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Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
November 2024

Litigating disability-discrimination wrongful-termination cases using the FEHA

TAKING ON A FEHA CASE, STEP BY STEP

"You can't eat an orange and throw the peel away – a man is not a piece of fruit." – Arthur Miller, *Death of a Salesman*

According to the Centers for Disease Control and Prevention, 7,664,913 adults in California had a disability in 2022. That figure equates to 27% of adults in California. My cousin Albert Lin is one of them. He lost his right leg below the knee in a vehicle-rollover incident in 2016. Over the past few years, he has traveled the world as the host of a television show for National Geographic with the aid of a prosthetic leg that helps him hike, climb, and surf.

Albert is one of the lucky ones. He continues to work hard in a job that he loves. But imagine a world in which people with missing limbs or other physical conditions and mental illnesses that limit a major life activity are kept out of the workforce because of their disabilities. Think of how much society would lose economically, and the toll it would take on the human beings that are marginalized.

Unfortunately, that world is a reality despite the Fair Employment and Housing Act (FEHA) prohibiting discrimination based on physical or mental disabilities by employers in California. According to the 2022 Annual Report from the Civil Rights Department (formerly DFEH), disability was the most common basis for submitting an employment right-to-sue complaint. Disability discrimination cases are by far the most prevalent type of case based on the FEHA that I handle.

Much more work needs to be done to continue to protect and advocate for people with disabilities. Lawyers serve an important role in teaching people about their rights, advocating for policies that ensure compliance with laws, and also seeking compensation for the harm that results from discrimination.

In this article, I will provide legal authorities, guidance, and tips on litigating a disability discrimination wrongful termination case using the FEHA. This article focuses on wrongful termination claims, rather than other types of disability discrimination claims such as failure to provide reasonable accommodations or failure to engage in an interactive process. Those kinds of cases have important nuances that should be addressed in another article. I will use my first case involving a FEHA claim to help illustrate my points.

Case background

In 2015, I met my client WR at her home in East Los Angeles several months after she had been terminated from her job at a non-profit organization. I learned that one day about six months into her job, WR arrived at work early as she usually did. She was happy working at that non-profit and doing helpful work for her community. As she walked through a hallway to get to her office, she remembers reaching out for the door handle. Then she blacked out because she had a seizure. For years, WR had

been dealing with epilepsy that had been largely under control with medication. When she woke up, she was on the floor of the hallway with coworkers surrounding her and she had extreme pain in her mouth. She was transported to an emergency room. She took a week off of work to recuperate, and then went back to work. Within a month, the nonprofit terminated WR, claiming that the grant that funded her position had run out.

But something did not sit well with her. She had helped the nonprofit get grants and had never heard about the grant that funded her position running out or not being renewed. Also, she was the only person in her department funded by that grant to be terminated. Moreover, she heard rumors that one of the executives of the nonprofit had been asking around about her seizure and had even blurted out to a coworker, "Did you know she was a liability?"

By the time I met with WR, she had gotten another job. She had not treated with a mental-health professional and was not diagnosed with any particular mental health or emotional condition. But even though she had gotten her life back on track, she could not let go of the way she had been let go.

Prelitigation considerations

When I took on WR's case, I had to determine whether she even had a viable claim and a prima facie case. For someone who was unfamiliar with the FEHA at that time, that meant that I had to spend numerous hours researching, researching, and researching some more before even filing her lawsuit.

Was her former employer considered an employer? Government Code section 12926, subdivision (d) defines "Employer" to include "any person regularly employing five or

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more persons, or any person acting as an agent of an employer, directly or indirectly, the state or any political or civil subdivision of the state, and cities," except a religious association or corporation not organized for private profit. When I read the statutory definition of "employer," I became worried because her former employer was a non-profit corporation.

Fortunately, the California Code of Regulations provides important clarifications. California Code of Regulations, title 2, section 11008, subdivision (d) provides that the definition of "employer" within California pursuant to the FEHA generally includes non-profit corporations or non-profit associations other than religious associations or religious corporations exempt from federal and state income tax. Moreover, WR received a W2 from her former employer, which raised a presumption that the former employer was an employer as defined by the FEHA pursuant to Government Code section 12928. WR's case passed its first hurdle.

Then I had to make sure that WR was an employee. The FEHA does not expressly define employee, though California Code of Regulations, title 2, section 11008, subdivision (c) defines employee to mean, "Any individual under the direction and control of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written." California Code of Regulations, title 2, section 11008 also provides certain situations in which a person is not an employee, such as an independent contractor, a person employed by certain family members, and a person employed under special license in a non-profit sheltered workshop or rehabilitation facility.

The definition of disability under the FEHA

I then needed to make sure that WR's epilepsy fell within the definition of disability under the FEHA. Government Code section 12926, subdivision (j) defines mental disability as "any mental or psychological disorder or condition, such as intellectual disability, organic brain syndrome, emotional or mental illness, or specific learning disabilities, that limits a major life activity." Government Code section 12926, subdivision (m) defines physical disability as having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that both (1) affects one or more of the following body systems: neurological, immunological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine, and (2) limits a major life activity. Government Code section 12926, subdivision (n) incorporates the definition of "disability" used in the federal Americans with Disabilities Act of 1990 if said definition would result in broad protection. Moreover, Government Code section 12926.1 provides the following non-exclusive list of conditions that are physical or mental disabilities: chronic or episodic conditions such as HIV/AIDS, hepatitis, epilepsy, seizure disorder, diabetes, clinical depression, bipolar disorder, multiple sclerosis, and heart disease. California Code of Regulations, title 2, section 11065 provides that certain conditions are excluded as disabilities, such as compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from the current unlawful use of controlled substances or other drugs, and "sexual behavior disorders," and also exclude conditions that are mild, which do not limit a major life activity, as determined on a case-by-case basis.

For wrongful-termination cases, whether the separation from employment is characterized as a firing, layoff, restructuring, or forced resignation, perhaps the easiest element to prove is that the employee was subjected to an adverse employment action. The California Civil Jury Instructions No. 2509 provides: "[t]here is an adverse employment action if [name of defendant] has taken an action or engaged in a course or pattern of conduct that, taken as a whole, materially and adversely affected the terms, conditions, or privileges of [name of plaintiff]'s employment."

With the passage of Assembly Bill 9 in 2019, the California Legislature set a statute of limitations for employment-based FEHA claims at three years from the last date of an adverse employment action or harassing conduct. The new statute of limitations is codified in Government Code section 12960, subdivision (e). Previously, the statute of limitations was one year from the last date of misconduct.

After determining that WR had a viable, prima facie case, was it time for me to file the complaint? Not yet! I still had to obtain a right-to-sue notice from the Civil Rights Department that properly exhausted her administrative remedies. You can either use the Civil Rights Department's online form via its website or submit a printed form via email or traditional mail to the Civil Rights Department. Filling out the complaint to obtain the right-to-sue notice is relatively straightforward, though remember that your client's claim will be limited to whatever you provide in the complaint and is set forth in the right to sue notice. An attorney may verify the complaint submitted to the Civil Rights Department. (*Blum v. Superior Court* (2006) 141 Cal.App.4th 418.)

Filing the complaint

In WR's case, the employer was a California-based non-profit corporation. Given the lack of complete diversity, I could file WR's claim in state court, rather than federal court. Moreover, under the special venue provisions of the FEHA, I could properly file WR's case in Los Angeles Superior Court pursuant to Government Code section 12965, subdivision (a)(3).

Though a complaint submitted to the Civil Rights Department must be verified pursuant to Government Code section 12965, the complaint filed with the trial court need not be verified. I generally do

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not file verified complaints unless necessary.

California law generally only requires pleading ultimate facts for common-law claims. Given that WR's claim was based on a statutory claim, I provided details as to WR's claim by providing the date of hire, date of termination, the specific type of disability, and the specific type of adverse employment action. (See *Fischer v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 604 ["facts in support of each of the requirements of a statute upon which a cause of action is based must be specifically pled."].) I also attached the right-to-sue notice as an exhibit to the complaint.

Discovery and investigation

Employers have an advantage in accessing witnesses and documents. Filing the lawsuit provides a somewhat level playing field by now having an avenue to talk to witnesses through depositions and require production of documents. Tenacious discovery and thorough investigation are key to litigating successfully.

Propound discovery early and often. For WR's case, I propounded four sets of written discovery plus supplemental requests for production and interrogatories over the course of two years. Thorough written discovery was the base for exposing the inconsistencies and demonstrably false misrepresentations that led to a successful settlement. Cover the basics such as requesting admissions that the right to sue notice is valid, the defendant is an employer pursuant to the FEHA, and your client is an employee. You don't want to sweat those issues at trial because they were not resolved during discovery.

Make sure you request the employer's entire insurance policy, and not just the declaration page, so that you can know whether the policy is "burning" (that is, the amount of available coverage diminishes as a result of the litigation expenses incurred to defend the lawsuit). A detailed demand that discusses the facts, damages, and insurance coverage issues can be useful in "opening" up the insurance policy. Under Code of Civil Procedure section 2017.210, parties are entitled to discovery into the existence and contents of any agreement under which any insurance carrier may be liable to satisfy in whole or in part a judgment that may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment, including the identity of the carrier and the nature and limits of the coverage, as well as whether that insurance carrier is disputing the agreement's coverage of the claim involved in the action.

Also, make sure that you provide accurate information about your client's damages. If requested, identify the damages witnesses who may have relevant information. Do not risk your client being unable to present evidence of what their lives have been like after the termination due to vague or incomplete responses.

Be ready to put in the work to meet and confer on every important issue and file motions if necessary. One tip that I learned is to write the meet-and-confer letters to look like the separate statement that must accompany a motion to compel further responses. I wrote six meet-and-confer letters specifically outlining the deficiencies of the responses, spoke to defense counsel over the phone numerous times, and filed a motion to compel when we reached an impasse.

A quick word about responding to the employer's discovery requests: be honest, be specific, and be ready. With regard to honesty, just assume that the defense attorney already knows everything about your client. Defense counsel can speak to the people who worked with your client day-in and day-out, and the employer likely already ran a background check. In responding to discovery requests, specific is terrific. The last thing you want is to be limited in your opposition to motion for summary judgment or at trial because the discovery responses that you provided were vague. And last but not least, be ready to respond to discovery. Try to avoid asking for extensions. Get your client ready for a lengthy and invasive deposition by preparing them thoroughly about the process of a deposition and the facts of their case and their life.

Depositions

The topic of depositions in employment cases can take up an entire article. I wrote an entire article about depositions in employment cases published in the March 2023 edition of Advocate. Depositions are necessary to getting maximum value for your client's employment claims. Start scheduling depositions early and keep scheduling depositions as new issues arise. Nineteen depositions were taken in WR's case by both sides over the course of two years. It is a huge amount of work just to schedule them, let alone actually take the depositions and then review the transcripts, but the information that I received during depositions was invaluable. Defense counsel did not even bring a motion for summary judgment due to the numerous inconsistencies that were raised for the defense. Plus, I had counters to every defense point raised as to liability during mediation.

Several legal issues regularly come up in disability discrimination wrongful-termination cases during discovery concerning liability.

Always seek me-too evidence showing that the defendant employer has discriminated, harassed, or retaliated against other people on the same basis as your client. While Form Interrogatory-Employment Law No. 209.1 is a good start, make sure to request more specific information and documents regarding other employees who made substantially similar claims based on the FEHA. Defense counsel may raise third-party privacy concerns, so be prepared to meet and confer. Knowing that defense counsel will likely provide objections only, you can send a pre-emptive meet and confer letter letting them know that the right to discovery of me-too evidence is expressly allowed under *Johnson v. United Cerebral*

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Palsy/Spastic Children's Foundation of Los Angeles & Ventura Counties (2009) 173 Cal.App.4th 740 and *Pantoja v. Anton* (2011) 198 Cal.App.4th 87.

Employers may claim that the employee termination was based on the lack of any reasonable accommodations available due to undue hardship. Government Code section 12940, subdivision (m) expressly references the affirmative defense of undue hardship concerning accommodations for a physical or mental disability of an applicant or employee.

Undue hardship is expressly defined by Government Code section 12926, subdivision (u) as an action requiring difficulty or expenses when considered in light of several factors. California Code of Regulations, title 2, section 11062 provides further clarification on factors to consider when determining whether the employer actually faced an undue hardship, including (1) the size of the relevant establishment or facility with respect to the number of employees, the size of budget, and other such matters; (2) the overall size of the employer or other covered entity with respect to the number of employees, number and type of facilities, and size of budget; (3) the type of the establishment's or facility's operation, including the composition and structure of the workforce or membership; (4) the type of the employer's or other covered entity's operation, including the composition and structure of the workforce or membership; (5) the nature and cost of the accommodation involved; (6) reasonable notice to the employer or other covered entity of the need for accommodation; and (7) any available reasonable alternative means of accommodation.

The essential function of the job

Employers may claim that the termination of your client was justified because your client could not perform the essential function of the job. At first blush, this defense seems difficult to overcome given the at-will nature of the vast majority of the jobs and the ability of the employer to change the responsibilities and duties of employees for any non-illegal reason. Fortunately, the term "essential job functions" is defined by Government Code section 12926, subdivision (f) as "the fundamental job duties of the employment position the individual with a disability holds or desires," and is further clarified by California Code of Regulations, title 2, section 11065. Evidence of whether a particular function is essential includes, but is not limited to, the following:
(1) the employer's or other covered entity's judgment as to which functions are essential; (2) accurate, current written job descriptions; (3) the amount of time spent on the job performing the function; (4) the legitimate business consequences of not requiring the incumbent to perform the function; (5) job descriptions or job functions contained in a collective bargaining agreement; (6) the work experience of past incumbents in the job. (7) the current work experience of incumbents in similar jobs. (8) reference to the importance of the performance of the job function in prior performance reviews.

This means that your client's essential job functions are not necessarily whatever the employer claims they are in the moment, and that the court, in evaluating a motion for summary judgment or the jury at time of trial, should take an approach that evaluates the totality of the circumstances.

What if an employer and their counsel continue to provide objections to discovery requests that you know you have the right to receive and the next hearing date for a motion to compel is a year later? There are things you can do to move your case along. First and foremost, use your client for all of their knowledge! Even if your clients worked for an employer for less than a year, they still have invaluable knowledge of the employer and its witnesses, including the temperament of witnesses and their attitudes towards telling the truth. Second, get creative in obtaining documents. Use the federal Freedom of Information Act and California Public Records Act with the appropriate government entities to obtain information. For example, I used the Freedom of Information Act to obtain information about grants given to WR's employer because the employer claimed that her job was eliminated solely due to the loss of a grant that funded WR's position. By showing that the employer actually continued to get the grant and then later getting documents from the employer showing that the employer merely switched the codes for the grant in their internal records for their employees, the main defense for the employer crumbled.

Mediation

While I prefer resolving cases directly with opposing counsel, I understand the utility and role that mediation plays in resolving cases. Again, mediation is a topic that has been the subject of numerous other articles. Rather than summarize those other articles, I want to provide two tips on how to maximize the chances of settling through mediation.

If you and your client want to mediate and believe the defense wants to get the case resolved, then consider disclosing all of the information that you plan on showing the jury in creative ways. I doubt defense attorneys will be swayed by written proclamations in briefs that an employee is entitled to $10 million in emotional-distress damages. Instead, as part of the confidential mediation process, I may provide videos of my clients who can finally tell their story in their own words without the restrictions of depositions. That way the insurance adjuster or risk management person who will make the call about how much money to resolve the case can see and hear what the employee has to say about the harm suffered as a result of the misconduct.

Given that an employee may recover attorney's fees upon prevailing on a single FEHA claim pursuant to Government Code section 12965, subdivision (c)(6),

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I like to advise the defense attorney about the number of hours that I put into a case in which I can obtain attorney's fees in confidential settlement negotiations. I ended up personally spending 382.3 hours on this case. My co-counsel likely spent an additional 50 hours at least on this case.

In WR's case, I remember meeting with the three defense attorneys during mediation and telling them the exact number of hours I spent on the case. I could tell by their body language that the three of them together did not spend nearly the amount of time I spent. At that point, they knew that I had outworked them and I would not stop. I could confidently tell defense counsel that I would seek hundreds of thousands of dollars in attorney's fees after trial, in addition to the compensatory and punitive damages that I would request the jury allow my client to receive.

Conclusion

WR was able to get her case settled at mediation for a confidential amount. I was prepared and willing to take her case to trial. Those are the cases that often do settle, though. Since settling WR's case, I have had the pleasure of trying several FEHA jury trials for deserving, hardworking employees.

Maximilian Lee is the principal attorney for the Law Office of Maximilian Lee *with its mailing address in Santa Ana, though the firm is a fully remote office. He holds of counsel positions with The Simon Law Group and Jaurigue Law Group. He graduated from Boston University School of Law. He focuses on plaintiff's side employment, personal injury, and housing cases.*