

# No Disability Discrimination Where Employee Cannot Competently Perform Job, Ninth Circuit Holds

2 min read

Jan 14, 2013

In *Lawler v. Montblac North American LLC*, the plaintiff, Cynthia Lawler, a store manager at a boutique retail store, was diagnosed with psoriatic arthritis. Lawler initiated the action after Defendant employer terminated her employment.

Lawler asserted four claims: (1) disability discrimination, (2) retaliation, (3) harassment, and (4) intentional infliction of emotional distress. The first three causes of action were brought under the [California Fair Employment and Housing Act](#) (“FEHA”).

The trial court granted summary judgment for Defendant as to all causes of action, and the [Ninth Circuit](#) affirmed.

**Disability Discrimination:** As the Ninth Circuit explained, a prima facie case of disability discrimination under FEHA requires the plaintiff to establish the following elements:

1. membership in a protected class;
2. that she was performing competently in the position she held;
3. that she suffered an adverse employment action, such as termination; and
4. some circumstances that suggest a discriminatory motive.

The Ninth Circuit held that “Lawler fails to establish a prima facie case because she was not competently performing her position as store manager.” As the court noted, discrimination on the basis of disability is prohibited

“only if the adverse employment action occurs because of a disability and the disability would not prevent the employee from performing the essential duties of the job, at least not with reasonable accommodation. . . . [T]he plaintiff employee bears the burden of proving he or she was able to do the job, with or without reasonable accommodation.”

Lawler could not competently perform her job duties, the court held, since she admitted that her disability made it impossible for her to perform the duties of her position. Indeed, she had been unemployed for three years since losing her job, had not applied for any positions, had made no effort to secure employment, and had exhausted her disability benefits.

**Retaliation:** FEHA makes it unlawful for an employer to discharge any person for opposing practices forbidden by the Act. Here, because Montblanc had a legitimate, nondiscriminatory reason for terminating Lawler (i.e., she could not perform her job duties), it had met its burden, and Plaintiff failed to provide evidence that the reason was pretextual. A plaintiff must offer “specific” and “substantial” circumstantial evidence to prove pretext in a retaliation claim under FEHA. Here, Lawler did not do so.

**Harassment:** To establish harassment under FEHA, an employee must demonstrate:

1. membership in a protected group,
2. that she was subjected to harassment because she belonged to this group, and
3. the alleged harassment was so severe that it created a hostile work environment.

The plaintiff must show a “concerted pattern of harassment of a repeated, routine or generalized nature.” Lawler claimed that her supervisor’s rudeness and belittling remarks regarding her disability (which she characterized as “gruff,” “abrupt,” and “intimidating”) constituted harassment. The court found that such conduct was not severe enough to constitute harassment.

**Intentional Infliction of Emotional Distress:** A claim for IIED requires conduct that is “outrageous,” which means so “extreme as to exceed all bounds of that usually tolerated in a civilized community.” The supervisor’s “gruff,” “abrupt” and “intimidating” conduct did not exceed all bounds tolerated in a civilized society, the Court held. While such conduct might have been inconsiderate and insensitive, “this is not conduct from which California tort law protects employees.” Furthermore, Lawler’s alleged emotional distress was not severe.

Please contact the author, [Michael Newman](#), if you would like to discuss the issues addressed in this article.

---

*Hinshaw & Culbertson LLP is a U.S.-based law firm with offices nationwide. The firm’s national reputation spans the insurance industry, the financial services sector, professional services, and other highly regulated industries. Hinshaw provides holistic legal solutions—from litigation and dispute resolution, and business advisory and transactional services, to regulatory compliance—for clients of all sizes. Visit [www.hinshawlaw.com](http://www.hinshawlaw.com) for more information and follow @Hinshaw on LinkedIn and X.*

## Topics

Retaliation, Case Updates, Ninth Circuit Court Of Appeals

