

# Employers Beware: A 100% WC Permanent Disability Rating Does Not Mean an Employee Cannot Work

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## **Introduction**

A recent California appellate court decision, *Cuiellette v. City of Los Angeles*,<sup>1</sup> is a key case for employers because it highlights the fact that California workers' compensation laws<sup>2</sup> and some discrimination laws, *i.e.*, the Fair Employment and Housing Act ("FEHA")<sup>3</sup> and the Americans with Disabilities Act ("ADA")<sup>4</sup> overlap. More specifically, it emphasizes that employers must understand that when a worker is injured on the job, it is very likely that in addition to the obligations the employer faces under the California workers' compensation system, the employer has responsibilities under disability discrimination laws, particularly when considering a return-to-work request or a request to remain on job.

Significantly, these laws have different standards for defining a disability and for determining whether or not an employee can work. For example, as discussed below, a 100 percent permanent disability rating in a workers' compensation case does not mean, under the FEHA/ADA, that an employer can refuse an employee's request to return-to-work, or to remain on the job. This is because the employee is protected by the FEHA/ADA, and the employer must comply with the provisions of these laws in considering return-to-work requests and other issues.

Further, some employers not only fail to grasp their obligations under these workplace disability discrimination laws, but they mistakenly believe that their workers' compensation insurance policy will cover disability discrimination claims, as they often develop from the underlying workers' compensation case. Since disability discrimination lawsuits are skyrocketing, costly to defend, and typically the largest portion of the FEHA/ADA claims filed by either the Department of Fair Employment of Housing ("DFEH") or the Equal Employment Opportunity Commission ("EEOC"), it is more vital than ever for

employers to recognize their responsibilities under both workers' compensation laws and FEHA/ADA.

## **Workers' Compensation and FEHA/ADA Differ in Their Focus**

As a preliminary matter, employers should understand that under the workers' compensation system when considering an employee's ability to work, the focus is on whether the employee can perform the usual and customary duties of the "job of injury." Alternatively, pursuant to the FEHA/ADA, the focus is on what the employee can do in terms of their current job or any other vacant, alternative position, if applicable. In essence, workers' compensation looks at what the employee *can no longer do* while the FEHA/ADA analyze what the employee *can still do*. Therefore, employers must exercise caution when considering return-to-work requests from injured workers and, in particular, avoid summarily denying a request based upon the disability alleged in a workers' compensation case.

## **A Common Scenario in Workers' Compensation Cases**

One common scenario that arises in workers' compensation cases is that the workers' compensation insurance claims adjuster contacts the employer to determine whether or not the employer will offer the injured worker regular, modified or alternative work. Under the workers' compensation system this is a fairly straight forward analysis. If the employer offers regular, modified or alternative work, there is a 15 percent reduction in permanent disability payments. If the employer does not offer regular, modified or alternative work, there is a 15 percent increase. Many times the employer is willing to take the 15 percent increase in permanent disability payments because the employer does not want to offer the injured worker regular, modified or alternative work.

Although this satisfies the employer's workers' compensation obligations (unless a Section 132a violation exists), it may constitute a violation of the FEHA/ADA. This is because even though the employer notifies the workers' compensation insurance claims adjuster that it will not offer the injured worker

<sup>1</sup> 194 Cal. App. 4th 757 (Apr. 22, 2011).

<sup>2</sup> Cal. Lab. Code §§ 3200-6208.

<sup>3</sup> Cal. Gov't Code § 12940.

<sup>4</sup> 42 U.S.C. § 12102.

regular, modified, or alternative work, the employer fails to consult with the employee to conduct an “interactive process” as required by the FEHA/ADA. Clearly, in these situations, because the employer fails to conduct the requisite “interactive process,” the employer does not understand that in addition to its responsibilities under workers’ compensation laws, the employer must also comply with the FEHA/ADA, which protect from disability discrimination disabled employees who want to resume or continue, working.<sup>5</sup>

### **Conducting the Interactive Process**

Because many employers do not understand the FEHA/ADA, they do not realize that under these discrimination laws, before an employer can refuse an employee’s request to return-to-work, or terminate an employee who cannot perform the essential functions of his or her job, the employer must conduct an “interactive process” with the employee to determine whether or not the employee can perform the essential functions of his or her job, with or without, a reasonable accommodation.<sup>6</sup> The “interactive process”<sup>7</sup> consists of a good faith consultation<sup>8</sup> with the employee, preferably a face-to-face meeting, to discuss:

- the employee’s job restrictions/limitations;
- the employee’s job description and the essential functions of the job;
- the employee’s ability/inability to perform the essential functions of the job;
- any reasonable accommodations, if appropriate; and
- alternative vacant positions, if the employee cannot perform the essential functions of his or her current

<sup>5</sup> Disability discrimination occurs when an employer treats an applicant or employee less favorably because he or she has a disability, has a history of a disability (such as cancer that is controlled or in remission), or is believed to have a physical or mental impairment that is not transitory (*i.e.*, lasting or expected to last six months or less) and minor, even if he or she does not have such an impairment. Less favorable treatment (*i.e.*, an adverse employment action) may include a refusal to reinstate or a refusal to offer a reasonable accommodation.

<sup>6</sup> Cal. Gov’t Code § 12940(m).

<sup>7</sup> Cal. Gov’t Code § 12940(n).

<sup>8</sup> Employers should also note that in most cases, follow-up consultations will be required in order to interact with the employee in good faith. So, essentially the interactive process is an ongoing effort, and not just a single meeting with the employee.

position, and any reasonable accommodations applicable to the alternative vacation position.

However, what sometimes occurs in workers’ compensation scenarios is that the employer unilaterally refuses to offer the injured worker regular, modified or alternative work when the worker reaches permanent and stationary status, or the employer refuses an employee’s request to return-to-work at the conclusion of the workers’ compensation case (or at any other point in the workers’ compensation case) without conducting the interactive process. This often happens because the employer believes that due to the extent and/or recent nature of the employee’s workers’ compensation injury, the employee is no longer capable of performing his or her job, and/or the employer is concerned about the employee sustaining another workers’ compensation injury. In these situations, the employer fails to realize that a refusal to return an employee to either their regular job, or a modified/alternative position based upon either of these considerations is a violation of FEHA/ADA, and could subject the employer to a costly disability discrimination claim.

### **The Cuiellette Case**

The *Cuiellette* case emphasizes that a workers’ compensation permanent disability rating (even one as high as 100 percent) *does not mean an employee cannot work* under the FEHA/ADA. For example, some employers believe that if an employee claims a substantial injury in the workers’ compensation case (which occurred in the *Cuiellette* case), and subsequently receives a significant disability rating, the employer is justified in refusing reinstatement, especially when the rating is as high as 100 percent. However, the court in *Cuiellette* delivered a strong message to employers that the standard for a permanent disability rating in workers’ compensation is *different* than the FEHA/ADA standard for determining whether a disabled employee is able to perform the essential functions of the job, with or without an accommodation. Therefore, best practices (and the lawful course of action) is for employers to conduct an interactive process with an employee who is requesting a return-to-work (or who is requesting to stay on the job), as opposed to denying that request solely based on the workers’ compensation disability rating or other considerations related to the workers’ compensation injury.

### **Facts of the Cuiellette Case**

The *Cuiellette* case involved Officer Rory Cuiellette, who worked for the City of Los Angeles (the “City”) as a field officer for several years, until he sustained a work-related injury for which he filed a workers’

compensation claim. Ultimately, Cuiellette was found to be 100 percent disabled pursuant to the workers' compensation rating system, and his workers' compensation case was subsequently resolved.

Cuiellette then requested a return-to-work in a light duty position, and he provided a note from his treating physician (as requested by the detective in charge of the unit) that authorized Cuiellette to perform "permanent light duty—administrative work only." In May 2003, the City accepted Cuiellette's request and returned him to work at a light duty desk job for the fugitive warrants unit, which is one of the City's light duty jobs for injured field officers who want to continue working.

The City had a long-standing policy and practice of allowing field officers to perform light duty assignments that did not require them to perform many of the essential job functions of a field officer. According to the officer in charge of the Medical Liaison Unit, he had placed hundreds of officers in light duty assignments during his 12 years in that position, and his orders were to accommodate disabled officers by placing them in assignments that did not require arrests, field work or dangerous driving. Another officer had reassigned at least 25 disabled officers to the fugitive warrants unit.

However, after five days of working in the new light duty desk job position, the City realized, with input from the workers' compensation third party administrator, that Cuiellette had received a 100 percent disability rating in the workers' compensation case. Based on this, Cuiellette's supervisor sent him home, presumably because he believed the 100 percent rating meant Cuiellette could not perform any job duties. However, the evidence presented at trial indicated that Cuiellette could perform the essential functions of the light duty desk job position.

### Court Analysis

The *Cuiellette* case involved multiple appeals on different issues, the most important of which centered on whether a finding of 100 percent disability in a workers' compensation claim precludes an employee from pursuing a claim under the FEHA for disability discrimination. The court determined that a **"rating received in the workers' compensation proceeding was not, as a matter of law, a legitimate, nondiscriminatory reason for an employer's adverse employment action."** Significantly, as discussed above, this means that even if an employee has a 100 percent disability rating in a workers' compensation case, the employer must still engage in the interactive process if the employee requests a return-to-work, to consider whether the

employee can still perform the essential functions of his or her job, with or without a reasonable accommodation and, if not, to consider whether there are any other alternative vacant jobs that the employee might be able to perform, with or without reasonable accommodation. The court essentially found that the rating in a workers' compensation case does not provide an employer with a way around an employee's rights under the FEHA/ADA.

The court then analyzed whether Cuiellette was required to prove that he could perform the essential functions of a field officer or the light duty desk position, with or without a reasonable accommodation, in order for the City to be liable for disability discrimination and/or a failure to accommodate. The City argued that even if Cuiellette could work the light duty desk job, he still had to prove that he could perform the essential functions of a field officer (his former position) because the light duty desk position was never meant to be permanent. However, the court was not persuaded by the City's argument that the light duty desk position was temporary. Instead, the court focused on evidence suggesting that the City's long-standing practice was to make light duty positions available to disabled field officers as permanent assignments.

The court also reviewed whether Cuiellette must prove that he was able to perform the essential functions of the light duty position or his former position as a field officer. On this point, the court ultimately determined that in order to prove a failure to reasonably accommodate a disability, the employee must establish that he or she can perform the essential functions of the position to which the employee has been reassigned, if that has occurred, rather than the essential functions of the employee's prior position. The court also observed that in this case the evidence indicated that it was not the policy and practice of the City to require sworn field officers who had been reassigned to light duty positions to be able to perform the essential functions of their prior positions. On this point, one of the City's own officers testified that "his marching orders" were to reasonably accommodate any disabled officer by eliminating the more strenuous essential functions of the job. Based upon this, the court found that Cuiellette only needed to prove that he was capable of performing the essential functions of the light duty desk job to which he had been reassigned. The court then found sufficient evidence to establish that Cuiellette could perform the essential functions of the light duty desk position, and concluded that he had done so without a problem for five days before being terminated.

### What Does the *Cuiellette* Case Mean for Employers?

As indicated above, employers must understand that when they have an employee who is injured on the job, they have obligations under numerous laws, not just workers' compensation. Specifically, employers must recognize that industrially injured employees, no matter how their workers' compensation claim is resolved, have additional rights under the FEHA/ADA.<sup>9</sup> In addition, employers need to be aware that any workers' compensation permanent disability rating is largely irrelevant to the employer's FEHA/ADA obligations.

Therefore, when responding to an injured worker's request for reinstatement, the employer must engage in an interactive process to determine if the employee can perform the essential functions of his or her "current" position, with or without a reasonable accommodation and, if not, to consider whether there are available, alternative, vacant positions that the employee can perform the essential functions of, with or without a reasonable accommodation. Any permanent disability rating in the workers' compensation case should not be a factor in the FEHA/ADA analysis.

The *Cuiellette* case also highlights the fact that employers must exercise caution in creating and implementing light duty positions if the employer offers such jobs. In this case, the court was not convinced that the City intended the light duty desk position to be temporary. Instead, the court analyzed the employer's past practices regarding light duty positions and concluded that the City treated the positions as permanent. Thus, if an employer intends for a light duty position to be temporary in nature, but allows some employees to remain in the light duty position for extended periods of time, essentially turning the job into a permanent position, a court may conclude that the light duty positions have essentially become permanent in nature based on the employer's practices. Since it may be beneficial for employers to have temporary

light duty positions available, employers may want to consider: (1) advising employees in writing that the light duty positions are temporary; (2) setting time limits for the light duty positions; and (3) setting limits on the number of light duty positions available depending on the business needs of the employer.

Moreover, for employers who face the possibility of a disability discrimination lawsuit, the potential for a \$1.5 million dollar judgment (as occurred in the *Cuiellette* case) for failure to comply with FEHA does not even take into account defense costs and the immense time spent by employers in defending such matters. Best practices in these situations is for employers to conduct a thorough interactive process with the employee to determine the best course of action when considering reinstatement. And, of course, to document that effort.

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<sup>9</sup> Employers must also understand that the FEHA/ADA apply to disabled employees whether they have a work-related injury or not.