

CALIFORNIA

EMPLOYMENT LAW LETTER



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DISABILITY DISCRIMINATION

Employee's inability to return to work dooms disability case

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*Winning summary judgment (a judgment in your favor without a full trial) in a disability discrimination case is rare for employers in California. Disability cases are often factually messy and involve complex legal issues. However, it can be done, as the California Court of Appeal's recent decision in *Streich v. JCM Partners* demonstrates. Although the court's opinion is unpublished, it's informative about how you can develop evidence and use an employee's conflicting or self-serving statements about his medical condition to defeat his discrimination claims.*

Employee becomes disabled

Jose Gomez was employed by JCM Partners, Inc., a property management company, from 2003 until 2011. Beginning in 2006, he worked as an after-hours leasing specialist from 5:00 p.m. to 10:00 p.m., six days a week. His job was to answer phone calls and respond to e-mails about rental property listings after business hours. He worked from home, and the job required him to be able to use a phone and a computer.

In 2009, Gomez was diagnosed with an aortic aneurysm in his abdominal area. In 2011, he was diagnosed with an aortic aneurysm in his chest area. The aorta is a major blood vessel that supplies blood to the entire body, and an aortic aneurysm (enlargement of the aorta) can be life-threatening. In early March 2011, Gomez informed his supervisor, Michael Sloan, that he needed surgery for his medical condition and requested one week of leave. Sloan granted his request and did not ask for any medical documentation.

On March 16, 2011, Gomez's wife, Debbie Streich, contacted Sloan to inform him that her husband had experienced complications during surgery that left him partially paralyzed. On March 18, Streich contacted Sloan again to update him on her husband's status and to ask that JCM keep his options for returning to work open. At the time, Gomez was still in the hospital's intensive care unit.

Over the next several weeks (from March 18 through April 22), an HR representative from JCM contacted Streich on three separate occasions, each time asking for medical documentation to support Gomez's absence and his possible return-to-work date. The HR representative also tried to reach Gomez directly. Neither Gomez nor Streich responded.

On April 22, the HR representative sent a letter to Gomez at his home requesting the same information. Neither Gomez nor his wife responded to the letter. On May 24, the HR representative made another attempt to contact both Gomez and Streich, but neither responded. That same day, JCM sent Gomez a termination letter stating that it hadn't heard from Gomez since March 18 and he was being terminated for job abandonment. He was invited to contact JCM to discuss the termination letter. JCM again received no response. Gomez was 66 years old at the time of his termination.

At the time of these events, Gomez was in a rehabilitation center several hours away from his home receiving intensive physical therapy, and his wife was staying with him (or at least nearby). Neither Gomez nor Streich ever received or read the letter JCM sent to their home on April 22. Gomez was likely unaware of any attempts by the HR manager to reach him. However, it appears undisputed that his wife received the messages from JCM requesting medical documentation of her husband's condition, but she never responded.

Employee's admissions on disability form

Throughout the remainder of 2011, Gomez's medical condition remained extremely critical. With the help of his wife, he applied for disability insurance benefits. In support of his application, he submitted a medical certification in which the doctor stated that he didn't anticipate releasing Gomez to his regular and customary work until 2020. The rehabilitation center where Gomez was being treated at the time of his termination categorized him as "catastrophically disabled."

In December 2011, Gomez's doctor certified that he had been diagnosed with quadriplegia and would never be able to resume his regular and customary work. During this time, Gomez also certified on several occasions that he was totally disabled, and he received benefits through March 2012 for his total disability.

In March 2012, Gomez filed a medical malpractice lawsuit alleging he had suffered paraplegia as a result of negligence. In the lawsuit, he asserted that because of his medical condition, he was no longer able to work. In response to written interrogatories in June 2012, he described his injury as "permanent quadriplegia" and asserted that he was confined to bed or a wheelchair, was completely dependent on his wife for all functions of daily living, and would never be able to work again.

In September 2012, after receiving a right-to-sue letter from the California Department of Fair Employment and Housing (DFEH), Gomez filed a lawsuit against JCM alleging disability discrimination under California's Fair Employment and Housing Act (FEHA). All of his claims were premised on his assertion that he could

have returned to his job at JCM with the reasonable accommodations of a finite leave of absence until September 1, 2011, and assistive devices thereafter. In addition to his own testimony, he supported his claims with testimony from a vocational expert.

Courts find no reasonable accommodation possible

JCM asked the trial court to grant summary judgment in its favor. The company asserted that it was undisputed that Gomez was unable to work at any time from March 2011 until March 2012, and he never provided any documentation of his disability, his physical condition and limitations, his need for additional leave, or his ability to return to work. At the time of his termination, JCM knew only that he was unable to return to work and might never return. Moreover, the FEHA doesn't require an indefinite medical leave. The trial court agreed and ordered summary judgment in JCM's favor.

Gomez appealed the trial court's decision. With respect to his disability discrimination claims, he argued that there were triable issues of fact about whether he could perform his job with reasonable accommodations and whether JCM properly engaged in the interactive process. He asked the court of appeal to allow his case to proceed to trial so a jury could decide the issues. The court of appeal disagreed and denied his appeal.

Gomez died in early 2016 while his appeal was pending. His wife decided to pursue the claims as his successor in interest.

After carefully reviewing the entire record, the court of appeal concluded that there was insufficient evidence

to establish that Gomez was able to perform his job with assistive devices as of September 1, 2011. In particular, the court found that his assertions in his civil lawsuit against JCM directly contradicted the earlier statements he made in his applications for disability insurance, his allegations in the medical malpractice lawsuit, and his answers to interrogatories in the malpractice lawsuit that he would never be able to work again. The court of appeal also assigned little weight to testimony from his vocational expert because he had no knowledge of Gomez's medical condition in 2011.

Notably, the court of appeal rejected JCM's argument that Gomez was barred from arguing that he was able to work with reasonable accommodations during periods when he was receiving disability benefits based on his inability to work. The court explained that statements made in support of an application for disability insurance are evaluated solely for purposes of receiving benefits and do not automatically bar a claim against an employer under the Americans with Disabilities Act (ADA) or the FEHA. However, an employee still has the burden of explaining any discrepancy between statements about his medical condition in an insurance application and statements made in a later civil lawsuit. Gomez was unable to reconcile his factually inconsistent statements.

The court of appeal also found that Gomez had insufficient evidence to support a triable issue of fact about whether JCM failed to engage in the interactive

process. While the court noted that JCM could have communicated more effectively, it also noted that Gomez failed to update his employer about his medical condition at any time during the two-month period between March 18 and May 24. Given the severity of his condition, it was reasonable for JCM to believe that he did not intend to return to work and did not want any accommodation. *Streich v. JCM Partners, LLC*, California Court of Appeal, 3rd Appellate District, 12/30/16, unpublished.

Bottom line

Gomez's medical condition was incredibly grave, which might have aided the trial court and the court of appeal in finding that no reasonable accommodation would have allowed him to perform his job at any time following his surgery. However, the decision provides important lessons on how to avoid (or minimize) liability in similar situations.

In particular, if you're faced with a disability discrimination claim, you should obtain all relevant records pertaining to an employee's medical condition. An employee's medical records may contain factually contradictory statements that may help you win a civil case!

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