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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

ALBERTSON'S INC., Plaintiff and Appellant, v. FAIR EMPLOYMENT AND HOUSING COMMISSION, Defendant and Respondent; DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING et al., Real Parties in Interest and Respondents.	B175816 (Los Angeles County Super. Ct. No. BS083412)

APPEAL from an order of the Los Angeles County Superior Court. David P. Yaffe, Judge. Affirmed.

Baker & Hostetler, Lawrence J. Gartner, Kimberly M. Talley and Lisa F. Hinchliffe for Plaintiff and Appellant.

Bill Lockyer, Attorney General of the State of California, Louis Verdugo, Jr., Senior Assistant Attorney General, Angela Sierra, Timothy M. Muscat and Regina J. Brown, Deputy Attorneys General, for Defendant and Respondent, Fair Employment and Housing Commission, and Real Party in Interest and Respondent, Department of Fair Employment and Housing.

SUMMARY

Donna Pepper suffered a workplace injury and sued her employer, Albertson's Inc., a Delaware Corporation. The workers' compensation action was settled. Subsequent to the settlement, Pepper sought reinstatement to her position as a stock clerk at Albertson's. Albertson's refused to reinstate Pepper or to discuss with her any accommodation which might enable her to perform her duties in that position. Pepper filed a complaint with the Department of Fair Employment and Housing (DFEH), alleging discrimination on the basis of physical disability. DFEH issued an administrative accusation against Albertson's, and a hearing was conducted before the Fair Employment and Housing Commission (FEHC).

FEHC found Albertson's discriminated against Pepper in violation of various provisions of the Fair Employment and Housing Act (FEHA) by refusing to reinstate her and failing to take reasonable steps to prevent discrimination. The company was ordered to reinstate Pepper, pay her lost wages and emotional distress damages, and provide anti-discrimination training and post compliance notices for its employees. Albertson's sought a writ of administrative mandate in the trial court, which was denied. On appeal, Albertson's contends the trial court erred in the following respects:

(1) DFEH failed to establish a prima facie case of disability discrimination;

(2) Insufficient evidence supports the award of emotional distress damages;

(3) Insufficient evidence supports FEHC's finding that Pepper mitigated her damages;

(4) Conciliation is a jurisdictional prerequisite to filing an administrative action;

(5) The action is barred by the private settlement agreement between Albertson's and Pepper in the workers' compensation action;

(6) The action is barred by the doctrine of judicial estoppel;

(7) The action is barred by collateral estoppel;

(8) FEHA claim is preempted by federal labor law;

(9) The action is time-barred; and

(10) Albertson's due process rights have been violated; it cannot comply with statutory mandates of both workers' compensation law and FEHA.

Finding no merit in these arguments, we affirm the denial of the writ of administrative mandamus.

FACTUAL AND PROCEDURAL BACKGROUND

Pepper began working as a part-time general merchandise clerk for Albertson's, Inc., in 1988.[1] Her duties included receiving, opening and unpacking cartons of merchandise, stocking shelves, taking inventory, and pricing and arranging merchandise.

In late 1988, Pepper developed carpal tunnel syndrome in her right wrist. In 1991, she broke her right arm in a non-work-related accident and underwent surgery, including a carpal tunnel release in her right wrist and hand. Pepper was on medical leave for six months. Sometime later, Pepper began experiencing carpal tunnel syndrome symptoms in her left hand and wrist. She continued performing her normal job duties without modification.

In November 1995, Pepper suffered a work-related injury to her right elbow and filed a workers' compensation claim. In July 1996, Pepper underwent carpal tunnel surgery on her left hand and wrist. She was on medical leave for approximately four months, during which she received workers' compensation benefits. In mid-November 1996, Pepper's surgeon, Dr. Greg Balourdas, released Pepper to return to work without restrictions. Pepper returned to work and performed her regular duties satisfactorily. During this period, however, Pepper experienced difficulty performing certain activities. She could not pronate or supinate her hand, and could not bend her arm around her back to get dressed. She had also lost hand and grip strength, and experienced numbness in her fingertips. On occasion, when Pepper had difficulty lifting particularly heavy items at work, she asked for and received assistance from other Albertson's employees. Balourdas re-evaluated Pepper in December 1996. He concluded she had not suffered any permanent disability, but was "permanent and stationary" for workers' compensation

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[1] Pepper was first hired by Albertson's predecessor in interest, Lucky Stores, Inc., which merged with Albertson's in June 1999. All references to Albertson's refer equally to Lucky's.

purposes, with "occasional" and "very mild" post-operative symptoms, based on the fact she had performed her regular job duties for about six weeks without apparent difficulty.

In February 1997, a claims adjuster for Albertson's workers' compensation carrier, Kemper Insurance, asked Pepper to return a portion of the disability benefits previously paid to her. Kemper informed Pepper she was not entitled to retain the benefits because Balourdas determined she was not permanently disabled. Pepper retained workers' compensation counsel. By mutual agreement, Kemper and one of Pepper's attorneys, Amy Marron, designated Dr. William Shoemaker as the Agreed Medical Examiner (AME).[2] Shoemaker evaluated Pepper in July 1997. He determined that while Pepper could perform her "usual and customary duties," she had lost approximately 50 percent of her pre-injury capacity to lift, push, pull or perform related activities. Kemper and Marron disagreed as to Pepper's workers' compensation "rating," but agreed that a new job analysis of Pepper's position should be conducted by a vocational rehabilitation firm. That analysis was completed in November 1997 by vocational rehabilitation counselor Jeannette Clark.

On November 13, 1997, Dr. Charles Jablecki, the neurologist who first diagnosed Pepper's carpal tunnel syndrome in 1988, re-evaluated Pepper and reviewed Shoemaker's report. Jablecki agreed Pepper had "lost approximately 50% of her pre-injury capacity for lifting, pushing, pulling . . . ." He recommended she avoid repetitive, forceful gripping, pushing, and pulling with both hands, which might injure her forearms or hands.

Shoemaker's deposition was conducted in the workers' compensation action on January 20, 1998. Shoemaker opined Pepper was a qualified injured worker and was eligible for vocational rehabilitation benefits. That same day, Shoemaker produced a report stating Pepper was no longer able to perform her job duties: "After reviewing Ms. Pepper's job history and noting her level of disability [i]t is my opinion she cannot do this

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[2] An AME is a neutral doctor appointed in a workers' compensation action to resolve medical issues about which the applicant and insurance carrier have a dispute.

job description." Albertson's was surprised by Shoemaker's determination because, until that point, Pepper had continued to satisfactorily perform her job duties.

Pepper worked until January 26, 1998. On that day, following a settlement conference in the workers' compensation action, Pepper's attorney instructed Pepper not to return to work until that litigation was resolved. However, Pepper was confused about her status. A few days later, Pepper contacted store manager Dan Williams to determine if she could return to work. Williams told Pepper she could not because she remained on workers' compensation leave.

In February 1998, Clark told Pepper she was compelled to accept vocational rehabilitation services, or she would lose them. Pepper began vocational rehabilitation, but "interrupted" the process a few weeks later because Clark would not help her obtain modified work at Albertson's.

A settlement was reached in Pepper's workers' compensation action on April 15, 1998. After reading and discussing the settlement documents with Marron, Pepper signed a "Compromise and Release." Accompanying the Compromise and Release was an addendum by which Pepper waived any claim against Albertson's agents or employees, and agreed the settlement would "apply to all unknown and unanticipated injuries and damages resulting from such accident and all rights under Section 1542 of the Civil Code of California . . . ."[3] Pepper received $48,000 in settlement of her workers' compensation action, less a deduction for sums previously paid. No sum was specifically included in the release for severance of Pepper's employment, nor did the release presented to Pepper by Albertson's specifically seek or obtain Pepper's resignation. Pepper remained on Albertson's payroll into 2000.

Pepper attempted to return to work at Albertson's in early May 1998. She was told she could not return because of the workers' compensation settlement. In early October 1998, Pepper again attempted to return to work. At that time, Albertson's

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[3] For convenience, we will refer to the Compromise and Release and addendum, collectively, as "the release."

human resources manager, Bruce Frazier, referred Pepper to her workers' compensation attorney. Frazier told Pepper the workers' compensation settlement had encompassed only vocational rehabilitation, and any request for workplace modifications must be made to Kemper. In mid-October 1998, Pepper sent Frazier another letter, again seeking reinstatement and stating she had settled her workers' compensation claim "without waiving [her] rights to return to work as a disabled worker."

Frazier responded to Pepper's letter on November 3, 1998. He said Albertson's was operating on the understanding Pepper was not able to work at all, even with modifications. However, Frazier said the company would consider Pepper's request and asked her to provide documentation from her health care providers indicating her work-related abilities or restrictions and any job modifications or accommodations that would allow her to return to work.

On November 23, 1998, Pepper sent Frazier a letter. Pepper said she had performed her job for months following her last surgery. During that time, she had been able to perform all her duties (with occasional assistance with "excessively heavy" pallets) and could do so again. Pepper enclosed copies of the 1997 medical reports prepared by Jablecki and Shoemaker. Frazier determined he had received no new information and did not respond to Pepper's letter. In mid-February, Pepper again wrote to Frazier. Again, she received no reply.

In mid-March 1999, Pepper sent Frazier a medical release from Jablecki stating Pepper was free to "resume the usual duties of employment." Jablecki said Pepper could work shifts of six or fewer hours, up to a maximum of 24 hours per week, with a day of rest between each shift. Frazier did not respond to the communication.

In March 1999, Pepper filed a grievance with her union asserting that, by refusing to reinstate her, Albertson's violated a nondiscrimination clause of the collective bargaining agreement (CBA) governing her employment. An arbitration hearing was conducted in December 1999. The arbitrator found Albertson's neither violated the CBA nor discriminated against Pepper in violation of the Americans with Disabilities Act (ADA) (42 U.S.C. § 12101 et seq.).

Pepper filed a complaint with DFEH on May 10, 1999, alleging Albertson's discriminated against her on the basis of physical disability. On May 10, 2000, DFEH issued an accusation against Albertson's. An administrative hearing was conducted before FEHC in June 2001. The administrative law judge issued a proposed decision in December 2002.

The proposed decision was adopted and became FEHC's final decision on January 22, 2003. FEHC found Albertson's unlawfully discriminated against Pepper on the basis of an actual and perceived disability in violation of the Fair Employment and Housing Act (FEHA), Government Code section 12926, subdivisions (k)(1), (k)(3) and (4), and section 12940, subdivision (a). FEHC also found Albertson's had not fulfilled its statutory duty to take reasonable steps to protect Pepper from discrimination. (Gov. Code, § 12940, subd. (i) [now subd. (k)]).[4] FEHC ordered Albertson's to: (1) pay Pepper back-pay and emotional distress damages, (2) reinstate Pepper, (3) provide anti-discrimination training, and (4) post compliance notices.

Albertson's sought a writ of administrative mandate. The writ petition was denied. This appeal followed.

DISCUSSION

1. The Standard of Review.

In this case, the trial court exercised its independent judgment. As the Supreme Court explained, "In exercising its independent judgment, a trial court must afford a strong presumption of correctness concerning the administrative findings, and the party challenging the administrative decision bears the burden of convincing the court that the administrative findings are contrary to the weight of the evidence." (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 817 (*Fukuda*); *Bixby v. Pierno* (1971) 4 Cal.3d 130, 139;

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[4] Numerous provisions of the FEHA related to mental and physical disabilities were amended in 2000. Unless otherwise indicated, for the sake of consistency with the parties' briefs, our citations are to statutory provisions in effect at the time of the events at issue during the FEHC proceeding.

Drummey v. State Bd. of Funeral Directors (1939) 13 Cal.2d 75, 85.) Nonetheless, the Court held: "Even when, as here, the trial court is required to review an administrative decision under the independent judgment standard of review, the standard of review on appeal of the trial court's determination is the substantial evidence test. [Citations.]" (*Fukuda*, at p. 824; *Yakov v. Board of Medical Examiners* (1968) 68 Cal.2d 67, 71-73.)

Albertson's insists the trial court improperly denied its petition because insufficient evidence supports the FEHC findings that Pepper was the victim of disability discrimination, was entitled to emotional distress damages, or made adequate efforts to mitigate her damages. These contentions are addressed in turn. Each runs aground on the record. We also determine no merit in Albertson's various jurisdictional or due process arguments.

2. Substantial Evidence Supports FEHC's Determination That Pepper Was the Victim of Disability Discrimination.

FEHC found Albertson's engaged in disability discrimination against Pepper. Albertson's insists that determination is not supported by sufficient evidence, because DFEH failed to establish the predicate elements of its prima facie case. A prima facie case of disability discrimination under FEHA required DFEH to establish: (1) Pepper is disabled, (2) Albertson's made an adverse employment decision, and (3) Albertson's decision was based on Pepper's disability. Once DFEH met this initial test, Albertson's responsibility to demonstrate a legitimate nondiscriminatory reason for its employment decision. (*Deschene v. Pinole Point Steel Co.* (1999) 76 Cal.App.4th 33, 44.)

a. Pepper is a person with a disability as defined by FEHA.

"Physical disability" is broadly defined under FEHA. At all times relevant to this action, and in pertinent part, physical disability was defined to include conditions in which a person has or is perceived by his or her employer as having a physiological disorder or condition that both affects the neurological, immunological and/or musculoskeletal body systems, and limits the ability to participate in major life activities. (Gov. Code, § 12926, subds. (k)(1)(A), (k)(1)(B), (k)(3) and (4); see also Gov. Code, § 12926.1, subd. (b) [By 2000 amendments, Legislature expressly clarified its

intention to broadly construe definition of disability].) "Major life activities" include functions such as caring for one's self, performing manual tasks, and working. In determining whether an individual has a disability which limits one's ability to participate in a major life activity under FEHA, "[p]rimary attention is to be given to those life activities that affect employability, or otherwise present a barrier to employment . . . ." (Cal. Code Regs., tit. 2, § 7293.6, subd. (e)(1)(A)2)(a); see also Gov. Code, § 12926.1, subd. (c).)

Pepper has bilateral carpal tunnel syndrome, which affects her musculoskeletal system. At the administrative hearing, Pepper testified that at various times, because of her condition, she could not turn her hand completely over, and she experienced difficulty performing activities requiring her to reach behind her back (e.g., such as putting on an item of clothing). Her hands were not as strong as they once were, and her fingertips were somewhat numb.

Albertson's contends Pepper's evidence is insufficient to sustain FEHC's decision that she is disabled. It points out that Pepper's job delivering bundles of newspapers to hotel customers requires the same repetitive motions Pepper was precluded from performing under its employ. However, Albertson's allegations are unsubstantiated. No evidence indicates Pepper's new employment actually involved the same tasks Pepper was precluded from performing at Albertson's. No evidence indicates Pepper's physical condition was not accommodated by her new employers, who may have permitted her to work limited schedules under specified conditions. No evidence indicates Pepper was unable to arrange her work schedule to meet her health needs. The logical thrust of Albertson's argument is that Pepper cannot be simultaneously a person with a physical disability and a person able to work. That is not the law.

Albertson's also contends FEHC's determination that Pepper is disabled is based, in part, upon information contained in Jablecki's November 1997 report. In that report, Jablecki said Pepper had lost approximately 50 percent of her pre-injury ability to lift, pull, push, grasp, pinch and torque. However, by the time he issued his next report 16 months later, Jablecki said the "year off from work [had] resulted in a definite

improvement in the symptomatology and [Pepper's] forearm and hand grip strength." Nevertheless, Jablecki said, consistent with preclusions Shoemaker placed on Pepper's workplace activities in 1997, Pepper's carpal tunnel syndrome continued to require that she work no more than 24 hours per week, four to six hours per day, with a day's rest between shifts. This constitutes sufficient evidence to support FEHC's determination that Pepper is a person with a physical disability under FEHA, because she has a physical condition limiting her ability to work. Evidence in the record indicates Pepper's physical condition prevents her from working anything other than a limited schedule under specified conditions. That condition undoubtedly affects Pepper's employability and presents a barrier to employment.[5]

b. Albertson's failed to demonstrate Pepper was unable to perform her job duties.

Albertson's maintains DFEH failed to establish a case of disability discrimination because it did not prove Pepper was qualified to perform her essential job functions. However, we agree with those authorities which conclude the prima facie case for disability discrimination does not require a plaintiff to prove she is a qualified individual. On the contrary, the burden is on the defendant to establish a plaintiff is incapable of performing her essential duties with reasonable accommodation. (See *Bagatti v. Department of Rehabilitation* (2002) 97 Cal.App.4th 344, 359-363 (*Bagatti*); see also Cal. Code Regs., tit. 2, § 7293.8(b) [including "inability to perform" among list of employer's potential affirmative defenses].)[6] Albertson's failed to prove Pepper would

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[5] The determination that Pepper is physically disabled under FEHA makes it unnecessary to address whether Albertson's also "perceived" her as such.

[6] There is a conflict of authority as to whether it is a plaintiff's burden to prove his or her capacity to perform. A full exploration of the issue is contained in the recently depublished case *Green v. State of California* (2005) 132 Cal.App.4th 97, 105-262, review granted Nov. 16, 2005, S137770 (*Green*). Some courts have required a plaintiff to demonstrate the ability to perform as an element of the prima facie case. *Brundage v. Hahn* (1997) 57 Cal.App.4th 228, 236 (*Brundage*) is a prime example, a case involving disability discrimination claims brought under both FEHA and the ADA. *Brundage*,

have been unable to perform the essential functions of her position, with reasonable accommodations.

Indeed, evidence in the record is strongly to the contrary. Testimony by Pepper and Williams indicates that, with minor modifications, Pepper performed her duties satisfactorily through her last day of work in January 1998. The administrative hearing officer specifically relied on this testimony in determining that Pepper was qualified to perform. According to Jablecki, Pepper was prepared in March 1999 to return to her position under the same conditions that had worked well for her and Albertson's through January 1998.

Albertson's argues Jablecki's March 1999 medical release was "useless," and "hardly qualifies as proof that Pepper was able to perform the essential functions of the job," because he lacked a copy of the 1997 job analysis of Pepper's job when he freed her to return. This argument misses its mark. It is Albertson's obligation to prove Pepper

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however, presents at least two problems. First, the court's analysis was premised on federal law. (*Id.* at pp. 235, 236.) Second, the issue in *Brundage* was whether the plaintiff was disabled and suffered adverse employment action. The court did not discuss the "qualification" element of the prima facie case. (*Id.* at p. 236, fn. 1.) Other courts have applied the same test for a prima facie case of disability discrimination under FEHA. (See *Hastings v. Department of Corrections* (2003) 110 Cal.App.4th 963, 971 [to establish prima facie case for discrimination under FEHA, plaintiff must prove she is qualified for position for which an accommodation is sought].) The Supreme Court granted review in *Green* to resolve this conflict.

Our conclusion is consistent with *Bagatti*. FEHA and its implementing regulations, together with recent Supreme Court decisions, make it clear that placing the burden of proof regarding the plaintiff's inability to perform on the defendant is "entirely consistent with the intent of the Legislature," to afford individuals with disabilities the broadest protection. (*Bagatti*, *supra*, 97 Cal.App.4th at pp. 359-363; see also *Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 819 [FEHA's provisions should be liberally construed to accomplish its purposes]; *Colmenares v. Braemar Country Club, Inc.* (2003) 29 Cal.4th 1019, 1026 [disability provisions of FEHA must be construed to provide the greatest protection available under either state or federal law]; Gov. Code, § 12926.1, subds. (a), (d) [California disability law provides protections independent of, and in addition to, those provided by ADA]; Cal. Code Regs., tit. 2, §§ 7293.5(b), 7293.7, 7293.8(b).)

cannot perform the job, not DFEH's burden to prove she can. Second, although the 1997 analysis of Pepper's position is more detailed than the previous one, the record nowhere indicates any significant change in the duties Pepper regularly performed in the course of her 10 years of employment as an Albertson's stock clerk.

Finally, to the extent Albertson's was concerned in March 1999 about a conflict between Jablecki and Shoemaker's opinions, was concerned Pepper would be unable to perform her duties, or believed Jablecki's recommendations were unreasonable, it had an affirmative obligation to further explore and discuss the matter with Pepper or her representatives to clarify the situation or determine an alternative accommodation that might suffice. (See *Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 950 (*Prilliman*) [employer has obligation to take positive steps, including engaging in "interactive process" with disabled employee to determine appropriate accommodation]; see also Gov. Code, § 12926.1, subd. (e) ["The Legislature affirms the importance of the interactive process between the . . . employee and the employer in determining a reasonable accommodation . . ."].) This is particularly true in light of Frazier's November 1998 invitation to Pepper to submit information supporting her assertion that she was able to work, and to identify the workplace modifications she needed. Albertson's cannot issue such an invitation, and then simply ignore its employee's response and proposed accommodations.

c. Sufficient evidence supports the finding that Pepper suffered an adverse employment action.

Albertson's contends no evidence indicated Pepper suffered an adverse employment action. To the extent any adverse action occurred, the company contends it was of Pepper's own volition and occurred when she "abandoned" her job in January 1998 at the direction of her attorneys.

The record supports a contrary conclusion. Until January 26, 1998, there is no dispute Pepper was performing satisfactorily. On that date, in what appears to have been a surprise to everyone involved, Shoemaker appeared at his deposition with a report indicating Pepper was no longer able to perform the job duties she continued to fulfill.

At that point, counsel for Pepper and Kemper agreed Pepper would receive vocational rehabilitation benefits, pending the trial of the workers' compensation action. Pepper, however, was confused about her status. She wanted to continue working and called Williams a few days later, asking to return to work. She was told she could not, because she had been placed on workers' compensation leave and could not yet return.

Pepper's workers' compensation action was resolved in April 1998. The release nowhere indicates that termination of Pepper's employment was a condition of settlement. In May 1998, Pepper again tried to return to work. She was told she could not do so because of the settlement. When Pepper contacted Albertson's in Fall 1998 to determine if she could return to work, Albertson's sent her back to her attorneys and Kemper. The following week, Pepper pointed out to Frazier that the workers' compensation settlement did not address her right or ability to return to work as a disabled employee, and asked him specifically if she had been fired. Frazier did not answer that question, but told Pepper that Albertson's had been under the impression she was not able to work. He told Pepper Albertson's would consider her request, and invited her to provide Albertson's an update regarding her ability to work and any modifications she required. Pepper complied with this request, but heard nothing in response.

In March 1999, Pepper provided Albertson's a medical report from her treating physician releasing her to return to her previous duties under the same conditions she had worked before her leave. Albertson's did not seek clarification, restore Pepper to her position, or take any action in response to the medical report.

This recitation reflects that substantial evidence supports FEHC's determination that Pepper suffered an adverse employment action due to her disability. The specific elements of a prima facie case of employment discrimination require a case-by-case determination based on objective evidence. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 355.) FEHC examined the evidence in this action and determined Albertson's failed to return Pepper to her job based on her disability and to take steps to investigate whether any accommodation was possible to enable Pepper's return to the

workplace. "Adverse action" is shown if a plaintiff presents evidence of material effect on terms, conditions or privileges of employment, taking into account the unique circumstances of the affected employee as well as the workplace context of the claim. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1036.) There is substantial evidence in the record to support the FEHC's conclusion that "[Pepper's] disability was a factor in [Albertson's] failure to return [Pepper] to her job."

3. The Record Supports the Award of Emotional Distress Damages.

Albertson's contends FEHC's award of $15,000 in emotional distress damages was unwarranted because the record is "devoid of any evidence that Pepper suffered any *actual* damages as a result of" the emotional upset she experienced after Albertson's refused to reinstate her and she became worried she would be unable to find another job and would lose her family's medical benefits.

FEHC was authorized to award actual damages up to $50,000 for emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life and other nonpecuniary losses.[7] (Gov. Code, § 12970, subd. (a)(3); *Konig v. Fair Employment & Housing Com.* (2002) 28 Cal.4th 743, 756-757.) The decision to award emotional distress damages and the amount of an award is determined by the effect of discrimination on the affected person with regard to the person's physical or mental well-being; personal integrity, dignity and privacy; ability to work, earn a living, and advance in his or her career; personal and professional reputation; family relationships; and, access to the job and ability to associate with peers and co-workers. (Gov. Code, § 12970, subd. (b)(1)-(6).)

In its decision, FEHC specifically found credible Pepper's testimony that she had enjoyed her job, and her family needed her income. FEHC also found credible Pepper's concern that Albertson's failure to reinstate her caused her ongoing frustration, anger, distress, and worry about her employability. Pepper's constant worry, loss of self-

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[7] The maximum administrative fine is now $150,000. (Gov. Code, § 12970, subd. (a)(3).)

esteem, frustration and feelings of betrayal by her employer were corroborated by her husband, her daughter, and a close friend and neighbor. However, FEHC also found some of Pepper's emotional distress arose out of the workers' compensation proceeding, and deducted a portion of the damages attributable to that action. This record contains sufficient evidence of actual damages to support FEHC's award of emotional distress damages.

4. Albertson's Did Not Prove Pepper Failed to Mitigate Her Damages.

FEHC awarded Pepper approximately $14,550 in lost wages. Albertson's asserts this amount is excessive and the evidence does not support the FEHC finding that Pepper sufficiently mitigated her damages. Albertson's insists that applying for five jobs over a seven-month period constitutes a "failure to diligently search for work" sufficient to preclude recovery. (*Dyer v. Workers' Comp. Appeals Bd.* (1994) 22 Cal.App.4th 1376, 1386.) Albertson's is incorrect.

First, Albertson's ignores the fact that, after unsuccessfully searching for seven months for a job in the retail industry, Pepper accepted work in September 1999 delivering newspapers for USA Today, the Union Tribune and the New York Times, and in 2000 working for the U.S. Census. By the time of the FEHC hearing in June 2001, Pepper regularly worked five- or six-hour shifts, five to seven nights each week on two delivery routes.

Second, to buttress its argument that Pepper failed adequately to mitigate her damages, Albertson's relies on testimony from Clark about Pepper's reluctance to participate in vocational rehabilitation in February 1998. That evidence is irrelevant. The reluctance to participate in vocational rehabilitation occurred over a year before the discriminatory conduct at issue occurred.

Third and most importantly, Albertson's argument rests on the faulty legal premise that DFEH was required to prove Pepper's inability to work. " 'The burden of proving a failure to mitigate damages in an employment discrimination suit is on *defendant*. [Citation.] To satisfy this burden, defendant must establish (1) that the damage suffered by plaintiff could have been avoided, i.e., that there were suitable positions available

which plaintiff could have discovered and for which he was qualified; and (2) that plaintiff failed to use reasonable care and diligence in seeking such a position.' [Citation.]" (*Donald Schriver, Inc. v. Fair Employment & Housing Com.* (1986) 220 Cal.App.3d 396, 407, emphasis added.) "The general rule is that the measure of recovery . . . is the amount of salary . . . for the period of service, less the amount which the employer affirmatively proves the employee has earned or with reasonable effort might have earned from other employment. [Citations.] . . . [T]he employer must show that the other employment was comparable, or substantially similar, to that of which the employee has been deprived; the employee's rejection of or failure to seek other available employment of a different or inferior kind may not be resorted to in order to mitigate damages." (*Parker v. Twentieth Century-Fox Film Corp.* (1970) 3 Cal.3d 176, 181-182.) This record is devoid of evidence presented by Albertson's that Pepper ever failed to accept, did not search for, or improperly rejected suitable positions for which she was qualified.

5. Albertson's "Jurisdictional" Arguments Lack Merit.

a. DFEH may file an administrative accusation even if it fails to conciliate.

Government Code section 12963.7, subdivision (a) states that, once DFEH has investigated and determined a complaint of employment discrimination is valid, DFEH "shall immediately endeavor to eliminate the unlawful employment practice complained of by conference, conciliation, and persuasion. . . ." Relying on federal authorities interpreting title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.) (Title VII), Albertson's maintains FEHC lacked jurisdiction to adjudicate the FEHA claims because DFEH made no attempt to conciliate prior to filing the accusation. While DFEH's effort to conciliate this matter was disappointing, the legal premise underlying Albertson's argument is faulty. Jurisdiction is not defeated if DFEH fails to attempt to resolve a complaint of discrimination through conciliation before issuing an accusation.

DFEH asserts that, if it had a duty to try to conciliate Pepper's discrimination complaint before issuing the accusation, the duty was satisfied. The initial package sent

by DFEH in May 1999 notified Albertson's that Pepper had lodged a discrimination complaint against the company. The package contained a letter encouraging Albertson's "to contact [an] assigned [DFEH] consultant . . . immediately" if the company was "interested in discussing a possible settlement of this complaint." The record contains no evidence that Albertson's ever responded to this invitation, or that DFEH ever followed up with any meaningful attempt to resolve the matter short of litigation.

Based primarily on this single sentence in DFEH's initial letter to Albertson's, FEHC found Albertson's failed to establish DFEH "made no conciliation overtures or attempts at informal resolution."[8] Technically, this is true. However, DFEH's "effort" to resolve this matter pre-accusation fell far short of the "maximum effort" standard urged in *Motor Ins. Corp. v. Division of Fair Employment Practices* (1981) 118 Cal.App.3d 209, 224 (*Motor Ins.*), the only California case to address the issue.[9] In *Motor Ins.*, employers asserted an entitlement to a writ of mandate in a case in which DFEH failed to investigate allegations of discrimination and, without having determined the validity of the complaints or engaging in any meaningful effort at conciliation, issued accusations. (*Id*. at p. 218.) Because the record contained evidence that (1) DFEH sent a letter--similar to the one sent to Albertson's--encouraging the employers to contact DFEH to discuss conciliation, and (2) a DFEH consultant wrote a letter to the employers and had spoken with them by phone, the court concluded DFEH had expended "some effort" to comply with its statutory conciliation requirement, and denied the writ. (*Id*. at p. 223.)

In this case, DFEH extended a cursory invitation to discuss informal resolution of Pepper's complaint. Such a tepid attempt does little to advance Government Code section 12963.7's goal of expeditious elimination of employment practices DFEH has

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[8] The FEHC decision repeats, but does not assess the credibility of, DFEH's assertion at the hearing that "informal conciliation attempts were encouraged by [DFEH] throughout its investigation."

[9] *Motor Ins.* addressed the requirements of Labor Code section 1422.2, which was repealed in 1980 and now appears in the Government Code.

investigated and found unlawful by means of confidential "conference, conciliation, and persuasion." (Gov. Code, § 12963.7, subd. (a).) Conciliation is an important, but not essential, legislative goal. As noted in *Motor Ins.*, the Legislature has given DFEH broad discretion to determine the circumstances that warrant the premature filing of an accusation under Government Code section 12963.7, and DFEH "may use this section to enable it to file an accusation . . . even if it has not obtained optimum results from its . . . efforts at conciliation." (*Motor Ins.*, *supra*, 118 Cal.App.3d at p. 224.) It is unnecessary to cite the lengthy list of authorities on point. Suffice it to say that, for at least 15 years, every California case that has addressed the issue has relied on the rule reiterated in *Stevenson v. Superior Court* (1997) 16 Cal.4th 880: Once DFEH "deems a complaint valid, it seeks to resolve the matter . . . by conference, conciliation, and persuasion. ([Gov. Code,] § 12963.7) If that fails *or seems inappropriate*, [DFEH] may issue an accusation to be heard by the [FEHC]. [Citation.]" (*Id*. at p. 891, emphasis added.)

A statutory review yields the same result. Government Code section 12963.7 requires DFEH to make its best efforts to eliminate and informally resolve valid complaints of unlawful employment discrimination. However, DFEH also has statutory authority to issue a written accusation "[i]n the case of failure to eliminate an unlawful practice . . . through conference, conciliation, or persuasion, or in advance thereof if circumstances warrant . . . ." (Gov. Code, § 12965, subd. (a).) Conciliation is not a jurisdictional prerequisite. If it were, the Legislature would not have vested DFEH with discretion to issue an accusation simply because it deems conciliation "inappropriate" in a given case. (See also Gov. Code, § 12930, subd. (h) [granting DFEH power to issue and prosecute accusations; power not conditioned upon fulfillment of any condition precedent].)

Albertson's reliance on federal cases interpreting Title VII to support its argument that conciliation is a jurisdictional prerequisite is misplaced.[10] In construing FEHA,

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[10] Some federal authorities have upheld dismissals of actions in which the Equal Employment Opportunity Commission (EEOC) failed to make a bona fide effort to

California courts, where appropriate, look to federal authorities interpreting Title VII. However, it is not appropriate to follow federal decisions if FEHA evidences a legislative intent different from that of Congress. (*Page v. Superior Court* (1995) 31 Cal.App.4th 1206, 1215-1216.) In *Motor Ins.*, the court examined and rejected an argument identical to that advanced by Albertson's, viz., that California should apply the federal standard and find conciliation jurisdictional under FEHA, because of the philosophical differences between the state and federal systems with regard to instituting litigation. (*Motor Ins.*, *supra*, 118 Cal.App.3d at pp. 218-221.) Under federal law, EEOC "cannot pursue a claim in court without first engaging in a conciliation process." (*EEOC v. Waffle House, Inc.* (2002) 534 U.S. 279, 290, fn. 7 (*Waffle House*).) Under FEHA, DFEH is bound by no similar restriction.

Moreover, adoption of Albertson's jurisdictional argument may lead to perverse results. FEHA exists to provide relief to victims of employment discrimination. If those victims could be deprived of a judicial, or even an administrative remedy, because of the oversight or ineptitude of the agency assigned to assist them, the statute's purpose is defeated. A finding that conciliation is a jurisdictional prerequisite would not advance the legislative goal of conciliating disputes that can be resolved short of litigation. Consider the following: A DFEH complainant has the option of choosing to obtain a "right to sue" letter and skipping the FEHC process--including conciliation--entirely. If that complainant, i.e., victim of discrimination, who might otherwise pursue an administrative resolution, knows she risks losing her "day in court" by virtue of a

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conciliate a dispute before filing suit. (See *E.E.O.C. v. Asplundh Tree Expert Co.* (11th Cir. 2003) 340 F.3d 1256, 1260-1261 [it was not an abuse of discretion to dismiss action in which EEOC's completely unreasonable "conduct 'smack[ed] more of coercion than of conciliation'"]; *Equal Employment Opp. Com'n v. Pierce Packing Co.* (9th Cir. 1982) 669 F.2d 605, 608 [rejecting EEOC's attempt to use employer's breach of 1973 settlement agreement, based on the results of an investigation in which EEOC had not been involved, as a "springboard" to court enforcement of that agreement four years later, where EEOC did not first satisfy all Title VII conditions precedent to filing suit, including independent investigation, determination of reasonable cause and attempt to conciliate].)

potential administrative misstep, she will be less likely to pursue informal resolution through administrative channels in the first place or at all. Conciliation is an important and useful tool to encourage informal, expeditious resolution of complaints of workplace discrimination. However, it is not and, under California law, has never been a jurisdictional hoop through which DFEH must jump before issuing an administrative accusation.

b. The workers' compensation settlement does not bar this FEHA action brought by DFEH in its representative capacity.

Albertson's insists DFEH was barred from bringing the FEHC action because Pepper signed the settlement agreement in the workers' compensation action, which included a release of all known or unknown civil claims against Albertson's and its agents and employees. DFEH argues, and FEHC found, that DFEH was not barred from prosecuting this action, which was brought under its statutory authority to act as a public prosecutor representing the state's interests, not Pepper's individual interests. (Gov. Code, §§ 12930, subd. (h), 12965, subd. (a), 12920 [DFEH acts pursuant to state's police power to "protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination . . ."]; see also *State Personnel Bd. v. Fair Employment & Housing Com.* (1985) 39 Cal.2d 422, 444 (*State Personnel Bd.*).) FEHC concluded--and we agree--that DFEH, which was not party to Pepper's workers' compensation action, is not bound by the private settlement agreement reached in that action.

DFEH does not function in this action as a private litigant. Nor is there any evidentiary support for Albertson's contention that DFEH is acting in a representative capacity on Pepper's behalf. On the contrary, under its statutory authority, DFEH represents the state's interests in this action, in which Pepper, who has not intervened, is not a party. A private release, to which the administrative agency is not a party, cannot preclude DFEH from exercising its independent statutory functions to issue and prosecute accusations. (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 99, fn. 6; *Waffle House*, *supra*, 534 U.S. at pp. 287-288.)

Albertson's also implies that DFEH is acting as Pepper's representative in this action because, by virtue of DFEH's prosecution of this action, Pepper will receive a "double recovery." No evidentiary support exists for this contention. FEHC specifically addressed this contention when it issued its award, and (1) noted that Pepper's remedies for lost earnings and emotional distress arose out of the discrimination she suffered after March 1999, not from her workplace injuries, and (2) apportioned Pepper's emotional distress damages to account separately for those injuries suffered as a result of discrimination and in the course of the workers' compensation action.

Albertson's reliance on *Jefferson v. Department of Youth Authority* (2002) 28 Cal.4th 299 (*Jefferson*) is misplaced. In that action, Jefferson filed a workers' compensation claim for injuries related to sexual harassment and a hostile work environment. While that action was pending, she lodged a discrimination complaint before DFEH, involving the same allegations of harassment, and received a right to sue notice. The workers' compensation action was settled, and Jefferson executed a standard general release form and a separate attachment containing a section 1542 release, releasing all claims, known or unknown, related to the claimed injury. (*Id.* at p. 302.) She then filed a civil action for discrimination in violation of FEHA based on the same events. The employer sought and received summary judgment, arguing the FEHA claim was barred by the broad language of the release signed in the workers' compensation action. (*Id.* at p. 303.) The Supreme Court agreed. It held: "[W]hen, as in this case, an employee has knowledge of a potential claim against the employer at the time of executing a general release in a workers' compensation proceeding, but has not yet initiated litigation of that claim, the employee has the burden of expressly excepting the claim from the release. Absent this exception, and absent contrary extrinsic evidence, a court will enforce general language, such as is found in the compromise and release and attachment in the present case, releasing all claims, including civil claims." (*Id*. at p. 310.)

This case differs from *Jefferson* in significant respects. First, unlike the plaintiff in *Jefferson*, when Pepper signed the release in April 1998, she had not yet filed a FEHA

complaint. That complaint was not lodged until May 10, 1999, two months after Albertson's discriminatory refusal to reinstate (and its concomitant refusal even to discuss workplace accommodations with) Pepper. Second, at the FEHC hearing, Pepper testified she was not aware of what FEHA was when she signed the release. The hearing officer specifically credited this factual testimony, and no reason exists to dispute that conclusion.[11] This is particularly so given the absence of evidence presented by Albertson's that the parties to the workers' compensation action discussed inclusion of any specific civil claims in the settlement, or its impact, if any, on Pepper's continued employment with Albertson's. Third and most significantly, unlike *Jefferson*, this case does not involve two actions between an employee and her employer. Whether it pursues class-wide or victim-specific relief, DFEH does not necessarily "stand in the shoes" of a particular victim of discrimination. The agency acts independently, on its own statutory authority, to protect and prosecute the public interest and welfare under FEHA. (Gov. Code, §§ 12930, subd. (h), 12965, subd. (a), 12920; *State Personnel Bd.*, *supra*, 39 Cal.3d at p. 444; see also *Victa v. Merle Norman Cosmetics, Inc.* (1993) 19 Cal.App.4th 454, 463-468 [question of whether EEOC is in privity with individual plaintiff requires a close examination of circumstances of individual case; no privity found because plaintiff did not control litigation which furthered public interest, rather than private plaintiff's].)

c. Judicial estoppel is inapplicable because Pepper's position in the workers' compensation proceeding was not inconsistent with the legal posture adopted by DFEH in this action.

Albertson's contends this action is barred by judicial estoppel because Pepper's legal posture in the workers' compensation action is legally inconsistent with the position DFEH advances in this case. DFEH responds that the doctrine of judicial estoppel is

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[11] Pepper's knowledge of a potential ADA claim does not mean she was necessarily aware she might also have a discrimination claim under a state statute about which she was not then aware.

inapplicable for several reasons: (1) Pepper's receipt of vocational rehabilitation benefits for a short period was not inconsistent with her claim she was able to work, with appropriate accommodations; (2) Albertson's never proved that Pepper claimed she was totally unable to work; (3) FEHA and workers' compensation law define "disability" differently and without reference to one another, and those definitions are not "totally inconsistent;" and (4) DFEH--not a party to the workers compensation action--cannot be precluded from exercising its independent statutory authority to prosecute an accusation.

FEHC deemed the doctrine of judicial estoppel inapplicable. It determined that Albertson's failed to establish Pepper had ever asserted she was completely unable to perform her job duties. FEHC found the record contained "no evidence that [Pepper] made any representations inconsistent with her present claims under FEHA." (See *Prilliman, supra*, 53 Cal.App.4th at pp. 960-963; *Bell v. Wells Fargo Bank* (1998) 62 Cal.App.4th 1382, 1387-1388.) To the contrary, FEHC found "the evidence established that [Pepper] consistently maintained that she could do her job, albeit with limits on her work hours." Substantial evidence supports that determination.

" ' "Judicial estoppel prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding. The doctrine serves a clear purpose: to protect the integrity of the judicial process." . . .'[ ] It is ' " ' "intended to protect against a litigant playing 'fast and loose with the courts. . . . .' " ' " ' " (*Hanna v. Los Angeles County Sheriff's Dept.* (2002) 102 Cal.App.4th 887, 896, original ellipses (*Hanna*), quoting *Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 181 (*Jackson*).) The doctrine is applied when (l) a party has taken two different positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the first position was successfully asserted (i.e., it was adopted or accepted as true by the tribunal); (4) the two positions are totally inconsistent; and (5) the first position was not adopted as a result of ignorance, fraud or mistake. (*Hanna*, at p. 896; *Jackson*, at p. 183.)

Pepper testified she agreed to participate in vocational rehabilitation because she was legally required to do so and was told she would lose benefits her family needed if

she did not participate. In addition, she was told that job modification was a possible rehabilitation benefit, and believed her participation might enable her to obtain modified work at Albertson's. Albertson's has not demonstrated that Pepper's participation in a program, which she hoped would enable her to obtain workplace accommodations from her employer so she could continue to perform her regular duties, is inconsistent with the assertion of a civil rights disability claim under FEHA.

The same logic applies to the contention that Pepper asserted totally inconsistent positions as between her workers' compensation action and this FEHA action. First, unlike the plaintiffs in the authorities on which Albertson's relies, Pepper never signed a declaration or statement claiming she was unable to work. In *Drain v. Betz Laboratories, Inc.* (1999) 69 Cal.App.4th 950 (*Drain*), the court deemed it appropriate to apply the doctrine of judicial estoppel. In *Drain*, materials submitted in support of an employee's application for long-term disability benefits stated he was unable to perform any of his job-related duties or any other job. The employee also filed a workers' compensation claim seeking compensation for a continuing permanent disability. (*Id.* at p. 953.) After the workers' compensation action settled, the employee filed a FEHA action claiming his employer should have accommodated his disability and given him a light duty job. The court affirmed summary judgment for the employer, concluding that the plaintiff's binding admission in his application for disability, in which he claimed a "total inability to perform any of his job functions or any other occupation," was completely at odds with his claim that he could have worked a light duty position in the FEHA action. (*Id.* at p. 960.)

In *Jackson, supra*, 60 Cal.App.4th 171, a county safety police officer settled his workers' compensation action. By stipulation, the parties agreed Jackson's work injuries had caused him "permanent disability" and among other things, he required a "work environment free from emotional stress and strain and no heavy work." (*Id.* at p. 177.) Jackson's superiors concluded the work restriction precluded him from serving as a safety officer, and no accommodation was possible to permit him to continue in that position. Jackson refused to consider any other job and sued the county claiming it

violated the ADA. (*Ibid.*) The court affirmed summary judgment in favor of the county, finding judicial estoppel barred Jackson's claim. The position Jackson took in the workers' compensation action with respect to his work restrictions--agreeing he required a stress-free work environment--was inconsistent with his litigation position in the ADA action, in which he claimed he could work as a safety police officer, a position in which even Jackson acknowledged all the duties involved stress. (*Id.* at pp. 188, 190-191.) In this case, Pepper has never claimed she was unable to work, and her conduct was not remotely similar to that of either plaintiff in the *Drain* and *Jackson* cases.

Albertson's also relies on testimony by Pepper's attorney in the workers' compensation action to support its claim Pepper understood that, by accepting the settlement and signing the release, she could not go back to work for Albertson's. But that evidence is equivocal. Marron said it was her practice to tell her clients that if they signed a release, they normally would not go back to work for an employer. However, Marron also said she could not recall her actual statement to Pepper, could not recall Pepper's response, and was not aware of Pepper's understanding at the time the release was executed.

Balanced against this equivocal evidence is substantial evidence and several reasonable inferences indicating Pepper never fully grasped Albertson's intention that, by agreeing to the release, Pepper would forgo the opportunity ever to return to its employ. First, the release does not mention terminating Pepper's employment. Second, beginning just weeks after reaching the agreement, and continuing through Fall 1998, Pepper made numerous attempts to return to her job at Albertson's, asserting her understanding that the workers' compensation settlement was made completely independent of her right to return to work. In addition, when Pepper specifically asked Marron if signing the release would prevent her from going back to work, Marron did not respond. Rather, Marron told Pepper she would "have to talk to an A.D.A. lawyer about that." From this a reasonable inference may be drawn that Pepper never understood she had agreed or somehow stated she was no longer able to work, and would never again be able to work for Albertson's. It certainly cannot be said that Pepper's confusion constitutes an

affirmative assertion of inconsistent positions. As a result, the doctrine of judicial estoppel does not apply.

d. Collateral estoppel does not bar this FEHA action.

As an Albertson's employee, Pepper was subject to a CBA requiring arbitration of employment disputes. The CBA provides that "[t]o the extent required by Federal or State laws, the Union and the Employer agree not to discriminate against any employee . . . because of . . . handicap." Pepper filed a union grievance claiming Albertson's violated the CBA by refusing to reinstate her in March 1999. The grievance was resolved against Pepper. The arbitrator found Albertson's did not violate the CBA's discrimination clause because Pepper "was not an otherwise qualified employee who could have been accommodated by [Albertson's] to enable her to adequately perform the reasonably required duties" of any job to which she might have been assigned. Albertson's contends the statutory FEHA claim asserted on Pepper's behalf is barred by collateral estoppel because the identical claim was fully litigated at arbitration. FEHC rejected this contention, as do we.

Collateral estoppel, an aspect of res judicata, precludes relitigation in a second action of an issue or claim necessarily decided in a prior adjudicatory proceeding between the same parties or their privies. (*Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 828; *Kelly v. Vons Companies, Inc.* (1998) 67 Cal.App.4th 1329, 1336.)

After an exhaustive discussion of federal and state law on the topic, the court in *Camargo v. California Portland Cement Co.* (2001) 86 Cal.App.4th 995, 1005-1018 (*Camargo*), concluded an arbitration award based on a FEHA claim under a CBA may be given collateral estoppel effect if each of two predicate conditions is satisfied. First, the union member's agreement to finally resolve FEHA claims through arbitration must be "clear and unmistakable" in the CBA. (*Id*. at p. 1018.) Second, the arbitration procedures must provide for full and fair adjudication of the employee's FEHA claim. (*Ibid*.)

Neither *Camargo* requirement is satisfied in this case. The CBA governing Pepper's employment does not mention FEHA, let alone incorporate its explicit statutory

or regulatory requirements. Nowhere does the CBA define "disability" (or the term "handicap" employed in the CBA). No reference is made to the employer's statutory obligation of accommodation, or the various defenses available. In addition, as discussed above, Albertson's has not established DFEH was in privity with Pepper. DFEH was not a party to the CBA and, in this action, it acts as a prosecutor on behalf of the public, which has a right to be free of discrimination in the workplace. Those interests were not adjudicated in the private grievance. (*State Personnel Bd.*, *supra*, 9 Cal.3d at p. 444; *Waffle House*, *supra*, 534 U.S. at pp. 287-288.)

This case also fails the second *Camargo* requirement. Pepper's FEHA claim was not fully and fairly adjudicated at arbitration. The arbitrator--who claimed no expertise in California's statutory employment law--applied federal ADA standards in concluding Pepper was not a victim of disability discrimination. The ADA establishes only the legal "floor" of disability civil rights in California. (See Gov. Code, § 12926.1, subd. (a).) FEHA is more protective of employees' rights than is federal law. Pepper's FEHA claim was never addressed--let alone fully or fairly adjudicated--at arbitration. Collateral estoppel does not apply.

e. This action is not preempted by federal law.

Section 301 of the Labor Management Relations Act of 1947 (LMRA) establishes federal jurisdiction in suits against employers for breach of collective bargaining agreements. (29 U.S.C. § 185, subd. (a).) "[I]f the resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement, the application of state law . . . is pre-empted and federal labor-law principles . . . must be employed to resolve the dispute." (*Lingle v. Norge Division of Magic Chef, Inc.* (1988) 486 U.S. 399, 405-406, 413 (*Lingle*); *Jimeno v. Mobil Oil Corp.* (9th Cir. 1995) 66 F.3d 1514, 1522 (*Jimeno*).) "The LMRA does not, however, preempt the application of a state law remedy when the 'factual inquiry [under the state law] does not turn on the meaning of any provision of a collective bargaining agreement.' " (*Id*. at pp. 1522-1523, original brackets, quoting *Lingle*, at p. 407.)

Albertson's contends this action is preempted by federal law because, to determine the validity of Pepper's FEHA claim, FEHC "necessarily had to interpret the CBA's non-discrimination provision and determine whether it was subject to the CBA's broad arbitration provision." We conclude otherwise.

The CBA governing Pepper's employment contains a broad nondiscrimination clause under which Albertson's agreed "not to discriminate . . . because of . . . handicap . . . ." As the Supreme Court emphasized, merely because a CBA contains a broad contractual provision against discrimination or provides a remedy for conduct that coincidentally violates state law, it does not follow that federal law preempts the state anti-discrimination statute, unless construal of the CBA is necessary in order to resolve the state law claim. (*Lingle, supra,* 486 U.S. 399 at p. 407.)[12] The FEHA statutory discrimination claim at issue exists independent of the CBA. Resolution of the FEHA claim is not governed by and does not require interpretation of the CBA. The private contract does not define "handicap," and fails to address either the duties of management faced with a situation involving a disabled employee requiring a workplace accommodation, or management's potential defenses in such a situation. For these reasons, FEHC properly exercised its jurisdiction over the FEHA claim. (*Jimeno, supra,* 66 F.3d at pp. 1523-1524, 1526-1527 [no LMRA preemption where CBA fails to address potential defenses available to employer, and is silent regarding management's response to employee deemed physically "unfit to continue in a position without work

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[12] Albertson's reliance on *Harris v. Alumax Mill Products, Inc.* (9th Cir. 1990) 897 F.2d 400 to support its argument that Pepper's FEHA claim is preempted is misplaced. In *Harris*, a unionized employee sued on nonstatutory claims of emotional distress and breach of the covenant of good faith and fair dealing, claims which arose directly out of an allegation that he was discharged in violation of the employer's work rules. Those claims were inextricably interwoven with the CBA itself and, by the employee's own admission, required interpretation of the agreement. Both claims--which involved allegations unlike any of the allegations of discrimination in violation of Pepper's statutory civil rights at issue here--were clearly preempted. (*Id*. at p. 403.)

restrictions," and fails to discuss reasonable accommodations]; Gov. Code, § 12926, subd. (k); Cal. Code Regs., tit. 2, §§ 7293.8, 7293.9.)

f. The action is not time-barred.

Albertson's also insists the FEHA claim is time-barred because the accusation filed by DFEH states Pepper was employed until April 15, 1998, and Pepper's DFEH claim was not filed until May 10, 1999. The company argues DFEH is "bound by the allegations" of its pleading.

The determination as to when the unlawful acts occurred is factual, and is reviewed under substantial evidence with deference to FEHC's findings. At the FEHC hearing, Albertson's claimed Pepper was "administratively terminated" on April 15, 1998. Albertson's points to no documentary or other evidence in the record to support this assertion. On the other hand, the record contains substantial evidence Pepper was not terminated in April 1998. Specifically, in January 1999, Albertson's attested Pepper was still in its employ, and only out "on leave," in order to try to defeat her application for unemployment benefits. At arbitration, Albertson's took the position Pepper was terminated in January 1999. Finally, Albertson's paid Pepper "special holiday" pay in 2000 and issued her a W-2 form in both 1999 and 2000. Pepper was retained her on Albertson's payroll in an "industrial leave" capacity into 2000.

6. Albertson's Due Process Rights Have Not Been Violated.

In its final assertion of error, Albertson's complains it is wedged between two incompatible statutory schemes. Albertson's claims FEHC ignored this conflict, violating its due process rights and penalizing the company for dutifully following California's workers' compensation law. In other words, the company maintains that, once it received the note from Shoemaker in January 1998, its hands were tied and it could not reinstate Pepper under any circumstances until Shoemaker alone said it was safe to do so. This is so because, if Pepper was reinstated and suffered another injury, Albertson's could be subject to substantial costs under Labor Code section 4553. This contention is meritless.

Labor Code section 4553 imposes penalties on employers who engage in intentional misconduct. " ' "Serious and willful misconduct" within the meaning of section 4553 is an act deliberately done for the express purpose of injuring another, or intentionally performed whether with knowledge that serious injury is a probable result or with a positive, active, wanton, reckless and absolute disregard of its possibly damaging consequences. [Citation.]' " (*Scalice v. Performance Cleaning Systems* (1996) 50 Cal.App.4th 221, 231, quoting *Ferguson v. Workers' Comp. Appeals Bd.* (1995) 33 Cal.App.4th 1613, 1622.) Albertson's cannot argue that it would be subject to Labor Code section 4553 penalties under the workers' compensation scheme by relying in good faith on Jablecki's March 1999 report freeing Pepper to return, simply because Jablecki (a physician who had treated Pepper since at least 1988 and who was an AME), was not the same AME upon whose recommendation Pepper was removed from the workplace.

FEHC appropriately recognized Albertson's obligation, as an employer, to comply with two concurrent, but independent, statutory schemes intended to protect employee rights. Albertson's chose to adhere only to the workers' compensation scheme, circumventing its duties of nondiscrimination and reasonable accommodation under FEHA. At a minimum, faced with the conflict between the 1997 and 1998 reports, Albertson's was obligated to contact Pepper or her representatives to discuss and attempt to clarify the discrepancy. (See e.g., Chin, et al, Cal. Practice Guide: Employment Litigation (The Rutter Group 2005) ¶ 12:1830, p. 12-150 [discussing intersection of workers' compensation and FEHA statutes in the context of leaves of absence, noting that, because definition of "disability" differs between two independent statutory schemes, employer must evaluate employee's situation under each statute "and then follow the law that is most protective of employee rights"].) FEHC's decision does not "penalize[] Albertson's for following California's workers' compensation laws," it merely acknowledges Albertson's failure to satisfy FEHA, and provides appropriate compensation for that failure. The company's protestations notwithstanding, nothing supports the contention that Albertson's suffered a loss of due process.

DISPOSITION

The judgment is affirmed. Respondents are to recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BOLAND, J.

We concur:

COOPER, P. J.

RUBIN, J.