

## New California Law Expands Retaliation Coverage

July 21, 2015



### ***Employees Requesting Accommodation Are Now Protected***

On July 16, 2015, Governor Brown signed into law AB 987, amending the California Fair Employment and Housing Act (FEHA) to reflect what many already believed to be the law: employers and other covered entities cannot retaliate against employees or other persons who request a religious accommodation or an accommodation for a disability. Effective on January 1, 2016, AB 987 establishes that requesting such an accommodation is a protected activity under the FEHA, regardless of whether the accommodation is granted.

### **New Law Overturns Court Case**

Didn't FEHA already prohibit retaliation against those requesting an accommodation? The answer depends on whom you ask. For years, employee advocates believed the answer was "yes" and filed lawsuits claiming this type of retaliation was barred under the statute. It was not uncommon for a religious or disability accommodation lawsuit to also allege retaliation for having exercised the right to seek an accommodation. On the other hand, a California court of appeal took a different view in the 2013 case of *Rope v. Auto-Chlor System of Washington, Inc.*

When Scott Rope was hired in 2010, he notified his employer that he would eventually need leave from work so that he could have surgery to donate one of his kidneys to his disabled sister. Later, at his doctor's recommendation, he requested additional leave time for post-surgery recovery and requested he be paid during his leave under the Michelle Maykin Memorial Donation Protection Act ("DPA"), a law which was to become effective on January 1, 2011. Under the DPA, employees are entitled to 30 days of paid leave when missing work for organ donation. Although Rope repeatedly reminded his employer about his request for paid leave, his employer did not respond and instead informed him that he could take an unspecified amount of unpaid leave. Two days before DPA became effective, Rope's employer terminated him for poor performance. Rope then filed a FEHA lawsuit.

One of Rope's allegations was that his former employer violated FEHA by retaliating against him for requesting leave for his surgery to aid his disabled sister's medical condition. The trial court disagreed and ruled that Rope's request for paid leave as an accommodation did not qualify as a "protected activity" within the meaning of the law. Although FEHA prohibited an employer from discriminating against workers because the person opposed forbidden practices, it did not explicitly protect against retaliation for requesting accommodations. On appeal, the appellate court agreed with the trial court, stating: "We find no support in the regulations or case law for the proposition that a mere request – or even repeated requests – for an accommodation, without more, constitutes a protected activity sufficient to support a claim for retaliation in violation of FEHA."

Employee advocates argued that the *Rope* holding would have a chilling effect on employees seeking religious or disability-related accommodations, and they successfully advocated that the legislature enact AB 987 to address this concern. As of January 1, 2016, FEHA will explicitly provide the coverage that would have provided Rope an opportunity to sue his employer, and will allow other workers in similar situations to bring retaliation lawsuits.

### **What Does This Mean For Employers?**

The passage of AB 987 reinforces the importance of employers adequately training their supervisors, managers, and Human Resources personnel to avoid engaging in conduct that may be perceived by an employee as retaliatory in nature. Specifically, termination or discipline of an employee who recently requested a religious or disability-related accommodation, whether or not the accommodation was granted, must be handled with extreme care.

If you have any questions about this law or how it may affect your business, please contact your Fisher & Phillips attorney or one of our attorneys in our California offices.

Irvine (949) 851-2424


Los Angeles: (213) 330-4500

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San Francisco: (415) 490-9000

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| Name          | Title     | Office | Phone          | Contact   |
|---------------|-----------|--------|----------------|---|
| Lizbeth Ochoa | Associate | Irvine | (949) 851-2424 |  |

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