

NAVIGATING THE REASONABLE ACCOMMODATION MAZE: LEARNING HOW TO AVOID COMMON LANDMINES AND PITFALLS WITH A DISABLED WORKER

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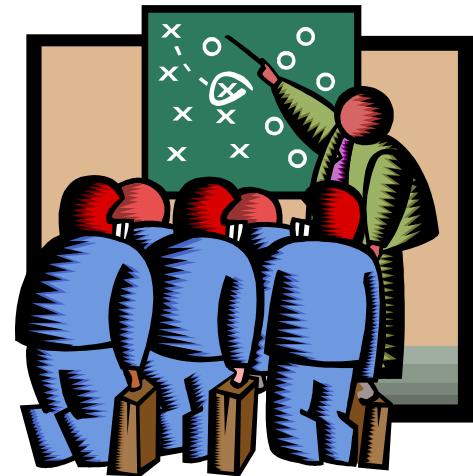
THE INTERACTIVE PROCESS CONUNDRUM

- California Law requires employers to engage in a “timely, good faith, interactive process”
- Required for all employee and applicants.
- This obligation often interferes with management’s ideas of how to effectively run the business.
- Disability Discrimination is the most common complaint filed with the DFEH.



Focus of Presentation

- Discussion of laws protecting injured workers;
- Interactive process and return to work concerns;
- Best Practices in conducting the Interactive Process



Laws Protecting Disabled Employees in California

- Workers' Compensation
- Family and Medical Leave Act (FMLA)
- California Family Rights Act (CFRA)
- Americans with Disabilities Act (ADA)
- Fair Employment and Housing Act (FEHA)
- Pregnancy Disability Leave (PDL)



REMEMBER – No Tort Claim Required

Employment discrimination claims under FEHA do not require a tort claim because they are already subject to a comprehensive scheme for administrative review through the Department of Fair Employment and Housing. *Garcia v. Los Angeles Unified School Dist.*, 173 Cal.App.3d 701, 710-711 (1985)



2012-2014 FISCAL YEAR EEOC CHARGES IN CALIFORNIA

	FY 2014	FY 2015	FY 2016
Race	34.2%	34.7 %	32.5%
Sex	26.8%	27.9%	26.6%
National Origin	17.3%	16.6%	15.8%
Religion	4.4%	4.7%	4.7%
Retaliation	48.5%	47.2%	50%
Age	24.7%	25.4%	25.8%
Disability	31.2%	31.9%	32.6%



Wait... There's more

- Paid Family Leave (PFL) – Not a leave right
- Rehabilitation Leave
- Military Spouse Leave
- Time Off for Victims of Domestic Violence or
- Serious Crime
- Time Off for School Children and
- Kin Care
- Paid Sick Leave
- Bone Marrow/Organ Donation Leave



Managing Employee Leaves

Think Before You Leap!



- Is Workers' Compensation Law Triggered?
- Is PDL (Pregnancy Disability Leave) Law Triggered?
- Is the Leave Medically-Related (FMLA/CFRA)?
- Is there a Duty to Offer Reasonable Accommodation (ADA/FEHA)?
- What are the employer's obligations to maintain health coverage and other benefits?
- Does the employer need to send out FMLA/CFRA notices to an employee injured on the job?



Managing A Disabled Employee

Common Areas of Concern

- Interference with LOA
- Reinstatement rights
- Accommodating work restrictions
- Interactive process
- Discipline
- Termination



Managing A Disabled Employee Do Not Interfere With LOA



- Includes discouraging employee from using FMLA/CFRA leave (i.e. suggestion that delay of surgery would better accommodate needs of business)
- Mischaracterizing leave
- Entitled to medical diagnosis?
- Failing to send out appropriate forms and notices.



Managing A Disabled Employee

Common Misconceptions

- *I cannot communicate with the injured worker*
- *My workers' compensation carrier / claims examiner / attorney is handling the leave of absence*
- *I need to wait until the employee is P&S/MMI to discuss a reasonable accommodation*
- *The Union is communicating with the injured worker; or I must coordinate RTW and accommodation issues with the Union.*



The Fair Employment and Housing Act

California Government Code section 12940

- Prohibits discrimination on the basis of “physical disability, mental disability and medical condition”;
- Limitation on major life activity need not be “substantial” – provides broader coverage than the ADA;
- Perceived physical and mental disabilities included;
- Requires reasonable accommodation provided to disabled employee who can perform the essential functions of the job.

The Interactive Process

- The FEHA requires employers to provide *reasonable accommodation* for the known physical or mental disability of an applicant or employee unless it would create an *undue hardship*.
- The *employee* usually has the burden of giving the employer notice of a disability (unless it is observable or otherwise known).
- The *employer* has the burden to take positive steps to accommodate the employee's limitations unless to do so would create an undue hardship.
- Finally, the *employee* has a duty to cooperate with an employer's efforts by explaining his or her restrictions and qualifications for the job.



Case Analysis



- Marvin has manic depressive disorder. He has worked for you for 15 years. After several employees, including Marvin, complained about rude supervisors, he was overheard making statement to co-workers about “shooting up” the place. Marvin told this to approximately five separate individuals.
- You call the police and remove Marvin from the workplace. Two days later, you receive a note placing Marvin off work for one month.
- Marvin complains the outbursts and threats were made as a direct result of his disability. Is Marvin entitled to the time off?



CASE ANALYSIS

Mayo v. PCC Structural, 795 F.3d 941 (9th Cir. 2015)

- Remember, to be entitled to FEHA and ADA protection, the individual must be “qualified” to perform the essential functions of the job, with or without accommodation.
- The ADA does not require that an employee whose unacceptable behavior threatens the safety of others be retained, even if the behavior stems from a mental disability.
- The Court stated “And while an employee can be qualified despite adverse reactions to stress, he is not qualified when that stress leads him to threaten to kill his co-workers in chilling detail and on multiple occasions (here, at least five times)”
- Threats should be “serious and credible.”

MR. SELF HARM



CASE ANALYSIS

Mayo v. PCC Structural, 795 F.3d 941 (9th Cir. 2015)

- Be careful!!
- Off-handed expressions of frustration or inappropriate jokes do not necessarily render an employee “not qualified.”
- An Employee who is rude, gruff, or unpleasant will not fall in the same category as Mayo.
- Many cases still hold “conduct resulting from a disability” is considered to be part of the disability, rather than a separate basis for termination.



The Interactive Process

UNDUE HARDSHIP

- Requires significant difficulty or expense.
- Consider:
 - Financial resources of the facility and the company
 - Number of employees
 - Impact accommodations place on the operation

VERY DIFFICULT TO PROVE



Essential Job Functions

- The fundamental job duties of the employment position held by the disabled employee. Considerations include:
 - The reason the position exists is to perform that function.
 - The limited number of employees available among whom the performance of that job function can be distributed.
 - The incumbent in the position is hired for his or her expertise or ability to perform the particular highly specialized function.
- Does not include the “marginal functions” of the position (those that, if not performed, would not eliminate the need for the job or that could be readily performed by another employee or that could be performed in an alternative way.)



CONSIDERATIONS FOR “REASONABLE” ACCOMMODATIONS

- The goal is to find the best match between the employee’s capabilities and an available position
- The FEHA does not obligate an employer to choose the *best* accommodation or the specific accommodation that a disabled employee or applicant seeks
- Accommodations must be reasonable, meaning that the size of the employer, the type of business, and the positions available are taken into consideration.
- Examples include:
 - Job restructuring of non essential job functions
 - Part-time, modified work schedules
 - Reassignment to a vacant position or another location
 - Temporary leave of absence
 - Equipment or special devices



CASE ANALYSIS

- Evan is a solid waste equipment operator a City as a waste collector. His job includes driving the waste truck, operating the equipment, moving waste bins, etc.
- Evan presents work restrictions prohibiting bending, twisting, squatting and lifting more than 10 lbs.
- What type of accommodation should Evan be offered?



CASE ANALYSIS

- When you engage in the interactive process, you show Evan the job description contained in his personnel file, and explain that bending, twisting, squatting and lifting more than 10 lbs are all essential functions of the job and you cannot accommodate the restrictions.
- Evan asks for the following accommodation:

George can do the heavy lifting and I can drive the truck and operate the waste controls from the driver's seat.



CASE ANALYSIS

- Would the result be any different if Evan claimed “that is how we have been operating for years” and Supervisor Dan had no problem with it.



CONSISTENCY IS KEY

- Have a temporary modified / alternate duty policy.
 - If it includes a period of time that mod/alt duty will be available be consistent.
- Inconsistent behavior in application of policy establishes “new normal”.
- Parade of Horribles – Examples



WHAT ABOUT JOB REASSIGNMENT?

- Typically sought when there are no reasonable accommodations that permit the injured employee to perform the essential functions of his or her job;
- Employer has duty to ascertain and offer suitable positions;
- Employers must determine whether the employee is qualified and able to perform the essential functions of the position to which reassignment is sought;
- The disabled employee is entitled to preference over existing employees when considering reassignment.



MUST THE EMPLOYER CREATE A NEW JOB?

To be protected, individuals must be qualified to do their job!

- An employer is NOT required to create a new job
- An employer is NOT required to move another employee
- An employer is NOT required to promote the disabled employee, and
- An employer is NOT to violate another employee's rights in order to accommodate a disabled employee.

- The duty is to reassign a disabled employee *if* an already funded, vacant position *at the same level* exists. *Hastings v. Dept. of Corrections* (2003) 110 Cal.App. 4th 963, 972.

- Note: Although an employer is not obligated to compensate an employee at the same rate of pay if they are moved to a lower paid position as an accommodation, employers can avoid retaliation claims if they maintain the same level of compensation.



CASE ANALYSIS

- Through the interactive process with Evan, our waste equipment operator, you identify two open and available positions.
- Evan is not qualified for either.
- Evan requests a leave of absence until a position becomes available.
- You end the employment relationship.



CASE ANALYSIS

Nealy v. City of Santa Monica

(2015) 234 Cal.App.4th 359

- You have met your interactive process obligations by demonstrating there were no vacant positions within your company for which the disabled employee was qualified and which the disabled employee was capable of performing with or without accommodation.
- What about a discrimination claim? Employee must show he could have performed the essential functions of the job, with or without accommodation. Cannot do so here.



CASE ANALYSIS

Nealy v. City of Santa Monica

(2015) 234 Cal.App.4th 359

- Requesting a reasonable accommodation is now protected activity under FEHA (2016 amendment). Thus, this portion of the *Nealy* case is invalidated by statute. Presumably, Nealy's retaliation claim could have proceeded to trial under the new law.



HOW TO EFFECTIVELY IMPLEMENT THE INTERACTIVE PROCESS



Begin the process when triggered – do not delay

- ✓ Meet with employee in person, if possible
- ✓ Interview others and obtain pertinent medical information
- ✓ Complete any necessary forms, reports, claims, etc. and document your file
- ✓ Make sure company policies are up to date, comply with the law and are applied consistently
- ✓ Obtain job descriptions and update regularly



HOW TO EFFECTIVELY IMPLEMENT THE INTERACTIVE PROCESS

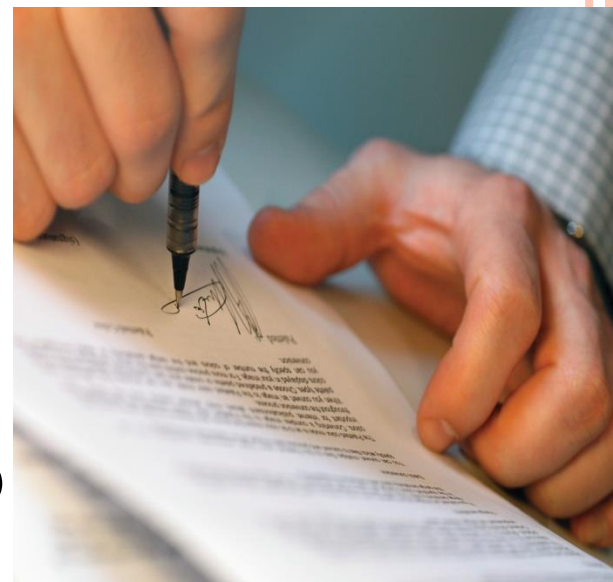
- ✓ Do not disparage or discriminate against an employee who reports an injury, claim or disability
- ✓ Examine all reasonable accommodations
- ✓ Stay in contact with the employee
- ✓ Do not forget the process is “on going” and must be revisited
- ✓ Develop a plan to offer an accommodation, if available, and be prepared to deal with an employee you cannot accommodate
- ✓ Remember these conversations are confidential and contain sensitive medical information



HOW TO EFFECTIVELY IMPLEMENT THE INTERACTIVE PROCESS

DOCUMENT THE PROCESS!!

- Identify participants
- Identify all documents reviewed
- List work restrictions
- List essential functions of the job
- List all accommodations suggested and considered (even the unreasonable ones)
- List all alternative positions considered
- Employee comments
- Everyone signs
- Complete this form every time a new restriction is provided



CASE ANALYSIS

Sarah was an assistant in a medical office. Her performance was substandard and she was repeatedly criticized and counseled by her supervisor, Rebecca. After one year of repeated concerns, Sarah became stressed out and could not handle working for Rebecca any longer. Sarah sought medical treatment for work related stress, anxiety and depression.

Sarah took a FMLA/CFRA leave of absence due to her medical condition. Upon her return, she presented a doctor's note stating she could return to work provided she is transferred to another department reporting to another supervisor.



CASE ANALYSIS

**IS SARAH ENTITLED TO THE
ACCOMMODATION?**



CASE ANALYSIS

Higgins-Williams v. Sutter Medical Foundation

(2015) 237 Cal.App.4th 78

- Inability to work for a particular supervisor is NOT a disability under the FEHA
- An employee's inability to work under a particular supervisor because of anxiety and stress related to the supervisor's standard oversight of the employee's job performance does not constitute a disability under FEHA.
- Would the result be different if the employee could prove the supervisor's oversight was not "standard?"



A LEAVE OF ABSENCE MAY BE A REASONABLE ACCOMMODATION

- Employers should not have a policy automatically ending temporary modified duty without engaging in the interactive process;
- Employers should not have a policy imposing time limits on leave;
- Length of time for leave should be definite. “Likely employee will be able to return at the end of the leave”;
- Leave of Absence as an accommodation should only occur when there are no reasonable accommodations that allow the employee to continue to work;
- Although indefinite leaves are not required, a hard and fast cap without considering the individual is a problem.

CASE ANALYSIS

Jonathan, an IT specialist for a municipality, is currently on a 30-day Performance Improvement Plan for poor performance, including low call volume and failing to meet his sales numbers. The day before the PIP is scheduled to expire, Jonathan trips over the computer wire and sprains his ankle. He is written “off work” for three months. Meanwhile, you were ready to terminate Jonathan’s employment because he failed to meet the mandates of the PIP.



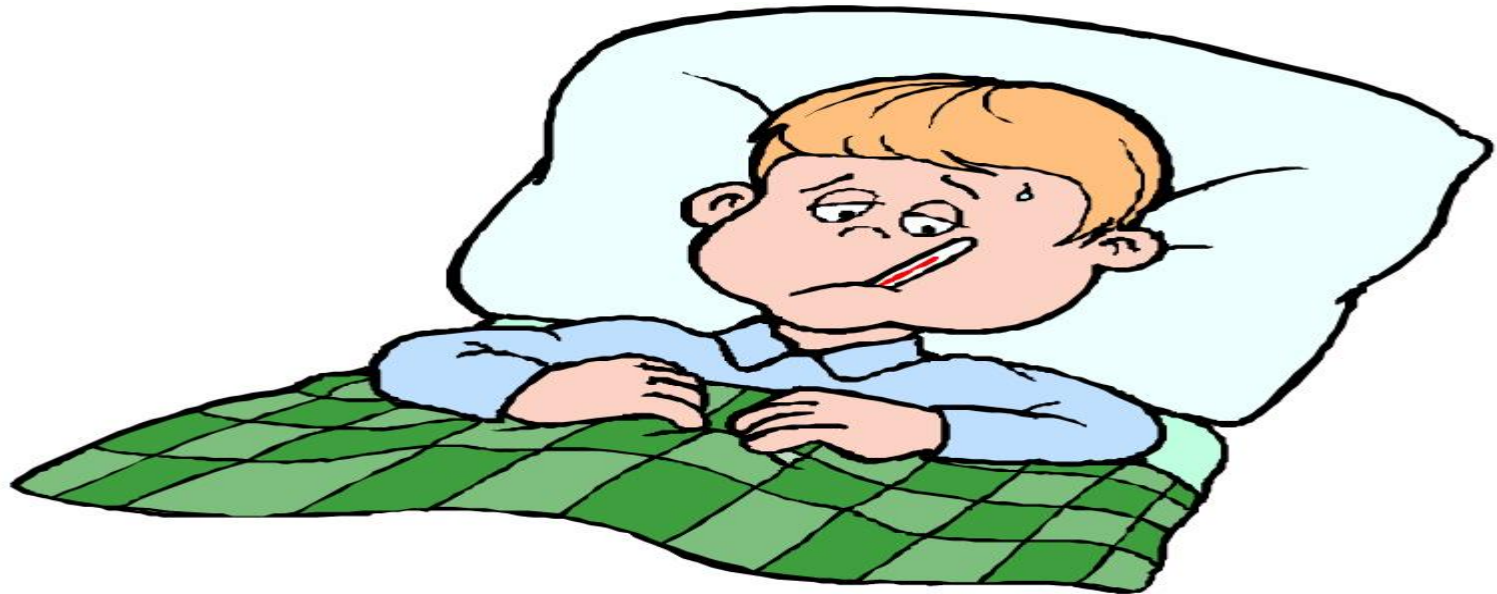
CASE ANALYSIS

You receive the doctor's note placing Jonathan "off work" for three months. What do you do?



CASE ANALYSIS

Jonathan's FMLA/CFRA leave expired and you receive a new note placing Jonathan "off work" for three more months. What do you do?



CASE ANALYSIS

Jonathan is very reliable. He brings you a new note placing him “off work” every three months. This goes on for more than one year.

When can you terminate Jonathan?



Beware of Attendance Policies



- Most common landmine with disabled employees
- Must analyze whether attendance is an essential function of the job
- Not as simple as you think -
 - *Samper v. Providence St. Vincent Medical Center* (9th Cir. 2012) 675 F.3d 1233. NICU Nurse



Is Discipline Appropriate?

- Be consistent
- Review policies
- Could medical condition be the cause of the improper conduct?
- Beware of renewed/continued obligation to engage in interactive process



Case Analysis

Peter is a Risk Analyst for a large Public Agency. Peter's work is suffering. He is missing deadlines, cannot complete assignments and is slow to respond to management inquiries.

During a counseling session with Peter, he reveals that he has Multiple Sclerosis which is causing him to lose focus and concentration.

What do you do?



Case Analysis

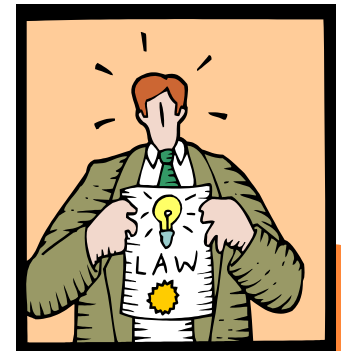
You ask Peter to let you know if he needs an accommodation to perform the essential functions of the job and provide him with appropriate paperwork to give to his physician. Peter does not want the doctor to get involved and says he can “deal with it.”

The performance issues worsen and Peter’s supervisor is ready to terminate.



Managing A Disabled Employee

- Provide employee with a claim form if they put you on notice of a potential work related injury – don't wait for them to ask.
- Evaluate whether the employee is eligible for FMLA/CFRA leave and provide all required notices.
- Manage the workers' compensation leave in keeping with the requirements of ADA/FEHA.
 - Engage in the interactive process
 - Provide reasonable accommodations



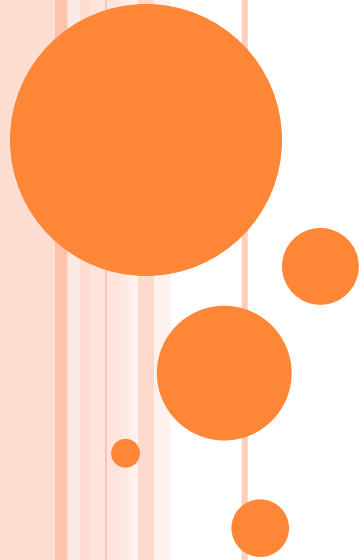
Managing A Disabled Employee

Workers' Compensation Retaliation

- Labor Code §132a prohibits discrimination on the basis of a workplace injury or workers' compensation claim. The employee must establish that they suffered some detrimental consequences based on an industrial injury and that the employer singled out the employee for disadvantageous treatment because of the injury.
- No intent requirement



QUESTIONS & ANSWERS



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