

Fenwick Employment Brief

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[Victor Schachter](#)

Editor

650.335.7905

[Mary Wang](#)

Contributor

650.335.7154

Fenwick
FENWICK & WEST LLP

CALIFORNIA COURT OF APPEAL NARROWS APPLICATION OF ADMINISTRATIVE EXEMPTION

In a decision narrowing the scope of the administrative exemption, a California Court of Appeal held in *Harris v. Superior Court* that insurance claims adjusters were improperly classified under the administrative exemption because they performed “production” rather than administrative work.

To qualify under California’s administrative exemption, an employee must (among other requirements) be primarily engaged in office or non-manual work “directly related to management policies or general business operations” of the employer or its customers. The court found that the “directly related” language encompasses two requirements: (1) the work must be administrative as opposed to production work, and (2) the work must be of “substantial importance.”

While acknowledging the line between exempt administrative and non-exempt production work is not clear, the court found that exempt administrative work must be carried out at the general operational or policy making level, and that producing the employer’s product is not necessarily a condition for doing production work. Moreover, the Court emphasized that the test should not depend on the nature of the employer’s business but rather on the *level* at which the employee operates.

As applied to the claims adjusters at issue in the case, the court held that they could not be exempt because none of plaintiffs’ work was carried on

at the level of management policy or general operations. Rather, plaintiffs were primarily engaged in work that falls on the production side of the dichotomy, namely, the day-to-day tasks involved in adjusting individual claims.

The court’s decision in *Harris* represents a severe restriction on the use of the administrative exemption in California. Employers should carefully evaluate those employees classified as exempt administrators in light of the court’s decision in *Harris*. In addition, employers should be mindful that the “administrative/production worker dichotomy” is merely one of the elements that must be satisfied under the administrative exemption.

CALIFORNIA SUPREME COURT HOLDS THAT EMPLOYEES CLAIMING DISABILITY DISCRIMINATION MUST PROVE THEY ARE QUALIFIED

In *Green v. State of California*, the California Supreme Court held that plaintiffs bringing a claim of disability discrimination under the Fair Employment and Housing Act (FEHA) have the burden of proving that they are able to perform the essential functions of the job.

Under FEHA, an employer is not liable for an adverse employment action against an applicant or employee who is not “qualified” – that is, unable to perform the position with or without reasonable accommodation. Previously, however, California courts were split as to whether the plaintiff or the employer bore the burden of demonstrating qualification (or lack thereof) at trial.

In *Green*, plaintiff, a stationary engineer at a correctional facility, suffered from Hepatitis C and was placed on light duty at the request of his doctor. After several complications plaintiff was denied his request to return to his original job and effectively forced to retire. The employee sued for disability discrimination under FEHA. The jury found for plaintiff and awarded him \$2.6 million.

The California Supreme Court overturned the lower court's decision, holding that, just as under the federal Americans with Disabilities Act (ADA), the burden is on the employee to demonstrate that he or she can perform the essential functions of the job.

Although the *Green* case is ultimately a victory for employers, it underscores the continued importance of carefully evaluating whether an employee with a disability is able to perform the essential functions of their position with or without accommodation before making any employment decision. While this case makes FEHA consistent with federal law in terms of the burden of proof, California employers should continue to exercise caution when faced with issues related to disability or medical leaves as the protections and scope of FEHA are in some instances broader than those of the ADA.

NEWSBITES

Former Google Employee Allowed to Proceed to Trial On Age Discrimination

In *Reid v. Google*, a former director-level employee at Google sued for age discrimination after he was terminated. A California Court of Appeal held that there was sufficient evidence of discrimination for plaintiff's claims to proceed to trial. Plaintiff

claimed that Google had a general "youthful" atmosphere that was biased toward older workers. When plaintiff was terminated, he was allegedly told he was not a "cultural fit" at Google. Plaintiff presented evidence of age-related comments by key decision makers and coworkers, such as telling plaintiff he was "slow," "fuzzy," "sluggish," "lethargic," and that his ideas were "obsolete," and "too old to matter," and that coworkers referred to plaintiff as an "old man" and an "old fuddy-duddy." Plaintiff also presented statistical evidence that older workers at Google received worse ratings on their performance evaluations and lower bonus amounts than their younger counterparts. Further, the court found that Google originally informed plaintiff that he lacked a "cultural fit," but after his termination, the company stated that the termination was because of job elimination and poor performance. The court concluded there was sufficient evidence of discriminatory motive for plaintiff's claims to be heard by a jury.

Employer Violated ADA For Terminating Employee For Excessive Tardiness Where Punctuality Was Not An Essential Part of the Job

In *Holly v. Clairson Industries*, plaintiff, a paraplegic employee who was terminated for excessive tardiness, brought suit against his former employer, alleging that the company failed to reasonably accommodate his disability in violation of the ADA and state disability laws. The employer had previously informally accommodated plaintiff's habitual tardiness, which was primarily due to his disability. However, under the employer's newly-implemented strict punctuality policy, plaintiff was terminated after being late 18 times.

The Eleventh Circuit Court of Appeal found that, although the company asserted that strict punctuality was important to the job, there was no evidence that plaintiff needed to work with others to complete his work, that his tardiness ever caused production to slow down, caused any other detriment to the company, or that he ever failed to complete his work on time. This case is a stark reminder that employers should carefully consider whether they have a duty to accommodate an employee's tardies and whether punctuality is truly an essential function of an employee's job.

Employee With Perfume and Fragrance Allergy Did Not Have Claim Under ADA

In *Robinson v. Morgan Stanley Dean Witter*, a federal court in Illinois held that an employee with "extremely high sensitivity" to perfumes and other fragrances did not have a claim under the Americans with Disabilities Act (ADA). The plaintiff complained that she was allergic to perfumes and other fragrances, which caused her to suffer cold-like symptoms lasting from a few hours to a week, including headache, stuffiness, fatigue, sore throat, and shortness of breath. The court found that plaintiff's condition did not render her substantially limited in her performance of any major life activity. Furthermore, the court found that the employer took reasonable steps to accommodate plaintiff's alleged disability as it provided plaintiff with several accommodations, including special seating arrangements, the use of a fragrance-free rental car, intervention with specific employees that wore fragrances, and a department-wide memorandum from management encouraging employees to be considerate of individuals with sensitivity to fragrances and perfumes.

Federal Court Holds That FMLA Does Not Require Payment of Any Specific Wage Rate While on Leave

In *Hendricks v. Compass Group USA Inc.*, the plaintiff, a utility driver, was unable to perform her usual driving duties after a shoulder injury. Plaintiff did not take a traditional leave of absence under the FMLA, but instead chose to accept light duty office work under a workers' compensation program, which paid less than what she earned as a driver. Plaintiff argued that her office work was "FMLA light duty" that should have been compensated at the same rate that she received as a utility driver. The court rejected plaintiff's argument, finding that there is no such thing as "FMLA light duty." The court ruled that the FMLA does not require an employer to pay a certain rate while the employee is on leave; the FMLA only requires that an employer permit an employee to take up to 12 weeks of unpaid leave and return to his or her prior position or an equivalent position at the end of the leave.