Disability and Religious Accommodations in California: Avoiding Common (and Not-So-Common) Traps

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ABOUT THE FIRM

- Represents management exclusively in every aspect of employment law

- 54 locations nationwide and over 750 attorneys, including San Francisco, Napa, Sacramento, Los Angeles, Orange County, and San Diego

- Current caseload of over 5,000 litigations and 300 class actions

New California Pregnancy and Disability Discrimination Regulations
New FMLA Regulations
California Workplace Religious Freedom Act (AB-1964)
The WRFA was enacted to clarify California law by amending certain provisions of the Fair Employment and Housing Act. Specifically, the WRFA:

- Provides that religious dress and grooming are protected under California's Fair Employment and Housing Act.
- Provides that an accommodation for religious practices is not reasonable if it requires segregation of an employee from customers or the general public.
- Defines “undue hardship” as defined elsewhere in the FEHA (clarifies that federal de minimis standard does not apply).
**Religious Discrimination Law**

The Fair Employment and Housing Act and Title VII **prohibit**:
- Discrimination based on religion
- Harassment (hostile work environment) based on religion
- Retaliation

The Fair Employment and Housing Act and Title VII **require**:
- Reasonable accommodation
- Interactive Process
Protection applies to beliefs, observances, and practices that (1) are “sincerely held” and (2) “occupies in the life of its possessor a place parallel to that filled by the God of those (religions) admittedly qualifying for the exemption . . . .”

- Includes religions that are not “traditional”
- Includes atheism or lack of religion
Duty To Provide Reasonable Accommodation

The Rules:
The FEHA and Title VII require employers to make reasonable accommodation for applicants’ or employees’ religious practices unless doing so would cause an undue burden on the employer.

Exceptions:
- Undue burden/business necessity
- Health and safety
Duty To Provide Reasonable Accommodation

Martin Corp. had a collective bargaining agreement and policy that required the company to terminate employees who did not join the union. Tom, Jill, and Judy were Seventh Day Adventists who, under tenets of faith, were prohibited from becoming members in or paying a service fee to a union. They informed management and offered to pay an amount equal to union dues to a mutually-agreeable charity. Martin Corp. refused and terminated them.

Did Martin Corp. fail to provide reasonable accommodation?

Tooley v. Martin-Marietta Corp. (9th Cir. 1981)
**So What's The Big Deal?**

**Oberoi v. Department of Corrections and Rehabilitation, 34-2009-00054595**
(Sacramento Superior Court, filed July 31, 2009)

**Summary:**
A Sikh man applied for work as a security guard at the California Department of Corrections and Rehabilitation (CDCR), which refused to allow Mr. Oberoi to continue the application process because he would not shave his beard.
The WRFA provides that religious dress should be construed broadly to include:

- The wearing or carrying of religious clothing
- Head or face coverings
- Jewelry
- Artifacts
- ...and any other item that is part of the observance of a religious creed

Religious grooming includes all forms of head, facial, and body hair that are part of the observance of a religious creed.
WHAT ABOUT DISABILITY?
Framework for handling disability-related issues:

1. Is Workers’ Compensation Law Triggered?
2. Is PDL (Pregnancy Disability Leave) Law Triggered?
3. Is the Leave Medically-Related (FMLA/CFRA)?
4. Is there a Duty to Offer Reasonable Accommodation (ADA/FEHA)?
Employer Obligations

- Employers are required to engage in an "interactive process" with individuals (both applicants and employees) to determine the need for effective accommodations of disabilities.
- The law does not require an employee to use "magic words" to trigger the accommodation obligation.
- A reasonable accommodation could include an unpaid or paid leave of absence.
What is a “Reasonable Accommodation?”

A request for reasonable accommodation is a request for some change in the workplace or in the way things are done that is needed because of a medical condition.
Choosing an Accommodation

- Physical modifications
- Modified work schedules
- Job restructuring
- Changing supervisory methods
- Job coach
- Telecommuting
- Leaves of absence
- Reassignment to a vacant position
**Actions Typically Not Required**

- Lowering production or performance standards
- Excusing violations of conduct rules that are job-related and consistent with business necessity
- Withholding discipline
- Eliminating or reassigning an essential function
- Monitoring an employee’s use of medication
- Actions that would result in undue hardship (i.e. significant difficulty or expense)
- Violating a seniority system
**What Documentation Can You Request?**

- An employer may obtain reasonable documentation that an employee **needs** an accommodation.
- Employer may require that documentation come from a health care professional.
No Obligation If “Undue Hardship”

Factors:
(1) the nature and cost of the accommodation needed;
(2) the overall financial resources of the facilities involved, the number of persons employed at the facility, and the effect on expenses and resources or on the operation of the facility;
(3) the overall financial resources of the company as a whole;
(4) the type of operations of the company; or
(5) the geographic separateness of the facility.
Tips for Reducing Risk of Liability

- Review policies and practices to ensure they comply with the FEHA (including the WRFA) and ADA.
- Once placed on notice that an employee may need an accommodation, make an individualized, fact-specific inquiry to determine whether a reasonable accommodation can be granted.
- Take the initiative to keep the interactive process moving.
- Document, document, document!
- When in doubt, consult legal counsel when religious accommodation situations arise.

EEOC guidance:
http://www.eeoc.gov/policy/docs/religion.html
http://www.eeoc.gov/policy/docs/accommodation.html
Test Your Knowledge
Following the loss of her life savings in the stock market, Lisa mentions that she is on Prozac and feels a marked decrease in her motivation. Later that month, Lisa misses several critical deadlines and ultimately misses an important client meeting in Chicago. Lisa claims she was too depressed to leave her hotel room and tried repeatedly to reach her psychiatrist. The client has switched her business to your competitor. Although you sympathize with Lisa’s situation, the consequences of Lisa’s recent conduct have terribly affected your business and you feel that you must take action.
QUESTION #1
Is the obligation to engage in the interactive process triggered under the ADA and/or FEHA?

ANSWER #1
Yes – likely both. Your employee made her mental disability known to you when she mentioned that she was treating with anti-depressants and felt a marked decrease in her motivation.
QUESTION #2
Can the employee be terminated based upon the fact that she failed to show up to the client meeting in Chicago? Let’s face it – her conduct cost the employer a major client.

ANSWER #2
Not in the 9th Circuit. An employer cannot fire an employee for conduct if the conduct was due to their disability and reasonable accommodation plausibly would have rectified the performance problem. (Gambini v. Total Renal Care, Inc., 486 F. 3D 1087 (9th Cir. 2007).)
QUESTION #3
Can the employee be transferred to a position with less demanding deadlines and client contact?

ANSWER #3
It depends. If decided unilaterally, this could be considered an adverse employment action. But a transfer position with less demanding deadlines and client contact could be a reasonable accommodation for your employee's depression. Before making a decision, you must engage the employee in a dialogue to determine the appropriate accommodation(s), if any, that will enable her to conform her conduct to acceptable standards.
A supervisor in your department is ready to return to work after a lengthy physical disability leave stemming from a freak workplace accident. Upon review of this employee’s workers’ compensation file, you notice a psychiatric report filed in 2006 in support of a claim for psychiatric disability. This report diagnoses the supervisor with extreme sociopathic tendencies. An essential function of her position is to empathize with other employees in order to best deal with their interpersonal conflicts. Based upon this report, you conclude that she should not resume her former position.
THE SUPERVISOR WITH SOCIOPATHIC TENDENCIES

QUESTION #1
If the supervisor is unable to show any improvement in her psychiatric condition so that she can perform the essential functions of her job, even with a reasonable accommodation, what obligations does the employer have under California law?

ANSWER #1
It depends. An adverse employment action on the basis of disability is not prohibited if the disability renders the employee unable to perform his or her essential duties, even with reasonable accommodation. To establish that an employer has violated the FEHA, an employee must prove he or she is able to do the job held or desired. (Green v. State of California, 42 Cal. 4th 254 (2007).) Thus, the employer may not have an obligation to return her to her former position if she cannot perform the essential functions of her job with or without a reasonable accommodation.
The Supervisor With Sociopathic Tendencies

QUESTION #2
The supervisor has requested additional leave time after her FMLA/CFRA leave expired. Currently, the supervisor has been on leave for 13 weeks. The employer would prefer to fire her since her temporary replacement is “outstanding” and “doesn’t exhibit any sociopathic tendencies” which the employees seem to prefer. In fact, several employees noted to the employer how things seem to be running better without the outbursts of those “sociopathic tendencies.” Can the supervisor be fired since she no longer has any FMLA/CFRA leave left?

ANSWER #2
No. Mere expiration of FMLA/CFRA leave does not permit an employer to terminate an employee with a disability. Leave may be a reasonable accommodation, especially if it is for a defined period of time and duration.
QUESTION #3

After several meetings with legal counsel and the drafting of a “decision tree” to plot out potential liabilities, the employer finally understands that firing the supervisor now may not be a good option. Yet, the employer asks how much leave time must be given to an employee with a disability? Which of the following is not the correct answer?  (a) 1 month?  (b) 3 months?  (c) up to a year of unpaid leave?  (d) indefinite leave?

ANSWER #3

(d) is incorrect. An employer does not have to accommodate an indefinite leave of absence since such leave is likely not a reasonable accommodation. However, an unpaid leave of absence over a year could be a reasonable accommodation.
One afternoon you see a plant manager smoking marijuana out back during business hours. Horrified, you lead this bleary-eyed individual into your private office and launch into a well-honed speech on a drug-free environment in your workplace. Before you can finish explaining this conduct is subject to discipline up to and including termination, Mellow Manager pulls out a laminated card identifying his doctor’s recommendation for medical marijuana and explains his afternoon smoke is the only way to ease his chronic back pain so he can continue to work.
QUESTION #1
Is Mellow Manager’s on the job smoke a reasonable accommodation for his chronic back pain?

ANSWER #1
No. The FEHA does not require employers to accommodate the use of illegal drugs, even if used to treat an employee’s disability. The Compassionate Use Act did not give marijuana the same status as any legal prescription drug. Federal Law does not recognize the use of medical marijuana.
QUESTION #2
Mellow Manager has worked for the employer for several years. The employer has more than 100 employees. During this time, the employer had no idea Mellow Manager was using illicit drugs. One day, Mellow Manager confides he has an addiction to medical marijuana recommended by his doctor. Mellow Manager asks if the employer would allow him to seek help and “get right.” Does the employer have to accommodate him?

ANSWER #2
Yes. In California, an employer may have to offer an employee rehabilitation leave under Labor Code 1025 where the employee self-identifies a problem.
THANK YOU!

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