Making the Most of Moorpark: Delineating Protections Against Discrimination for Injured Workers after the Prudence K. Poppink Act

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Enacted on January 1, 2001, the Prudence K. Poppink Act, also known as California Assembly Bill 2222, may ensure that injured workers will be able to take advantage of the protections the California Supreme Court provided in the landmark case of City of Moorpark.

By expanding the definition of "disability," the statute may provide greater access to discrimination protections for industrially injured workers. The Fair Employment and Housing Act's ("FEHA") remedies and protections, which are broader than those provided by the California workers' compensation anti-discrimination statute, have been available to injured workers since the California Supreme Court's 1998 decision in City of Moorpark. In Moorpark, the Court held that injured workers could seek relief outside of the workers' compensation system for discrimination claims. However, many industrially injured plaintiffs have been unable to prove they have a "disability" and, consequently, have been denied the remedies and protections of the FEHA. In fact, before the passage of the Poppink Act, almost eighty per cent of all FEHA disability discrimination claims were dismissed before trial because the plaintiff did not qualify as "disabled" under the statute. Thus, depending on how the California Courts interpret the Poppink Act, the statute may allow injured workers to access the same protections as other persons with disabilities, regardless of how and where they were injured.

City of Moorpark set the stage for the Poppink Act's potential impact within the insular workers' compensation system. The Moorpark Court held that the state's workers' compensation anti-discrimination statute, section 132a of the California Labor Code was not the exclusive remedy for injured workers suffering from disability discrimination. For the first time, it allowed California employees who are injured at work to file discrimination claims under the disability provisions of both the FEHA and

1. The act was named after the late Prudence Poppink, who worked as a social justice advocate in the field of employment discrimination for over 25 years. She began her career at the Employment Law Center and subsequently worked for the Department of Fair Employment and Housing as a hearing officer and commission counsel. California Assembly Member Sheila Kuehl honored Ms. Poppink's career by naming the Poppink Act after her. Ross Hanig, Obituary, Prudence K. Poppink, 56, Former FEHA Attorney, THE RECORDER, Nov. 20, 2000, at 3.
2. The Poppink Act was introduced on February 24, 2000 by Assembly Member Sheila Kuehl and signed by Governor Davis on September 30, 2000, available at http://www.leginfo.ca.gov/pub/99-00/bill/asm/ab_2201-2250/ab_2222_bill_20000930_history.html (last visited March 1, 2003).
section 132a, so long as there is no double recovery. Before 1998, the place and manner in which one was injured determined the available remedies for employees who had suffered from disability discrimination. Thus, before Moorpark, California employees injured at work could seek redress only in the workers’ compensation system for disability discrimination, while employees disabled otherwise could seek remedies for disability discrimination under the FEHA and the Americans with Disabilities Act (ADA).

Access to the FEHA’s remedies was an important step in providing appropriate protection for injured workers who suffer from discrimination. The FEHA’s remedies tower over those provided by the workers’ compensation statute in section 132a. Section 132a provides only three types of remedies: increase of the workers’ compensation award by fifty per cent, but not more than an additional $10,000; reimbursement of lost wages and benefits; and reinstatement.

In contrast, the FEHA generally does not delineate the courts’ remedial powers (aside from providing attorneys’ fees to the prevailing party). Instead, the FEHA grants courts considerable discretion to fashion remedies to provide employment discrimination victims with “the most complete relief possible.” The California Supreme Court has held that any relief available to civil litigants generally is also available under the FEHA. For example, compensatory damages in a Department of Fair Employment and Housing hearing can be as much as $150,000 and no limit is placed on compensatory damages in private lawsuits. Similar to section 132a, the FEHA offers the remedy of backpay, but it goes beyond section 132a’s provisions by providing front pay.

In addition, under section 132a, discriminatory employers face only

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7. Id. The Moorpark Court states, for example, that an employee who settles his or her claim for lost wages in a 132a proceeding may not recover these same damages through a subsequent FEHA proceeding. Id.
9. Id. This Comment will focus primarily on the protections of the Fair Employment and Housing Act because it provides more protection to California workers than the Americans with Disabilities Act does. 42 U.S.C. § 12101 et seq. (2003).
14. See, e.g., Am. Nat’l Ins. Co. v. FEHC, 651 P.2d 1151 (Cal. 1982) (upholding the Fair Employment and Housing Commission’s decision to award reinstatement with back pay for a plaintiff who had been discharged for having high blood pressure).
misdemeanor charges and a small fine, while discriminatory employers may be enjoined and may be required to pay punitive damages in an action under the FEHA. Furthermore, section 132a limits attorneys' costs and expenses to $250, which may deter many attorneys from taking injured workers' cases. In contrast, the FEHA specifically allows courts to award reasonable fees and costs to the prevailing plaintiff. Finally, where workers' compensation does not require accommodation for an injured worker, the FEHA includes an accommodations provision that could fill an important gap in the workers' compensation system by increasing the opportunities for injured workers to return to work safely.

Although the rewards and protections are greater under the FEHA than under the workers' compensation system, Moorpark also provided a safety net for injured workers who suffer from disability discrimination. Leaving the door open for some protection under section 132a may have provided (and may continue to provide in some instances) an option for injured workers who cannot access the FEHA's protections.

The enactment of the Poppink Act, however, may reduce the need for such a safety net. By expanding the definition of "disability," the Act expands eligibility for protection under the FEHA, potentially making it easier for workers, including industrially injured workers, to seek protection under this civil rights law. Depending on how the courts interpret the specific changes to the FEHA, more classes of injured workers may be able to take advantage of the FEHA's remedies, which were designed to address discrimination, and receive reasonable accommodations in order to return to work safely.

By providing relief under civil rights anti-discrimination statutes, courts have leveled the playing field for disabled workers. Courts may now offer the same remedies to disabled individuals, regardless of the source of their disability. However, the addition of these remedies to the historically

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16. CAL. LAB. CODE § 132a(1).
17. See, e.g., Johnson v. Civil Serv. Comm'n, 200 Cal. Rptr. 289, 292 (Ct. App. 1984) (ordering the city of San Diego to hire plaintiff as a firefighter). Injunctive relief is not expressly provided by the FEHA, but is provided by analogy to the federal courts' authority to provide this type of relief in employment discrimination cases. See 42 U.S.C. §2000e-5(g) (2003); CALIFORNIA EMPLOYMENT LAW §43.01(8)(d) (Matthew Bender & Co. 2003). See, e.g., County of Alameda v. FEHC, 200 Cal. Rptr. 381, 385-86 (Ct. App. 1984) (granting retroactive seniority).
20. CAL. GOV'T CODE § 12,965(b) (West 2003).
21. CAL. GOV'T CODE § 12,940(m) (West 2003).
22. Injured workers who work for employers with fewer than five employees are not eligible for the FEHA's protections. CAL GOV'T CODE § 12,926(d) (West 2003). Also, temporarily disabled employees have not been able to access the ADA's protections; however, courts may reevaluate the FEHA's applicability to temporary disabilities after the Poppink Act. See Section IV.A. for a more complete discussion.
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The insular workers' compensation system has also created a complicated intersection of laws. Because the FEHA remedies and workers' compensation system were not necessarily designed to work together, these policies have often been criticized for a lack of consistency and uniformity. Employees with work related injuries who suffer from discrimination must not only find their way through the complicated paths of the individual schemes, they must often navigate the interrelationships. This note attempts to disentangle some of these issues to aid injured workers in using the protections Moorpark intended and the Poppink Act supplies.

To place the potential impact of the Poppink Act in the context of disability discrimination protections for injured workers, section I of this note provides a brief history of disability discrimination law within the workers' compensation system, including a discussion of City of Moorpark. Section II examines and compares the remedies of section 132a and the FEHA. Section III discusses access to section 132a and the FEHA. Finally, section IV explores the Poppink Act and its potential ramifications for injured workers and concludes that by expanding the reach of the FEHA, the Poppink Act may offer disabled workers access to the protections Moorpark intended to provide.

I.
SECTION 132A, THE EXCLUSIVITY RULE, AND THE WORKERS' COMPENSATION BARGAIN

The exclusive remedy rule of the California Workers' Compensation Act severely limits an injured worker's potential actions against her employer. Aside from a few statutory exceptions, the Act states that, in the case of a work-related injury or death, the right to recover workers' compensation benefits is the "sole and exclusive remedy of the employee or his or her dependants against the employer." The rule is based upon a theoretical compensation bargain under which

25. CAL. LAB. CODE § 3602 et seq. provides the following exceptions to the exclusive remedy rule: where the employer's "willful physical assault" proximately causes the injury or death, where the employer's "fraudulent concealment of the existence of the injury" aggravates the employee's injury, and where the employer's defective product causes the injury or death. CAL. LAB. CODE §§ 3602 (b)(1)-(3) (West 2003). In addition, the exclusive remedy rule does not apply where an employer "fails to secure the payment of compensation" or when an employee's injury or death is proximately caused by the employer's responsibility concerning a "point of operation guard on a power press." CAL. LAB. CODE §§ 3706, 4558(b) (West 2003).
26. CAL. LAB. CODE § 3602(a).
an employer assumes liability on a no-fault basis in exchange for a limit on the employer’s liability.\textsuperscript{27} In other words, under the bargain, the injured employee receives “relatively swift and certain” compensation benefits in exchange for relinquishing the right to a more generous common law remedy.\textsuperscript{28} As a result of the bargain, the employer has immunity from the threat of compensatory damages, punitive damages, and litigation.\textsuperscript{29}

This historic trade-off was designed to replace personal injury actions based on negligence.\textsuperscript{30} Prior to the adoption of workers’ compensation laws around the beginning of the twentieth century,\textsuperscript{31} employees suing for their industrial injuries had the difficult burden of proving that the employer did not exercise “due care” and that the employer’s negligence was a proximate cause of the injury.\textsuperscript{32} In addition, employers often thwarted liability through assertion of the assumption of risk, fellow servant, and contributory negligence defenses.\textsuperscript{33}

Employers agreed to this bargain in the context of industrialization, which had brought about an increase in the number of dangerous jobs. The compensation bargain soothed employers’ fears of escalating liability costs and allowed them to pass the burden of higher accident costs back to workers by decreasing wages.\textsuperscript{34} On the whole, the workers’ compensation bargain nearly eliminated the employee’s burden of proof, while allowing the employer to reduce potential post-accident costs.\textsuperscript{35}

California Labor Code section 132a is the anti-discrimination provision of the Workers’ Compensation Act. The statute is introduced by a broad policy statement, which declares that it is unlawful for an employer to discriminate against employees injured in the course and scope of employment.\textsuperscript{36} In relevant part, the statute reads:

\begin{quote}

28. Id. at 755 (citing Iverson v. Atlas Pac. Eng’g, 191 Cal. Rptr. 696, 698 (Ct. App. 1983)).
32. Id. at 308.
33. Id. at 309.
34. Id. at 309-310.
35. Moscovitz, supra note 30, at 593-594.
36. The statute states: “It is the declared policy of this state that there should not be discrimination against workers who are injured in the course and scope of their employment.” CAL. LAB. CODE § 132a.
\end{quote}
Any employer who discharges, or threatens to discharge, or in any manner discriminates against an employee because he or she has filed or made known his or her intention to file a claim for compensation with his or her employer or an application for adjudication, or because the employee has received a rating, award, or settlement, is guilty of a misdemeanor and the employee's compensation shall be increased by one-half, but in no event more than ten thousand dollars ($10,000), together with costs and expenses not in excess of two hundred and fifty dollars ($250). Any such employee shall also be entitled to reinstatement and reimbursement for lost wages and work benefits caused by the acts of the employer. . . .

Although section 132a does not contain an explicit "exclusive remedy" provision, prior to Moorpark, California courts consistently held that section 132a should provide the exclusive remedy for injured workers who suffer from disability discrimination.38

A. The Cases Before Moorpark

Prior to Moorpark, California courts consistently placed disability discrimination based on industrial injuries within the compensation bargain. Among the earlier cases, Portillo v. G.T. Price Products39 most strongly emphasized the application of the exclusive remedy provision to disability discrimination cases, setting the tone for future decisions. In Portillo, the plaintiff brought a wrongful discharge claim against her employer who had allegedly fired her for filing a 132a claim.40 The Portillo Court relied on the compensation bargain to justify the exclusivity of the workers' compensation remedy provision.41 Although the plaintiff argued that section 132a, with its compensation limits and lenient punishment provisions, offered insufficient remedies, the Court replied that "the fact that the exclusivity of remedy . . . is for the benefit of workers, generally outweighs any occasional disadvantage that could be argued."42 The Court also noted that the workers benefit consists of "quick determination of their claims" without regard to an employer's common law defenses.43

Portillo was followed by a line of cases echoing this rationale. For example, in 1988, the court in Pickrel v. General Telephone Co. applied the

37. Id.
40. Id. at 292.
41. Id. at 293.
42. Id.
43. Id.
exclusive remedy doctrine where a plaintiff alleged she was terminated due to a back injury she had suffered on the job. Subsequently, the cases of Usher v. American Airlines, Angell v. Peterson Tractor, and Langridge v. Oakland Unified School District upheld the concept that disability discrimination cases based on industrial injuries belonged within the workers' compensation bargain and, consequently, out of the reach of other civil remedies.

In 1993, the same year that Usher v. American Airlines was decided, the California legislature amended the Fair Employment and Housing Act through Government Code section 12993. The amended code states:

Nothing in this part shall be deemed to repeal any of the provisions of the Civil Rights Law or of any other law of this state relating to discrimination... unless those provisions provide less protection to the enumerated classes of person covered under this part.

In other words, under section 12993, the FEHA took priority over other state laws that addressed discrimination but provided less protection.

It would not be difficult to argue, and in fact the Court of Appeal in the Moorpark case did argue, that the limited remedies of section 132a provide less protection than the more expansive remedies of the FEHA. However, until Moorpark, courts continued to emphasize the exclusivity of workers' compensation for the disability discrimination claims of injured employees. In December 1993, soon after the amendments were added, a California Court of Appeal in Usher v. American Airlines deemed work-related injury discrimination to fall within the compensation bargain and, thus, out of the reach of the FEHA. The Court justified its reasoning by stating that the legislature was likely aware of the workers' compensation exclusivity rule when it enacted the FEHA and absent an explicit repeal, section 132a was appropriate for discrimination based on work-related injuries. One year later, a California Court of Appeal in Angell v. Peterson Tractor reemphasized that workers' compensation should be the exclusive remedy for a plaintiff who had allegedly been discriminatorily terminated due to a
physical disability. In so holding, the Court made no reference to the 1993 amendments.

Until the 1998 decision of *City of Moorpark*, California Courts confirmed that the compensation bargain should encompass the disability discrimination claims of injured workers. The California Supreme Court's decision in *Moorpark* transformed the landscape of discrimination protection by allowing injured workers to seek remedies outside of the workers' compensation system.

**B. City of Moorpark**

In *City of Moorpark*, the California Supreme Court ultimately decided not to address the potential effect of the FEHA amendment on section 132a. Rather, it abrogated the exclusivity rule on three grounds. It compared disability discrimination with other types of employer behavior that fell outside of the compensation bargain, argued that the FEHA should not be restricted to non-industrial disabilities, and, finally, emphasized the unique nature of section 132a in the context of the Workers' Compensation Act. The Court acknowledged the greater protections of the FEHA, but laid out the protections of section 132a as an option. Although the Court argued for the application of the FEHA, it stopped short of holding that the FEHA displaces section 132a. By addressing the rationale of *Portillo* and subsequent cases instead of looking toward the FEHA amendments under which the FEHA could possibly override section 132a, the Court nullified the exclusivity of workers' compensation while maintaining access to the protections of section 132a.

**1. Moorpark Addresses the Previous Line of Cases Denoting Employer Behavior Outside the Compensation Bargain**

The *Moorpark* Court held that disability discrimination should not fall within the compensation bargain. This decision was the next logical step in a line of cases in the late 1980's and early 1990's in which courts had delineated employer behaviors that should fall outside of the compensation bargain. For instance, in *Cole v. Fair Oaks Fire Protection*, the California Supreme Court noted that the exclusive remedy of workers' compensation

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52. 26 Cal. Rptr. 2d at 543.
53. 959 P.2d at 758.
54. Id. at 763.
55. Id. at 760.
56. See id. at 758-759.
57. Id. at 758-760.
58. Id. at 763-764.
should continue to apply to situations that are part of the "normal" employment relationship, such as promotions and demotions. However, the Court also observed that this exclusive remedy is not appropriate to address "conduct where the employer or insurer stepped out of their proper roles."  

Subsequently, the Court in *Shoemaker v. Myers* stated that actions that result from employer misconduct and do not reasonably stem from the intent of the parties implicit in the compensation bargain may lead to separate civil remedies. The Court in *Gantt v. Sentry Insurance* reaffirmed the rationales of *Shoemaker* and *Cole* by holding that an employment act that violates fundamental public policy does not fall within the 'normal part of the employment relationship' and, thus, should not be subject to the compensation bargain's exclusivity rule. Specifically, the *Gantt* Court held that the workers' compensation bargain should not include racial or sexual discrimination because these are violations of the "interests of the state and contrary to public policy and sound morality."  

Although none of these cases directly implicated section 132a, because these cases discussed situations in which employees had suffered from physical or psychological injuries after wrongful termination, the *Moorpark* Court recognized their rationale. In particular, the Court in *Moorpark*, extending the reasoning of *Shoemaker* and *Gantt*, emphasized that "termination in violation of section 132a is just as 'obnoxious to the interests of the state and contrary to public policy and sound morality' as sexual or racial discrimination." Thus, the *Moorpark* Court held that "a section 132a violation, like sexual and racial discrimination, falls outside of the compensation bargain."  

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60. Id. at 751.
63. Id.
64. 959 P.2d at 759 (citing Gantt, 824 P.2d at 692).
65. Id. Although the *Moorpark* Court did not cite to any lower court decisions, the California Courts of Appeal had also been moving toward placing certain types of employment discrimination outside of the compensation bargain. For instance, in 1988, a California Court of Appeals, looking to Michigan and Washington court decisions separating civil rights violations from the workers' compensation exclusive remedy, held in *Jones v. Los Angeles Community College District* that racial discrimination should similarly fall outside of the bargain. The Court in *Jones* stated that the workers' compensation system would be inadequate to address the racial discrimination the plaintiff was forced to endure. In fact, the Court stated that "a failure to recognize a cause of action under such circumstances also furthers a policy in favor of discrimination in the workplace." *Jones v. Los Angeles Cmty. College Dist.*, 244 Cal. Rptr. 37, 43-44, 45 (Ct. App. 1988) (emphasis in original). The following year, basing its decision in part on *Jones*, a California Court of Appeal reluctantly removed religious discrimination from the scope of the compensation bargain. *Goldman v. Wilsey Foods, Inc.*, 265 Cal. Rptr. 294, 300 (Ct. App. 1989). The Court noted that the policy behind the workers' compensation act favored upholding the exclusivity of the remedy and only removed religious discrimination from the
The fact that sex and race discrimination were deemed to fall outside the bargain indicates the courts' acknowledgement that the compensation bargain was not meant to encompass these types of harms. In the context of discrimination, the bargain does not make sense. The bargain merely eliminated the employee's burden of proving negligence; it was never designed to address civil rights. Although discrimination due to occupational injury remained within the compensation bargain and, consequently, under the sole jurisdiction of section 132a until Moorpark, the logical next step was to place it on the same level as race, gender, and religious discrimination.

2. Moorpark Emphasizes the FEHA's Protections

The second ground on which the Moorpark Court based its decision to abrogate the exclusivity of workers' compensation focused on the breadth of the FEHA and its applicability to injured workers. The Court began by citing the FEHA's public policy statement against discrimination and noted that the legislature declared that the FEHA should be construed liberally. Thus, the Court concluded, the legislature would not have intended the FEHA's provision to apply to workers disabled by non-work injuries but not those disabled by industrial injuries. Next, the Court cited previous decisions that "emphasized the breadth of the FEHA." In the past, the Moorpark Court noted, the California Supreme Court had held that the FEHA should "supplement" and "amplify" existing antidiscrimination remedies. Finally, the Moorpark Court reasoned that, as the educational provisions of the workers' compensation law mandated that workers' compensation education include a pamphlet informing injured workers of their rights under the FEHA, injured workers informed of their rights...
under the civil rights statute should be able to exercise those rights.\textsuperscript{74}

3. Moorpark Emphasizes Section 132a’s Protections

The Moorpark Court’s final ground for abrogating exclusivity under section 132a was based on considering section 132a as separate from the rest of the Workers’ Compensation Act, which is subject to exclusivity.\textsuperscript{75} The Court reasoned that section 132a does not contain an express exclusive remedy clause and that the general exclusivity of workers’ compensation law should not apply to section 132a.\textsuperscript{76} Moreover, the Court stated that section 3600 of the California Labor Code, which mandates that workers’ compensation shall be the exclusive remedy “in lieu of any other liability whatsoever,” refers only to division four of the Labor Code.\textsuperscript{77} The Court emphasized that section 132a is found in division one of the Labor Code, which offers definition and general rules, and that “remedies the legislature placed in other divisions of the Labor Code are simply not subject to the workers’ compensation exclusive remedy provision.”\textsuperscript{78}

In addition to this statutory analysis, the Court also designated section 132a a civil rights statute. It noted that section 132a is substantively unique; while other remedies in the workers’ compensation system focus on medical treatment, section 132a addresses an employee’s civil rights.\textsuperscript{79}

In conclusion, the Moorpark Court used three arguments to hold that disability discrimination should fall outside of the scope of the compensation bargain. First, the Court extended the reasoning of previous cases, which had excluded certain employer behaviors from the compensation bargain, to include disability discrimination claims.\textsuperscript{80} Second, the Court emphasized that the breadth of the FEHA supported the exclusion of disability discrimination from the compensation bargain.\textsuperscript{81} Finally, the Court determined that section 132a was a special provision separate from the Workers’ Compensation Act and, thus, not subject to the exclusivity provision.\textsuperscript{82} The Court ultimately concluded that employees suffering from disability discrimination due to workplace injuries were not limited to remedies under section 132a.

\textsuperscript{74} Id.
\textsuperscript{75} Id. at 759.
\textsuperscript{76} Id.
\textsuperscript{77} Id. Division four addresses general workers’ compensation rules.
\textsuperscript{78} Id.
\textsuperscript{79} Id. at 758.
\textsuperscript{80} Id. at 759.
\textsuperscript{81} Id. at 760-761.
\textsuperscript{82} Id. at 759.
II.
SECTION 132A, THE FEHA, AND THE REMEDIES THEY PROVIDE

Offering injured workers an option of filing disability discrimination claims under either section 132a or the FEHA was a momentous step in the realm of disability rights. To better understand what is at stake for injured workers who decide to file claims under either statute, it is helpful to examine the remedies and protections each provides as well as the paradigms from which they stem.

A. Section 132a and Its Remedies

California Labor Code section 132a was written in 1941, not as a civil rights statute, but as a provision to protect employees who had filed workers’ compensation claims from retaliation by their employers. The original statute read:

Any employer who discharges, or threatens to discharge, or in any other manner discriminates against any employee because the latter has filed or made known his intention to file an application or complaint with the commission, or because the employee has testified or made known an intention to testify in any investigation or proceeding held by the commission, is guilty of a misdemeanor.

Approximately thirty years later, two significant changes were made. The first change was the legislature’s 1972 addition of a broad policy statement to the statute: “It is the declared policy of this state that there should not be discrimination against workers who are injured in the course and scope of their employment.” This statement, though suggestive of the language of civil rights statutes, did nothing to change the statute’s express provisions. The statute continued to limit the employee’s potential remedies to filing a claim, testifying, or receiving a “rating, award, or settlement.” The second significant change occurred in 1978 when, in Judson Steel, the California Supreme Court interpreted section 132a to protect any employee who suffers from discrimination because of a work-related injury; the negative employment action did not have to be

83. 1941 Cal. Stat. 401.1 (current version at CAL. LAB. CODE § 132(a)).
84. Id.
85. Id.
87. CAL. LAB. CODE § 132a.
88. CAL. LAB. CODE § 132a(1).
specifically named in section 132a. 89

Although the statute’s policy statement and the Court in *Judson Steel* attempted to bring section 132a into the civil rights context, section 132a’s remedies continue to ground the statute in the workers’ compensation paradigm. As previously noted, in successful 132a cases, the workers’ compensation award can be increased by one-half, to a maximum increase of $10,000. 90 The limited damages provisions of section 132a correspond to the artificially low benefits throughout the workers’ compensation system. This artificially low compensation stems from the fact that the workers’ compensation system was never intended to make whole an injured worker. 91 Instead, compensation is designed to prevent injured workers from needing to receive welfare benefits while they are disabled and to encourage rehabilitation and subsequent return to work. 92

Interestingly, the low compensation amount also extends to workers’ compensation attorneys. Under section 132a, attorneys’ costs and expenses are limited to $250 (payable by the defendant employer). 93 While this low fee does not apply directly to injured workers, it may discourage attorneys from representing plaintiffs.

Section 132a also provides for reinstatement of the injured employee. While this remedy does reflect the “back to work” policy of the workers’ compensation system, it does not take into account the fact that reinstatement may not be a viable option for employees who have suffered from discrimination (or made allegations of discrimination). Such employees may not want to return to work; alternatively, they may not feel welcome to. If, consequently, reinstatement is not an option, the employee cannot receive front pay under section 132a as she may under the FEHA. 94

Finally, an employer who violates section 132a can be found guilty of a misdemeanor. 94 California Labor Code § 23 states that any offense declared to be a misdemeanor by the California Labor Code is punishable with a fine of up to $1000 and/or time in the county jail (not to exceed six months). 95 Once again, the limit on punitive damages seems to stem from the workers’ compensation system’s inception. The purpose of the Workers’ Compensation Act was to encourage a productive work force

90. CAL. LAB. CODE § 132a(1).
91. See *Universal City Studios, Inc. v. WCAB*, 160 Cal. Rptr. 597 (Cl. App. 1979) (citing *West v. Indus. Accident Comm’n*, 180 P.2d 972, 978 (Cal. 1947)) (stating that providing compensation for all consequences of an employee’s injury may lead to employee malingering and carelessness).
92. *Id*. See also *ARTHUR LARSON, WORKERS’ COMPENSATION LAW: CASE MATERIALS AND TEXT* S.20 (1984) (explaining that workers’ compensation benefits are designed to prevent an injured worker from burdening others and to prevent malingering).
93. CAL. LAB. CODE § 132a(1).
94. *Id*.
95. CAL. LAB. CODE § 23 (West 2003).
through the rehabilitation of injured workers rather than the punishment of employers.96

While the limited awards of section 132a comport with the general workers' compensation policy of maintaining benefits at levels designed to encourage workers to go back to work, they are out of place in a statute designed to protect workers from discrimination.

B. The FEHA and Its Remedies

Unlike section 132a, which is part of a system designed to address physical injuries, the FEHA was created to address discrimination at the state level while using the federal statutes as models. At the federal level, Congress extended civil rights protection to persons with disabilities for the first time through the Rehabilitation Act of 1973.97 Under the Rehabilitation Act, covered entities (the federal government, federal contractors, and recipients of federal funds) could not discriminate against employees or applicants on the basis of disability.98 Subsequently, Congress passed the Americans with Disabilities Act of 1990, which, among other things, expanded protection to employees of private employers.99

The California legislature modeled the major definitions in the FEHA's disability provisions after the Rehabilitation Act regulations.100 Enacted in 1980, the FEHA repealed the California Fair Employment Practices Act.101 The California Fair Employment Practices Act, enacted in 1959, had added disability to its list of protected categories in 1973.102

The FEHA was modified in 1992, after the enactment of the American Disabilities Act of 1990 to replace the term "handicap" with "disability," and further refine its definitions.103 As discussed below, the current version of the FEHA after the Poppink Act provides the most protection against disability discrimination in California to date.

Like the introduction to section 132a, the FEHA specifically uses the language of civil rights statutes and states that "the opportunity to seek, obtain and hold employment without discrimination because of... physical disability [and] mental disability... is hereby recognized as and declared to

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96. Moscovitz, supra note 30, at 600.
103. CAL. GOV'T CODE § 12,926(k).
be a civil right.'104 Unlike section 132a, however, the FEHA aims to eliminate discriminatory practices by providing remedies that address the "adverse effects of those practices on aggrieved persons."105 Thus, the remedies of the FEHA attempt to restore an individual to the status she would have enjoyed but for the discriminatory action.

Consequently, significant compensatory damages for emotional distress and mental suffering are available under the FEHA.106 While damages in a Department of Fair Employment and Housing hearing are limited to $150,000, no limit exists for damages awarded in a private lawsuit.107 In addition, compensatory damages can cover any other resulting damages that are not part of back or front pay.108 The potential for compensatory damages under the FEHA is staggering compared to the $10,000 limit under section 132a.

A successful plaintiff under the FEHA can also receive front pay if the discrimination caused her to lose earnings past the date of judgment or if reinstatement is not feasible.109 In contrast, section 132a has no such provision. By providing this type of remedy, the FEHA authors seemed to recognize that there are lasting emotional and financial effects of discrimination.

The FEHA also "highlights an employee's right to an appropriate working environment"110 as it attempts to "prevent and deter unlawful employment practices."111 To this end, significant punitive damages are available when the discriminatory act is accompanied by malice, oppression, or fraud.112 Courts can also enjoin discriminatory policies or practices.113 For example, in Aguilar v. Avis Rent A Car, the Court enjoined the use of racial epithets in the work environment.114

Finally, unlike the $250 attorneys' cost limit under section 132a, under the FEHA, courts will ordinarily award reasonable fees and costs to the prevailing plaintiff (without limits) unless special circumstances would

104. CAL. GOV'T CODE § 12,921(a).
105. CAL. GOV'T CODE § 12,920.5.
106. See, e.g., Rojo v. Kliger, 801 P.2d 373, 381 (Cal. 1990) (affirming that both compensatory and punitive damages are available under the FEHA in civil actions).
107. CAL. GOV'T CODE §§ 12970(a)(3) and (c).
110. Hughes, supra note 8, at 517.
111. CAL. GOV'T CODE § 12,920.5.
112. See Commodore Home Sys., 649 P.2d at 914 (citing CAL. CIV. CODE § 3294). While punitive damages are available in civil actions, the Fair Employment and Housing Commission does not have the power to award them.
113. As discussed supra note 18, injunctive relief is not expressly provided by the FEHA, but is provided by analogy to the federal courts' authority to provide this type of relief in employment discrimination cases. See 42 U.S.C. §2000e-5(g) (2003).
114. 980 P.2d 846, 853 (Cal. 1999).
show the award to be unjust. Overall, the remedies available under the FEHA, far greater than those found in the workers' compensation system, reflect the civil rights statute's goal of addressing discrimination with appropriate injunctive and monetary remedies and deterring discriminatory acts through punitive damages.

III.
ACCESS TO SECTION 132A AND THE FEHA, AND THE POTENTIAL OF THE POPPINK ACT

Although the FEHA's protections seem more appropriate for addressing disability discrimination, protection under section 132a has historically been more inclusive. For example, prior to the Poppink Act, while employees with occupationally related temporary disabilities may have been able to file a claim under section 132a, these same employees would certainly not have been able to meet the definition of "disability" to qualify for the FEHA's protections. Depending on how courts interpret its terms, the Poppink Act may make it easier for such workers to access the civil rights statute.

This section will discuss the general eligibility requirements of filing under section 132a and the FEHA, including the evolution of the definition of "disability" under the FEHA. The section will also elaborate on the changes that accompanied the Poppink Act and discuss the potential ramifications of these changes upon injured workers.

A. Statutory Requirements and Exceptions

As the Moorpark Court noted, the "standards for establishing disability discrimination" differ under section 132a and the FEHA. Section 132a, uses the requirements of the workers' compensation system to determine disability discrimination, and the FEHA contains its own eligibility limitations and explicit exceptions.

First, the FEHA does not apply to independent contractors, workers employed by family members, and those employed by religious organizations (unless organized for private profit). In addition, the FEHA does not apply to private employers with fewer than five employees.

115. CAL. GOV'T CODE § 12,965(b).
116. However, some employees, such as those who work for an employer with fewer than five employees, will have to continue to rely on the workers' compensation statute.
117. 959 P.2d at 761.
118. CAL. GOV'T CODE §12,926. However the statute does protect independent contractors under its harassment provisions. See CAL. GOV'T CODE §12,940(j) (West 2003).
119. CAL. GOV'T CODE §12,926. Once again, the harassment statute is an exception that provides protection to employees regardless of the size of the employer. CAL. GOV'T CODE § 12,940(j)(4)(A).
Similar to the FEHA, section 132a also does not cover independent contractors. However, there are no blanket exceptions for family members as in the FEHA. In addition, section 132a does not make exceptions for religious organizations. Finally, coverage under section 132a is not predicated upon the size of the employer.

Both the FEHA and section 132a, however, focus on the employment relationship to determine eligibility. The FEHA defines employees as those working under the control and direction of an employer. The term “employee” in the workers’ compensation system is defined by section 3351 of the California Labor Code, which states that an employee includes “every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed.”

B. “Injured Employees” Under Section 132a

In general, section 132a echoes the requirement for a cause of action under the workers’ compensation system. Section 132a states that “it is the declared policy of California that there should not be discrimination against workers who are injured in the course and scope of their employment.” Concordant with this policy statement, a cause of action arises under the Workers’ Compensation Act when an industrially injured employee is injured in the “course and scope” of employment. Although there are complicated exceptions, an injury occurs within the “course of employment” “where, at the time of injury, the employee is performing service growing out of and incidental to his or her employment and is acting

120. There are exceptions for family members who work as residential employees for a limited amount of time. CAL. LAB. CODE § 3352(a) excludes from the definition of “employee” any person defined in §3352(d) who is employed by his or her parent, spouse, or child. CAL. LAB. CODE §3352(d) refers to any person employed by the owner or occupant of a residential dwelling, including the care and supervision of children, or whose duties are personal and not in the course of the trade, business, profession, or occupation of the owner or occupant except as provided in California Labor Code § 3352(h), which addresses the time and pay limits.

121. CAL. CODE REGS. tit 2, § 7286.5(b) (West 2003).

122. CAL. LAB. CODE § 3351. In fact, section 132a’s language specifically focuses on this employer-employee relationship. It states that discrimination is not allowed “against workers who are injured in the course and scope of their employment.” CAL. LAB. CODE § 132(a) (emphasis added). In addition, 132a(1) provides that liability may be established against an “employer who discharges, or threatens to discharge, or in any manner discriminates against any employee” (emphasis added). Case law further supports the need for an employment relationship. For example, the Court in City of Anaheim reasoned that since the primary remedies of 132a are reinstatement and recovery of lost wages, the statute implies an employer-employee relationship requirement. City of Anaheim v. WCAB, 177 Cal. Rptr. 441, 444 (Ct. App. 1981).

123. CAL. LAB. CODE § 132a.

124. CAL. LAB. CODE § 3600(a).

125. For instance, there are a number of employer defenses such as employee intoxication, and self-inflicted injury. CAL. LAB. CODE §§ 3600(a)(4) and (5).
within the course of his or her employment." The injury must also be proximately caused by the employment. A covered injury can include any injury or disease that arises out of employment including conditions that are specific or cumulative, as well as aggravations of preexisting conditions or diseases.

The requirements of a prima facie showing of discrimination under section 132a have evolved through case law. Although the Court in Judson Steel pointed to the general anti-discrimination policy of section 132a and provided employers with a "business realities" defense to discrimination claims, it did not define the term "discrimination." Subsequently, in 1984, the Court of Appeal in Smith v. WCAB held that an "action which works to the detriment of the employee because of an injury is unlawful under section 132a."

Although the Smith "detriment" test has often been accepted as the general rule for proving discrimination under section 132a, the California Supreme Court in Lauher recently challenged this test. Lauher, which was decided on June 26, 2003, changed the landscape for a prima facie showing of discrimination under section 132a. The Court in Lauher addressed the question of whether an employer discriminates against an industrially-injured employee under section 132a if it requires the employee to use sick and vacation time for medical appointments during the work day to treat a permanent injury. The Worker's Compensation Judge ("WCJ") held that Lauher had established a sufficient connection between his industrial injury and his employer's conduct of requiring him to take sick leave and that the employer had failed to establish a good faith business necessity to justify these actions. The Fourth Appellate District annulled the decision stating that Lauher had not met his burden of establishing a prima facie case under section 132a. The Court stated that in order to show a violation of section 132a, an injured worker must show more than that she or he "suffered some adverse result as a consequence of some

126. CAL. LAB. CODE § 3600(a)(2).
127. CAL. LAB. CODE § 3600(a)(3).
131. Dep't of Rehab. v. WCAB, 70 P.3d 1076 (Cal. 2003).
133. Ronald Lauher, an industrially injured employee of the Department of Rehabilitation received ongoing medical treatment after his condition was deemed permanent and stationary. The Department of Rehabilitation refused to pay for the time he was at the medical appointments scheduled during the work day. 70 P.3d at 1078-1079.
134. Id. at 1079.
135. Id. at 1080.
action or inaction by the employer that was triggered by the industrial injury.”

The California Supreme Court agreed with the Court of Appeal and held that Lauher’s showing of “detrimental consequences” resulting from his industrial injury was not enough to establish a prima facie case under section 132a. The Court emphasized that the workers’ compensation system does not offer a “make-whole remedy” and that “an employer does not necessarily engage in ‘discrimination’ prohibited by section 132a merely because it requires an employee to shoulder some of the disadvantages of his industrial injury.” The Court focused on the fact that other employees had to follow the policy of using sick leave to attend medical appointment and that Lauher was not singled out because of his industrial injury.

The California Supreme Court noted that holding otherwise would “elevate those who had suffered industrial injuries to a point where they enjoyed rights superior to those of their co-workers.” However, by dismantling the previously accepted Smith “detriment” test, the Court made it much more difficult for injured workers to prove discrimination under section 132a. Still, the employee does not have to prove that she is “disabled” as she must under the definitions of the FEHA.

C. “Disabled Employees” Under the FEHA

Unlike individuals in any other protected category in the FEHA, those seeking to bring a claim of disability discrimination must first prove that they have a disability (as defined by the statute). The FEHA, similar to the ADA, provides a three-pronged definition of a person with a “physical disability.” To be considered physically disabled, one must have (1) a disease or condition that (2) affects one or more delineated body systems and limits a major life activity and (3) have a record of such a condition (or be regarded or treated as having such a condition). The FEHA defines a mental disability as including, but not limited to having a mental or psychological disorder or condition, such as mental retardation,
organic brain syndrome, emotional or mental illness, or specific learning
disabilities, that limits a major life activity. Eligibility for protection
begins with these definitions.

At its inception, the FEHA defined “physical handicap” as an
“impairment of sight, hearing, or speech, or impairment of physical ability
because of amputation or loss of function or coordination, or any other
health impairment which requires special education or related services.” This
definition had been originally adopted by the California legislature in
1973 in California Labor Code section 1420 as part of the California Fair

California’s discrimination protections were also molded by federal
statutes. The FEHA’s accompanying regulations, issued by the newly
formed Fair Employment and Housing Commission (“FEHC”) in 1980,
closely echoed the language of the federal Rehabilitation Act of 1973
(“Rehabilitation Act”). Although the Rehabilitation Act used the term
“condition” instead of “handicap,” both the FEHC regulations and the
Rehabilitation Act defined a disabled individual as one who (1) has a
physical handicap which substantially limits one or more major life activity
(2) has a record of such a physical handicap; or (3) is regarded as having
such a physical handicap.

In 1982 (two years after the enactment of the FEHA), the California
Supreme Court decided the case of American National Insurance v.
FEHC and established boundaries for the FEHA’s definition of “physical
handicap.” In American National, the plaintiff, who had high blood
pressure, was fired from his job and brought a claim for disability
discrimination under the FEHA. The Court held that the plaintiff’s high
blood pressure was a “physical handicap” under the state statute, and further
established a test to determine the types of conditions that qualify as
physical handicaps under the statute. The Court interpreted section
12926 broadly and held that the list of disabilities contained in the statute
was not “exhaustive.” In order to qualify for protection under the FEHA,
an individual must show that (1) the illness or defect is physical, and 2) that

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144. CAL. GOV'T CODE § 12,926(i)(1).
145. The term “disability” was not used in the statute until 1992.
CODE § 12,926(h)).
147. Id.
148. Id. at 1149.
149. Cassista, 856 P.2d at 1149 (citing CAL. CODE REGS. tit. 2 § 7293(i)). Rehabilitation Act of
151. Id. at 1152-1153.
152. Id. at 1154.
153. Id.
it is handicapping.” The Court also noted that “a condition of the body which has that disabling effect is a physical handicap.” Finally, the Court held that a “physical handicap” should be construed according to Webster’s definition as “a disadvantage that makes achievement unusually difficult.” Although the Court construed the statute broadly, it did exclude non-physical handicaps from the statute’s protection.

When the FEHA was amended in 1992, following the enactment of the ADA, the California legislature stated that the new definition of disability would echo the former statute’s definition of “physical handicap” as defined by American National. In addition to articulating, for the first time, a definition of mental disability, the legislature provided a new three-prong definition of physical disability and updated the term “physical handicap” to “disability.” The amendments stated that the definition of physical disabilities included, but was not limited to, the following:

1. Having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following:
   (A) affects one or more of the following body systems: neurological, immunological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine.
   (B) limits an individual’s ability to participate in major life activities.

The amendment was modeled after the newly enacted ADA. Its similarity to the 1980 FEHC regulations is no coincidence since both the ADA and the regulations were modeled after the Rehabilitation Act. In fact, the only marked difference between the 1992 amendment’s definition and that of the ADA, was the lack of the word “substantially” in describing the limit of an individual’s ability to participate in a major life activity.

While the word “substantially” was clearly absent from the amended statute, the California Supreme Court, in the 1993 case of Cassista v.
Community Foods,\textsuperscript{164} leaned toward a "substantial limitation" interpretation.\textsuperscript{165} Although the Court acknowledged the new statutory language, it indicated the similarities between the federal and state discrimination statutes. It noted that the ADA’s definition of a "disability," which did include the word "substantially," was modeled after the Rehabilitation Act and that, subsequently, the FEHA’s 1992 amendments were modeled after the ADA.\textsuperscript{166} Since the state and federal statutes were derived from the same source, the Court stated that the new definition of "disability" and the interpretation of "handicap" (which had also been based on the Rehabilitation Act and included the term "substantially") were "in harmony."\textsuperscript{167}

\textbf{D. The Poppink Act and Its Potential Impact}

In 2001, the Poppink Act, amended the FEHA and has offered new hope to California’s disability advocates, as well as to California’s injured workers. The changes arrived at a low point in federal disability discrimination litigation. While the drafters of the Americans with Disabilities Act (ADA) had created a powerful structure to address disability discrimination, it has subsequently been watered down by judicial opinions.\textsuperscript{168} The federal judiciary has interpreted the statute narrowly, making it extremely difficult for persons with disabilities to fit within the definition of a “qualified individual with a disability” as protected under the statute.\textsuperscript{169} Studies tracking ADA cases found that a significant majority of plaintiffs were simply unable to win their cases.\textsuperscript{170} At the trial court level, defendants prevailed in over ninety-three per cent of reported employment discrimination cases filed under the ADA.\textsuperscript{171}

The drafters of the Poppink Act took advantage of the fact that the ADA establishes minimum protections and does not “invalidate or limit [state] remedies. . .that provide[] greater or equal protection for the rights of

\begin{thebibliography}{9}
\bibitem{164} 856 P.2d 1143.
\bibitem{165}  Id. See Murphy, supra note 158, at 507-509.
\bibitem{166} Cassista, 856 P.2d at 1150-1151.
\bibitem{167} Id. at 1150.
\bibitem{169} Id.
\bibitem{170} Id. (citing American Bar Ass’n Comm’n on Mental & Physical Disability, Study Finds Employers Win Most ADA Title I Judicial and Administrative Complaints, 22 MENTAL AND PHYSICAL DISABILITY L. REP. 403; Ruth Colker, The Americans with Disabilities Act: A Windfall for Defendants, 34 HARV. C.R.-C.L. L. REV. 99 (1999)).
\bibitem{171} Colker, supra note 170, 99-100 (citing the American Bar Association’s Commission on Mental and Physical Disabilities).
\end{thebibliography}
individuals with disabilities than are afforded by this chapter."

Through the Poppink Act, the legislature declared that California's disability discrimination protections are "independent from" the ADA and offer "additional protections" beyond those in the federal statute.

Through the Poppink Act, the FEHA set itself apart from its federal analog in a number of ways. First, the California legislature drafted the FEHA's definition of "disability" more broadly and inclusively than the ADA's definition. Under the FEHA, a "disability" is a mental or physical impairment that "limits" a major life activity, while under the ADA the condition must "substantially limit[]" a major life activity. Section 12926.1(c) of the FEHA states that this "distinction is intended to result in broader coverage under the law of this state than under [the ADA]."

Under the FEHA, a condition limits a major life activity if "it makes the achievement of the major life activity difficult." In addition, the California legislature emphasized the difference between state and federal law by noting that the state law is independent of the federal law regardless of Cassista, which had veered toward requiring a "substantial" limitation.

The ADA, on the other hand, followed the Equal Employment Opportunity Commission ("E.E.O.C.") regulations defining an impairment as "substantially limiting" if an individual cannot "perform a major life activity that the average person in the general population can perform" or if an individual is "significantly restricted as to the condition, manner, or duration under which an individual can perform a particular major life activity[]." The regulations state that the following factors should be considered when determining whether an individual is substantially limited: (1) the nature and severity of the impairment; (2) the duration or expected duration of the impairment; and (3) the permanent or long term impact[]."

Second, unlike the ADA, the amended FEHA notes that mitigating

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172. 42 U.S.C § 12,201(b) (West 2003).
173. CAL. GOV'T CODE § 12,926.1(A).
176. CAL. GOV'T CODE § 12,926.1(c).
177. CAL. GOV'T CODE § 12,926(k)(1)(B)(ii).
178. CAL. GOV'T CODE § 12,926.1(d).
measures should not be considered when determining whether a person has a limitation under the statute.182 Instead, the statute states that "whether a condition limits a major life activity shall be determined without respect to any mitigating measures, unless the mitigating measure itself limits a major life activity, regardless of federal law under the [ADA]."183

Once again, the FEHA, as amended by the Poppink Act, expands its protections beyond those of the ADA. Although the initial E.E.O.C. guidelines also suggested that an impairment should be "determined without regard to mitigating measure,"184 the E.E.O.C. has amended its guidelines in light of subsequent Supreme Court rulings.185

These recent rulings include three cases: 1) Sutton v. United Airlines, in which the Supreme Court found that correctable myopia was not a "disability" under the ADA because it could be corrected with lenses;186 2) Murphy v. United Parcel Service, in which a plaintiff with high blood pressure was found not "disabled" under the ADA where his condition was controlled with medication;187 and 3) Albertson's v. Kirkingburg, in which the Supreme Court ruled that a truck driver with an eye condition was improperly deemed "disabled" by the Ninth Circuit since the lower court had not considered the ability of the plaintiff's own body to compensate for his condition.188 Notably, when considering the Poppink Act, the California legislature specifically addressed the "Sutton Trilogy," stating that the Poppink Act "would send a clear message that California is not in accord with the recent trilogy of United States Supreme Court decisions in Sutton v. United Airlines...Murphy v. UPS...and Albertson's v. Kirkingburg[.]"189

Finally, the FEHA specifically includes "working" as a major life activity.190 Once again, the California legislature addressed the difference between the state statute and the ADA by noting that working is a major life activity "regardless of whether the actual or perceived working limitation implicates a particular employment or a class or broad range of

182. CAL. GOV'N CODE § 12,926.1(c).
183. Id.
184. Murphy, supra note 158, at 525-526 (citing 29 C.F.R. § 1630.2(h) (1999)).
185. Murphy, supra note 158, at 526 (citing 65 Fed. Reg. 36,327). The EEOC issued an amended final rule was issued on June 8, 2000, which stated that "this rule rescinds several sentences of the Interpretive Guidance on Title I of the Americans with Disabilities Act that address mitigating measures used by persons with impairments. This action is necessary as a result of recent Supreme Court rulings."
186. Sutton, 527 U.S. at 488-89.
187. Id. at 521.
188. Id. at 556.
189. Murphy, supra note 158, at 532 (citing Senate Rules Committee, Third Reading, August 28, 2000, available at www.leginfo.ca.gov/pub/99-00/bill/asm/ab_2201-2205/ab_2222_cfa_20000829_091548_sen_floor.html).
190. CAL. GOV'T CODE § 12,926.1(c).
While the ADA does not explicitly state that working is a major life activity, the E.E.O.C. guidelines do include working as an example of a major life activity. However, the Supreme Court in *Sutton* determined that, to be "substantially limited" in the major life activity of working, a plaintiff must show that she would be precluded by her disability from working in a broad class of jobs. The Court stated that a person must be "precluded from more than one type of job, a specialized job, or a particular job of choice" in order to be "substantially limited." The Court also noted that if another job utilizing an individual's skills is available, "one is not precluded from a substantial class of jobs." Most recently, the Supreme Court in *Toyota Manufacturing, Kentucky Inc. v. Williams* stated that "occupation-specific tasks" only have "limited relevance" to the question of whether or not tasks are "important parts of individuals' lives."

IV.

THE POTENTIAL IMPACT OF THE POPPINK ACT

From January 1, 2001, when the Prudence K. Poppink Act became effective, until February 2003, California appellate courts were concerned more with the retroactivity of the Poppink Act than the interpretation of the amended statute. When considering whether the statute was retroactive, several courts addressed the question of whether the Poppink Act was a clarification of or significant change in disability law. In February 2003, the California Supreme Court in *Colmenares v. Braemer Country Club* ultimately held that the Poppink Act did not change, but clarified the degree of limitation required. Furthermore, the Court held that both before and after the passage of the Poppink Act, the FEHA's test of a physical disability was whether it limits, not substantially limits, a major life

191. *Id.*
192. 29 C.F.R. § 1630.2(i).
194. *Id.*
195. *Id.*
196. 534 U.S. 184, 201 (2002).
197. For instance, the California Court of Appeals in *Colmenares v. Braemer Country Club* determined that the Poppink Act should not be applied retroactively because it represented a significant change in the law. 107 Cal. Rptr. 2d 719, 722-723 (Ct. App. 2001) superseded by grant of review, 63 P. 3d 220 (Cal. 2003). However, in *Wittkof v. County of Los Angeles,* the Second Appellate District found that the Poppink Act serves to clarify the degree of limitation required, not change California's disability law. The Court added that as clarified, the statute should not apply retroactively. 109 Cal. Rptr. 2d 543, 548 (Ct. App. 2001) superseded by grant of review, 33 P.3d 446 (Cal. 2001) review dismissed, 69 P.3d 977 (Cal. 2003).
198. 63 P.3d at 224.
Although the Colmenares opinion emphasizes the greater protection that the FEHA offers, the courts have yet to address some of the terms used in the newly expanded FEHA statute. While the Poppink Act clearly applies a broader definition of "disability," the courts will ultimately have to apply and, in the process, further define such terms as "limits" and "difficult." Perhaps after the Poppink Act, disability discrimination cases will turn more on the question of whether an employer discriminated against a disabled employee, as opposed to determining whether an employee is "disabled."

Specifically, certain classes of injured workers who would certainly be excluded under the ADA may be protected under the FEHA. For example, as described below, workers with temporary disabilities may qualify for protection under the FEHA though they are not disabled under the ADA. In addition, the FEHA's duty to accommodate a person with a disability is an incredibly significant addition for injured workers, as the workers' compensation system contains no such requirement. The next section considers specifically how temporarily disabled workers may benefit under the Poppink Act.

A. Temporarily Disabled Workers as an Example

The changes to the FEHA enacted through the Poppink Act may have a direct effect on injured workers with temporary or episodic disabilities. These employees are among the most vulnerable to being unprotected under section 132a. The worker's compensation statute's fee structure has the practical effect of making a temporarily disabled plaintiff's claim less attractive to potential applicants' attorneys.

Although the workers' compensation system is designed to work without attorneys, laypersons often require legal assistance due to the complex laws and procedures. However, the contingency fee structure (which allows for fees of nine to fifteen per cent of the permanent disability award) may determine what types of cases an attorney will be willing to take. Since attorneys' costs and expenses of 132a claims are limited to $250, workers' compensation attorneys often cannot afford (or think they

199. Id.
200. Murphy, supra note 158, at 538.
201. See Mary Crossley, The Disability Kaleidoscope, 74 NOTRE DAME L. REV. 621 (1999). According to Crossley, the question of a person's "disability" has been the main issue in more than half of the disability discrimination cases filed under the ADA.
202. JULIANN SUM, LEGAL SERVICES AVAILABLE TO INJURED WORKERS IN CALIFORNIA, 2 (2002).
can not afford) to take on a client's 132a case. An attorney may take the case only in conjunction with an injured worker's other claims in the system, which must usually be fairly substantial (i.e. permanent disability claims) to make the contingency fee worthwhile. Thus, injured workers who have a temporary disability or a low level of permanent disability may not be able to find representation for their general workers' compensation claims or their related discrimination claim under section 132a.

Perhaps, after the Poppink Act, the California Courts will reevaluate the statute's applicability to temporary disabilities. The FEHA's definition of disability does not include a temporal requirement, nor does the California Code of Regulations provide any guidance on the issue. In addition, as of yet, there is no case law addressing the issue of time in defining a disability.

The distinction between the FEHA's "limiting" and the ADA's "substantially limiting" requirement could be significant in the courts' future examination of any temporal requirements for establishing a "disability." In addition, the FEHA provides several categories of per se disabilities, including epilepsy, seizure disorder, and heart disease that may be "chronic or episodic." This statement clearly separates the language of the FEHA from the way episodic and temporary disabilities have been treated under the ADA.

While the ADA, like the FEHA, does not contain any reference to duration limits on disabilities, the E.E.O.C. guidelines suggest that the "duration" and "permanent or long term impact" of an individual's disability be considered when evaluating whether a major life activity is "substantially limited." Consequently, circuit courts have nearly unanimously found impairments of a very temporary nature not to be disabilities within the ADA.

204. See CAL. LAB. CODE § 132a. There seem to be differing opinions on the usefulness of the $250 fee limits. While some applicant attorneys interviewed said that the fee provision kept them from taking discrimination cases, other attorneys noted that they can actually receive higher fees through these cases. Since backpay is not included in the general attorney fee restriction (nine to fifteen per cent), attorneys may ask for fees in excess of fifteen per cent.

205. See CAL. GOV'T CODE §§ 12,940-12951 (West 2003).

206. See CAL. CODE REGS. tit. 2 § 7293.6.

207. CAL. GOV'T CODE § 12,926.1(c).


210. Burgdorf, supra note 208, at 486-487 (citing Vande Zande v. Wisc. Dep't of Admin., 44 F.3d 538 (7th Cir. 1995); Gordon v. E.L. Hamm & Assoc., 100 F. 3d 907 (11th Cir. 1996); Sanders v. Arneson Products, Inc., 91 F.3d 1351 (9th Cir. 1996); McDonald v. Penn. Dep't of Public Welfare, 62 F.3d 92 (3d Cir. 1995); Hamm v. Runyon, 51 F. 3d 721 (7th Cir. 1995). See also EEOC v. Sara Lee Corp., 237 F.3d 349, 352 (4th Cir. 2001).
The Seventh Circuit was the first to address this temporal issue in *Vande Zande v. Wisconsin Department of Administration*. There, a paralyzed woman sought accommodation for pressure ulcers she periodically developed.\(^{211}\) The Court stated that "[i]ntermittent, episodic impairment" should not qualify as a disability under the ADA.\(^{212}\) After *Vande Zande*, several circuit court cases followed its logic and found temporary disabilities not to be "disabilities" for purposes of the ADA.\(^{213}\) The Supreme Court in *Toyota Manufacturing v. Williams* reemphasized that the E.E.O.C. regulations instruct that, when deciding whether an individual is substantially limited in a major life activity, an impairment’s impact must be "permanent or long-term."\(^{214}\)

**B. The FEHA’s Accommodations Requirement**

Though *Moorpark* does not mention the duty to accommodate under the FEHA, by breaking the exclusivity of workers’ compensation while maintaining its protections, the California Supreme Court created an environment in which the two laws can work together. The FEHA’s duty to accommodate may fill a gap in the workers’ compensation system for some injured workers. Since there is no authority stating whether section 132a requires employers to create reasonable accommodations for injured workers, the established protections in the FEHA may help injured workers return to work safely.

Returning to work is an important issue for injured workers. It is often the best option for avoiding financial loss. Over the course of five years, injured workers from both insured and self-insured companies tend to lose more than 30% of the income they could have earned without sustaining an injury.\(^{215}\) Accommodation programs instituted by employers can increase the likelihood that injured workers will successfully return to work.\(^{216}\) Studies have shown that the return-to-work rate can double when employers offer modified work programs.\(^{217}\)

\(^{211}\) *Id.* at 482 (citing *Vande Zande*, 44 F.3d at 543-44).

\(^{212}\) *Id.* (citing *Vande Zande*, 44 F.3d at 544).

\(^{213}\) *Id.* at 482-86.

\(^{214}\) 534 U.S. 184, 197 (2003) (citing 29 CFR §§ 1630.2(j)(2)(i)-(iii)).

\(^{215}\) The Court in *Barns v. WCAB* implies that an employer should accommodate an employee while she is healing; however, there are no published opinions on whether or not an employer must accommodate an injured worker with a permanent disability. 266 Cal. Rptr. 503 (Ct. App. 1989).


\(^{217}\) *Id.*

The workers' compensation system does not require an employer to accommodate injured workers. In fact, a recent study suggests that employers may have a greater incentive to terminate, rather than accommodate, injured workers. Participants in the study stated that employers often refuse to bring back injured workers because of concern regarding the cost of accommodations.

Accommodations, however, have proven to be cost-effective. A recent study by the Department of Labor found that seventy-one percent of job accommodations cost less than $500 and that twenty percent of these accommodations cost nothing. This relatively low cost of accommodations provides companies with substantial benefits, including the prevention of lost work days and elimination of the cost of training new employees to do the job. In addition, employers who take the time to learn about accommodations can design their workplace to minimize injury for all employees, thereby reducing future workers' compensation costs.

Often, disabled individuals are denied employment opportunities on the basis of biases and prejudices, which have nothing to do with work capabilities. In reality, employees with accommodated disabilities perform on approximately the same level as non-disabled employees. According to a 1990 survey, ninety percent of disabled employees rated average or better than average in job performance compared to ninety-five percent of non-disabled employees. A similar, earlier study found that ninety-two percent of disabled employees rated average or better than average compared to ninety percent of non-disabled employees.

One way in which the workers' compensation system does address job modification is through the vocational rehabilitation program, which is designed to bring an employee back to work or retrain the employee for a new job. Since 1994, an employer may offer an injured worker alternative or modified work instead of vocational rehabilitation benefits. A "modified work offer" means that an employee can return to her old job with modifications that make it possible to work within the confines of the individual's disability. An "alternative work offer" must conform to several requirements: the individual must have the physical capacity to perform the job, the job must pay no less than 85% of the prior job, and the job must be located at the old site or within reasonable commuting distance. Cal. Code Regs. tit. 8, § 10122 (2001).

219. One way in which the workers' compensation system does address job modification is through the vocational rehabilitation program, which is designed to bring an employee back to work or retrain the employee for a new job. Since 1994, an employer may offer an injured worker alternative or modified work instead of vocational rehabilitation benefits. A "modified work offer" means that an employee can return to her old job with modifications that make it possible to work within the confines of the individual's disability. An "alternative work offer" must conform to several requirements: the individual must have the physical capacity to perform the job, the job must pay no less than 85% of the prior job, and the job must be located at the old site or within reasonable commuting distance. Cal. Code Regs. tit. 8, § 10122 (2001).
220. Sum & Frank, supra note 216 at 17, 24.
221. Id. at 17.
224. Id. at 901.
225. Id. at 883.
227. Id.
In addition, reasonable accommodations, in practice, help "eliminate discriminatory practices" in accord with the FEHA's goal. By allowing disabled employees to work to their full potentials, employers work towards the eradication of negative and false stereotypes. Moreover, an increased number of disabled individuals in the workforce helps achieve a diverse environment.

The disability protections under the FEHA and the ADA require employers to reasonably accommodate known disabilities of any employee or applicant unless the accommodation would result in undue hardship. Through this duty to accommodate, the FEHA and the ADA introduced a new structure of equality into the legal world of civil rights. Unlike any prior piece of civil rights legislation, the statutes require employers to treat disabled people both the same and differently in order to be treated equally.

In other words, similar to other civil rights legislation, the ADA and the FEHA require equal treatment of similarly situated persons; however, the "duty to accommodate" also requires employers to treat disabled employees or applicants differently.

Although the FEHA does not define the term "reasonable accommodations," it does provide a non-exhaustive list of examples. For instance, acceptable accommodations "may include" making existing facilities readily accessible to individuals with disabilities and restructuring or modifying positions or devices.

In fact, if an employer knows about an employee's disability, she has the duty to investigate whether the disabled employee can be reasonably accommodated. The Court in Prilliman v. United Airlines stated that an employee's failure to request a specific accommodation was not relevant to a determination of reasonable accommodation.

If an injured worker can qualify as "disabled," she may establish a prima facie case of discrimination based on a denial of a "reasonable accommodation" by proving that the employer did not accommodate her

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228. CAL. GOV'T CODE § 12920 (West 2003).


230. CAL. GOV'T CODE § 12940.


232. Id.

233. CAL. GOV'T CODE § 12,926.


235. Prilliman, 62 Cal. Rptr. 2d at 142.

236. Id. at 152.
disability.\textsuperscript{237} For those injured workers who do qualify as "disabled," the duty to accommodate can potentially work in conjunction with the workers' compensation system's goals of safely returning injured workers to work.

As compared to the FEHA's duty to accommodate, the duty under the workers' compensation system is merely a duty not to discriminate. The FEHA's accommodations provision may make it more difficult for an employer to shirk the duty not to discriminate. For example, an important question in determining the validity of an injured worker's discrimination claim under section 132a is whether the employee is capable of performing her job.\textsuperscript{238} If the employee can establish that she is entitled to reasonable accommodations,\textsuperscript{239} these accommodations could make it more likely that the employee will be capable of safely performing her job and, consequently, more likely that her discrimination claim will be considered valid.

Another important consideration in 132a cases is whether safety considerations necessitated the employer's disputed conduct.\textsuperscript{240} If the employer can show that she reasonably believed that the employee would not be able to perform her regular job without re-injuring or furthering the injury, the employer is not guilty of discrimination for firing or refusing to reinstate the employee if business realities are demonstrated.\textsuperscript{241} Again, assuming a plaintiff can meet the other requirements prescribed by the


\textsuperscript{238} See Judson Steel v. WCAB, 586 P. 2d 564 (Cal. 1978) (finding discrimination where plaintiff was entitled to reasonable accommodations).

\textsuperscript{239} This would include demonstrating that the accommodation would not result in an undue hardship to the operation of the employer's business (defined as an action requiring significant difficulty or expense, when considered in light of such factors as: the cost and nature of the accommodation; the overall financial resources of the facilities; and the type of operations). \textsc{Cal. Gov't Code} § 12,940(s). The employee would also have to prove that she is able to perform her "essential duties" without risking the health and safety of herself or others. \textsc{Cal. Gov't Code} § 12,926(f).

\textsuperscript{240} Barns v. WCAB, 266 Cal. Rptr. 503, 503 (Ct. App. 1989). \textit{See also} Caputo v. WCAB, 52 Cal. Comp. Cas. 4, 4-5 (1986) (finding that the employer had not violated section 132a when he refused to rehire an injured employee after a doctor had stated that the employee was not able to do his job without the possibility of re-injury). According to Smith, conflicting, ambiguous, or unclear medical evidence on the issue of an employee's ability to return to work may still excuse an employer from violating 132a; the Court in Smith stated that it may only cause the employer to be reasonably cautious. Smith, 61 Cal. Comp. Cas. at 139. In this case, the workers' compensation judge had pointed out that the medical evidence was "sufficiently ambiguous so as to cause Defendant [employer] to be cautious." \textit{Id}. Nonetheless, the judge held that the employer's actions were not unreasonable. \textit{Id}.

\textsuperscript{241} See Barns, 266 Cal. Rptr. at 509. In the 132a process, once the employee has shown that the detrimental act was based on an industrial injury or claim, the employer must prove that the act was necessary and linked to business realities. \textit{See Judson Steel}, 586 P. 2d at 570; Smith, 199 Cal. Rptr. 881, 884 (Ct. App. 1984); Barns, 266 Cal. Rptr. at 507-508. For example, the employer can prevail by showing that an employee is permanently precluded from performing the job; that it was necessary to fill the employee's position and that the position was unavailable when the employee tried to return to work; or that there was no less detrimental alternative. \textit{See Silberman & Silberman, supra} note 86, at 13.
FEHA, accommodation may prevent re-injury, thereby making a discrimination claim under section 132a more viable.

In addition, under section 132a, if the employer reasonably believes "that the worker is permanently disabled from performing the job, or will be disabled for . . . a long time," termination and replacement of an employee with a disability does not violate section 132a. As discussed above, the permanence of an individual's disability may help qualify her for protection under the FEHA by bringing her within the definition of "disability." Assuming the plaintiff can qualify (including being able to perform the essential duties of her job), the FEHA may protect an employee from losing her job due to her permanent disability.

However, the duty to accommodate is not unlimited. The FEHA requires that the employer make reasonable accommodations unless this accommodation would place an undue hardship on the employer by imposing "significant difficulty or expense." To consider whether an accommodation is an undue hardship, courts consider the following factors: the overall financial resources of the company (including the number of employees); the type of business operation; and nature and cost of the accommodation. In addition, injured workers must still meet the definition of "disability" to trigger the employer's duty to accommodate.

While it may still be difficult to qualify for a right to accommodations under the FEHA, after the Poppink Act, an employer's duty to provide accommodations may make a significant impact on the lives of some injured employees seeking to return to work. Those who do qualify for protection under the FEHA would be entitled to safe accommodations. Even those who do not qualify may benefit from the intersection of the workers' compensation system and the FEHA. The addition of a civil rights remedy increases injured workers' bargaining power and the threat of an ADA or FEHA claim may cause employers to be more accommodating in general.

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242. See Barns, 266 Cal. Rptr. at 509.
243. Id. (emphasis in original).
244. See CAL. GOV'T CODE § 12,926(f).
245. CAL. GOV'T CODE § 12,940(k).
246. CAL. GOV'T CODE § 12,926(p).
247. Id.
V.

CONCLUSION

The Workers' Compensation Act and the FEHA stem from different histories and ideologies. Workers' compensation was created to address physical injuries in the workplace, while the FEHA was born of the civil rights movement. While the workers' compensation system considers the ways in which an injured worker will not be able to perform her job, the FEHA facilitates a disabled person's achievement of her highest possible productivity.\(^{249}\)

Although California Labor Code section 132a and the FEHA's disability discrimination provisions stem from two different paradigms, they may be able to work both parallel to, as well as in conjunction with, each other to provide industrially injured workers with maximum protection against discrimination. In addition, section 132a continues to be a safety net for those injured workers who cannot qualify under the FEHA. However, after the passage of the Poppink Act, the disability provisions of the FEHA are more inclusive than ever before, providing injured workers greater access to more appropriate remedies for discrimination. In addition, the accommodations requirements of the FEHA may be able to fill a gap in the workers' compensation system by protecting injured workers who return to work.

According to California's Division of Labor Statistics and Research, there were an estimated 790,000 non-fatal occupational injuries and illnesses in California in 2000.\(^{250}\) Moorpark presents these injured workers with two systems in which to seek redress should they suffer from discrimination as a result of their injuries. By expanding the reach of the FEHA, the Poppink Act may offer more of these workers access to the protections Moorpark intended to provide.

\(^{249}\) Id. at 415.