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CURIOUSER AND CURIOUSER: EXPANSION OF THE DUTY TO REASONABLY ACCOMMODATE DISABILITY

For the first time, the California Court of Appeal held that the Fair Employment and Housing Act ("FEHA") creates a duty to reasonably accommodate an applicant or employee who is associated with a disabled person. The holding of *Castro-Ramirez v. Dependable Highway Express, Inc.*[1] is unprecedented and there is a possibility that it will be appealed to the California Supreme Court.[2] However, based on this decision, California employers are required to engage in a good faith interactive process to consider reasonable accommodations for an employee or applicant who associates with a disabled person.

FACTUAL BACKGROUND

Luis Castro-Ramirez was employed by Dependable Highway Express (DHE) as a truck driver. He informed DHE in 2010 that his disabled son needed a kidney transplant, that his son required dialysis on a daily basis, and that Mr. Castro-Ramirez was responsible for administering his son's dialysis. He requested work schedule accommodations that would permit him to attend his son in the evenings. His supervisor, Winston Bermudez, granted this request, and Mr. Castro-Ramirez worked a modified schedule that would permit him to start in the mornings to be home in the evenings. However, on occasion, he would work late. His ability to work late depended on his son's condition, which varied daily. Mr. Castro-Ramirez would communicate with his supervisors daily about whether he needed to be home earlier to begin his son's dialysis. Mr. Castro-Ramirez performed satisfactorily during his career with DHE.

However, Mr. Castro-Ramirez's situation changed in 2013, when Mr. Bermudez was promoted and another employee, nicknamed "Junior," became Mr. Castro-Ramirez's immediate supervisor. In March 2013, Mr. Castro-Ramirez complained to Mr. Bermudez about the fact that Junior had changed his hours and was requiring him to start later in the day. Mr. Bermudez told Junior that Mr. Castro-Ramirez had complained, and Junior replied that he would "work on that." On April 15, 2013, one of DHE's customers sent an email to Mr. Bermudez and another manager asking for Mr. Castro-Ramirez to return to doing his regular deliveries at 7:00 a.m. When Mr. Castro-Ramirez asked Junior about making deliveries to this customer, Junior told him that the customer did not like Mr. Castro-Ramirez's work and that was why Junior had given him shifts starting later. A few

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[1] Case No. B261165 and B262524 (April 4, 2016).
[2] On April 19, 2016, the employer filed a petition for rehearing.

days later, the customer called Mr. Castro-Ramirez directly and asked why he was no longer making their deliveries. Mr. Castro-Ramirez explained what Junior had said, and the customer told him that was untrue and sent him a copy of the email he sent to Mr. Bermudez.

On April 23, 2013, Junior assigned Mr. Castro-Ramirez to a shift beginning at 12:00 p.m., even though there were eight shifts that started earlier in the day. Mr. Castro-Ramirez complained and explained that he would not be able to get home early enough to care for his son. He requested that Junior permit him to take the day off. Junior told him he would be fired if he did not take the assignment. Junior told him to return the next day for termination paperwork.

Mr. Castro-Ramirez returned to DHE for three consecutive days because he wanted to work. On the third day, another manager told him that because he had not worked for three days, he was terminated. The termination was processed as a voluntary termination or resignation, with the reason being that he refused an assignment. Mr. Castro-Ramirez refused to sign the document. DHE's employee handbook states that refusal to obey a supervisor's order or refusal to perform a job assignment is grounds for disciplinary action, up to and including termination.

Procedural Background

Mr. Castro-Ramirez sued DHE for disability discrimination, failure to prevent discrimination, and retaliation under the Fair Employment and Housing Act ("FEHA") as well as wrongful termination in violation of public policy. The trial court granted DHE's motion for summary judgment, finding that there were no triable issues of fact. The court rejected his theory that DHE violated the FEHA, finding that there was no evidence that the termination was based on his association with his disabled child. Mr. Castro-Ramirez appealed.

Court of Appeal Ruling

As the court observed, the "FEHA provides a cause of action for associational disability discrimination, although it is a seldom-litigated cause of action." The court noted that the FEHA's definition of disability includes association with a physically disabled person. Specifically, *Government Code* section 12926(o) states in full:

> "Race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, age, sexual orientation, or military and veteran status" includes a perception that the person has any of those characteristics or ***that the person is associated with a person who has, or is perceived to have, any of those characteristics***. (emphasis added)

The court held that in order to establish a prima facie case of disability discrimination, the plaintiff must show the following:

1. The plaintiff suffered from a disability;
2. The plaintiff was otherwise qualified to do his or her job, with or without reasonable accommodation; and
3. The plaintiff was subjected to adverse employment action because of the disability.[3]

[3] Following the establishment of a prima facie case, the burden shifts to the employer to offer an legitimate, non-discriminatory reason for the adverse employment action. The plaintiff can then show that the employer's proffered reason is pretextual.

Reasonable Accommodation

DHE argued that the FEHA was clear that there was only a duty to reasonably accommodate a disabled employee, not an employee whose disability is only one of association with a disabled person. The court rejected this argument, stating,

> ...it is not at all clear under FEHA that employers have no duty to provide reasonable accommodations in the associational disability context. No published California case has determined whether employers have a duty under FEHA to provide reasonable accommodations to an applicant or employee who is associated with a disabled person. We hold that FEHA creates such a duty according to the plain language of the Act.[4]

The court explained that in the context of associational disability discrimination, the association with a disabled person is the "disability." As such, when the FEHA states that an employer "must reasonably accommodate 'the known physical...disability of an applicant or employee,' the disabilities that employers must accommodate include the employee's association with a physically disabled person."

The court recognized that this interpretation of the FEHA was contrary to federal case law interpreting the Americans with Disabilities Act ("ADA"). Noting that the FEHA expressly declares that it provides protections to disabled persons that are independent of those provided by the ADA, the court reasoned that this is a situation where the FEHA provides for a greater protection. Further, it explained that, unlike the FEHA, the ADA does not include associational disability in its definition of disability. As such, the court held that the federal cases were not relevant to the analysis under the FEHA.

As a result of the court's analysis, it held that it was not appropriate for the trial court to issue summary judgment to DHE on the disability discrimination cause of action because there was a triable issue of fact over whether Mr. Castro-Ramirez could perform the essential functions of the job *with* reasonable accommodations.

Discriminatory Motive and Pretext

The court also found that there were triable issues of fact as to DHE's motive and pretext, and as such, the trial court should not have granted summary judgment on those arguments.

The court first highlighted some of the circumstances that could give rise to associational disability discrimination, and noted that the common thread among them is "that they are instances in which the 'employer has a motive to discriminate against a nondisabled employee who is merely associated with a disabled person.'" (*citing Larimer v. International Business Machines Corp.* (7th Cir. 2004) 370 F.3d 698, 702).

[4] Note, the FEHA sets forth separate causes of action for disability discrimination and failing to provide reasonable accommodations, which are similar, but not identical. Plaintiff had included a cause of action for failure to reasonably accommodate, but abandoned it on appeal. However, the court explained that it would still rule on the accommodation issue because "when, as here, the plaintiff has chosen to pursue only a discrimination cause of action, reasonable accommodation is still intertwined with that plaintiff's case...because...one element of the discrimination plaintiff's case is that the plaintiff was qualified to do his or her job, with or without reasonable accommodation."

With this in mind, the court found that a jury could find that Mr. Castro-Ramirez's association with his disabled son was a substantial motivating factor in Junior's decision to terminate him, and that Junior's stated reason for the termination was pretext. Specifically, the court noted:

- Junior was aware that Mr. Castro-Ramirez needed to finish work early so he could administer his son's dialysis.
- Mr. Bermudez had discussed this with Junior and told Junior to work with Mr. Castro-Ramirez in this respect. When Mr. Castro-Ramirez complained to Mr. Bermudez about Junior, Mr. Bermudez spoke with Junior again about scheduling Mr. Castro-Ramirez so he could care for his son.
- Despite his knowledge of Mr. Castro-Ramirez's situation, and despite the fact that eight earlier shifts were available, and that a customer had specifically requested Mr. Castro-Ramirez to do their 7:00 a.m. deliveries, Junior scheduled Mr. Castro-Ramirez at a shift that started at noon, later than he had ever started before.
- Junior provided a false reason as to why Mr. Castro-Ramirez was not assigned to the customer's 7:00 a.m. deliveries.
- There was no evidence that Mr. Castro-Ramirez was acting in bad faith or being insubordinate when he said he could not work that shift because of his son.
- DHE did not consider less severe action against Mr. Castro-Ramirez, even though the policy allowed for it.

The court concluded that one inference from these facts is "that Junior acted proactively to avoid the nuisance [Mr. Castro-Ramirez's] association with his disabled son would cause Junior in the future. As such, summary judgment was inappropriate.

Retaliation

Employees are not required to use any legal terms or magic words when complaining to their employer about retaliation. Rather, an employee must only communicate enough information to "sufficiently convey the employee's reasonable concerns that the employer has acted or is acting in an unlawful discriminatory manner." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1047). The court held that the evidence here was sufficient that a reasonable trier of fact could find that Mr. Castro-Ramirez engaged in protected activity because he made repeated complaints to both Mr. Bermudez and Junior about Junior's treatment of him.

Dissent

Justice Grimes wrote a dissent in this case. He argued that it was "particularly inappropriate" for the court to rule on the reasonable accommodation issue because Mr. Castro-Ramirez had abandoned that theory of liability on appeal. Justice Grimes also argued that the statute did not support the majority's finding that a non-disabled employee could be disabled by association. Finally, he asserted that the court should have considered the issue of whether Mr. Castro-Ramirez was entitled to intermittent family leave under the California Family Rights Act ("CFRA"), an issue that was not addressed by the majority.

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What This Means for Employers

This decision is binding in the Second Appellate District, which includes Los Angeles, Ventura, Santa Barbara, and San Luis Obispo counties, and it is persuasive authority in the rest of the state. The other courts of appeal could follow the decision, or they could decline to do so. There is a possibility that the employer will appeal the decision to the California Supreme Court, which could overturn or affirm the decision.

However, at this time, this is a published decision in California that all employers should be aware of and sensitive to in handling requests to care for others. Note, while this decision dealt with a close familial relationship, there is nothing in the case or in the statute that limits associational disability to close family members. At this time, it would be prudent for employers to:

- Consider requests for accommodation for employees to care for others, and, in particular family members under the FMLA/CFRA (if applicable) as well as under the FEHA.
- Engage in a good faith interactive process with employees who associate with a disabled person to evaluate any requests for reasonable accommodation.
- Train supervisors to be sensitive to such requests and to report any request to care for a disabled person to human resources.
- Train supervisors not to make employment decisions or treat employees differently simply because they are associated with a disabled person.

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