



The More Things Change, The More They Stay The Same: The California Supreme Court on Green

By Gregory M. Bergman and John P. Dacey

Superficially scored as a win for the employer, the California Supreme Court's recent employment law decision in *Green v. State of California* more pertinently embodies a sobering reminder that the most effective way to win in litigation is to take steps to avoid it.

The Green Decision

Dwight Green, an employee of the State of California, contracted hepatitis C and was concomitantly placed on light duty by his physician for the duration of a treatment regimen. The State purportedly attempted to coerce Green into disability retirement arguing that Green could no longer perform the duties of his job. Unwilling to retire, Green sued the State alleging disability discrimination in violation of the Fair Employment and Housing Act (FEHA). A jury ultimately agreed with Green's contentions, awarding \$2,597,088.00 in damages; the Appeals Court later affirmed.

Subsequently, the California Supreme Court reversed and articulated a new FEHA standard that now mirrors that of the Americans with Disabilities Act (ADA). At the outset, the Court first reiterated that the intent of the ADA and FEHA is not to require an employer to accommodate a disabled employee who can no longer perform the essential functions of his or her job. Put another way, the ADA and FEHA only serve to protect an employee with a disability who can perform the essential duties of his or her job with reasonable accommodation. In this regard, the Court held that, as is the case with the ADA, it is an employee's burden to prove that he or she is a qualified disabled person by demonstrating that he or she can perform the essential functions of a job with or without reasonable accommodation. The burden of this showing does not rest with the employer, as the trial court had erroneously instructed the jury.

The Impact for In-House Counsel

The Green decision alleviates the burden on an employer to show that an employee's disability makes him or her unable to perform certain job functions, that those aspects were essential to the job, and that no accommodation could have resolved it. However, despite the Court's clarification that plaintiffs bear these burdens, the substantive law of disability discrimination remains untouched.

As a result, preventative measures to avoid litigation remain of paramount importance. This means that an employer, encouraged by mindful in-house counsel, should be regularly assessing which job functions are essential and documenting these enumerated duties in employee job descriptions. Employers should also diligently engage in the interactive process to determine if and when there is need for reasonable accommodation of employee disabilities. Reasonable accommodation and interactive process procedures should be articulated with specificity and continually updated in the

employer's policy manual. Finally, managers and human resources executives should be trained to ensure compliance and to increase widespread awareness of the employer's duties in this ever-changing area of law.

The impetus for diligent preventative planning is not difficult to articulate. The jury in *Green* had initially given the State of California 2,597,088 reasons to reevaluate its policies for complying with the FEHA. As the legal sage of the employer, effective in-house counsel should visualize the shoals in the distance and presciently steer the ship out of danger.

Dwight D. GREEN, Plaintiff and Appellant v. STATE of California, Defendant and Appellant

42 Cal.4th 254, 165 P.3d 118, 64 Cal.Rptr.3d 390 (Aug. 23, 2007)

Gregory M. Bergman and John P. Dacey are the senior shareholders of Bergman & Dacey, Inc, a litigation firm practicing employment, construction, business, environmental, and complex litigation. They can be reached at gbergman@bergmandacey.com and jdacey@bergmandacey.com or at 310-470-6110