own expense
- Form: Documentation of the "Interactive Process" and all alternative positions identified by ER and EE's response to those positions

Analysis of Alternative Positions Comes Up Short.. Are We Now Finished?

WC

No alternative or modified work is available

ADA/FEHA

No alternative positions exist for which the employee is qualified and can perform with or without reasonable accommodation

According to the Equal Employment Opportunity Commission ...

- There is no special procedure for requesting accommodations. ADA obligations can be triggered very informally.
- To request an accommodation, an EE may use "plain English" and need not mention the ADA or use the phrase "reasonable accommodation."
- *"I need six weeks off to get treatment for a back problem" is enough to trigger duties under the law.*

“Reasonable Accommodation” Can Include:

- Altering when and how job tasks are performed
- Providing unpaid leave that does not result in termination
- Reassignment to a vacant position
- Providing equipment or devices
- An accommodation that causes the ER “undue hardship” is not “reasonable.”
 - Caveat -- ER has the burden of proof!
 - \$2,500 -- is this expense automatically too much for an employer with 50 or fewer employees?
- An accommodation that constitutes a “direct threat” to the health and safety of co-workers or to the EE is not “reasonable.”
 - Caveat -- ER has the burden of proof!

Who Has the Burden of Proof?

- **FEHA:** EE must show that he/she has a disability and can perform the essential functions of the job with or without reasonable accommodation.
 - *Green v. State of California*
42 Cal.4th 254 (August 23, 2007)

Examination of the California Supreme Court's Decision in *Green v. State of California*

- Plaintiff began working for the State of California in 1974.
- In 1987, plaintiff worked as a stationary engineer for the Department of Corrections at the California Institute for Men in Chino.
- In 1990, plaintiff was diagnosed with hepatitis C. Plaintiff presumably contracted the disease while working on the sewer pipes at the Institute.
- From 1990 until 1997, plaintiff did not have any work restrictions because of the illness, nor did he lose any time from work.
- Plaintiff was considered one of the best stationary engineers at the facility.

Examination of the California Supreme Court's Decision in *Green v. State of California*

- In 1997, plaintiff began taking interferon injections for his hepatitis C. A single course of treatment required injections three times a week for a one-year period.
- The treatment caused plaintiff to feel fatigued, have trouble sleeping, and to suffer headaches and body aches.
- On February 14, 1997, plaintiff's physician, Dr. Wang, requesting that plaintiff be put on light duty until at least May or June of 1997. (A 1997 QME report from Dr. Markowitz also recommended light duty.)
- The CDC accommodated plaintiff and allowed him to arrive to work late on the days he received the injections.
- At times, he was assigned to positions that did not require heavy labor. In all other respects, plaintiff continued to perform his duties.

Examination of the California Supreme Court's Decision in *Green v. State of California*

- On January 11, 1999, plaintiff was reprimanded for coming into work late on various days. Plaintiff explained to his employer that his ongoing medical condition prevented him from being punctual at times.
 - *How did this happen?*
 - *Why doesn't the right hand know what the left hand is doing?*
- In June 1999, plaintiff injured his back while lifting a garbage disposal. The injury was unrelated to the injections. Plaintiff was placed on light duty due to his back injury.

Examination of the California Supreme Court's Decision in *Green v. State of California*

- Defendant had a "policy" that employees could only be on light duty for a limited time period.
- In November 1999, defendant placed plaintiff on disability leave b/c his back injury continued to require light duty work.
- **On July 3, 2000, plaintiff returned to work cleared for full duty.**
 - He took sick leave to attend physical therapy sessions for his back injury only.
 - *Things are looking up, right?*

Examination of the California Supreme Court's Decision in *Green v. State of California*

- The RTW Coordinator noticed the 1997 doctor's report the QME prepared at the time plaintiff began receiving his interferon injections. The report *recommended* plaintiff for light duty only.
- RTW Coordinator concluded that plaintiff should not have been cleared for full duty work and could not return to work. She discussed various options with plaintiff, who *initially* decided to take disability retirement.

Examination of the California Supreme Court's Decision in *Green v. State of California*

- October 2, 2000, letter to plaintiff, "if you can't be cleared for full duty, you cannot return to your job as a stationary engineer."
- November 2000, plaintiff sought permission to return to work.
- The RTW Coordinator denied his request based on 1999 findings of a workers' compensation proceeding that found plaintiff had suffered a work-related injury.

Examination of the California Supreme Court's Decision in *Green v. State of California*

- Plaintiff filed a DFEH claim and then a lawsuit for disability discrimination.
- Dr. Markowitz's 1997 report was not admitted into evidence and Dr. Markovitz was not allowed to testify.
- Jury verdict for plaintiff:
 - \$597,088 in economic damages
 - \$2 million for pain & suffering

Examination of the California Supreme Court's Decision in *Green v. State of California*

- CDC appealed the jury verdict.
- The Court of Appeal affirmed the judgment.
- California Supreme Court granted review.
- Ruling: "We conclude that the Legislature has placed the burden on a plaintiff to show that he or she is a qualified individual under the FEHA i.e., that he or she can perform the essential functions of the job with or without reasonable accommodation."
 - Green will have to demonstrate to a jury that he could perform the essential functions of the stationary engineer position with or without a reasonable accommodation.

Green Returns to the Courtroom ...

- The California Supreme Court “remanded the matter for proceedings consistent with this decision.”
- Green will have to shoulder his burden of proof to demonstrate that he or she is a qualified individual under the FEHA i.e., that he or she can perform the essential functions of the job with or without reasonable accommodation. “

Interaction Between Worker's Compensation & the ADA/FEHA

- *City Of Moorpark v. Superior Court*

Holding: Despite the exclusivity of work comp for the *actual injury* to the employee, employees can still sue their employers for “failing to accommodate” an industrial injury under the FEHA.

Impact of the *Moorpark* Decision

Why are injured workers pursuing these claims?

- Follow the \$\$
- The plaintiffs' bar is advising injured EEs of their rights under the ADA/FEHA

**BOTTOM LINE:
INJURED EMPLOYEES UNDERSTAND
THE OVERLAP!**

What Happens When an EE Suffers an Industrial Injury Because of her ER's Refusal to Accommodate a Disability?

- *Ask Marilyn Bagatti ...*
- Marilyn was employed by the California Department of Rehabilitation. Marilyn had a disability that required an accommodation. However, her employer refused to modify her job to accommodate her physical disability.
- Marilyn filed a complaint with the DFEH.
- Marilyn continued to work, but then suffered an industrial injury and claimed that it resulted from her employer's "failure to accommodate" her physical disability.

What Happens When an EE Suffers an Industrial Injury Because of her ER's Refusal to Accommodate a Disability? (cont.)

- The ER argued that WC was Marilyn's exclusive remedy and that she could not bring a claim under the FEHA for her physical injury.
- Who won?
- Why?

Why Do Employees Like "Failure to Accommodate" Claims Under the ADA/FEHA More than Labor Code 132a Claims?

- The remedies are different!!
- The FEHA allowed Marilyn significant additional remedies. Labor Code section 132(a) offers a limited remedy, while a violation of the FEHA allows the EE to seek compensatory and punitive damages!