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**EMPLOYER REQUIRED TO ACCOMMODATE EMPLOYEES
WHO ARE PERCEIVED AS DISABLED**

A California Court of Appeal recently decided an important disability accommodation issue. In *Gelfo v. Lockheed Martin Corporation*, 2006 Cal.LEXIS 830 (June 2, 2006), the court held that an employer must attempt to accommodate an employee who is “regarded as” disabled, even if the individual is not actually disabled.

The California Fair Employment and Housing Act (FEHA) requires employers to reasonably accommodate disabled employees and engage in an interactive process with the employee to determine which accommodations will work. Government Code § 12950 (a), (m), (n).

This case broadens an employer’s obligations under FEHA and is a significant departure from several federal court interpretations of the Americans with Disabilities Act. Once again, California courts have chosen to interpret FEHA’s disability discrimination provisions in a much broader manner than federal courts interpret the ADA.

Background of the Case

Charles Gelfo, a senior metal fitter at Lockheed had a work-related injury to his lower back that resulted in significant work restrictions. The workers’ compensation medical report stated that he would not be able to return to his position as a metal fitter and instructed Gelfo to avoid heavy lifting, repetitive bending, and prolonged sitting and standing.

While his claim for benefits was pending, he was laid off as part of a reduction in force. Later, Gelfo became eligible for recall and completed training for a different position as a fabricator. Lockheed offered Gelfo a fabricator position, but then rescinded the offer after reviewing its file and determining that Gelfo’s medical restrictions rendered him unable to perform the essential functions of his new position.

Gelfo told Lockheed that he was feeling fine and that he no longer had any restrictions that would prevent him from performing the fabricator position. Gelfo

also told Lockheed that he had been cleared to return to work, but that his attorney had told him not to share the clearance with Lockheed.

Lockheed submitted the issue to its Placement Review Committee, which carefully considered the issue. The Committee reviewed the essential functions of the position, the workers' compensation medical reports and Gelfo's deposition transcript. The Committee also consulted Lockheed's in-house physician. After review, Lockheed concluded that Gelfo could not perform the essential functions of the job, that no reasonable accommodation was possible, and refused to re-hire him.

Gelfo sued for disability discrimination, failure to accommodate and failure to engage in the interactive process under FEHA.

After a six-day jury trial, the trial court issued a directed verdict in favor of Lockheed determining that (1) Gelfo was not actually disabled; and (2) Lockheed had no duty to reasonably accommodate or engage in the interactive process with an employee who was not actually disabled.

The only issue submitted to the jury was whether Lockheed violated FEHA by refusing to hire Gelfo because it regarded him as disabled. The jury found for Lockheed on this issue.

Troubling Result On Appeal

Gelfo successfully appealed. On review, the court held that the trial court erred in submitting the issue of whether Gelfo was regarded as disabled to the jury. Instead, the trial court should have determined as a matter of law that Lockheed regarded Gelfo as disabled because it admitted this during the trial by stating that its decision not to rehire was based on its belief regarding the medical restrictions. Any employee or applicant who is denied a job based on medical restrictions in his/her file is, according to the court, regarded as disabled.

In the most troubling portion of its decision, the court then went on to state that an employer must engage in an informal interactive process to determine whether a reasonable accommodation exists for an employee it regards as disabled. Thus even though Gelfo was found to have no actual disability, Lockheed was still required to engage in the interactive process, and give him a reasonable accommodation, if necessary.

The result: an employer is now *required to reasonably accommodate a non-existent impairment!*

This decision goes against the Ninth Circuit's decision in *Kaplan v. City of North Las Vegas*, 323 F.3d 1226. In *Kaplan*, the Ninth Circuit held that "regarded as" plaintiffs are not entitled to reasonable accommodation under the ADA. The

Kaplan court reasoned that if plaintiffs who are perceived as disabled are entitled to reasonable accommodation, it would lead to “bizarre results.”

The court of appeal in *Gelfo*, instead chose to rely on a Tenth Circuit case which stated “an employer who is unable or unwilling to shed his or her stereotypic assumptions based on a faulty or prejudiced perception of an employee’s abilities must be prepared to accommodate the artificial limitations created by his or her faulty perceptions. In this sense, the ADA encourages employers to become more enlightened about their employees’ capabilities, while protecting employees from employers whose attitudes remain mired in prejudice.” The *Gelfo* court noted that the protections under FEHA are broader than the protections under the ADA.

What Should Employers Do?

This case sends a message to employers to be very careful when making decisions regarding employees who have current or past medical restrictions.

Employers should:

- Engage in the interactive process for any applicant or employee it regards as disabled. Set aside assumptions about the actual or perceived medical limitations of the employee and have an open dialogue about the need for accommodation and possible accommodations. Even if the final decision is that there is no reasonable accommodation, this process should still be initiated. Do not wait for the employee to ask for a reasonable accommodation.
- Do not rely on old medical information. Obtain updated and objective medical information and only base decisions on that current information.
- Be wary of relying on workers’ compensation medical reports. These reports are geared for the workers’ compensation system and do not answer the necessary questions under FEHA or the ADA.
- Do not require employees to certify that they can return to work without any physical restrictions. According to the court, “A policy requiring an employee be 100 percent healed before returning to work is a per se violation [of the FEHA and ADA] because it permits an employer to avoid the required individualized assessment of the employee’s ability.”