Disabling Workers' Compensation Exclusivity: Enabling California Workers to File Work-Related Disability Discrimination Claims in State Court

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"DISABLING" WORKERS' COMPENSATION EXCLUSIVITY: ENABLING CALIFORNIA WORKERS TO FILE WORK-RELATED DISABILITY DISCRIMINATION CLAIMS IN STATE COURT

I. INTRODUCTION

The California Workers' Compensation Act\(^1\) ("WCA" or "Workers' Compensation Act") provides an exclusive system of compensation for workers injured in the course and scope of their employment.\(^2\) Created to benefit both the employer and the injured worker, the California workers' compensation system provides workers with the opportunity to attain full and swift compensation for work-related injuries without regard to fault while relieving employers of the burden of potentially large civil damage awards.\(^3\) Traditionally, this presumed "compensation bargain"\(^4\) has been interpreted broadly to extend to claims of discrimination based on a work-related injury which results in a disability, making the workers' compensation system a worker's exclusive remedy for such a discrimination claim.

Until recently, California courts uniformly agreed that the workers' compensation exclusivity provisions applied to work-related disability discrimination claims and, specifically, that section 132a of the California Labor Code,\(^5\) part of the Workers' Compensation Act, provided a worker's exclu-

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4. See discussion infra Part II.C.2.
sive remedy for his or her discrimination claim based on a disability arising out of a work-related injury. Conversely, claims of discrimination based on a nonwork-related injury giving rise to a disability had traditionally been unactionable. However, in 1992, with the advent of the Federal Americans with Disabilities Act of 1990 ("ADA"), California amended its Fair Employment and Housing Act ("FEHA") to provide employees with protection against discrimination based on a disability. Therefore, as of the 1992 amendment, a worker has been able to bring a claim against his or her employer for disability discrimination with the Department of Fair Employment and Housing ("DFEH") when the disability arises out of an injury that is not work-related. In most cases, a disabled worker is now protected from discrimination based on his or her disability, irrespective of how he or she becomes disabled.

However, the FEHA was amended again in 1993 to provide that its provisions are to preempt any provision of state law providing less protection to an employee than the FEHA does. The 1993 amendment makes the FEHA the exception to other laws. Now, it is to control whenever another state law provides less protection. Subsequent to this amendment, it has been argued that the workers' compensation laws provide less protection to workers and, therefore, that even a worker with a work-related disability can take advantage of the more liberal protections extended by the FEHA. How-

6. See discussion infra Parts II.C, IV.A.1.a. Disability discrimination claims where the underlying injury resulting in a disability is not work-related (i.e. where the injury is suffered off-the-job) are subject to the jurisdiction of the Department of Fair Employment and Housing. See discussion infra Part IV.A.1.b.

7. See discussion infra Part II.B.2.a. The FEHA has not always protected employees from discrimination based on a disability. It was not until the passage of the Americans with Disabilities Act of 1990, infra note 8, that mental and physical disabilities were protected at all. The FEHA adopted disabilities as part of its protection in 1992. See discussion infra Part II.B.2.a.


9. The FEHA is applicable to employers with five or more employees. Therefore, employees who work for employers with less than five employees cannot take advantage of the protections provided under the FEHA. See CAL. GOV'T CODE § 12926(d) (West 1989 & Supp. 1998) ("Employer" includes any person regularly employing five or more persons . . .").


11. Id.

12. See discussion infra Part II.D.2.
ever, in two appellate court cases decided since the enactment of the 1993 amendment to the FEHA—both dealing with disability discrimination—one court has held that the workers' compensation system is still an employee's exclusive remedy, while the other has read the amendment to permit an employee to sue for civil damages under the FEHA.\textsuperscript{13} This split makes it unclear under which remedial system an employee who is discriminated against based on a work-related disability can pursue his or her discrimination claim.

This comment first traces the development of the Workers' Compensation Act\textsuperscript{14} and how a broad reading of section 132a of the California Labor Code,\textsuperscript{15} read in conjunction with the exclusivity provisions of the workers' compensation laws,\textsuperscript{16} has come to apply to work-related disability discrimination claims.\textsuperscript{17} Next, this comment discusses the development of the Fair Employment and Housing Act\textsuperscript{18} and how the recent amendments to the FEHA,\textsuperscript{19} made, at least partly, in light of the passage of the ADA,\textsuperscript{20} affect work-related and nonwork-related disability discrimination claims. Then, this comment outlines the development of case law implicating discrimination claims brought by employees against their employers, both prior and subsequent to the recent amendments to the FEHA.\textsuperscript{21}

Further, this comment analyzes the effect of the recent amendments to the FEHA on work-related disability discrimination claims\textsuperscript{22} and, specifically, the reasoning of the courts in \textit{Cammack v. GTE California Inc.}\textsuperscript{23} and \textit{City of Moorpark v. Superior Court},\textsuperscript{24} the two conflicting cases on this issue recently decided by California appellate courts. It

\textsuperscript{15} CAL. LAB. CODE § 132a (West 1989 & Supp. 1998).
\textsuperscript{17} See discussion infra Part II.A.4-5.
\textsuperscript{19} See discussion infra Part II.B.2.
\textsuperscript{21} See discussion infra Part II.C.
\textsuperscript{22} See discussion infra Part IV.A.
\textsuperscript{23} 55 Cal. Rptr. 2d 837 (Ct. App. 1996).
\textsuperscript{24} 57 Cal. Rptr. 2d 156 (Ct. App. 1996).
is argued that the recent amendments to the FEHA preempt the exclusivity provisions of the Workers' Compensation Act, thereby giving an employee with a work-related disability for which he or she has been discriminated against the option to sue his or her employer under the FEHA for civil damages.25

This comment proposes that, in deciding this issue, the California Supreme Court reject the rationale of the Cammack court and follow that of the City of Moorpark court to permit the application of the FEHA to all disability discrimination claims over which it has jurisdiction, including those where the injury giving rise to the disability is work-related.26 Also proposed is giving the Workers' Compensation Appeals Board27 and the Department of Fair Employment and Housing28 concurrent jurisdiction over work-related disability claims so as to provide employees the option to sue under the FEHA or WCA.29 Finally, this comment offers some practical suggestions on how workers with a work-related disability discrimination claim should proceed in light of the current flux in the law.30

II. BACKGROUND

Recent California appellate court decisions have resulted in conflicting conclusions on the issue of whether state Fair Employment and Housing Act disability discrimination claims are preempted by the exclusive jurisdiction provisions of the Workers' Compensation Act.31 In order to better understand these recent decisions and their implications on employment litigation, it is necessary to closely examine the two intersecting branches of worker-protection laws in Cali-

25. See discussion infra Part IV.B.
26. See discussion infra Part V.
27. CAL. LAB. CODE § 111 (West 1989 & Supp. 1998). The Workers' Compensation Appeals Board ("WCAB") is the administrative body created to deal with workers' compensation claims. Id.
28. CAL. GOV'T CODE § 12901 (West 1989). The Department of Fair Employment and Housing ("DFEH") is the administrative body created to deal with discrimination claims, including those for disability discrimination. Id.
29. See discussion infra Part V.
30. See discussion infra Part V.
A. The Purpose of California's Workers' Compensation Laws and Legislative Intent of the Workers' Compensation Act

1. Overview of the Workers' Compensation Act

California's workers' compensation laws provide extensive and liberal protection to the state's workers. This protection extends to virtually all employees working within the state. The primary purpose of the workers' compensation statutes is to ensure that an employee injured in the course of his or her employment, and those dependent on him or her, have adequate means of sustenance while the employee is unable to work. In addition, the laws are aimed at promoting the employee's prompt recovery so that he or she can return to productive employment.

2. Constitutional Basis for California's Workers' Compensation Act

The California Constitution sets forth the intent of the people to establish a system of workers' compensation. Article XIV, section 4, empowers the California Legislature to enact legislation to create and enforce a complete system of workers' compensation... and in that behalf, to create and en-

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35. An "employee" is defined as "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 ..." CAL. LAB. CODE § 3351 (West 1989 & Supp. 1998).
36. O'Brien, supra note 34, at 1.
38. Id.
40. A complete system of workers' compensation includes: adequate provisions for the comfort, health and safety and general welfare of any and all persons to compensate any or all of their workers for injury or disability ... in the course of their employment, irrespec-
force a liability on the part of any or all of their workers for injury or disability, and their dependents for death incurred or sustained by the said workers in the course of their employment, irrespective of the fault of any party.  

Further, the California Constitution reflects the intent of the people to create a workers' compensation system which operates to accomplish "substantial justice in all cases expeditiously, inexpensively, and without encumbrance."

In the early 1900s, the California Legislature enacted statutes that are the basis of the current Workers' Compensation Act. These early enactments developed into the Workmen's Compensation, Insurance and Safety Act of 1917. In 1937, this Act was restated and codified in the California Labor Code. Over the last century, subsequent amendments and revisions to the WCA have been made. However, these amendments and revisions have not affected the basic premise of the workers' compensation system: to provide assistance to workers injured in the course and scope of their employment.

3. Purpose Behind the Workers' Compensation Act

The Workers’ Compensation Act seeks to ensure that California workers are afforded full and swift compensation for injuries suffered in the course of their employment without regard to fault. The WCA balances the worker’s interest...

Id.

41. Id. "The Legislature is hereby expressly vested with plenary power, unlimited by any provision of this constitution, to create, and enforce a complete system of workers' compensation, by appropriate legislation . . . ." Id.

42. Id.

43. ESKENAZI, supra note 37, § 1:3.


in a speedy no-fault determination of his or her claims for injury against the right to litigate for damages in a trial court.\textsuperscript{49} In exchange for assuming no-fault liability for injuries caused by the employee's work, an employer is relieved of the burden of potentially large civil action damage awards.\textsuperscript{50} At least in theory, both the employee and employer benefit from this system. The employee receives swift and certain compensation for his or her injury and the employer is relieved of the prospect of a large civil verdict.\textsuperscript{51}

One of the principal goals of the workers' compensation system is to ensure an employee receives medical treatment for his or her work-related injury and compensation for the time he or she is unable to work.\textsuperscript{52} Therefore, the purpose of providing an employee who has suffered a work-related injury with compensation is not to make the injured employee whole, but rather, to prevent the employee from going on welfare while disabled.\textsuperscript{53} This is why both the amount and type of damages recoverable in the workers' compensation system are limited.\textsuperscript{54}


a. Liberal Construction of the Workers' Compensation Act

The provisions of the Workers' Compensation Act are intended to be liberally construed in order to extend its benefits to injured employees.\textsuperscript{55} In order to effectuate the broad re-


\textsuperscript{50} Shoemaker v. Myers, 801 P.2d 1054, 1062 (Cal. 1990). Essentially, an employer is limited to providing payment of an employee's reasonable medical expenses and compensation for a percentage of the employee's lost wages based on the duration and extent of the employee's disability. See O'Brien, supra note 34, at 3.


\textsuperscript{52} See O'Brien, supra note 34, at 1.

\textsuperscript{53} 1 M. KIRBY WILCOX, CALIFORNIA EMPLOYMENT LAW § 20.01, at 20-8 (1996).

\textsuperscript{54} Id. at 20-9.

\textsuperscript{55} CAL. LAB. CODE § 3202 (West 1989); see 2 W. HANNA, CALIFORNIA LAW
The primary purpose of workers' compensation laws, the California Legislature has promulgated section 3202 of the California Labor Code, which requires that provisions of the Workers' Compensation Act be construed liberally by the courts. The California Supreme Court has interpreted this liberal construction mandate in a way which "favor[s]... awarding workers' compensation, not... permitting civil litigation." Therefore, even in situations where an employee could better benefit from bringing his or her claim in a civil court, he or she will likely be precluded from doing so. While this may present a sort of double-edged sword, to comport with the stated purpose of the workers' compensation laws, it is necessary to ensure that an employee is compensated for his or her work-related injury.

b. Workers' Compensation Exclusivity

Because the goal of workers' compensation is to provide employees with swift and certain compensation for their work-related injuries, the workers' compensation system seeks to keep as much of the employee-employer injury claims and related matters within the framework and jurisdiction of the Workers' Compensation Act as possible. Therefore, with only certain exceptions, the Workers' Compensation Act establishes an exclusive system of compensa-

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56. CAL. LAB. CODE § 3202 (West 1989) (“This division... shall be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment.”).


58. Id.


61. Id.

tion for workers injured in the course of their employment. Section 3600 of the California Labor Code provides that an employer’s liability for workers’ compensation is in lieu of any other liability. Section 3602 of the Labor Code provides that the right to recover against an employer under the Workers’ Compensation Act is generally the employee’s exclusive remedy.

The legal theory supporting this exclusive remedy provision is the presumed compensation bargain between an employer and his or her employee. In this bargain, the employer assumes liability for work-related personal injuries or death, irrespective of fault, in exchange for the limitation on the amount of that liability, while the employee is afforded relatively swift and certain payment of benefits to cure or relieve the effects of a work-related injury without having to prove fault but, in exchange, gives up the wider range of damages potentially available in tort. According to one commentator, the basic theory behind these exclusivity provisions is to further the idea “that an employer who has complied with the law by securing payment of benefits through insurance, permissible self-insurance, or in the case of a public agency, legal uninsurance, should be immune from tort actions brought by injured workers, their dependents, or heirs.”

5. Section 132a of the California Labor Code

Adopted in 1941, section 132a of the California Labor Code (“section 132a”) makes it unlawful for an employer to discriminate against an employee who has been injured in

64. Id. § 3600 (“Liability for the compensation provided by this division [is] in lieu of any other liability whatsoever to any person except as otherwise specifically provided in Sections 3602, 3706, and 4558 . . . .”).
65. Id. § 3602 (“Where the conditions of compensation set forth in Section 3600 concur, the right to recover such compensation is, except as specifically provided in this section and Sections 3706 and 4558, the sole and exclusive remedy of the employee or his or her dependents against the employer . . . .”).
68. HERLICK, supra note 51, at 1-4.
the course of his or her employment.\textsuperscript{70} In 1972, this section was amended to declare a general policy of the State of California that there should not be discrimination against workers injured in the course and scope of their employment.\textsuperscript{71} In 1978, it was further amended to provide for reinstatement and reimbursement for lost wages and work benefits caused by an employer's discriminatory acts, which were in addition to the increased compensation award that section 132a already had provided.\textsuperscript{72} Currently, section 132a reads, in relevant part:

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. (1) 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 . . . . \textsuperscript{73}  

\textsuperscript{70} CAL. LAB. CODE § 132a (West 1989 & Supp. 1998).
\textsuperscript{71} 1972 Cal. Stat. 1545 (S.B. 1157). The Legislative Counsel's Digest Note to section 132a of the Labor Code states that the rationale behind the change to the statute is to:

modify[\textsuperscript{]} provisions of workmen's compensation law penalizing an employer for discharging or in any manner discriminating against employee for described benefits or actions taken by employee. Makes comparable penalties applicable to workmen's compensation insurance carriers who advise, direct, or threaten an insured in order to have employee discharged for taking described action.

Id.  

\textsuperscript{72} 1978 Cal. Stat. 4349 (A.B. 2945). Punitive damages are not available under section 132a. See CAL. LAB. CODE § 132a (West 1989 & Supp. 1998); Johns-Manville Prods. Corp. v. Superior Court, 612 P.2d 948 (Cal. 1986). Additionally, the remedies under section 132a of the Labor Code are cumulative. See CAL. LAB. CODE § 132a (West 1989 & Supp. 1998). Therefore, the employee would be entitled to reinstatement with back pay and to the increased benefit if he or she was discharged. Id.  

\textsuperscript{73} Id.
Section 132a is designed to prevent retaliatory discrimination by employers against their employees who seek workers' compensation remedies based on work-related injuries.\(^7\) Although section 132a does not contain express exclusivity provisions,\(^7\) the exclusivity provisions of sections 3600-3602 of the California Labor Code have been interpreted by the California Supreme Court to include wrongful termination claims, making section 132a the statutory remedy for employees who are discriminated against based on a work-related injury.\(^7\) Therefore, a broad reading of the general policy considerations expressed in the preamble to section 132a and the language in section 3600 of the California Labor Code, stating that the Workers' Compensation Appeals Board is vested with full power to determine finally all matters specified in this section,\(^7\) makes it possible for an employer to be in violation of section 132a even if he or she has not violated any of the statute's specific provisions.\(^7\)

Section 132a has been interpreted to express "a policy opposing all discrimination against workers based solely on their having been injured in the course of employment."\(^7\) The California Supreme Court has held that an employee who is terminated based on a disability arising out of a work-related injury is limited to seeking redress against his employer under section 132a.\(^8\) Because section 132a serves a remedial function by providing some compensation to an employee who is penalized for having suffered a work-related injury, it is to be liberally construed.\(^8\)

Prior to the 1992 and 1993 amendments to the Fair Employment and Housing Act,\(^\) California courts uniformly held that a claim of disability discrimination arising out of a work-

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81. Id.
82. See discussion infra Part II.B.2.
related injury was preempted by section 132a. However, subsequent to the amendment to the FEHA providing for application of "other" California laws "unless those laws provided less protection than the FEHA," the issue of whether the FEHA or WCA laws are applicable to disability discrimination claims has arisen in the courts. In order to fully understand the implications of workers' compensation exclusivity provisions in light of the 1993 amendment to the FEHA, an explanation of the FEHA is required.

B. California's Fair Employment and Housing Act

1. Overview and Purpose of the Fair Employment and Housing Act

In 1959, California adopted a comprehensive police power measure prohibiting discrimination in employment. Subsequently, in 1980, that statute was repealed and replaced by the California Fair Employment and Housing Act ("FEHA"). The FEHA applies to employers, employees, employment agencies and labor organizations. It expresses the declared policy of the State of California to protect the right and opportunity of all employees to be free from discrimination in employment. The statute recognizes:

the practice of denying employment opportunity and discriminating in the terms of employment...foments domestic strife and unrest, deprives the state of the fullest utilization of its capacities for development and advance,


Although decided after the 1992 amendment to the FEHA, the court in Langridge v. Oakland Unified School District, 31 Cal. Rptr. 2d 34 (Ct. App. 1994), held that a claim of disability discrimination arising out of a work-related injury was preempted by section 132a of the California Labor Code.

85. See discussion infra Part II.D.
86. See discussion infra Part II.B.
and substantially and adversely affects the interest of employees, employers, and the public in general.\textsuperscript{91}

Therefore, its purpose is to "provide 'effective remedies which will eliminate such discriminatory practices.'\textsuperscript{92}

Under the FEHA, the right to be free from discrimination is declared to be a civil right.\textsuperscript{93} The FEHA expresses a legislative policy that it is necessary to protect and safeguard the right for an individual to hold employment without discrimination.\textsuperscript{94} To advance this policy, the Legislature has stated that the FEHA must be construed liberally.\textsuperscript{95} If there is an ambiguity that is not resolved by the legislative history of the FEHA or other extrinsic sources, the court is required to construe the FEHA so as to facilitate the exercise of jurisdiction by the Fair Employment and Housing Commission.\textsuperscript{96}

2. Recent Amendments to the FEHA

In 1992, as a result of the federal Americans with Disabilities Act,\textsuperscript{97} the FEHA was amended to provide employees with protection against discrimination based on a disability.\textsuperscript{98} Consequently, section 12993(a) of the FEHA reads:

The provisions of this part shall be construed liberally for the accomplishment of the purposes thereof. Nothing contained 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 because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex or age.\textsuperscript{99}

Additionally, in 1993, it was amended to provide that "[n]othing contained in this part shall be deemed to repeal

\textsuperscript{91.} Id.
\textsuperscript{92.} Id.
\textsuperscript{94.} CAL. GOV'T CODE § 12920 (West 1989 & Supp. 1998).
\textsuperscript{95.} CAL. GOV'T CODE § 12993(a) (West 1989 & Supp. 1998).
\textsuperscript{96.} See Brown v. Superior Court, 691 P.2d 272 (Cal. 1984). The Fair Employment and Housing Commission is now referred to as the Department of Fair Employment and Housing ("DFEH"). See also CAL. GOV'T CODE § 12925(b) (West 1989 & Supp. 1998).
\textsuperscript{98.} CAL. GOV'T CODE § 12993(a) (West 1989 & Supp. 1998); see also discussion infra Part II.B.2.a.
\textsuperscript{99.} Id. (emphasis added).
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 persons covered under this part.”

These amendments, which California courts have traditionally treated as an issue subject to workers’ compensation exclusivity, implicate an employee’s redress for a work-related injury resulting in a disability over which he or she is subsequently discriminated against.

a. Impact of the Americans with Disabilities Act on the FEHA—the 1992 Amendment to the FEHA

In 1990, Congress passed the Americans with Disabilities Act (“ADA”). On July 26, 1992, it became effective for employers with twenty-five or more employees and, as of July 26, 1994, extended to employers with fifteen or more employees. The Act specifically recognized the compelling need to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities and for the integration of persons with disabilities into the economic and social mainstream of American life. It further recognized a need to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities.

Prior to 1992, the FEHA prohibited specific acts of discrimination against persons with a physical handicap. However, in 1992, California amended its Fair Employment

100. Id. (emphasis added).
102. See discussion infra Part IV.
103. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. §§ 12101-12213 (1994)). Under the ADA, an employee is required to show: (1) that he or she has, or is perceived to have, a disability; (2) that, despite the real or perceived disability, he or she is qualified to perform the essential functions of the job with reasonable accommodation; (3) but that the employer refused to provide such reasonable accommodation; and (4) took adverse action (e.g. termination, demotion) against him or her because of the disability. 42 U.S.C. §§ 12111(8), 12112 (1994).
106. Id.
107. CAL. GOV'T CODE § 12993(a) (West 1989).
and Housing Act to comport with the ADA. The 1992 amendment was designed to broaden the rights of the state's disabled community and give added vitality to the ADA. Consequently, as of January 1, 1993, section 12920 of the California Government Code includes physical disability as one of the Act's protections against discrimination. Therefore, as of 1993, the FEHA has provided employees with protection against discrimination based on a disability.

b. FEHA Preemption to Provide Employees Protection from Discrimination in Employment—the 1993 Amendment to the FEHA

In 1993, section 12993(a) of the FEHA was amended to include the following phrase: “unless those provisions provide less protection to the enumerated classes of persons covered under this part.” The addition of this phrase illustrates the intention of the legislature to have the FEHA preempt any provision of state law that offers less protection. The FEHA has now become an exception to other laws, which are implicitly repealed unless they provide as much protection as the FEHA. The legislative history of the amendment of section 12993(a) indicates that the new FEHA provision was to apply to discrimination in housing. However, the actual revision of section 12993(a) does not distinguish between housing and employment situations.

111. Id.
113. Id.
114. Id.
C. Development of Case Law Implicating Discrimination Claims Brought by Employees Against Their Employers

1. Broad Application of Section 132a to Provide Employees with a Remedy Against Employers for Termination—the Judson Steel Case

Although Judson Steel Corp. v. Workers’ Compensation Appeals Board was decided nearly twenty years ago and does not directly implicate the disability discrimination issue, it is cited in nearly every California case dealing with the applicability of the exclusivity provisions of workers’ compensation laws to discrimination claims based on work-related injuries. Specifically, the case presented the issue of whether an employer who terminates an employee’s seniority rights and, ultimately, his employment, because of the employee’s absence from his job as the result of a work-related injury, has engaged in unlawful discrimination within the meaning of section 132a of the California Labor Code.

In Judson Steel, the employer appealed a Workers’ Compensation Appeals Board decision permitting the employee to pursue a claim for discrimination under section 132a. However, the California Supreme Court upheld the decision of the Workers’ Compensation Appeals Board. Basing its decision on the 1972 Amendment to section 132a providing that “it is the declared policy of this state that there should

117. In Judson Steel, the plaintiff was not terminated because of a disability for which the employer failed to make reasonable accommodation, but, rather, for missing too much work because of being temporarily disabled as a result of a work-related injury. Id. at 566.
118. See supra note 83; see also discussion supra Part II.A.4.b.
120. Id. at 566. The FEHA was not at issue in this case. The issue was whether to apply section 132a to a work-related disability discrimination claim or leave the employee without a remedy. Id. at 567.
121. Id. at 570. The employer made three arguments in support of its contention that section 132a should not be applied. First, the employer argued that the enumerated sections of section 132a limited the basis on which section 132a can be invoked. Id. at 568-69. Second, if section 132a were invoked in this situation, the employee would be subject to mandatory reinstatement in spite of any economic considerations of the employer. Id. at 569. And, third, it argued that section 132a provides for the imposing of a penalty and, therefore, must be strictly construed and cautiously applied. Judson Steel Corp. v. Workers’ Compensation Appeals Bd., 586 P.2d 564, 569-70 (Cal. 1978). The California Supreme Court rejected all three arguments. Id. at 570.
not be discrimination against workers who are injured in the course and scope of their employment," the court held that section 132a permitted the employee to bring a workers' compensation claim against his employer for stripping him of his seniority rights leading to his termination.\textsuperscript{123}

The court reasoned that despite the fact that there was no specific provision in section 132a covering the employee's claim, the 1972 amendment provided for a broad application of section 132a.\textsuperscript{124} This broad policy supports the theory that "[t]he policy of protection which the workers' compensation laws declare can only be effectuated if an employer may not discharge an employee because of the employee's absence from his job as the consequence of an injury sustained in the course and scope of [his] employment."\textsuperscript{125} Applying the broad policy provision of section 132a, the court permitted the employee to pursue his discrimination claim under section 132a.\textsuperscript{126}

\textit{Judson Steel} established what became the widely accepted interpretation of section 132a prior to the 1992 and 1993 amendments to the FEHA, expressing a broad policy against discrimination of all employees who sustain industrial injuries and not just those who exercise their rights under the Workers' Compensation Act.\textsuperscript{127} Up until recently, California courts have uniformly utilized the \textit{Judson Steel} analysis to construe section 132a to apply to all employer discrimination against workers injured in the course and scope of their employment, including discrimination based on a disability arising out of a work-related injury.\textsuperscript{128}

\begin{footnotes}
\footnotetext[122]{CAL. LAB. CODE § 132a (West 1989 & Supp. 1998).}
\footnotetext[123]{\textit{Judson Steel Corp.}, 586 P.2d at 570.}
\footnotetext[124]{\textit{Id.} at 568-69.}
\footnotetext[125]{\textit{Id.} at 570.}
\footnotetext[126]{\textit{Id.}}
\footnotetext[128]{City of Moorpark v. Superior Court, 57 Cal. Rptr. 2d 156 (Ct. App. 1996), \textit{review granted}, 926 P.2d 968 (Cal. Nov. 26, 1996).}
\footnotetext[129]{See \textit{supra} note 83 and accompanying text.}
\end{footnotes}
2. Exclusivity of Workers' Compensation Laws for Discrimination Claims Encompassed in Compensation Bargain

a. Disabling Injuries Resulting from Termination Considered Among the Risks Reasonably Within the Compensation Bargain—the Shoemaker Case

In Shoemaker v. Myers, a former employee brought several causes of action against his employer, including one for violation of California's "whistleblower" statute, after having been terminated by his employer. The employee attempted to maintain a cause of action under the FEHA by arguing that the whistleblower statute was distinct and separate legislation which "preempted" workers' compensation laws. In permitting the employee's cause of action under the whistleblower statute, the California Supreme Court held that since the whistleblower statute was more "specific," it preempted the more general Workers' Compensation Act and permitted the employee's cause of action under the FEHA.

However, while the court permitted a cause of action under the whistleblower statute, it concluded that disabling injuries, whether physical or mental, arising from termination of employment are generally within the coverage of workers' compensation and subject to its exclusive remedy provisions. Only when the discharge comes within an express or implied statutory exception or the discharge results from risks reasonably deemed not to be within the compensation bargain are the workers' compensation exclusivity provisions inapplicable. Therefore, the court stated that unless the conduct at issue was distinct from that which arises out of the normal employment relationship, an employee's exclusive remedy is found under the Workers' Compensation Act. Considering the purpose of the whistleblower stat-

130. 801 P.2d 1054 (Cal. 1990).
133. Id. at 1065.
134. Id. at 1066-67.
135. Id. at 1056.
137. Id. at 1065.
ute and its intention to cover conduct that does not arise out of the normal employment relationship, it need not be seen as reasonably coming within the compensation bargain. Thus, it is not preempted by workers' compensation laws.140

Shoemaker expresses the court's position on workers' compensation exclusivity as of 1990.141 Although disability discrimination claims under section 132a were not directly implicated by this decision, the general principle of workers' compensation exclusivity vis-à-vis the opportunity to collect civil damages indirectly affects claims of discrimination for a disability arising out of a work-related injury. In fact, subsequent appellate courts confronted with the issue of whether redress for disability discrimination arising out of a work-related injury is subject to workers' compensation exclusivity have used the Shoemaker compensation bargain analysis to preclude claims under the FEHA.142

b. Recent Appellate Court Decisions Utilizing the Compensation Bargain Analysis143

In light of Judson Steel144 and Shoemaker,145 a number of California appellate courts have indicated that the exclusive remedy provisions of the Workers' Compensation Act146 do not bar a civil action for damages under the FEHA for discrimi-

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138. *Id.* at 1066. The court found that the whistleblower statute was to expressly relate to state civil service and was intended to encourage and protect the reporting of on-the-job or job-related unlawful government actions and to effectively deter retaliation for such reporting. *Id.*

139. *Id.*

140. *Id.* at 1067.

141. Shoemaker v. Myers, 801 P.2d 1054 (Cal. 1990). *Shoemaker* was decided by the California Supreme Court on December 20, 1990. *Id.*

142. See discussion infra Part II.C.2.b.


nation in employment based on age, race, sex or religion. However, abundant decisional authority has established that a claim of disability discrimination arising prior to the 1992 and 1993 amendments to the FEHA out of a work-related injury is preempted by section 132a. Even after the 1992 amendment to the FEHA, which amended the act to include disability as a protected class against discrimination, but prior to its 1993 amendment, the appellate courts had barred a FEHA action for discrimination in employment based on a disability arising from a work-related injury. Persuaded by the rationale applied by the California Supreme Court in Judson Steel, California appellate courts had unanimously held that an employee's claim of disability discrimination arising out of a work-related injury is preempted by the exclusive remedy provisions of workers' compensation law. Three recent decisions applied the compensation bargain analysis promulgated in Shoemaker in determining the applicability of section 132a. These decisions are Langridge v. Oakland Unified School District, Angell v. Peterson Tractor and Usher v. American Airlines.

i. Langridge v. Oakland Unified School District

In Langridge, the California court of appeal for the first district, Division 5, held that an employee's claims under the FEHA for physical disability discrimination based on a work-related injury were preempted by the exclusive remedy provisions of workers' compensation laws. Basing its decision on the standard established in Shoemaker, that the exclusive remedy provisions of workers' compensation laws do not apply to employer conduct that does not constitute a risk re-

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147. See supra note 62.
148. See supra note 83; see also discussion supra Parts II.A.4.b, II.A.5.
149. See supra note 108.
151. Id.
153. 31 Cal. Rptr. 2d 34 (Ct. App. 1994).
154. 26 Cal. Rptr. 2d 541 (Ct. App. 1994).
155. 25 Cal. Rptr. 2d 335 (Ct. App. 1993).
156. Langridge, 31 Cal. Rptr. 2d at 38.
157. Shoemaker v. Myers, 801 P.2d 1054 (Cal. 1990); see also discussion supra Part II.C.2.a.
reasonably encompassed within the workers' compensation bar-
gain, the court concluded that because termination based on
a disability arising out of a work-related injury is a risk rea-
sonably considered in the compensation bargain, section 132a
is applicable.\textsuperscript{158}

ii. Angell v. Peterson Tractor

In its analysis, the \textit{Langridge} court cited \textit{Angell v. Pet-
erson Tractor}\textsuperscript{159} decided by the California court of appeal for the
third district.\textsuperscript{160} The \textit{Angell} court also found disability dis-
crimination to be within the compensation bargain contempl-
ated by the workers' compensation legislation, reasoning that
because the Legislature, through section 132a of the La-
bor Code, specifically placed work-related disability discrimi-
nation within the scope of workers' compensation law, such
conduct is within the scope of the compensation bargain.\textsuperscript{161}
The court also reasoned that section 132a controls because it
is more specific than the FEHA.\textsuperscript{162} While section 132a pro-
vides remedies for a specific type of discrimination—based on
work-related injuries—the FEHA proscribes all employment
discrimination based on a physical handicap, whether or not
work-related.\textsuperscript{163} Therefore, the \textit{Angell} court held that section
132a was to provide the exclusive remedy for an employee
discriminated against based on a disability arising out of a
work-related injury.\textsuperscript{164}

iii. Usher v. American Airlines

The \textit{Angell} court cited to \textit{Usher v. American Airlines},\textsuperscript{165}
decided by the California court of appeal for the first district,
Division 3.\textsuperscript{166} In \textit{Usher}, as in \textit{Angell}, the Court found that
section 132a controlled because it is more specific than the
FEHA.\textsuperscript{167} It reasoned that discrimination based on a disabil-
ity arising out of a work-related injury was, in effect, dis-

\textsuperscript{158} \textit{Langridge}, 31 Cal. Rptr. 2d at 37.
\textsuperscript{159} 26 Cal. Rptr. 2d 541 (Ct. App. 1994).
\textsuperscript{160} \textit{Id.}
\textsuperscript{161} \textit{Id.} at 550.
\textsuperscript{162} \textit{Id.} at 549-50.
\textsuperscript{163} \textit{Id.} at 550.
\textsuperscript{164} \textit{Id.} at 551.
\textsuperscript{165} 25 Cal. Rptr. 2d 335 (Ct. App. 1993).
\textsuperscript{166} \textit{Id.}
\textsuperscript{167} \textit{Id.} at 338.
crimination based on a work injury and that this type of discrimination is "expressly covered" by section 132a.\textsuperscript{168} Therefore, pursuant to the exclusive remedy provisions of sections 3600 and 3602 of the California Labor Code, the employee is barred from bringing a civil action for discrimination based on the same work-related injury.\textsuperscript{169} Using the rationale applied by the California Supreme Court in Shoemaker,\textsuperscript{170} the Usher court held that "where the employment injury causes the disability on which the discrimination claim is based, the exclusive remedy provisions of the Workers' Compensation Act apply."\textsuperscript{171}

Although all three of these cases were decided prior to the 1993 amendment to the FEHA,\textsuperscript{172} they reflect the trend in case law governing disability discrimination claims when the disability is a result of a work-related injury. The appellate courts had found that unless the conduct falls outside the compensation bargain, section 132a is applicable.\textsuperscript{173} However, the 1993 amendment went into effect as of January 1, 1994.\textsuperscript{174} Its implementation has spurred the current split in the California appellate courts as to whether state FEHA discrimination disability claims are still preempted by the exclusive jurisdiction of the WCA.\textsuperscript{175}

D. Disability Discrimination Claims After the 1993 Amendment to the FEHA—the Cammack and City of Moorpark Decisions

Prior to the 1993 amendment,\textsuperscript{176} the FEHA stated that

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\textsuperscript{168} Id. at 340.
\textsuperscript{169} Id.
\textsuperscript{170} Shoemaker v. Myers, 801 P.2d 1054 (Cal. 1990); see also discussion supra Part II.C.2.a.
\textsuperscript{173} Langridge, 31 Cal. Rptr. 2d 34; Angell, 26 Cal. Rptr. 2d 541; Usher, 25 Cal. Rptr. 2d 335.
\textsuperscript{175} See City of Moorpark v. Superior Court, 57 Cal. Rptr. 2d 156 (Ct. App. 1996), review granted, 926 P.2d 968 (Cal. Nov. 26, 1996); Cammack v. GTE California, Inc., 55 Cal. Rptr. 2d 837 (Ct. App. 1996), review granted, 926 P.2d 968 (Cal. Nov. 26, 1996); see also discussion infra Part II.D.
\textsuperscript{176} See discussion supra Part II.B.2.b.
nothing in the FEHA should be deemed to repeal any California law relating to discrimination because of a physical disability. However, the amendment effectuated the inverse proposition, making the FEHA the rule rather than the exception whenever its provisions provided more protection to an employee. In one of the first cases interpreting the 1993 amendment, the U.S. District Court for the Southern District of California held that “the 1993 amendment to the FEHA reverses prior doctrine that disability discrimination claims stemming from a work-related injury fall exclusively within the workers' compensation scheme,” denying the defendant’s motion to dismiss his disability discrimination claim for lack of subject matter jurisdiction. However, it was not until Cammack v. GTE California, Inc. and City of Moorpark v. Superior Court, also decided after the 1993 amendment to the FEHA went into effect, that the California appellate courts had the opportunity to interpret the meaning of the amendment.

Two divisions of the California court of appeals came to opposite conclusions in interpreting the effect of the 1993 amendment on workers' compensation exclusivity for disability discrimination claims. In Cammack, the Fifth Division of the court of appeal for the second district held that...
despite the FEHA amendment, section 132a still provided the exclusive remedy for an employee discriminated against for a disability based on a work-related injury.\textsuperscript{184} Alternatively, in \textit{City of Moorpark}, the Sixth Division of the court of appeal for the second district held that the plain language of the FEHA amendment implicitly repealed the applicability of workers' compensation exclusivity, permitting an employee to go outside the workers' compensation system and sue for civil damages under the FEHA for his or her work-related disability discrimination claim.\textsuperscript{185}

1. The Cammack Decision

On August 8, 1996, the California court of appeal for the second district, Division 5, decided the case of \textit{Cammack v. GTE California, Inc.}.\textsuperscript{186} The plaintiff had alleged causes of action based on a work-related injury\textsuperscript{187} for unlawful disability discrimination in violation of the FEHA when he attempted to return to work after being off on disability, was subsequently refused reasonable accommodation for his disability, and, thereafter, terminated.\textsuperscript{188} The plaintiff contended that the 1992 and 1993 amendments to the FEHA and, specifically, section 12993(a) requires an employer to reasonably accommodate persons disabled by work-related injuries and that a cause of action for refusal to do so was not preempted by the Workers' Compensation Act.\textsuperscript{189} The appellate court rejected the plaintiff's contention and affirmed the lower court's ruling that the 1993 amendment to the FEHA does not abolish the Workers' Compensation Act's preemption of a work-related disability discrimination claim\textsuperscript{190} and that sec-

\begin{itemize}
\item \textsuperscript{184} Cammack \textit{v. GTE California, Inc.}, 55 Cal. Rptr. 2d 837 (Ct. App. 1996).
\item \textsuperscript{185} \textit{City of Moorpark v. Superior Court}, 57 Cal. Rptr. 2d 156 (Ct. App. 1996).
\item \textsuperscript{186} 55 Cal. Rptr. 2d 837 (Ct. App. 1996).
\item \textsuperscript{187} The plaintiff had bilateral carpal tunnel syndrome. \textit{Cammack}, 55 Cal. Rptr. 2d at 840.
\item \textsuperscript{188} \textit{Id.}
\item \textsuperscript{189} \textit{Id. at} 848.
\item \textsuperscript{190} \textit{Id. at} 855. In deciding to reject plaintiff's contention that section 12993(a), as amended, should permit his claim under the FEHA, the court reviewed substantial legislative committee reports prepared in connection with the adoption of section 12993 and found no reference made to the Workers' Compensation Act, in general, or section 132a of the Labor Code specifically. \textit{Id. at} 851-52. No language in the FEHA mentions the Workers' Compensation Act nor do the committee reports prepared prior to adoption of the amended section 12993. \textit{Cammack v. GTE California Inc.}, 55 Cal. Rptr. 2d 837, 851-52.
\end{itemize}
tion 132a provides the employee's sole remedy for that type of discrimination.\textsuperscript{191}

The court considered the premise that, generally, workers' compensation is the exclusive remedy for a work-related injury, even if "the employee is denied the right to seek redress at law."\textsuperscript{192} Therefore, while recognizing the judicially and statutorily created exceptions to workers' compensation exclusivity,\textsuperscript{193} the court asserted that most all disabling injuries arising from either a work-related injury or termination are to be considered within the compensation bargain.\textsuperscript{194} The court considered the broad policy of section 132a\textsuperscript{196} and reasoned that section 132a, read in conjunction with the statutory exclusivity provisions of sections 3600-3602 of the California Labor Code, required the court to find that the amendments to the FEHA did not impliedly repeal section 132a preemption for work-related disability discrimination claims.\textsuperscript{196} Citing a litany of cases decided by California courts prior to the 1993 amendment to the FEHA,\textsuperscript{197} the court found these decisions regarding disability discrimination claims to be persuasive. A legitimate statutory construction, concludes the court, is that section 132a would be applicable when the disability and the discrimination arise in the workplace, while the FEHA applies to discrimination, even in the workplace, when the disability arises outside the employment context.\textsuperscript{198}

2. \textit{The City of Moorpark Decision}

One month after \textit{Cammack}, on September 26, 1996, in \textit{City of Moorpark v. Superior Court},\textsuperscript{199} the California court of appeal for the second district, Division 6, issued a modified version of its opinion previously filed on March 12, 1996, spe-
cifically rejecting the *Cammack* decision.\textsuperscript{200} The court reiterated its holding that the workers' compensation exclusivity provisions of sections 132a and 3600-3602 of the California Labor Code do not preclude an employee from suing for civil damages under the FEHA.\textsuperscript{201} This is the first, and currently only state court case, which has held that the 1993 amendment to section 12993(a) of the FEHA permits an employee who is discriminated against based on a disability arising out of a work-related injury to sue under the FEHA.\textsuperscript{202}

The *City of Moorpark* court reasoned that since the "unless" clause added to section 12993(a) of the FEHA is unambiguous, there is no need for the courts to look beyond its plain meaning.\textsuperscript{203} Therefore, reviewing the legislative intent behind the 1993 amendment, as the *Cammack* court did, is unnecessary.\textsuperscript{204} Section 12993(a) expressly repeals those provisions of the law that offer less protection than the FEHA.\textsuperscript{205} Whereas the FEHA provides remedies to eliminate discriminatory practices and a civil lawsuit for damages seeks to make the victim whole, the Workers' Compensation Act provides significantly less monetary awards, nothing to compensate an individual for pain and suffering, and no punitive damages.\textsuperscript{206}

The court then determined that since workers' compensation, in fact, does provide less protection than the FEHA to workers discriminated against based on a physical disability,\textsuperscript{207} the FEHA should be available to an employee for pur-

\textsuperscript{200} City of Moorpark v. Superior Court, 57 Cal. Rptr. 2d 156, 161 (Ct. App. 1996).
\textsuperscript{201} Id. at 166.
\textsuperscript{202} Id. *Gallo v. Board of Regents of the Univ. of California* was decided by the U.S. District Court for the Southern District of California. 916 F. Supp. 1005 (S.D. Cal. 1995). *Buckley v. Gallo Sales Co.* was decided by the U.S. District Court for the Northern District of California. 949 F. Supp. 737 (N.D. Cal. 1996). The only other cases to be decided by the California appellate courts after the 1993 amendment to the FEHA are *Andreacchi v. Price Co.*, 61 Cal. Rptr. 2d 854 (Ct. App. 1997), *review granted*, 941 P.2d 54 (Cal. July 9, 1997) and *Cammack v. GTE California, Inc.*, 55 Cal. Rptr. 2d 837 (Ct. App. 1996), *review granted*, 926 P.2d 968 (Cal. Nov. 26, 1996). Both *Andreacchi* and *Cammack* held that the workers' compensation laws provide the exclusive remedy for an employee's work-related disability discrimination claim.
\textsuperscript{203} City of Moorpark v. Superior Court, 57 Cal. Rptr. 2d 156, 160 (Ct. App. 1996).
\textsuperscript{204} Id. at 161.
\textsuperscript{205} Id.
\textsuperscript{206} Id. at 161-63.
\textsuperscript{207} Id. at 162.
suing his or her disability discrimination claim. Section 132a is not rendered superfluous by this reading of section 12993(a) of the FEHA because section 132a still covers claims of discrimination based on work-related injuries. The court asserted that, furthermore, "the anti-discriminatory protections of Labor Code section 132a remain available to those workers whose claims fall outside the ambit of the FEHA." Therefore, the court held that, in light of the 1993 amendment to section 12993(a) of the FEHA, an employee may seek redress for his or her disability arising out of a work-related injury under the FEHA.

III. IDENTIFICATION OF THE PROBLEM

Prior to 1993, California courts uniformly agreed that the workers' compensation exclusivity provisions of sections 3600-3602 of the California Labor Code applied to disability discrimination claims and, specifically, that section 132a of the Labor Code provided an employee's exclusive remedy for his or her discrimination claim based on a disability arising out of a work-related injury. Since the FEHA provided that it was neither an exception to any other statutes nor intended to repeal any other provisions of California law, and the California Supreme Court had broadly interpreted section 132a to prohibit discrimination based on workplace injuries, the courts did not perceive any real conflict between the FEHA and section 132a.

Even when the FEHA was amended in 1992 to specifically provide for protection against disability discrimination, the courts still uniformly held that employees who were discriminated against based on a disability arising out of a work-related injury were limited to seeking redress un-

208. *Id.* at 166.
210. *Id.* (citing Judson Steel Corp. v. Workers' Compensation Appeals Bd., 586 P.2d 564 (Cal. 1978)).
211. *Id.* at 166.
212. *See supra* note 83 and accompanying text.
215. *See supra* note 83 and accompanying text.
216. *See discussion supra* Part II.B.2.a.
der California's workers' compensation laws. Even though section 132a has never expressly provided a remedy for discrimination based on a workplace disability, the expansive reading it has been given by the California Supreme Court continues to persuade California courts. Consequently, even after the 1992 amendment to the FEHA providing employees with protection from disability discrimination, California appellate courts still agreed that workers' compensation laws provided an employee's exclusive remedy for discrimination based on a disability when that disability arises out of a work-related injury.

However, the 1993 amendment to the FEHA makes it the exception to other laws. Now, the FEHA is to control whenever another state law provides less protection than the FEHA does. While it appears clear by the plain language of section 12993(a) that an employee discriminated against based on a disability now has statutory authority to go outside the workers' compensation system and sue his or her employer for civil damages, the appellate courts are split on the issue. In the two state appellate court cases decided since the enactment of the 1993 amendment to the FEHA dealing with disability discrimination, one court has held that the workers' compensation system is still an employee's exclusive remedy, while the other has read the amendment to permit an employee to sue for civil damages. This split makes it unclear under which remedial system an employee who is discriminated against based on a work-related disability can pursue his or her discrimination claim.

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217. See discussion supra Part II.C.2.b.i-iii.
219. See supra note 83 and accompanying text.
220. See discussion supra Part II.B.2.a.
221. See discussion supra Part II.C.2.b.i-iii.
222. See discussion supra Part II.B.2.b.
223. See discussion supra Part II.B.2.b.
225. City of Moorpark, 57 Cal. Rptr. 2d 156; Cammack, 55 Cal. Rptr. 2d 837.
226. Cammack, 55 Cal. Rptr. 2d 837.
227. City of Moorpark, 57 Cal. Rptr. 2d 156.
IV. ANALYSIS

The disability discrimination issue will be heard before the California Supreme Court this term. To be decided is whether, in light of the recent amendments to the FEHA, an employee who is discriminated against based on a work-related disability is limited to pursuing a claim under section 132a of the California Labor Code or may pursue a civil claim under the FEHA. At first blush, it may appear that the California Supreme Court would have to outright reject established doctrine in order to permit an employee to bring a work-related discrimination disability claim under the FEHA. However, the court need not do so. The court may still find that an employee can sue his or her former employer under the FEHA for work-related disability discrimination by recharacterizing, rather than outright rejecting, the precedent established by Judson Steel and Shoemaker. Limiting Judson Steel and Shoemaker to discrimination claims which fall outside the ambit of the FEHA and paying appropriate deference to the clear language of section 12993(a) of the FEHA as amended in 1992 and 1993, the court is able to interpret section 12993(a) to provide employees with a civil remedy for disability discrimination, irrespective of whether the disability arises out of a work-related injury.

A. The “Source of the Disability” Distinction Prior to and in Light of the 1992 and 1993 Amendments to the FEHA

Historically, the source of an employee's disability has been the pivotal factor in determining whether he or she can pursue a discrimination claim based on that disability under section 132a of the Workers’ Compensation Act or section...
12993(a) of the FEHA. A work-related disability discrimination claim is actionable under section 132a. Alternatively, a nonwork-related disability discrimination claim is actionable under the FEHA. However, since the underlying injury giving rise to the disability for which an employee is discriminated against is not considered a factor in determining whether or not the employee was discriminated against based on a disability either under section 132a of the Workers' Compensation Act or 12993(a) of the FEHA and the FEHA now provides employees with more protection against disability discrimination than does the workers' compensation system, the distinction between a work-related and nonwork-related injury should not matter. An employee should have the option to sue under the FEHA for work-related disability discrimination.

1. The "Importance" of the Source of the Disability Prior to the 1992 and 1993 Amendments to the FEHA

When an individual alleges he or she has been discriminated against based on a disability and seeks to collect damages from the employer for that discrimination, he or she is required to show that he or she has, or is perceived to have, a disability, that, despite the real or perceived disability, he or she is qualified to perform the essential functions of the job with or without reasonable accommodation, but that the employer took adverse action (e.g., termination, demotion) against him or her because of the disability. Nowhere does the law require the employee to show how he or she got his or her disability. The underlying source of the disability does not figure into the equation.

However, by making workers' compensation laws the exclusive remedy for work-related disability discrimination,

234. See discussion infra Parts IV.A.1, IV.A.1.a-c.
235. See supra note 83 and accompanying text.
236. See discussion supra Parts II.A, II.C.
237. See discussion supra Part II.B.
238. See discussion infra Part IV.A.1.
239. See discussion infra Part IV.B.1.b.
240. See supra note 103 and accompanying text.
California courts have made the source of the disability an additional factor. While this additional factor does not directly implicate the standard of proof required for a disability discrimination claim, it does affect the forum in which the employee will be able to bring the claim. In turn, the forum affects the remedies available to the employee, if his or her claim is successful. Whereas an employee suing for disability discrimination under the FEHA has a wide array of remedies available against his or her employer, the workers’ compensation system provides a much more limited remedial scheme.

a. **When the Source of the Disability Is Work-Related**

If an individual is injured on the job and that injury results in a disability for which he or she is subsequently discriminated against, prior to the 1993 amendment to the FEHA, he or she was strictly limited to filing a claim under section 132a of the California Labor Code. Although section 132a claims for disability discrimination are decided by using the same standards as under the FEHA or ADA, the potential recovery is much more limited. Under section 132a, an employee’s recovery is limited to an increase of his or her compensation award by one-half, but in no event more than $10,000. In addition, an employee is entitled to back pay and reinstatement. However, irrespective of the severity of the underlying injury giving rise to the disability, an employee will be limited to $10,000 for the work-related disability discrimination. Because workers’ compensation laws are designed to help rehabilitate employees—not punish employers—punitive damages and injunctive relief are not available for section 132a claims. Attorneys fees and costs

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242. See discussion infra Part IV.A.1.a-c.
243. See supra notes 27-28 and accompanying text.
244. See discussion infra Part IV.A.1.a-b.
245. See discussion infra Part IV.A.1.a-b.
246. See discussion supra Part II.A.5; see also supra note 83 and accompanying text.
247. See discussion supra Part IV.A.1.
248. See discussion infra notes 249-53 and accompanying text.
250. Id.
251. Id.
252. Id.
are limited to $250.253

b. When the Source of the Disability Is Not Work-Related

Alternatively, if an employee is injured outside the course and scope of his or her employment, subsequently becomes disabled from that injury and is thereafter discriminated against based on that disability, he or she can sue his employer for civil damages under the FEHA.254 The remedial goal of the FEHA is to restore an individual who proves discrimination in violation of the act to the position or status he or she would have enjoyed but for the defendant's wrongful conduct.255 Under the FEHA, if an employee proceeds under the Act in court, he or she is able to recover both compensatory and punitive damages, as well as equitable and injunctive relief.256 Back pay and future lost earnings are also available remedies under the FEHA.257 If the employee prevails, reasonable attorneys' fees and costs may be awarded by the court.258

c. When the Source of the Disability Is an Exacerbation of an Earlier Nonwork-Related Injury

Deciding under which system an employee can sue becomes particularly difficult when an employee's disability does not arise solely in the course and scope of his or her employment. An employee who is injured from an activity outside the course and scope of his or her employment that gives

253. Id.
257. See, e.g., Ackerman v. Western Elec. Co., Inc., 643 F. Supp. 836, 852 (N.D. Cal. 1986), aff'd, 860 F.2d 1514 (9th Cir. 1988) (awarding back pay and future lost earnings to disabled employee because employer failed to reasonably accommodate employee's asthma); American Nat'l. Ins. Co. v. Fair Employment and Hous. Comm'n, 651 P.2d 1151 (Cal. 1982) (upholding back pay award for individual with high blood pressure who was denied employment and accommodation).
rise to a disability is typically permitted to sue his or her em-
ployer under the FEHA if he or she is discriminated against based on that disability. However, if the employee becomes disabled as a result of a subsequent injury which exacerbates his or her original, nonwork-related injury, he or she may be limited to seeking recourse against his or her employer within the workers' compensation system. This means that while an employee with a strictly nonwork-related injury resulting in a disability would have a cause of action under the FEHA, if his or her disability is one that is even somewhat work-related, he or she will be limited in his or her recovery to the same extent as an employee whose disability arises solely out of his or her employment.

2. In Light of the 1992 and 1993 Amendments to the FEHA, the Source of an Employee's Disability Should Not Limit Him or Her to Suing Under the Workers' Compensation Act

Situations such as the third one outlined above illustrate the inconsistency of having a distinction between a work-related and nonwork-related injury giving rise to a disability. Prior to the enactment of the FEHA, considering the source of an employee's disability was a practical and effective means of ascertaining whether the workers' compensation system had jurisdiction over the claim. This is because prior to the enactment of the FEHA, the workers' compensation system provided the only remedy available to a worker for disability discrimination. As a result, section 132a was interpreted expansively so as to provide employees with redress for discrimination by employers.

However, with the implementation of the FEHA and the more expansive remedies it provides, it no longer makes sense to limit an employee to the workers' compensation system's remedies for his or her disability discrimination claim.

259. See discussion supra Part IV.A.1.b.
261. See discussion supra Part IV.A.1.b.
262. See ESKENAZI, supra note 37, § 4:10.
263. See discussion supra Part II.C.1.
265. Id.
266. See discussion supra Part IV.A.1.b.
Limiting a worker's remedies to minimal damages under the workers' compensation system will not further the system's purpose of allowing workers to recover damages for injuries incurred in the course and scope of their employment. Additionally, the compensation bargain of the workers' compensation system will not be compromised because the disability discrimination claims are covered under an alternative specific statute.

Yet, up until the 1992 and 1993 amendments to the FEHA, this distinction continued to be advanced by the appellate courts. However, the 1992 and 1993 amendments to the FEHA have made disability discrimination a clear part of the protections intended to be covered by the FEHA. The FEHA is now the rule rather than the exception. No distinction is made between work and nonwork-related injuries. The FEHA specifically states that its purpose is to protect against disability discrimination unless the protection it provides is less than an alternative state law.

B. The 1992 and 1993 Amendments to the FEHA Change the Complexion of the Disability Discrimination Issue—Work-Related Disability Discrimination Claims Should No Longer Be Subject to Workers' Compensation Exclusivity

Prior to the enactment of the FEHA, the California Supreme Court broadly interpreted section 132a to express a policy opposing all discrimination against workers based solely on their having been injured in the course of employment. Despite the FEHA's enactment providing protection against "physical handicap" discrimination, the courts still found the workers' compensation system to provide the exclusive venue for work-related disability discrimination claims. Even when section 12993(a) of the FEHA was amended in 1992 to provide for protection against disability

267. See discussion supra Part II.A.3.
269. See discussion supra Part II.C.2.b.
270. See discussion supra Part II.B.2.
274. See discussion supra Part II.C.
discrimination in particular,\textsuperscript{275} the courts still found workers' compensation an employee's exclusive remedy for discrimination based on a work-related disability.\textsuperscript{276} However, the 1993 amendment, making the FEHA the rule rather than the exception in disability discrimination claims, changes the complexion of the issue.

1. \textit{The 1993 Amendment to the FEHA Makes It an Exception to Other Laws Which Provide Less Protection to Employees Against Disability Discrimination}

a. \textit{The Plain Language of the FEHA Says Any Provision of State Law Offering Less Protection Than the FEHA Is Inoperable and Effectively Preempted by the FEHA}

The plain language of a statute prescribes its interpretation by the courts.\textsuperscript{277} To determine what a statute means, a court is to first look at the words themselves, giving them their usual and ordinary meaning.\textsuperscript{278} When a statute is clear and unambiguous on its face, the court is obliged to take the statute as it finds it and not embark upon a quest to determine legislative intent.\textsuperscript{279}

Section 12993(a) of the FEHA provides that "[n]othing contained 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 persons covered under this part."\textsuperscript{280} It clearly states that the FEHA is to govern claims relating to discrimination when an alternative state law provides less protection.\textsuperscript{281} While the \textit{Cammack} court painstakingly reviewed the legislative history behind the 1993 amendment of section 12993(a) and read it to sug-

\begin{itemize}
\item \textsuperscript{275} 1992 Cal. Stat. 3659 (A.B. 1286).
\item \textsuperscript{276} See discussion \textit{supra} Part II.C.2.b.
\item \textsuperscript{277} City of Moorpark v. Superior Court, 57 Cal. Rptr. 2d 156, 160 (Ct. App. 1996) (citing \textit{CAL. CIV. PROC. CODE} § 1858 (West 1983 & Supp. 1998)).
\item \textsuperscript{278} See \textit{Smith v. Fair Employment and Hous. Comm'n}, 913 P.2d 909 (Cal. 1996).
\item \textsuperscript{279} \textit{Delaney v. Superior Court}, 789 P.2d 934, 940-41 (Cal. 1990) (citing Lun- gren v. Deukmajian, 755 P.2d 299 (Cal. 1988)).
\item \textsuperscript{280} \textit{CAL. GOV'T CODE} § 12993(a) (West 1989 & Supp. 1998).
\item \textsuperscript{281} \textit{Id}.
\end{itemize}
gest that the new FEHA provision was intended only to apply to discrimination in housing, \(^{282}\) the plain language of the statute does not make this distinction.\(^ {283}\)

Although the City of Moorpark court may have been a bit dramatic in its assertion that section 12993(a) of the FEHA provided "for a refreshing change, [a] statute that is clear and intelligible . . . [i]ts words do not beg to be understood, nor do they defy comprehension,"\(^ {284}\) the underlying rationale for this statement comports with standard statutory interpretation.\(^ {285}\) If the Legislature had wanted to limit the 1993 amendment to housing discrimination it could have made it clear in the statute. It is not the court's role to try and figure out what the legislative intent behind amending section 12993(a) was when the statute can be clearly read on its face.\(^ {286}\) Therefore, the 1993 amendment to the FEHA should be read literally to provide employees with protection against disability discrimination.

b. \textit{Workers' Compensation System Provides Less Protection Than the FEHA}

The 1993 amendment to section 12993(a) of the FEHA means that the FEHA effectively preempts any provision of state law offering less protection.\(^ {287}\) Looking at the purpose of the workers' compensation laws and the FEHA and comparing the remedies available under each,\(^ {288}\) it is clear that the workers' compensation laws provide less protection than the FEHA.

The purpose of the FEHA is "to provide effective remedies which will eliminate . . . discriminatory practices."\(^ {289}\) A party seeking to enforce a claim of discrimination under the FEHA may pursue a number of remedies.\(^ {290}\) The purpose of these liberal remedies is to eliminate discriminatory practices and attempt to make the victim of discrimination

\begin{footnotes}
\footnotetext[282]{Cammack v. GTE California, Inc., 55 Cal. Rptr. 2d 837, 851 (Ct. App. 1996).}
\footnotetext[283]{CAL. GOV'T CODE § 12993(a) (West 1989 & Supp. 1998).}
\footnotetext[284]{City of Moorpark v. Superior Court, 57 Cal. Rptr. 2d 156, 160 (Ct. App. 1996).}
\footnotetext[285]{See supra notes 277-79 and accompanying text.}
\footnotetext[286]{City of Moorpark, 57 Cal. Rptr. 2d at 160.}
\footnotetext[287]{CAL. GOV'T CODE § 12993(a) (West 1989 & Supp. 1998).}
\footnotetext[288]{See discussion supra Parts II.A-B, IV.A.1.a-b.}
\footnotetext[289]{CAL. GOV'T CODE § 12920 (West 1989 & Supp. 1998).}
\footnotetext[290]{See supra notes 256-58 and accompanying text.}
\end{footnotes}
The FEHA specifically allows for remedies to eliminate discriminatory practices. Moreover, it provides the possibility of, to some extent, virtually unlimited damages. The opportunity to bring an action in court, coupled with the potential for a larger award of monetary damages, means greater protection for a victim of discrimination.

Conversely, the principal purpose of the workers' compensation laws is to ensure an employee receives medical treatment for his or her work-related injury and compensation for the time he or she is unable to work. Workers' compensation benefits provide significantly smaller monetary awards than do civil lawsuits. Whereas a claimant suing under the FEHA may have a variety of remedies available to him or her, one suing under the workers' compensation laws is much more limited in what he or she may recover.

Therefore, not only does the purpose of each of the laws support a finding that the FEHA affords an employee more protection than the workers' compensation laws, but so do the remedies available under each.

2. The 1992 and 1993 Amendments to the FEHA Make the FEHA a Statutory Exception to Workers' Compensation Exclusivity

While, traditionally, workers' compensation laws have preempted other state laws, the 1993 amendment to section 12993(a) of the FEHA has made it so the FEHA preempts other state laws providing less protection. Since workers'
compensation laws provide less protection than the FEHA, they are expressly preempted by section 12993(a) of the FEHA. Read in conjunction with the 1992 amendment to the FEHA, making mental and physical disability specific protected classes, the 1993 amendment has made the FEHA a specific statutory exception to workers' compensation exclusivity.

a. Discriminatory Conduct Based on a Specific Statutory Exception to the Workers' Compensation Laws Is Not Subject to Workers' Compensation Exclusivity

By reading the 1992 and 1993 amendments to the FEHA as creating a specific statutory exception to the workers' compensation laws, the California Supreme Court may hold that an employee suing his or her employer for work-related disability discrimination may do so under the FEHA, without violating any long standing principles of workers' compensation exclusivity.

The workers' compensation laws were enacted prior to the FEHA to provide a specific remedy for employer discrimination based on work-related injuries. Therefore, the California Supreme Court, prior to the 1992 and 1993 amendments to the FEHA, interpreted section 132a broadly as the exclusive remedy for any type of employer discrimination against workers because of injuries occurring in the course of and arising out of their employment. However, as of 1990, the Court had established specific limitations on the "broad" scope of section 132a. The Shoemaker court specifically held that when discrimination "comes within an express or implied statutory exception or results from risks deemed not to be within the compensation bargain," the workers' compensation exclusivity provisions are inapplicable. Therefore, by identifying the FEHA as an express statutory exception, the underlying rationale of the Shoemaker decision is not compromised.

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299. See discussion supra Part IV.B.1.b.
303. Id. at 1059.
C. Reconciling the Cammack and City of Moorpark Decisions

The Cammack and City of Moorpark courts have come to diametrically opposed conclusions as to whether, in light of the 1992 and 1993 amendments to the FEHA, work-related disability discrimination claims should still be subject to workers' compensation exclusivity.\(^3\) Therefore, it will be difficult for the California Supreme Court to reconcile these two cases without rejecting at least one line of reasoning. However, because the Cammack decision fails to appropriately recognize the implications of the 1993 amendment to section 12993(a) of the FEHA and City of Moorpark not only recognizes the implications of the revised 12993(a), but also the public policy sought to be advanced by the amendments, the court should follow the rationale of City of Moorpark and hold that an employee discriminated against based on a work-related disability can sue his or her employer for civil damages under the FEHA.

1. The Problems with the Cammack Decision

a. The Cammack Court Overemphasizes Precedent and Underemphasizes the Recent Amendments to the FEHA

In holding that an employee who alleges discrimination based on a work-related injury is limited to the workers' compensation system, the Cammack court has overemphasized precedent and underemphasized the recent amendments to the FEHA.\(^5\) The court's analysis is laden with cites to cases decided prior to the 1993 amendment to the FEHA.\(^6\) While certainly the court would be bereft if it did not consider prior case law in its analysis, by placing such a strong emphasis on precedent without considering the plain language of the revised FEHA, it fails to take into account that the recent amendments to the FEHA change the law.
b. The Court Mistakenly Relies on the Legislative History Rather Than the Plain Language of Section 12993(a)

Rather than looking at the plain language of section 12993(a) of the FEHA, the Cammack court mistakenly relies on the legislative history of the amendments to the FEHA and its own review of substantial legislative committee reports in determining that there has been no "implied repeal" of workers' compensation exclusivity. There has been no implied repeal of workers' compensation exclusivity, nor could there be, because the amendment to section 12993(a) expressly repeals any other laws which provide less protection against discrimination. While the Cammack court expressed its wish that the Legislature would have listed the California state laws that are repealed by the amendment to the FEHA, it would have been absurd for the Legislature to do so. For the Legislature to have listed each and every state law it intended to be repealed by the 1993 amendment to section 12993(a) would have been inordinately burdensome and, inevitably, incomplete. Thus, while the Legislature did not specifically indicate which laws provided less protection than the FEHA, it is clear that workers' compensation laws provide less protection. Therefore, the FEHA should be applied to work-related disability discrimination claims.

c. The Cammack Rationale Perpetuates the Outdated Distinction Between Work-Related and Nonwork-Related Disabilities

If the California Supreme Court follows the Cammack court's line of reasoning, the distinction between a work-related and nonwork-related disability will be perpetuated. While the distinction made sense prior to the enactment of the FEHA and may have even been important up until the 1992 amendment to the FEHA providing for protection against disability discrimination, in light of the 1992 and 1993 amendments to the FEHA, it no longer makes sense.

307. Id. at 848.
310. See discussion supra Part IV.B.1.b.
311. See discussion supra Part IV.A.1.a-b.
While the Cammack court found that construing section 132a to apply to work-related disabilities and section 12993(a) of the FEHA to apply to nonwork-related disabilities "a perfectly legitimate consistent construction," it would not be consistent to do so. The recent amendments to the FEHA have made disability discrimination a clear part of the protections intended to be covered by the FEHA. No distinction is made between work and nonwork-related injuries. The FEHA specifically states that its purpose is to protect against disability discrimination unless the protection it provides is less than an alternative state law.

2. The Rationale of the City of Moorpark Court Makes More Sense

a. The City of Moorpark Court Balances Precedent with the Recent Amendments to the FEHA

In City of Moorpark, the court found that the 1993 amendment to section 12993(a) of the FEHA, stating that any provision of state law offering less protection than the FEHA is preempted by the FEHA, is unambiguous and clear on its face. Where the ambiguity lies, if any, is in interpreting whether the workers' compensation exclusivity laws provide less protection to employees discriminated against based on a disability. The court considered the history of section 132a and the most recent appellate court decisions which had found than an employee's claim of disability discrimination to be preempted by workers' compensation exclusivity, but found that the recent amendments to the FEHA clearly express the legislature's intent to make the FEHA an option to employees discriminated against based on a work-related disability.

314. Id.
316. Id. at 161-63.
317. Id. at 159.
318. Id. at 161.
b. The Court Appropriately Considers the Plain Language of Section 12993(a)

Unlike the Cammack court which, despite clear language, analyzed the legislative history behind the 1993 amendment to section 12993(a) of the FEHA, the City of Moorpark court appropriately considered the plain meaning of section 12993(a).\(^{319}\) This consideration comports with the way in which statutes are to be read by the courts.\(^ {320}\) When a statute is clear and intelligible on its face, the meaning of those words control.\(^ {321}\) The plain language of section 12993(a) reads that if any provision of state law offers less protection than the FEHA, the FEHA preempts that provision.\(^ {322}\) Therefore, the legislative history of this amendment indicating that it may only be meant to refer to provisions of California's housing laws is not binding on the courts. Since the plain language of the FEHA seeks to protect individuals from both employment and housing discrimination and section 12993(a) does not distinguish between the two,\(^ {323}\) the City of Moorpark court correctly determined that the 1993 amendment preempted workers' compensation exclusivity laws for work-related disability discrimination claims.

c. The Court Implicitly Rejects the Outdated Distinction Between Work-Related and Non-Work-Related Disability Discrimination to the Extent It Makes Workers' Compensation the Exclusive Remedy

By holding that an employee can sue under the FEHA for work-related disability discrimination, the City of Moorpark court implicitly rejects the distinction between work-related and nonwork-related disabilities.\(^ {324}\) However, the court does not altogether reject the use of section 132a in all discrimination claims.\(^ {325}\) Only disability discrimination claims where

\(^{319}\) Id.

\(^{320}\) Id. at 160 (citing Smith v. Fair Employment and Hous. Comm'n, 913 P.2d 909 (Cal. 1996)).

\(^{321}\) City of Moorpark v. Superior Court, 57 Cal. Rptr. 2d 156, 160 (Ct. App. 1996). See also supra note 279 and accompanying text.


\(^{324}\) City of Moorpark v. Superior Court, 57 Cal. Rptr. 2d 156, 163 (Ct. App. 1996).

\(^{325}\) Id.
the underlying disability is a result of a work-related injury and the FEHA is an option for the employee are to be permitted under the FEHA.\textsuperscript{326} The anti-discriminatory protections of section 132a are intended to "remain available to those workers whose claims fall outside the ambit of the FEHA."\textsuperscript{327} It is important to ensure that employees discriminated against based on a disability are able to seek recourse against their employers for wrongful conduct. Therefore, the City of Moorpark distinction is a good one. Employees would be given the option to sue under the FEHA, but if they were unable to do so because of the number of employees employed by their employer,\textsuperscript{328} they would still be permitted to invoke the protections of section 132a.

V. PROPOSAL

The California Supreme Court should permit the application of the FEHA to all disability discrimination claims over which the Department of Fair Employment and Housing has jurisdiction, including those where the injury giving rise to the disability is work-related. If the court upholds the City of Moorpark decision, individuals who have been discriminated against by an employer as a result of a disability will no longer be forced to file their virtually identical claims under different remedial systems simply because of where the underlying injury occurred. Workers will have the choice to file under the FEHA and have the opportunity to take advantage of the liberal protections it provides. Additionally, making the FEHA available to individuals who are discriminated against based on a work-related disability, will eliminate the need for the forum (whether it be the Workers' Compensation Appeals Board or the Department of Fair Employment and Housing) to determine how a claimant got his or her disability. Therefore, instead of spending time determining how the individual got his or her disability, the forum will be able to spend its time considering the merits of the claimant's disability discrimination claim.

\textsuperscript{326} Id.
\textsuperscript{327} Id.
\textsuperscript{328} The Fair Employment and Housing Act is applicable to employers with five or more employees, whereas the workers' compensation system is applicable to all employers, irrespective of the number of workers they employ. See supra note 9 and accompanying text.
Further, permitting an individual to bring his or her claim under the FEHA for work-related disability discrimination will not render section 132a superfluous. Section 132a would remain an option for individuals who either decide that pursuing their claim under the FEHA would be too time consuming, 329 expensive or difficult, 330 or are unable to pursue their claim there because it falls outside the ambit of the FEHA. The proposal is not to eliminate section 132a for work-related disability discrimination claims, but, rather, eliminate workers' compensation exclusivity in this area.

In light of the recent amendments to the FEHA, expanding the FEHA to cover disability discrimination, a claimant should have the option to pursue his or her remedies available under the FEHA. Giving the Department of Fair Employment and Housing and the Workers' Compensation Appeals Board concurrent jurisdiction over work-related disability discrimination claims would permit an individual to assert his or her rights under the FEHA without necessarily precluding him or her from seeking redress under the Workers' Compensation Act. This would be an equitable way to reconcile the historically broad interpretation of section 132a with the recent amendments to section 12993(a) so as to recognize the importance of each remedy without outright rejecting one or the other.

The purpose of the 1992 and 1993 amendments to the FEHA was to include disability discrimination amongst the civil rights protected under the FEHA. 331 No distinction was made between work-related and nonwork-related disabilities, presumably because this distinction did not matter. While

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329. Generally, disability discrimination claims filed at the Department of Fair Employment and Housing usually take longer than a section 132a claim filed in the workers' compensation system. This is primarily because of the filing requirements at the Department of Fair Employment and Housing which, once fulfilled, usually lead to litigation of the case in the judicial court system. Cases in the judicial court system can take several years to settle or go to trial.

330. At least one difficulty that a claimant may face is finding an attorney to take his or her case. Given the difficulty of proving discrimination claims, an individual with few financial resources may find it difficult, if not impossible, to find legal counsel who would be willing to take his or her case on a contingency basis. However, it can be just as difficult to secure representation by a workers' compensation attorney for a section 132a claim. Since workers' compensation attorneys are limited in the amount of attorneys' fees they can recover, they do not usually find section 132a claims desirable. This, too, can have preclusive effect on an individual's claim.

331. See discussion supra Part II.B.2.
permitting workers to sue under the FEHA will increase an employer's liability for work-related disability discrimination claims, such an increase in liability will better prevent disability discrimination from taking place altogether. If employers are able to continue to take advantage of workers' compensation exclusivity provisions to substantially limit an individual's recovery, it is unlikely that they will be deterred from discriminating against the disabled. Without deterrence, neither the goals of the Americans with Disabilities Act nor the FEHA—to eliminate disability discrimination in employment—are recognized.

However, as a practical matter, since the appellate courts have come to conflicting conclusions as to whether workers' compensation exclusivity should preempt a work-related disability discrimination claim under the recently amended FEHA and the California Supreme Court has yet to decide this issue, potential claimants would be wise to simultaneously file their disability discrimination claims under the state workers' compensation system, the state FEHA and the federal ADA. This way, if the Supreme Court decides to permit work-related disability discrimination claims to be brought under the FEHA, a claimant will not be precluded from bringing his or her claim under the FEHA because his or her statute of limitations has ran. Alternatively, in the event that the court does decide to limit work-related disability discrimination claims to the workers' compensation system, a claimant's cause of action is protected under the ADA.

VI. CONCLUSION

The law, like the society it reflects, is not static. The recent amendments to the FEHA reflect the public's desire to

332. A maximum of $10,000 in penalties, plus back pay and reinstatement, is a small price for an employer to have to pay for discriminating against a disabled employee. See CAL. LAB. CODE § 132a (West 1989 & Supp. 1998).
334. See Wood v. County of Alameda, 875 F. Supp. 659 (N.D. Cal. 1995). Workers' compensation exclusivity does not preclude a claim under the federal ADA for work-related disability discrimination. Id. at 664.
combat disability discrimination in employment. While workers’ compensation exclusivity may have made sense when the workers’ compensation system provided individuals with their only redress for disability discrimination, in light of the recent amendments to the FEHA, it no longer does. By permitting a worker to file his or her work-related disability discrimination claim with the Department of Fair Employment and Housing, the California Supreme Court can ensure that the recent amendments to the FEHA are given the weight to which they are entitled. The court has the opportunity to revolutionize a field of law which, despite evolution in the law of disability discrimination, has managed to remain stagnant. Hopefully, it will seize the opportunity.

Linda J. Lorenat