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## **Ninth Circuit Affirms Dismissal Of Employee's FEHA Disability Lawsuit Because She Could Not Do The Work**

### **Overview**

In a brief, and to the point decision, the Ninth Circuit affirmed the dismissal of a former United Parcel Service employee's California FEHA disability discrimination claims. The Court's decision was based on the following: the fact the employee admitted that she was completely unable to work during the relevant time; that she did not ask for any accommodation beyond medical leave; and because the employer did not have to suggest alternative accommodations until she had a return-to-work date. Today's Legal Update looks at that decision and what employers can learn from the Court's analysis in this case.

*Markowitz v. United Parcel Serv., Inc.*, 9th Cir., 16-56083, 2/15/18.

### **Background**

The employee (Markowitz) was appealing the lower district court's granting of summary judgment in favor of United Parcel Service ("UPS"), regarding her claims for disability discrimination, failure to accommodate, and failure to engage in the interactive process under the California Fair Employment and Housing Act ("FEHA"), and for wrongful termination. *See* Cal. Gov't Code § 12940. The court noted that because the parties were familiar with the facts, the Court did not recite them in the decision. We will focus in today's Update on the elements of the causes of action the employee alleged set forth above, and why the Court found the employee's case legally deficient.

## Disability Discrimination

The Court held that Markowitz failed to raise a triable issue for disability discrimination under FEHA.<sup>1</sup> The Court noted that the FEHA “*does not prohibit an employer from ... discharging an employee with a physical or mental disability ... if the employee ... is unable to perform [his or her] essential duties even with reasonable accommodations.*”<sup>2</sup> (Emphasis added)

### *Employee's Inability To Perform Essential Functions*

The Court noted that there were three doctors' opinions, as well as Markowitz's own testimony, establishing that ***she could not work at all relevant times*** during her nearly thirteen months of leave from April 2013 to May 2014. The Court pointed out that throughout her leave of absence, the medical professionals and Markowitz herself indicated she was completely unable to work. The Court cited the opinions of two of the doctors' in the opinion: Dr. Sandhya Gudapati concluded Markowitz was unable to work repeatedly throughout the time period from July 25, 2013 to July 3, 2014; and Dr. David Brendel concluded that Markowitz was “totally and temporarily disabled due to work-related psychological stress and strain secondary-to-work related injuries” during his examinations beginning on May 20, 2014.

### *The Impact Of The Employee's Workers' Compensation Claims*

In an important aspect of this decision, the Court held that Markowitz's disability discrimination claim was also precluded by judicial estoppel.<sup>3</sup> The Court pointed out that during the workers' compensation proceedings filed by Markowitz, ***she asserted that she could not work***. Based in part on that assertion, Markowitz was awarded a payout of \$26,000 as part of the settlement of her workers' compensation claim. The Court held that “Her claim now that she was able to work during the relevant time period flatly contradicts both her prior sworn statements and the medical evidence,” and therefore, failed to create a genuine issue of fact for trial.”<sup>4</sup>

## Failure To Accommodate

The Court found that Markowitz's failure to accommodate claim is equally unavailing because she ***was not a qualified individual***, and UPS did not fail to accommodate her disability.<sup>5</sup> The Court noted that Markowitz failed to request other forms of accommodation beyond leave. The Court also held that employers are not required to provide indefinite leaves of absence.<sup>6</sup> The Court also held that Markowitz's argument on appeal that UPS failed to accommodate her

<sup>1</sup> See *Arteaga v. Brink's, Inc.*, 163 Cal. App. 4th 327, 344-45 (2008).

<sup>2</sup> Cal. Govt. Code § 12940(a)(1); see also *Green v. State*, **42 Cal. 4th 254**, 262 (2007).

<sup>3</sup> See *Drain v. Betz Labs., Inc.*, **69 Cal. App. 4th 950**, 959 (1999).

<sup>4</sup> See *Kennedy v. Applause, Inc.*, **90 F.3d 1477**, 1481 (9th Cir. 1996).

<sup>5</sup> See *Cuiellette v. City of L.A.*, **194 Cal. App. 4th 757**, 766 (2011).

<sup>6</sup> 2 Cal. Code Regs. 11068(c); see *Dark v. Curry Cty.*, **451 F.3d 1078**, 1090 (9th Cir. 2006).

request for a transfer failed because UPS responded by providing her a new shift working with a different management team.

## Failure To Engage Interactive Process

The Court held that Markowitz's failure to engage in the interactive process claim also failed. Because it was Markowitz's responsibility to "identify [her] disability and resulting limitations," and to "suggest the reasonable accommodations" she sought.<sup>7</sup> The Court held that UPS did engage in the interactive process with Markowitz by granting her multiple extensions for her leave of absence. The Court held that UPS had no obligation to take further steps to come up with reasonable accommodations *until Markowitz gave some indication that she would be able to return to work in any capacity*.

Finally, the Court held that Markowitz's claims for wrongful termination in violation of public policy also failed for the same reasons that her underlying claims for disability discrimination and failure to engage in the interactive process under FEHA fail.<sup>8</sup>

## Summary and Important Points

1. Today's case *turns on the fact the employee was not protected* by either the FEHA or ADA definition of a qualified individual with a disability.
2. The issues in this case can be brought into clearer focus by reviewing the following EEOC Q&A guidance on who is a *qualified individual with a disability*, and, therefore, *protected under the ADA/FEHA*:

A qualified individual with a disability is a person who meets legitimate skill, experience, education, or other requirements of an employment position that he or she holds or seeks, and who can perform the "essential functions" of the position with or without reasonable accommodation. Requiring the ability to perform "essential" functions assures that an individual will not be considered unqualified simply because of inability to perform marginal or incidental job functions. If the individual is qualified to perform essential job functions except for limitations caused by a disability, the employer must consider whether the individual could perform these functions with a reasonable accommodation. If a written job description has been prepared in advance of advertising or interviewing applicants for a job, this will be considered as evidence, although not necessarily conclusive evidence, of the essential functions of the job. (Emphasis added)

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<sup>7</sup> *Scotch v. Art Inst. of California-Orange Cty., Inc.*, **173 Cal. App. 4th 986**, 1013 (2009) (citation and internal quotation marks omitted)

<sup>8</sup> *Hanson v. Lucky Stores, Inc.*, 74 Cal. App. 4th 215, 229-30 (1999).

3. In this case, the court specifically noted that the FEHA “*does not prohibit an employer from ... discharging an employee with a physical or mental disability ... if the employee ... is unable to perform [his or her] essential duties even with reasonable accommodations.*” Why? The employee failed to meet the basic requirements for being considered a “*qualified individual with a disability,*” as set forth above in paragraph #2.

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**If you have any questions concerning this email or any other employment law related issues please do not hesitate to contact me by either replying to this email or by telephone at 888-851-1160 or my assistant Nanci Berry at this number.**

*This update is provided by Gary W. Bethel and Littler Mendelson in order to review the latest developments in employment law. This update is designed to provide accurate and informative information and should not be considered legal advice.*

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