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MEMO

TO:

FROM: JRB

DATE: 9/4/07

RE: Green v. State of California

The California Supreme Court in *Green v. State of California*, 2007 DJDAR 127 99 (August 24, 2007) held that like the ADA, the FEHA requires employees alleging discrimination to prove they are “qualified individuals” able to perform a job’s essential duties with or without reasonable accommodation. This is a significant development in employment litigation because prior to the *Green* case it was unclear whether the burden of proof fell upon the employer or the employee. However, referring to the federal case law interpreting the ADA, the California Supreme Court concluded that the Legislature intended to place the burden on the plaintiff/employee to show that he or she is a qualified individual under the FEHA; *i.e.*, that he or she can perform the essential functions of the job with or without reasonable accommodation.

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The significance of this case is twofold. First, there had been a split of authority among the appellate courts in California as to whether the burden of proof fell upon the employer or the employee. The jury instruction on point, CACI 2540, includes the capacity to perform the essential duties of the job as one of the elements of proof for a claim of disability discrimination. The directions for use for CACI 2540 observe that “there is a divergence of authority on whether the plaintiff is required to prove that he or she has the ability to perform the essential duties of the job.” The *Green* case makes clear that this burden is on the plaintiff and, as a requirement to proving disability discrimination, the plaintiff must show that he or she has the ability to perform the essential duties of the job with or without the disability.

Second, it is significant that the Supreme Court has drawn yet another parallel between the ADA and the FEHA statutory scheme-work. The federally enacted ADA is more employer friendly because its definitions giving rise to liability are not as expansive as the FEHA. In past cases, California appellate courts and the California Supreme Court had upheld the FEHA’s more expansive employee-friendly definitions at the expense of the ADA framework. This case may signal a shift towards one set of standards which employers must comply with in order to be certain that they do not violate the rights of individuals with physical or mental disabilities. If that shift is towards the ADA framework, California employers will be the beneficiaries.