LOS ANGELES & SAN FRANCISCO
Daily Journal
www.dailyjournal.com
WEDNESDAY, NOVEMBER 20, 2024

Failure to accommodate claims: Strategies for establishing liability when accommodations are denied

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Under California's Fair Employment and Housing Act (FEHA), disabled employees have the right to reasonable workplace accommodations. FEHA mandates that employers must make reasonable accommodations for an employee or applicant unless doing so would impose an undue hardship. Cal. Gov. C. § 12026(m). It is the employer's duty to initiate an interactive process with an employee once the employer becomes aware that the employee has a disability or when it becomes aware of an employee's need for accommodation. 2 C.C.R. § 11069(b). Failure to engage and failure to accommodate claims are intrinsically intertwined, and determining the extent and feasibility of an accommodation must be an individualized process based on the employee's limitations and the nature of their essential job duties.

Unfortunately, employers often mishandle accommodation requests, such as by denying additional protected medical leave where there is no hardship, failing to consider alternative accommodations, or otherwise imposing requirements that are per se unlawful. The below strategies should be considered in all failure to engage and failure to accommodate cases.

UNCOVER UNLAWFUL POLICIES AND PRACTICES

Employers' policies on interactive processes, medical leave, and accommodations should be examined. Some employers maintain "100% healed" policies or practices, which unlawfully require that employees be completely healed and cleared to return to work without any medical restrictions prior to returning from a medical leave. *See* 2 C.C.R. § 11068. Similarly, "maximum leave" policies that result in automatic termination of an employee after exhausting their leave under the FMLA or CRFRA, or which otherwise attempt to "cap" an employee's leave allotment without a good faith interactive process, are not permitted. Other potential unlawful policies include those that subject an employee to discipline for accruing a certain number of absences, regardless of the reason for the absence.

Such policies and practices, which are often unlawful on their face, in practice, or both, may demonstrate discrimination or a failure to accommodate.

ESTABLISH LACK OF DOCUMENTATION AND CLEAR COMMUNICATION

Documented evidence of accommodation requests, responses, and communications is crucial in failure to accommodate cases. Employees should keep records of doctor's notes and communications with their employer and follow up in writing after verbal discussions.

An employer's unexplained delay or dismissive response to a request for an accommodation can suggest an unwillingness to accommodate the disability and can also give rise to a failure to engage claim. Comparatively, an employer's quick or immediate rejection of an

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employee's request for an accommodation can suggest that no good faith interactive process was performed and/or that the employer failed to conduct an adequate undue hardship analysis.

HIGHLIGHT IGNORED ALTERNATIVE ACCOMMODATIONS

The law requires that employers consider "any and all reasonable accommodations" for an employee's disability, except ones that create an undue hardship. 2 C.C.R. § 11068(e).

If an employee proposed multiple potential accommodations, an unexplained rejection of reasonable options can indicate bias. Showing that the employer refused feasible, alternative accommodations can strengthen the claim that its refusal was based on discriminatory reasons rather than practical concerns. Moreover, showing that an employer refused to even consider any potential alternative accommodation other than the one specifically requested by the employee can be evidence of discrimination and failure to accommodate.

While FEHA does not require an employer to create a new position or eliminate essential functions of a position in order to accommodate an employee, see 2 C.C.R. § 11068(b), (d) (4), an employer's failure to consider reassignment, job restructuring, paid or unpaid leaves of absence, modified work activities, and "any and all" other potential reasonable accommodations can strengthen your failure to accommodate and failure to engage claims.

ATTACK THE "HARDSHIP" DEFENSE

In failure to accommodate cases, the employer will undoubtedly assert an "undue hardship" defense. To succeed on this defense, an employer must establish that the accommodation sought would create an undue hardship because it would be "significantly difficult or expensive," in light of various factors, including the nature and cost of the accommodation, the impact on the employer's operations, the number of employees and the relationship of the employees' duties to one another, and the financial resources of the employer. CACI 2545; Cal. Gov. C. § 12926(u).

Logically, larger corporations with many employees in each classification and at each facility will have a harder time establishing this defense than a small company with fewer employees. Regardless, it is important to be proactive in attacking this defense, notwithstanding that it will be the employer's burden to establish the defense at trial. Demonstrating the feasibility of the accommodation sought by obtaining evidence that the accommodation was practical and affordable can help illustrate that the defense fails.

Ask for all documents and witnesses to support the employer's hardship defense, and then take depositions to ascertain exactly what steps were taken to conduct the hardship analysis. More often than not, the employer can cite very few–if any–documents to support its alleged hardship defense. If the employer alleges that a proposed accommodation would have been significantly expensive such that it posed an undue hardship, push for the employer's financial information. Where financial information goes to the heart of a cause of action or affirmative defense, a litigant should not be denied access to such information so easily. *Rawnsley v. Sup. Ct.* (1986) 183 Cal.App.3d 86, 91; *see also Notrica v. State Comp. Ins. Fund*. (1999) 70 Cal.App.4th 911, 939 (stating that "evidence of a defendant's wealth and profits... is not to be excluded...when the information is relevant to liability). The employer's financial condition is directly relevant to its motive and ability to accommodate, and an employer should not be given the tactical advantage of placing its financial condition at issue while simultaneously denying the employee the ability to challenge that contention.

Finally, once discovery regarding the employer's hardship defense has been completed, consider filing a motion for summary adjudication on the issue, citing to the employer's failure to produce sufficient evidence to support the defense.