Open Question

VIEWPOINT: The California Supreme Court, and new legislation, could significantly alter the landscape for attorneys who are contemplating litigation under workplace disability laws.

BY AARON P. SILBERMAN AND DENNIS C. HUIE

New case law expected from the California Supreme Court and new legislation contemplated at both the state and federal levels could significantly alter the landscape for attorneys contemplating litigation under workplace disability laws. The effect of these changes on case adjudication is an open question.

■ **Disability defined.** The Americans with Disabilities Act, codified at 42 U.S.C. Section 12101 et seq., and California Fair Employment and Housing Act , found at Government Code Section 12926, both prohibit discrimination in the workplace based on disability, but each defines "disability" differently.

Under the ADA, a disability is "a physical or mental impairment that substantially limits one or more of the major life activities" of an individual. 42 U.S.C. Section 12102(2)(A). The FEHA defines "physical disability" as an impairment that "[l]imits an individual's ability to participate in major life activities" and "mental disability" as any disabling mental or psychological condition not specifically excluded by the FEHA. Government Code Section 12926, subd. (i), (k).

■ **The state-federal split.** Despite the differences between the ADA and FEHA definitions, most California court decisions assumed that both statutes require an impairment to substantially limit a major life activity. See, e.g., *Cassista v. Community Foods Inc.*, 5 Cal.4th 1050 (1993), *Hobson v. Raychem*, 73 Cal.App.4th 614 (1999). Since 1998, however, three other appellate courts have addressed the issue, with three different outcomes.

In *Muller v. Automobile Club of Southern California*, 61 Cal.App.4th 431 (1998), the 4th District Court of Appeal held that a mental impairment must substantially limit a major life activity to be a "disability" under the FEHA and implied that the same requirement applies to physical impairments.

The court found that the FEHA was ambiguous about whether mental disabilities must limit a major life activity, but based on legislative history, it concluded that "the Legislature intended to conform California's employment discrimination statutes to the ADA by extending protection to persons with mental disabilities, and intended, in accordance with the ADA, to uniformly define 'mental disability' as a mental impairment that substantially limits a major life activity."

In *Pensinger v. Bowsmith, Inc.*, 60 Cal.App.4th 709 (1998), the 5th District Court of Appeal agreed with *Muller* that the FEHA requires a substantial limitation for physical disabilities but also held that it does not require that mental disabilities limit a major life activity. The court stated that "[e]stablishing a mental disability for purposes of the ADA requires a plaintiff to prove that it 'substantially limits one or more major life activities.'"

Although the FEHA includes this requirement with respect to proving a physical disability, it is absent from the definition of mental disability.

Finally, in *Swenson v. County of Los Angeles*, 75 Cal.App.4th 889 (1999), rev. granted, 99 Cal.Rptr.2d 253 (2000), the 2nd District Court of Appeal went even further, stating that neither mental nor physical impairments need to substantially limit a major life activity to qualify as disabilities under the FEHA.

Swenson affirmed the trial court's refusal to give the employer's proposed jury instruction defining a disability as an impairment which substantially limits a major life activity, concluding that "[n]either the plain language of the FEHA definitions of 'mental disability' or of 'physical disability'" contained a substantial limitation requirement.

The outcome of the California Supreme Court's review of *Swenson* will resolve the split in the appellate courts and determine whether the FEHA definitions of physical and mental disabilities require a substantial limitation in a major life activity.

■ **Proposed legislation.** The California Legislature is considering amendments to the FEHA, under Assembly Bill 2222 (AB2222), that would broaden FEHA's protections against disability discrimination.

While the FEHA language defining "physical disability" and "mental disability" will remain the same, Section 1.5 of the bill makes it clear that the Legislature intends those definitions to be broader than those found in the ADA:

"The Legislature finds and declares that California law in the area of disabilities provides protections independent from those in the [ADA]. Although the ADA provides a floor of protection, California law has always, even prior to the passage of the ADA, afforded additional protections. [*] California law contains broad definitions of ... physical disability, and mental disability."

Comments by the Assembly Committee on Labor and Employment to AB2222 also confirm the Legislature's intent: "Some California courts have been either confused or are reluctant to apply the independent FEHA definitions where the protections under FEHA are stronger than under the ADA" (citing *Muller*, 61 Cal.App.4th 431).

AB2222 retains the FEHA requirement that physical disabilities limit a major life activity and the statutory language indicating that the FEHA's definition of "physical disability" is the same as the California Supreme Court's definition of "physical handicap" as set out in *American National Insurance Co. v. Fair Employment and Housing Commission*, 32 Cal.3d 603 (1982), where the court held that a "physical handicap" includes more than just "major ills or defects." In that case, the court defined physical handicap as a condition of the body that "makes achievement unusually difficult."

AB2222's true significance to attorneys contemplating litigating mental disabilities cases, however, is in what the bill does not say. Despite the split among the appellate courts on whether the FEHA requires that mental disabilities limit a major life activity, the bill does not add or indicate this requirement. If the Legislature intended to require such a limitation, it likely would have included language to that effect in the bill.

AB2222 passed the Appropriations Committee on May 26, 2000, and is before the Senate Judiciary Committee, after which, if changes are made, it will go back to the Assembly for concurrence. When the bill was before the Labor Committee, 26 organizations supported the passage of the bill, while eight opposed it, so it is expected that the bill will pass with only minor changes. The bill must make it through the entire legislative process by Aug. 31, 2000, in order to survive. If signed by the governor, the bill will become law Jan. 1, 2001.

■ **Effect of a broad definition.** If the California Supreme Court or the Legislature determines that the FEHA defines disability differently from the ADA, more impairments will qualify as disabilities under the FEHA, but precisely what will qualify as a disability under the FEHA is uncertain. While physical impairments and possibly mental impairments as well must limit a major life activity, both employers and courts must decide what is "limiting" under the FEHA.

In addition, the extensive guidance provided by ADA case law and EEOC regulations, relied upon by California employers and courts, will no longer apply to FEHA claims. An impairment will only be sufficiently limiting if it "makes achievement unusually difficult" under the *American National Insurance* standard. However, this provides little guidance because it is unclear what the standard actually means, since despite having been decided 18 years ago, the case is rarely cited, and no case has ever interpreted or clarified the standard.

In the past, ADA cases have evaluated impairments based on their severity and duration, but the extent to which these factors would be required under a different, FEHA standard is an open question. Would some de minimus standard apply? Would limitations with minimal severity or of minimal duration be physical disabilities? Or would something more be required? Would impairments like a strained back or a broken arm qualify? Would a different standard apply to mental disabilities? Would an employee "stressed out" about an overdue assignment qualify? Under a new FEHA standard, unlike under the ADA, the answers to these questions could be unclear.

■ **The effects of change.** The result of all this uncertainty will be threefold.

First, it will be more difficult for employers to evaluate employees' accommodation requests. If employers cannot determine with any certainty whether their employees are "disabled" under the FEHA, they will be forced to accommodate employees with virtually any physical or mental impairment because, if they do not, they will run the risk of significant liability and costs of defense in a FEHA lawsuit.

Second, FEHA disability lawsuits will become more common because plaintiffs will naturally test the limits of a broader, less defined standard.

Third, courts will be less willing to grant summary judgment for defendants based on lack of demonstrated disability because of the dearth of precedent to guide the decisional rationale.

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