



Employment Law Update

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- State Supreme Court Interprets FEHA to parallel the ADA

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Under a recent California Supreme Court decision, the state Fair Employment and Housing Act now requires an individual alleging disability discrimination to establish that they are able to perform their job's essential duties before they can prevail in a lawsuit for discrimination. This case puts California law in line with federal law under the American's with Disabilities Act. California employers will be pleased that an employee alleging disability discrimination now has the burden of proof to establish that they can perform their position's essential duties.

Highlight Article

State Supreme Court Interprets FEHA to Parallel the ADA

By Shane Singh

The Americans with Disabilities Act (ADA)(42 U.S.C. § 12112(a)) requires that plaintiffs prove they are "qualified individuals" under the statute, i.e., that they are able to perform a job's essential duties before they can prevail in a lawsuit for disability discrimination. Although California's Fair Employment and Housing Act (hereinafter "FEHA") (Gov. Code, § 12900 et seq.) does not expressly include the term "qualified individual," the question posed is whether it includes a similar requirement. Courts of Appeal have had different results. The California Supreme Court settled our state's law in *Green v. State of California* (2007) 42 Cal 4th 254.

FEHA bars discrimination against any person with a disability but, like the ADA, provides that the law allows the employer to discharge an employee with a physical disability when that employee is unable to perform the essential duties of the job even with reasonable accommodation. (§ 12940, subd. (a)(1); 42 U.S.C. § 12112(a).) After analyzing the statute's language, legislative intent, and well-settled law, our Supreme Court concluded that FEHA requires employees to prove that they are qualified individuals under the statute just as the federal ADA requires them to prove that they can perform a job's essential duties.

In an effort to cause FEHA to be consistent with the federal ADA, the court stated, "... 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). As explained further below, legislative intent, case law, and legislative history support defendant's position—a view that also finds support in Evidence Code section 500, which requires a plaintiff to prove each fact essential to the claim for relief he or she is asserting."

The Court analyzed Federal law and concluded, "The ADA provides: "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." (42 U.S.C. § 12112(a).)

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In turn, the ADA defines the term “qualified individual with a disability” to mean “an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.” (42 U.S.C. § 12111(8).)

Federal case law interpreting the ADA is clear that an employee bears the burden of proving, among other elements, that he or she meets the definition of a “qualified individual with a disability” in order to establish a violation of the ADA. Speaking in terms of the elements for which a plaintiff bears the burden of proof at trial, the high court has explained that “[a]n ADA plaintiff bears the burden of proving that she is a ‘qualified individual with a disability’ — that is, a person ‘who, with or without reasonable accommodation, can perform the essential functions’ of her job.”

In Green, the court summarized existing California disability law as follows:

Our state law previously provided that, “California has prohibited employment discrimination based on physical handicap since 1973. (Citation.) “In 1980, that prohibition and the definition of physical handicap to include ‘impairment of sight, hearing, or speech, or impairment of physical ability’ were incorporated into the newly enacted FEHA.” (Citation.)

The state Supreme Court analyzed the both of the statutory schemes: Like the ADA, and like its predecessor the Rehabilitation Act of 1973, today the FEHA, section 12940, subdivision (a), prohibits discrimination based on an employee’s physical disability. Under the FEHA, it is unlawful “[f]or an employer, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition . . . of any person, . . . to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment.” (Ibid.) Although section 12940 proscribes discrimination on the basis of an employee’s disability, it specifically limits the reach of that proscription, excluding from coverage those persons who are not qualified, even with reasonable accommodation, to perform essential job duties: “This part does not prohibit an employer from refusing to hire or discharging an employee with a physical or mental disability. . . where the employee, because of his or her physical or mental disability, is unable to perform his or her essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger his or her health or safety or the health or safety of others even with reasonable accommodations.” (§ 12940, subd. (a)(1).)

By 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.

Therefore, in order to establish that a defendant employer has discriminated on the basis of disability in violation of the FEHA, the plaintiff employee bears the burden of proving he or she was able to do the job, with or without reasonable accommodation.

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Our Supreme Court ultimately concluded that "...FEHA is strikingly similar to the ADA, which as indicated prohibits employer discrimination against any "qualified individual with a disability," i.e., discrimination against "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position." (Citations omitted.)

The Justices determined that it was the Legislature's deliberate effort in 1992 to conform the FEHA to this ADA provision. As the legislative history discloses, the Legislature amended the FEHA in 1992 by clarifying that an employee must be able to perform the "essential duties with reasonable accommodations."

The Court stated, "... we conclude that under the FEHA, a plaintiff must demonstrate that he or she was qualified for the position sought or held in the sense that he or she is able to perform the essential duties of the position with or without reasonable accommodation.

The opinion unifies both state and federal law and potentially negates the opportunity of potential disability discrimination plaintiffs forum shop. Overall, it also reflects the recent pro-business nature of the Court.

Unfortunately, some questions still remain in California with regards disability discrimination law. FEHA still has a less stringent definition of what constitutes a disability than the ADA. This decision did not state what constitutes an "essential" job function. The case did not define "reasonable" and "unreasonable" accommodations, since the FEHA definition is still broader than the ADA. Finally, the Court did not indicate if an employer is under a duty to reassign a disabled employee to another open position.

The Green case provides a victory for California employers. Each disabled employee or applicant must still be carefully screened by employers to see if they can perform essential job functions before an employment decision is made.

Any questions please call Shane Singh at (916) 266-9000. Mr. Singh specializes in the defense of ADA and State Law Disability Claims. He represents both national retailers and smaller businesses.

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*The information contained herein is for informational purposes only and should not be relied upon in reaching a conclusion in a particular area. The legal principles discussed herein were accurate at the time this article was authored but are subject to change with time. Applicability of these same legal principles may differ substantially in individual situations. Please consult an attorney before making a decision in a particular area using only the information provided in this article.

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