

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by)	SPB Case No. 00-1605
)	
PETE REECE)	BOARD DECISION
)	(Precedential)
from denial of request for reasonable)	
accommodation in the position of Office)	No. 02-06
Assistant (General) with the State)	
Compensation Insurance Fund)	June 18, 2002
at Glendale)	

APPEARANCES: Harry Gibbons, Attorney, California State Employees Association, on behalf of appellant, Pete Reece; Cynthia Chin-Perez, Attorney, on behalf of respondent, State Compensation Insurance Fund.

BEFORE: Ron Alvarado, President; William Elkins, Vice President and Florence Bos, Member.

ERRATA

There was an error was made in the position title in the above referenced caption, it should read as follows:

“...from denial of request for reasonable accommodation in the position of Office **Assistant** (General) with the State Compensation Insurance fund at Glendale.”

And the second line on the second page should read as follows:

“1992 as an Office Assistant (General) in SCIF’s Cerritos Office.”

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BEFORE: Ron Alvarado, President; William Elkins, Vice President and Florence Bos, Member.

DECISION

This case is before the State Personnel Board (SPB or Board) after the Board granted the petition for rehearing filed by Pete Reece (appellant) to determine whether appellant's appeal from denial of reasonable accommodation properly stated a cause of action for disability discrimination under Government Code § 19702 and whether this matter should be remanded to the Administrative Law Judge (ALJ) to consider evidence relevant to the issue of compensatory damages. In this Decision, the Board finds that an appeal from denial of reasonable accommodation automatically states a cause of action for disability discrimination under Government Code § 19702. The Board concludes, however that appellant's failure to offer any evidence of compensatory damages when this matter was before the ALJ precludes the Board from reopening this matter now to take

such evidence.

BACKGROUND

Employment History

Appellant began working for the State Compensation Insurance Fund (SCIF) in 1992 as an Office Assistant (General) in SCIF's Cerritos Office.

Appellant's Disability

Appellant is a 29 year old man who has had diabetes for 14 years. Although appellant takes insulin and regularly monitors his blood sugar, his diabetes is not stable. His blood sugar fluctuates daily and sometimes falls below a safe level, a condition referred to as hypoglycemia. Within a 30 minute time period, appellant's blood sugar can drop from a safe to an unsafe level. When appellant becomes hypoglycemic, he sweats, shakes, and becomes nauseated, disoriented and incoherent. Appellant's diabetes caused appellant to be absent from work on 21 occasions between June 1 through August 10, 1999. Because of his diabetes, appellant must often see his doctor during the workweek.

August 11, 1999 Incident

On August 11, 1999, while at work at SCIF's Monterey Park switchboard, appellant became hypoglycemic. Although appellant remembers little about what happened, his supervisor Will Collins (Collins) testified that appellant told him that he was having a diabetic incident and asked to leave work. Collins saw appellant punching the telephone and keyboard buttons in sequence around and round. Collins repeatedly asked appellant

to turn off the switchboard. When appellant still had not responded after the third request, Collins reached around and turned off the switchboard himself. With the help of another employee, Collins took appellant to a conference room. Appellant started walking out of the conference room and fell onto a chair, hitting the back of his head, causing it to bleed. A security guard called the paramedics. When the paramedics arrived, appellant did not respond to any of their questions. When they tried to take his blood pressure, he resisted. At one point, appellant slapped one of the paramedics. The paramedics called the police for assistance. When the police arrived, appellant was handcuffed, placed on a gurney and rushed to the Santa Monica Hospital.

D. Rodriguez (Rodriguez), a SCIF employee who was working with appellant on the switchboard on August 11, 1999, witnessed appellant's hypoglycemic incident and filed a workers' compensation claim for psychiatric injury as a result. She was out of work from August 12, 1999. In March 2000, Rodriguez's doctors concluded that her psychiatric injury precluded Rodriguez from working at the same location as appellant, but did not restrict her from performing her usual and customary duties at another location. Rodriguez returned to work at the Monterey Park office in September 2000.

Appellant's Reasonable Accommodation Request

In late 1999, appellant learned that the Claims Unit in Monterey Park was going to move to SCIF's Glendale office. On April 11, 2000, appellant submitted a written request for reasonable accommodation to SCIF. In response to the question asking how his disability substantially limited him in a major life activity, appellant stated:

Because of my disability (diabetes), I need to be able to check my blood

sugar levels throughout the day, be able to take restroom breaks as needed, and be able to eat a snack if necessary to maintain proper blood sugar levels. I need to be closely monitored by my private physician. I need frequent reevaluations, as well as emergency visits to the doctor/hospital. I need to be in close contact with my health care provider.

In response to the question of what accommodation appellant needed to enable him to perform his job duties, appellant stated:

I need to remain in the Monterey Park office to stay in close proximity with my primary care physician. I have recently changed primary care physicians, and my doctor has informed me that it is important that I be able to follow up with him for continuity of care, so he can better monitor and treat my condition. If I move to the Glendale office, I will be further away from my doctor, which will make it inconvenient and difficult for regular doctor's appointments. If I do not attend regular doctor's appointments, my condition may worsen, or I could have an emergency situation at work due to improper medical monitoring. If I move to Glendale and there is an urgent medical situation, I may not be able to be seen by my doctor, due to the length of time it takes to drive from Glendale to my doctor's office....

Attached to appellant's request for reasonable accommodation was a hand-written memo from Harding Young, M.D., which stated that appellant:

has brittle Diabetes¹. Please allow him to remain at work at present job location to ensure needed frequent follow-up.

By an inter-communication memorandum dated May 12, 2000, SCIF denied appellant's reasonable accommodation request, stating, in pertinent part, as follows:

Regarding your requests for additional restroom breaks, snacks and time to attend medical appointments, these are requests which are available at any location in which you are working. These accommodations were granted on previous occasions and you are still receiving these accommodations.

As you are already aware, due to the LA Basin reorganization, your department will be transferring to the new Glendale office on May 19, 2000.

¹ The National Institute of Diabetes and Digestive and Kidney Diseases of the National Institutes of Health at <http://www.niddk.nih.gov/health/diabetes/pubs/dmdict/A-E.htm#B>, defines "brittle diabetes" to be a "term used when a person's blood glucose (sugar) level often swings quickly from high to low and from low to high. Also called labile and unstable diabetes."

Your position is also transferring to the Glendale office. Note that you may wish to explore opportunities in other district offices on your own by looking at blue flyers, etc.

You wish to be in close proximity to your physician, such a request falls outside of the parameters for reasonable accommodation. Based on the above information, we are unable to provide the specific accommodation requested.

Although SCIF's Claims Unit moved out of the Monterey Park office in May 2000, other SCIF units remained at that location and new SCIF units moved into it. Appellant interviewed for positions in other units in the Monterey Park office, but he was not selected for any of those positions.

Appellant lives in Compton. His treating physicians are located in Lynwood, a five to ten minute drive from appellant's home. The weekday drive time between appellant's home and the Monterey Park office is 20 to 45 minutes, depending upon the traffic conditions and time of day. The weekday drive time from appellant's home to the Glendale office is from 35 minutes to two hours, depending upon the traffic conditions and time of day. The evening commute during "rush hour" generally takes the longest.

Although SCIF's denial letter to appellant did not refer to Rodriguez and her work restriction as a basis for SCIF's denial of appellant's reasonable accommodation request, during the hearing before the ALJ, SCIF asserted that it was confronted with competing reasonable accommodation requests, one from Rodriguez and the other from appellant, and decided to grant Rodriguez's reasonable accommodation request that she not work in the same location as appellant over appellant's request that he remain in the Monterey Park office. SCIF asserted that it did not disclose any

information about Rodriguez's reasonable accommodation request to appellant because it did not want to violate her right to privacy.

Appellant was transferred to SCIF's Glendale office after his reasonable accommodation request was denied. Appellant attempted to work in the Glendale office on only one occasion, July 5, 2000. On that day, his blood sugar dropped so low that he became disoriented.

There was no evidence presented that SCIF ever attempted to engage in the interactive process after appellant submitted his request for reasonable accommodation. SCIF asserts that it was appellant who caused the interactive process to break down because he filed his appeal after SCIF denied his reasonable accommodation request, instead of initiating the interactive process at that time.

Procedural History

The ALJ conducted three days of hearing in this matter, on October 26 and December 21, 2000 and January 23, 2001. SCIF informed appellant of Rodriguez's reasonable accommodation request for the first time during the October 26, 2000 hearing. The ALJ scheduled the December 21, 2000 hearing to review appellant's discovery requests with respect to Rodriguez's reasonable accommodation request. At no time during the three days of hearing before the ALJ did appellant seek, on the record, to put on evidence as to the nature and extent of any compensatory damages he may have incurred as a result of SCIF's denial of his reasonable accommodation request.

The ALJ issued a proposed decision granting appellant's request for reasonable accommodation. The Board adopted that proposed decision at its meeting on July 10-11, 2001. Appellant filed a petition for rehearing, which informed the Board that, as a result of his diabetes, appellant was not able to return to work and asked the Board to reopen this matter to take additional evidence as to appellant's compensatory damages. The Board granted appellant's petition for rehearing at its October 2, 2001 meeting.

The Board has reviewed the record in this matter, including the transcript, exhibits and written arguments of the parties, and has heard the oral arguments of the parties, and now issues the following decision.

ISSUES

The following issues are before the Board for consideration:

1. Was SCIF's denial of appellant's request for reasonable accommodation justified?
2. Did appellant's appeal from denial of reasonable accommodation state a cause of action under Government Code § 19702?
3. If so, should this matter be reopened to take evidence as to appellant's compensatory damages?

DISCUSSION

Appellant's Reasonable Accommodation Request

When appellant learned that SCIF's Claims Unit was moving to SCIF's Glendale office, he requested that, as a reasonable accommodation for his diabetes, he be

allowed to stay in SCIF's Monterey Park office in order to remain closer to his doctors.

Pursuant to Government Code § 19230(c), a department must provide reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee who is an individual with a disability, unless the department can demonstrate that the accommodation would impose an undue hardship on its operations.

SCIF does not dispute that appellant's diabetes is a physical disability as defined in the California Fair Employment and Housing Act (FEHA).² Appellant's diabetes is clearly a physical impairment that limits many of his major life activities, including eating and working. SCIF also does not dispute that, during all times relevant to this case, appellant met the qualifications of an Office Technician (General).

In its denial of appellant's reasonable accommodation request, SCIF stated that appellant's request to remain in close proximity to his physician fell "outside of the parameters for reasonable accommodation." It is not clear what SCIF meant by this statement. Under Government Code §19230, an employer is required to remove unnecessary barriers that prevent qualified employees with disabilities from performing the essential functions of their positions. When, as here, an employee proves that he is a qualified individual with a disability who needs a reasonable accommodation to perform the essential functions of his job, the determination of what type of accommodation may be required to remove unnecessary barriers to effective job performance must be made on a case-by-case basis. Depending upon a case's particular facts and circumstances, including the size of the appointing power, the nature of the employee's job and job

² Government Code § 12926(k).

qualifications, and the availability of vacant positions in other locations into which the employee could be transferred, reassigning an employee to a vacant position in order that he may be closer to his doctors may be a reasonable and appropriate accommodation to assure that the employee will remain capable of performing the essential functions of his job.

During the hearing before the ALJ and in its arguments to the Board, SCIF asserted that it was faced with competing, inconsistent reasonable accommodation requests and that it appropriately chose Rodriguez's reasonable accommodation request over appellant's. SCIF's assertions are disingenuous. While the Board will not comment upon whether Rodriguez stated a good claim for reasonable accommodation since her case is not before us, SCIF admitted that, while Rodriguez's doctor restricted her from working in the same location as appellant, her doctor did not require that she remain in the Monterey Park office. Thus, SCIF could have granted both Rodriguez's request and appellant's request by transferring Rodriguez, instead of appellant, to the Glendale office.

SCIF contends, however, that it was not required to grant appellant's request to remain in its Monterey Park office because it had already accommodated appellant by granting his requests for additional time to take restroom breaks, eat snacks and attend medical appointments. While SCIF may have made some accommodations for appellant's disability, providing those accommodations did not relieve SCIF of its obligation to engage in the interactive process with appellant to determine whether his

request to remain in the Monterey Park office should have been granted. As the Board made clear in Dianna Henning,³ citing to Humphrey v. Memorial Hospitals Association⁴:

An employer's obligation to engage in the interactive process ... extends beyond the first attempt at reasonable accommodation and continues when the employee asks for a different accommodation or where the employer is aware that the initial accommodation is failing and further accommodation is needed.⁵

In its written and oral arguments before the Board, SCIF blamed appellant for failing to engage in the interactive process by appealing to the Board after SCIF denied his reasonable accommodation request, instead of pursuing the interactive process with SCIF. SCIF's assertion has no merit. While an employee who requests a reasonable accommodation has an obligation to cooperate with an appointing power during the interactive process, it is the appointing power's duty to initiate the interactive process with an employee immediately upon receipt of a reasonable accommodation request. From the record, it appears that SCIF denied appellant's reasonable accommodation request without first making any effort to engage with him in an interactive process to determine whether it could grant his request.

The Board, therefore, finds that SCIF's denial of appellant's request for a reasonable accommodation was without merit or justification.

Reasonable Accommodation and Disability Discrimination

As set forth above, after the Board adopted the ALJ's proposed decision granting appellant's appeal from denial of reasonable accommodation, appellant informed the

³ (2001) SPB Dec. No. 01-01, pp. 20-21.

⁴ (9th Cir. 2001) 239 F.3d 1128, 1138.

⁵ SPB Dec. No. 01-01 at pp. 20-12.

Board that he could not return to work and asked the Board to consider his appeal from denial of reasonable accommodation to be a disability discrimination appeal under Government Code § 19702.

The civil service laws governing reasonable accommodation and disability discrimination are located in two different sections of the State Civil Service Act. The civil service laws that require appointing powers to provide reasonable accommodations to qualified employees with disabilities are set forth in Government Code §§ 19230 – 19237. Government Code § 19230(c) states that:

It is the policy of this state that a department, agency, or commission shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee who is an individual with a disability, unless the hiring authority can demonstrate that the accommodation would impose an undue hardship on the operation of its program. A department shall not deny any employment opportunity to a qualified applicant or employee who is an individual with a disability if the basis for the denial is the need to make reasonable accommodation to the physical or mental limitations of the applicant or employee.

The State Civil Service Act's prohibitions against illegal discrimination are set forth in Government Code §§ 19700 – 19706. Government Code § 19702(a) provides that:

A person shall not be discriminated against under this part because of sex, race, religious creed, color, national origin, ancestry, marital status, physical disability, or mental disability. A person shall not be retaliated against because he or she has opposed any practice made an unlawful employment practice, or made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this part. For purposes of this article, "discrimination" includes harassment. This subdivision is declaratory of existing law.

In addition, Government Code § 19702(f) provides that:

If the board finds that discrimination has occurred in violation of this part, the board shall issue and cause to be served on the appointing authority an order requiring the appointing authority to cause the discrimination to cease and desist and to take any action, including, but not limited to, hiring, reinstatement, or upgrading of employees, with or without backpay, and compensatory damages, which, in the judgment of the board, will effectuate the purposes of this part.

The Board made clear in Andrew Ingersoll⁶ that, when the Legislature enacted Government Code § 19702, it intended to provide state employees with the broadest civil rights and anti-discrimination protections available under the law. The Board, therefore, interprets the anti-discrimination provisions of Government Code § 19702 broadly to give effect to the law that is most protective of the civil rights of state employees under the particular circumstances, whether it is the State Civil Service Act, the federal Americans with Disabilities Act (ADA),⁷ or the FEHA.

Although Government Code § 19702 does not explicitly refer to reasonable accommodation, the ADA⁸ makes clear that the illegal denial of a request for

⁶ (2000) SPB Dec. No. 00-01.

⁷ 42 U.S.C. § 12101 et seq.

⁸ Under the ADA, 42 U.S.C. § 12112(b)(5)(A), the term “discriminate” is defined to include:

not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity.

reasonable accommodation constitutes illegal disability discrimination and the FEHA⁹ provides that the failure to grant a reasonable accommodation for the known physical or mental disability of an employee is an unlawful employment practice unless it would cause an undue hardship or be inconsistent with a bona fide occupational qualification. In addition, the FEHA makes clear that the failure to engage in the interactive process constitutes an unlawful employment practice.¹⁰

In order to provide qualified individuals with disabilities with the broadest protections available under the law, when reviewing appeals from denial of reasonable accommodation, the Board will interpret the disability discrimination prohibitions of Government Code § 19702 to cover both the illegal denial of reasonable accommodation and the failure to engage in the interactive process. Thus, when an employee files an appeal from a department's denial of a reasonable accommodation request, the Board will automatically consider that appeal to be a disability discrimination appeal under Government Code § 19702, subject to all the remedies

⁹ Government Code § 12940(m) provides that: "It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification ...

For an employer or other entity covered by this part to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee. Nothing in this subdivision or in paragraph (1) or (2) of subdivision (a) shall be construed to require an accommodation that is demonstrated by the employer or other covered entity to produce undue hardship to its operation.

¹⁰ Government Code § 12940(n) provides that "It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification ...

For an employer or other entity covered by this part to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition.

available under subdivision (f) of that section, including an award of compensatory damages, even if the appeal does not explicitly mention the term “disability discrimination” or refer to Government Code § 19702.

Compensatory Damages

Appellant has asked the Board to reopen this matter to allow him to put on evidence as to the compensatory damages due him as a result of SCIF’s improper denial of his reasonable accommodation request.

In Ingersoll, the Board adopted the detailed standards that the Fair Employment and Housing Commission has established for awarding compensatory damages to employees who have been subjected to illegal discrimination in violation of the FEHA.¹¹ The Board made clear that, to obtain compensatory damages for illegal discrimination in violation of Government Code § 19702, an employee must show that he suffered pain, fear, emotional distress, shame, humiliation, or similar injury as a result of his appointing authority’s illegal discrimination. The Board will only award compensatory damages if an appellant proves, by credible evidence, the extent and nature of the injuries he or she incurred as a result of the appointing authority’s unlawful conduct; the Board will not indulge in speculation or guesswork.

In his closing brief after hearing, citing to Ingersoll, appellant asked the ALJ to “infer” from appellant’s testimony that he had suffered emotionally as a result of SCIF’s failure to honor his reasonable accommodation request and to compensate him accordingly. The record shows, however, that at no time during the course of the

¹¹ SPB Dec. No. 00-01, pp. 30-33.

hearing did appellant offer any evidence as to the extent and nature of the injuries he sustained as a result of SCIF's wrongful actions.

If appellant wished to obtain compensatory damages, it was incumbent upon him to offer evidence of compensatory damages during the hearing before the ALJ so that SCIF could have responded to that evidence during the evidentiary hearing and the ALJ could have addressed it in his Proposed Decision. Because appellant did not seek to offer any evidence as to compensatory damages during the hearing before the ALJ, appellant waived the right to seek compensatory damages before the Board.¹² The Board will not reopen this matter at this late date to take evidence that appellant should have presented earlier to the ALJ.

CONCLUSION

SCIF discriminated against appellant on the basis of disability by failing to engage with him in the interactive process and by failing to grant his request for reasonable accommodation to remain in the Monterey Park office to be closer to his doctors. SCIF is, therefore, ordered to pay appellant all back pay, benefits and interest, if any, he may have received for any period of time that he may have been ready, able and willing to work in SCIF's Monterey Park office from July 5, 2000 to the date he was determined to be unable to work, minus any pay or benefits he may have received from any other sources during that time.

Although SCIF illegally discriminated against appellant on the basis of disability by failing to grant his request for reasonable accommodation to remain in the Monterey Park

¹² See, *id.* at p. 15.

office to be nearer to his physicians and by failing to engage in the interactive process, appellant's failure to offer any evidence of compensatory damages when this matter was before the ALJ precludes the Board from reopening this matter at this time.

ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in this case, it is hereby ORDERED that:

1. The appeal of Pete Reece from denial of reasonable accommodation is granted.
2. The State Compensation Insurance Fund shall cease and desist from discriminating against Pete Reece based upon his disability.
3. The State Compensation Insurance Fund shall pay Pete Reece all back salary, interest and benefits, if any, that would have accrued to him for any period of time he may have been ready, able and willing to work in SCIF's Monterey Park office from July 5, 2000 to the date he was determined to be unable to work, minus any salary or benefits he may have received from any other sources during that time.
4. This matter is hereby referred to the Chief Administrative Law Judge and shall be set for hearing upon the written request of either party in the event that the parties are unable to agree as to the back salary, interest and benefits due Pete Reece.
5. The request to reopen the record to take additional evidence as to compensatory damages is denied.
6. This decision is certified for publication as a Precedential Decision. (Government Code § 19582.5).

STATE PERSONNEL BOARD¹³

Ron Alvarado, President
William Elkins, Vice President
Florence Bos, Member

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on June 18, 2002.

Walter Vaughn
Executive Officer
State Personnel Board

[Reece-dec]

¹³ Member Sean Harrigan was not present and did not participate in this decision.