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ASSEMBLY BILL 2222: CALIFORNIA PUSHES AND BREAKS THE DISABILITY LAW ENVELOPE

Michael L. Murphy

In 1973, California enacted legislation prohibiting discrimination on the basis of physical handicap, except in cases where the person is unable to perform the duties of the job in question. The legislation defined "physical handicap" as an "impairment of sight, hearing, or speech, or impairment of physical ability because of amputation or loss of function or coordination, or any other health impairment which requires special education or related services." In 1980, the California Legislature recodified its housing and employment laws to enact the Fair Employment and Housing Act (FEHA). The current FEHA, which

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2. Cassista, 5 Cal. 4th at 1056 (citation omitted).
3. The Fair Employment & Housing Act is codified at CAL. GOV'T CODE §§ 12,900-12,996 (West 1992). Enacted in 1980, FEHA consists of the following:
   - Chapter 1 – establishes the Department of Fair Employment & Housing;
   - Chapter 3 – identifies the public policy of the State of California as forbidding discrimination in employment on the basis of race, religion, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, or age;
   - Chapter 4 – contains definitions for terms within the Act;
   - Chapter 5 – identifies the powers and duties of the Department and the Commission;
   - Chapter 6 – describes the types of employment discrimination that are deemed unlawful employment practices;
covers all employers with five or more employees,4 prohibits discrimination in all aspects of employment including hiring, termination, and terms and conditions.5 The FEHA is similar to the federal civil rights laws, including Title VII of the Civil Rights Act of 1964,6 the Pregnancy Discrimination Act,7 the American with Disabilities Act (ADA),8 and the Age Discrimination in Employment Act (ADEA).9

The FEHA’s disability discrimination provisions have undergone a major expansion. Enacted on January 1, 2001, Assembly Bill 2222 (AB 2222),10 popularly known as the Prudence K. Poppink Act,11 amended the FEHA12 and the Unruh Civil Rights Act.13 Consequently, the disability

Chapter 7 – outlines the enforcement and hearing procedures; and
Chapter 8 – describes the nondiscrimination and compliance employment programs.


10. AB 2222 was introduced by Assembly Member Sheila Kuehl on February 24, 2000. Complete Bill History, http://www.leginfo.ca.gov/pub/99-00/bill/asm/ab_2201-2250/ab_2222_bill_20000930_history.html (last visited Nov. 2, 2001). It was amended several times before its passage on August 29, 2000, in the Senate, and August 31, 2000, in the Assembly. Id. The Bill was signed by Governor Davis on September 30, 2000, and filed with the Secretary of State the same day. Id.


12. CAL. GOV’T CODE §§ 12,900-12,996 (West 1992). This law prohibits harassment or discrimination in all aspects of employment on the basis of: age (forty and over), ancestry, color, creed, denial of family and medical care leave, disability (mental and
law landscape in California has changed significantly. The language of AB 2222 distinguishes it from federal disability law by stating:

The law of this state in the area of disabilities provides protections independent from those in the federal Americans with Disabilities Act of 1990 (Public Law 101-336). Although the federal act provides a floor of protection, this state’s law has always, even prior to the passage of the federal act, afforded additional protections.14

By changing four basic areas of disability law, California has effectively distinguished itself from its federal counterpart. First, AB 2222 broadens the definition of “disability” to apply to “laws prohibiting discrimination in public accommodations, business transactions, access to public places, and employment in the state civil service system.”15 Second, it creates an affirmative duty for employers to engage in an interactive process to assess, in conjunction with the employee requesting the accommodation, the possibility and effectiveness of any potential accommodation.16 Third, it prohibits employers from requiring medical or physical examinations of either applicants or employees, unless the exam is given after an employment offer is made and the exam is job related and consistent with business necessity.17 Fourth, AB 2222 protects individuals from discrimination on the basis of an actual or perceived physical or


15. Id. §§ 2-4 (codified at CAL. CIV. CODE §§ 51, 51.5, 54).

16. Id. § 6(e) (codified at CAL. GOV'T CODE § 12,926.1(e)). The circuits are split on whether the ADA requires an employer to engage in an interactive process with the employee when discussing reasonable accommodations. In Rehling v. City of Chicago, 207 F.3d 1009, 1016 (7th Cir. 2000), the court determined that an employer’s failure to engage in an interactive process was not a violation of the ADA. However, in Barnett v. U.S. Air, Inc., 228 F.3d 1105 (9th Cir. 2000), cert. granted in part, 532 U.S. 970 (2001), the Ninth Circuit concluded that the ADA requires an employer to engage in the interactive process. Id. at 1116. Also, in Cravens v. Blue Cross and Blue Shield of Kansas City, 214 F.3d 1011 (8th Cir. 2000), the Eighth Circuit held that a plaintiff may proceed with an ADA claim when the employer’s role in the interactive process is questionable. Id. at 1021.

mental disability, including potentially disabling conditions or ones perceived as such. 18

Title I of the Americans with Disabilities Act of 1990, 19 which is the federal analog to the employment disabilities portion of the FEHA, also prohibits discrimination against individuals with mental or physical disabilities. 20 An individual qualifies for protection under the ADA if that individual has a "disability" and is otherwise a "qualified individual," 21 so long as that individual's employer employs fifteen or more employees. 22 An individual is deemed to have a "disability" under the ADA if that individual has (1) a physical or mental impairment that substantially limits one or more of his major life activities; (2) a record of such an impairment; or (3) been regarded as having such an impairment. 23 Because the ADA's disability definition is disjunctive, a person need only qualify in one of the three areas. 24 The basic definition of a disability consists of three core components: physical or mental impairment, substantial limitation, and major life activity.

The federal regulations define a "physical impairment" as "[a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine." 25 This term has been interpreted to protect against discrimination for several types of disabilities, including: "heart conditions, back problems, high blood

18. Id. § 6(b) (codified at CAL. GOV'T CODE § 12,926.1(b)).
19. 42 U.S.C. §§ 12,101-12,213 (1994). The relationship between the ADA and other state laws is expressed as follows:

Nothing in this chapter shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this chapter. Nothing in this chapter shall be construed to preclude the prohibition of, or the imposition of restrictions on, smoking in places of employment covered by subchapter I, in transportation covered by subchapter II or III of this chapter, or in places of public accommodation covered by subchapter III of this chapter.

Id. § 12,201(b).
20. Id.
21. Id. § 12,112(a).
22. Id. § 12,111(5)(A).
23. Id. § 12,102(2) (emphasis added).
24. Disjunctive is defined as a term "which is placed between two contraries, by the affirming of one of which the other is taken away; it usually expressed by the word 'or.'" BLACK'S LAW DICTIONARY 469 (6th ed. 1990).
pressure, AIDS, epilepsy, diabetes, alcoholism and sight, hearing, speech and mobility impairments."26 However, short-term illnesses and injuries are not covered by the ADA.27

A "mental impairment" is defined as "[a]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities."28 But, traits or behaviors, such as stress, irritability, chronic lateness, and poor judgment, which may be linked to a mental impairment, are not considered impairments under the ADA.29

A substantial limitation exists when a person is "[u]nable to perform a major life activity that the average person in the general population can perform," or is "[s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to . . . the average person . . . ."30 To determine if an individual is substantially limited in performing a major life activity, it is necessary to evaluate the (1) nature and severity of the impairment, (2) the actual or expected duration of the impairment, and (3) the actual or potential long-term impact.31 To add to this formula, the Supreme Court recently held that mitigating measures, such as eyeglasses,32 medications,33 and even the body's anatomical or physiological systems,34


27. Id.


30. 29 C.F.R. §§ 1630.2(j)(1)(i), (ii) (2001). In Toyota Motor Mfg., Ky., Inc. v. Williams, __ U.S. __, 122 S. Ct. 681 (2002), the Supreme Court stated that "[t]he word 'substantial' . . . clearly precludes impairments that interfere in only a minor way with the performance of manual tasks from qualifying as disabilities." Id. at 691.

31. 29 C.F.R. §§ 1630.2(j)(2)(i)-(iii) (2001). The EEOC has provided the following guidance:

The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual. Some impairments may be disabling for particular individuals but not for others, depending on the stage of the disease or disorder, the presence of other impairments that combine to make the impairment disabling or any number of other factors.


should be considered to determine whether an individual qualifies as having a “disability” under the ADA.

A “major life activity” is any activity that “an average person can perform with little or no difficulty.” The Equal Employment Opportunity Commission (EEOC) identifies activities such as, “caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working” as major life activities. These not only include activities that have a public, economic, or daily aspect, but also include private activities. The determination of whether an activity constitutes a major life activity is a question of law that the court must consider.

In addition to having an impairment that substantially limits a major life activity, an individual seeking an accommodation must also be qualified for the position. An employee that is otherwise qualified is someone who “satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position.” An individual must satisfy all requirements that are job-related and consistent with business necessity.

In the years to come, it will most likely be AB 2222’s expansive definition of a mental and physical “disability” that will be the focus of a

35. 29 C.F.R. § 1630, app. § 1630.2(i) (2001).
36. 29 C.F.R. § 1630.2(i) (2001); 29 C.F.R. § 1630, app. § 1630.2(i) (2001) (“This list is not exhaustive.”). In Toyota Motor Manuf., Ky., Inc. v. Williams, __ U.S. __, 122 S. Ct. 681 (2002), the Court held that “to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives.” Id. at 691.
37. See Bragdon v. Abbott, 524 U.S. 624, 638 (1998) (finding that private activities, such as reproduction, are major life activities).
39. 29 C.F.R. § 1630.2(m) (2001).
40. Id. The individual must have “the appropriate educational background, employment experience, skills, licenses, etc.” 29 C.F.R. § 1630, app. § 1630.2(m) (2001). The EEOC further stated that “[t]he determination of whether an individual with a disability is qualified is to be made at the time of the employment decision.” Id.
41. 42 U.S.C. § 12,113(a) (1994). In Albertson’s, Inc. v. Kirkingburg, the Supreme Court determined that an individual’s failure to meet any essential job function, even if the failure was a result of the disability, will preclude protection under the ADA. 527 U.S. 555, 567-66 (1999). In Albertson’s, the plaintiff did not meet the DOT’s vision standards for a truck driver position, and as a result, the employer’s summary judgment was affirmed. Id. at 558.
great deal of litigation. California’s definition departs from the federal definition in three ways. First, under AB 2222, an impairment merely needs to “limit” an individual’s ability to participate in a major life activity, in contrast to the federal standard which requires an impairment that “substantially limits” a major life activity. Second, the determination of whether a limitation exists must be made without the consideration of mitigating measures. This requirement directly conflicts with the ADA’s regulations and a trio of recent Supreme Court decisions that held mitigating measures must be considered when determining a person’s disability. Third, the amendments require that the term “major life activities” shall be broadly construed and shall include physical, mental, and social activities and working. Moreover, the California Legislature found that “working is a major life activity, regardless of whether the actual or perceived working limitation implicates a particular employment or a class or broad range of employments.” This paper will focus on these three areas of difference.

A discussion of the new provisions contained in AB 2222 must begin with an appreciation for the development of the FEHA. Accordingly, this paper first examines the origins and development of the FEHA. Next, this paper examines the California Supreme Court’s decision in Cassista v. Community Foods and its progeny that narrowed the statutory definition of disability. This paper then analyzes the decisions that have evaluated AB 2222’s retroactive effect. This paper then compares the ADA’s statutory provisions to those of the FEHA, as modified by AB 2222. Finally, this paper concludes by discussing the implications that AB 2222 will have on California’s disability law.

I. STATUTORY DEVELOPMENT

A. The Origins and Development of the FEHA

In 1959, California enacted the Fair Employment Practices Act (FEPA), which proscribed employment discrimination on the bases of
race, creed, color, national origin, and ancestry. The California Legislature amended the FEPA, in 1973, to prohibit discrimination on the basis of physical handicap, unless the person is unable to perform the duties of the job in question. The Legislature's definition of "physical handicap" created three general categories: (1) "impairment of sight, hearing, or speech"; (2) "impairment of physical ability because of amputation or loss of function or coordination"; and (3) "any other health impairment which requires special education or related services."

See Gelb & Frankfurt, supra note 1, at 1057-58. The authors noted:

When the wartime Fair Employment Practices Committee was disbanded in 1945, its supporters caused fair employment legislation modeled on the committee's procedures to be introduced in five states: California, New York, Pennsylvania, Massachusetts, and New Jersey. The statutes passed in every state but California. Fair employment legislation was also proposed to the voters of California in 1946 as Initiative Measure No. 11, but was defeated by a proportion of over two to one. Similar measures were introduced in the legislature in 1947, 1949, 1951, 1953, 1955, and 1957, failing every time. Finally, in 1959 a bill sponsored by Assemblymen Rumford and Hawkins, co-sponsored by 52 other assemblymen and supported by Governor Edmund G. Brown, was passed by both houses and signed into law on April 16, 1959.

This new law, entitled the Fair Employment Practices Act, established a five member Fair Employment Practices Commission to be appointed by the Governor and an administrative agency, the Division of Fair Employment Practices, to carry out the policies and dictates of the Commission. The statute established as the public policy of California that:

[T]he practice of denying employment opportunity and discriminating in the terms of employment for such reasons foments domestic strife and unrest, deprives the state of the fullest utilization of its capacities for development and advancement, and substantially and adversely affects the interests of employees, employers, and the public in general.

The Commission was given the power to investigate, hold hearings and issue cease and desist orders. The original act barred employment discrimination on the basis of race, creed, color, national origin, or ancestry.

There were serious political impediments to similar legislation on the national level. It was not until 1963 that a comprehensive civil rights bill, covering accommodations, voting, governmental benefits, and employment, was introduced. The portion of the bill covering employment discrimination, Title VII, only passed after numerous amendments stripped the new Equal Employment Opportunity Commission (EEOC) of the power to issue cease and desist orders or go to court. The EEOC could only investigate complaints and issue "right-to-sue" letters for private enforcement of the Act. The federal act did prohibit discrimination on the basis of sex, a provision not included in the 1959 California law.

Id. (citations omitted).

Cassista, 5 Cal. 4th at 1056 (citations omitted).

Id. at 1056-57.
Ultimately, the Legislature enacted the FEHA, which repealed and recodified the FEPA and the Rumford Housing Act.  

1. Administering Regulations  

In 1980, the newly created Fair Employment and Housing Commission (FEHC), the agency responsible for administering the FEHA, promulgated regulations defining “handicapped individual.” Under the regulation, a “handicapped individual” is defined as a person who “(1) has a physical handicap which substantially limits one or more major life activities; (2) has a record of such a physical handicap; or (3) is regarded as having such a physical handicap.” This definition mirrors the one contained in the Vocational Rehabilitation Act of 1973. Moreover, the regulation defined an “impairment of physical ability due to loss of function” as “[a]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin and endocrine.”

The regulations were amended in 1995, to reflect the changes made by the California Legislature in 1992. The modified regulations exchanged the term “handicapped” for “disability.” The FEHC defines disability as an impairment that “limits an individual’s ability to participate in major life activities.” The definition of physical disability included a reference to the California Supreme Court’s decision in American National Insurance Co. v. Fair Employment & Housing Commission.
Further, the regulations included a separate definition for "mental disability," which was added to the statute in 1992.60

2. American National Insurance

In American National Insurance Co. v. Fair Employment & Housing Commission,61 the California Supreme Court established the boundaries for the statutory definition of "physical handicap." Former section 12,926(h) of the FEHA defined a "physical handicap" as an "impairment of sight, hearing, or speech, or impairment of physical ability because of amputation or loss of function or coordination, or any other health impairment which requires special education or related services."62 When American National was decided, the FEHA's statutory definition (as opposed to the regulatory definition) "appeared to be more restrictive than the federal definition" under the Rehabilitation Act.63

In American National, the defendant fired the plaintiff because of high blood pressure.64 Claiming that the adverse employment action was the result of discrimination on the basis of physical handicap, the plaintiff brought a claim under the FEHA.65 In concluding that high blood pressure is protected under the FEHA,66 the court determined that a physical handicap is a condition of the body, which has the "disabling effect" of making "achievement unusually difficult."67

Ultimately, the court determined that the conditions enumerated in former section 12,926(h)68 were not exhaustive.69 To receive protection

61. 32 Cal. 3d 603 (Cal. 1982).
62. See supra note 50.
63. Gelb & Frankfurt, supra note 1, at 1095. For the Rehabilitation Act's definition of "physical handicap," see supra note 54.
64. Am. Nat'l, 32 Cal. 3d at 606.
65. Id. During the administrative phase of the proceedings, the Fair Employment Practices Commission (FEPC) determined that the plaintiff had been the subject of discrimination. Id. As such, the FEPC ordered the insurance company to reinstate the defendant with back pay. Id. The company was unsuccessful in seeking a writ of review in the superior court, which determined that the record supported the FEPC's findings and that high blood pressure is indeed a "physical handicap" under the FEPA. Id.
66. Id. at 610 ("We should not conclude that the Legislature intended any such anomalous result.").
67. Id. at 609 (stating that "Webster's [Dictionary] tells us that a handicap is 'a disadvantage that makes achievement unusually difficult.' Obviously a condition of the body which has that disabling effect is a physical handicap") (citation omitted).
68. The definition was significantly altered by the 1992 amendments. See infra Part A.3. The current definition of "physical handicap" is codified at CAL GOVT CODE § 12,926(k).
69. Am. Nat'l, 32 Cal. 3d at 608-09.
for a condition not specifically listed, the court stated that an individual must show "(1) that the illness or defect is physical, and (2) that it is handicapping." The court determined that epilepsy, cerebral palsy, arthritis, and high blood pressure are conditions not expressly listed in section 12,926(h), but are in fact covered by the statute. The dissent stated that the majority's construction essentially "rewrot[e] the statute in the guise of construing it." Although the majority construed the FEHA's definition of physical handicap very broadly, it did exclude non-physical handicaps, such as mental or economic disabilities as well as "ills or defects that in fact are not handicapping," such as "digestive, respiratory, or skin disorders."

3. 1992 Amendments to the FEHA

Following the passage of the ADA, the California Legislature updated the FEHA's definition of "handicap" to the more current term "disability," and enacted a new three-part definition of "physical disability." The new definition stated that a "physical disability" includes, but is not limited to, all of the following:

(1) Having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following:

70. Id. at 609.
71. Id.
72. Id. at 616 (Mosk, J., dissenting). After a lengthy discussion, Justice Mosk concluded that:

We should therefore refuse to follow the commission's overbroad administrative construction of the act's definition of "physical handicap." I do not doubt, of course, that the commission is motivated by a sincere desire to implement the salutary purposes of this legislation. Nor do I underestimate the practical difficulties faced by the commission in doing so. But in California the prohibition against employment discrimination is wholly a creature of statute: the provisions of this act "are in no sense declaratory of preexisting common law doctrine but rather include areas and subject matters of legislative innovation, creating new limitations on an employer's right to hire, promote or discharge its employees." If the definition of physical handicap set forth in the act is found to be too limited for its purposes in the light of today's medical knowledge, it is not for the commission but for the Legislature to rewrite it. In other settings the Legislature has shown that it knows how to do so with great precision.

For the reasons stated, I would hold that the challenged decision of the commission was in excess of its jurisdiction, and that the superior court erred in ruling otherwise.

Id. at 619-20 (Mosk, J., dissenting) (citations omitted).
73. Id. at 608.
74. See infra note 75; see also Cassista v. Cmty. Foods, 5 Cal. 4th 1050, 1060 & n.10 (Cal. 1993).
(A) Affects one or more of the following body systems: neurological, immunological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine.

(B) Limits an individual’s ability to participate in major life activities.

(2) Any other health impairment not described in paragraph (1) that requires special education or related services.

(3) Being regarded as having, or having had, a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment described in paragraph (1) or (2).

(4) Being regarded as having, or having had, a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment that has no present disabling effect but may become a physical disability as described in paragraph (1) or (2).  

Further, the amendments stated that "[i]t is the intent of the Legislature that the definition of physical disability in this subdivision shall have the same meaning as the term 'physical handicap' formerly defined by this subdivision and construed in American National Insurance Company v. Fair Employment & Housing Commission."  

In addition, the 1992 amendments included, for the first time, a definition of "mental disability." Under the FEHA, a "mental disability" included "any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, or specific learning disabilities." As a result, the FEHA and its implementing regulations generally followed those of the ADA, which were, in turn, modeled on the definition contained in the Vocational

75. CAL. GOV'T CODE § 12,926(k) (West 1992); Cassista, 5 Cal. 4th at 1060 (citing CAL. GOV'T CODE, § 12,926(k). As discussed below, infra Part II, this definition was significantly altered by AB 2222.

76. CAL. GOV'T CODE § 12,926(k) (West 1992). The reference to American National in subsection (k) was dropped in AB 2222. See infra note 206 and accompanying text.

77. CAL. GOV'T CODE § 12,926(i) (West 1992).

78. Id. The definition further states that: [M]ental disability’ does not include conditions excluded from the federal definition of ‘disability’ pursuant to Section 511 of the Americans with Disabilities Act of 1990. Additionally, for purposes of this part, the unlawful use of controlled substances or other drugs shall not be deemed, in and of itself, to constitute a mental disability.

Id. (citation omitted).

Rehabilitation Act of 1973.\textsuperscript{80} Facially, the only noteworthy difference between the FEHA and the ADA was FEHA’s omission of the term “substantially” when referring to a condition that “limits” a major life activity.

\textbf{B. Cassista v. Community Foods}

In \textit{Cassista v. Community Foods},\textsuperscript{81} the California Supreme Court considered whether the FEHA prohibited “employment discrimination on the basis of a person’s weight.”\textsuperscript{82} The court held that “weight may qualify as a protected ‘handicap’ or ‘disability’ within the meaning of the FEHA if medical evidence demonstrates that it results from a physiological condition affecting one or more of the basic bodily systems and limits a major life activity.”\textsuperscript{83} However, the court determined that plaintiff’s condition did not qualify.\textsuperscript{84} Although the court’s holding dealt directly with the issue of obesity as a limitation on a major life activity, the court’s interpretation of the statutory language was its most significant contribution.

Although the dispute arose from an alleged incident in the summer of 1987,\textsuperscript{85} the case did not make it to the California Supreme Court until

\textsuperscript{80} See \textit{Cassista}, 5 Cal. 4th at 1060 (1993). The Vocational Rehabilitation Act of 1973, 29 U.S.C. §§ 701-797b (1994), requires that “[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .” 29 U.S.C. § 794 (1993). The Act also defines an “individual with a disability” as any person who “(i) has a physical or mental impairment which substantially limits one or more of such person’s major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.” 29 U.S.C. § 706(8)(B).

\textsuperscript{81} 5 Cal. 4th 1050 (Cal. 1993) (en banc).

\textsuperscript{82} \textit{Cassista}, 5 Cal. 4th at 1052.

\textsuperscript{83} \textit{Id.} (emphasis added).

\textsuperscript{84} \textit{Id.}

\textsuperscript{85} \textit{Id.} at 1053. In pertinent part, the court described the facts of the case as follows:

In the summer of 1987, Toni Linda Cassista (plaintiff) applied for one of three openings at Community Foods, a health food store in the City of Santa Cruz. Founded as a neighborhood collective in the 1970’s, Community Foods normally employed 16 to 17 people. The duties to be performed by the prospective employees included running the cash register, stocking 35- to 50-pound bags of grain, carrying 50-pound boxes of produce, retrieving groceries form the warehouse, changing 55-gallon drums of honey, and carrying large crates of milk. To fill the vacancies, Community Foods sought people with grocery store, retail clerk, cashier and stocking experience. New employees could eventually become members of the collective with management and ownership interests.

Plaintiff [Cassista] is five feet four inches tall and, at the time she applied to Community Foods, weighed three hundred and five pounds. She had previously been employed in several restaurants, managed a sandwich shop and worked as
after the 1992 amendments were enacted. The court noted that “[b]ecause neither party raised the 1992 Amendment to section 12926 or its possible effect on this litigation, we solicited and received supplemental briefing on the matter.”

The court found that the state of the “current and former law are remarkably consistent.” The court went further by stating that “[i]n fact, the definition of ‘physical disability’ adopted by the Legislature in 1992 has been effectively controlling FEHA claims in California since 1980.” The court noted that in 1980 the FEHC promulgated the regulation defining a “physical handicap” as one that “substantially limits one or more major life activities.”

The court was cognizant of the fact that the statutory language of the FEHA only required a “limit” on a major life activity, as opposed to the “substantial limitation” language that appeared in the regulation. The court indicated, however, that “[t]he obvious similarity between the 1980 regulation and the 1992 statutory amendment [was] not coincidental.”

The court was quick to point out that the origin of both provisions was the Vocational Rehabilitation Act of 1973. The Vocational Rehabilitation Act defines an “individual with a disability” as any person who “(i) has a physical or mental impairment which substantially limits

an aide in nursing homes. Plaintiff heard about the openings at Community Foods through a friend who worked there; she was interested in the job because she believed that the collective shared her “political awareness of issues and consciousness and concerns regarding the community and the environment.”

Plaintiff filed a complaint with the Department of Fair Employment and Housing (Department), alleging discrimination on the basis of her weight. Shortly thereafter, Community Foods offered plaintiff a position with the store. She refused the offer, however, because she did not believe the collective had adequately “educated” itself about the concerns of overweight people. After the Department determined not to file a complaint in the matter, plaintiff filed suit against Community Foods and Will Hildeburn alleging that she was denied employment in violation of the FEHA “in that [they] regarded her as having a physical handicap, i.e., too much weight.” Community Foods answered the complaint and denied its allegations.

*Id.* at 1053-54.

86. The case was decided on September 2, 1993. *Id.* at 1050.
87. *Id.* at 1058 n.8.
88. *Id.* at 1059.
89. *Id.*
90. *Id.* at 1060 (citing [former] CAL. CODE REGS. tit. 2, § 7293.6(i)) (emphasis in original).
91. *Id.*
92. *Id.*
93. *Id.*
one or more of such person’s major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.94

The court recognized that it has been common practice for states, including California, to enact statutes that closely track their federal counterparts.95 The court noted that the ADA’s definition was modeled after the Rehabilitation Act, and, in turn, the 1992 amendments to the FEHA were modeled on the ADA.96 In finding that the changes in the FEHA were premised on the ADA, the court surmised that the “result [was] that [California’s] statute ha[d] finally caught up with its [1980] implementing regulation.”97

The court concluded by describing the harmonization of the two versions and stating that the “touchstone of a qualifying handicap or disability is an actual or perceived physiological disorder which affects a major body system and limits the individual’s ability to participate in one or more major life activities.”98 In sum, the court leaned heavily towards a “substantial limitation” interpretation of the statutory language.99

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95.  Cassista, 5 Cal. 4th at 1060.
96.  Id.
97.  Id. The court also noted that:

The case law also reveals a general consistency between the current and former versions of section 12926. The regulation, which is now more than a dozen years old, has regularly informed the courts’ decisions. Indeed, every reported decision to date has either cited, or is consistent with, the regulatory provision. In Pickrel v. General Telephone Co. (1988) 205 Cal.App.3d 1058, 1061, for example, the court relied on the regulation in holding that the plaintiff’s back injury—a physiological disorder affecting the musculoskeletal system—satisfied the definition of physical handicap. In County of Fresno v. Fair Employment & Housing Com. (1991) 226 Cal.App.3d 1541, 1549, the court noted that the plaintiffs’ physical condition, an extreme sensitivity to smoke, constituted a physiological disorder affecting the respiratory system and therefore qualified as a physical handicap under the FEHA. (See also Raytheon Co. v. Fair Employment & Housing Com. (1989) 212 Cal.App.3d 1242, [acquired immune deficiency syndrome is the result of a virus affecting the human immune system and therefore constitutes a physical handicap under FEHA.] Even the relatively broad holding in American National, 32 Cal.3d 603, was informed and limited by the fact that the plaintiff alleged a physiological disorder (high blood pressure) affecting the cardiovascular system and therefore fit neatly within the regulatory requirements.

Id. at 1061.
98.  Id.
99.  Id.; see also Elizabeth Kristen, Addressing the Problem of Weight Discrimination in Employment, 90 CAL. L. REV. 57, 95-98 (2002) (maintaining that AB 2222 would have likely changed the outcome of the Cassista decision).
C. Post-Cassista: Courts Fail to Achieve Consensus

In the aftermath of the court’s decision in Cassista, the lower courts failed to reach consensus on whether the FEHA’s definitions of “physical” and “mental” disability\textsuperscript{100} were identical to the ADA’s singular definition of “disability.”\textsuperscript{101} The split was most evident in the appellate courts’ analysis of mental disability. Similarly, the passage of AB 2222 has created a rift among the lower courts with respect to the legislation’s retroactive effect.\textsuperscript{102} This issue is currently being resolved by the California Supreme Court.\textsuperscript{103}

1. California Appellate Courts: Pre-AB 2222

a. Pensinger v. Bowsmith: Unambiguous Definition of Mental Disability

In Pensinger v. Bowsmith,\textsuperscript{104} the Fifth Appellate District of the California Court of Appeals stated that under section 12,926, “[f]or some reason, the Legislature imposed a requirement that a physical disability must limit a major life activity without imposing the same requirement on a mental disability.”\textsuperscript{105} When comparing section 12,926’s dual definition of disability\textsuperscript{106} with the single definition of the ADA,\textsuperscript{107} the court stated:

There is no doubt . . . that establishing a mental disability for purposes of the ADA requires a plaintiff to prove that it substantially limits one or more of the major life activities. Although the FEHA includes this requirement with respect to proving a physical disability, it is absent from the definition of mental disability.\textsuperscript{108}

The court analyzed numerous California statutes that contain singular definitions for mental and physical disability.\textsuperscript{109} By way of comparison,
the court noted that the Legislature was capable of changing the
definition of “mental disability” in section 12,926 if they wished to do
so.\textsuperscript{110} Although the court “question[ed] the wisdom of making the hurdle
higher for a person who has suffered the loss of a limb to prove he or she
suffers from a disability for purposes of the FEHA, than it is for a person
who . . . [suffers from a mental disability],” they were clear to point out
that they were “not at liberty to ignore the plain language of the statute
or supplant [their] judgment for that of the Legislature.”\textsuperscript{111}

\textbf{b. Muller v. Automobile Club: Ambiguous Definition of Mental
Disability}

Approximately one month after the Fifth Appellate District’s decision
in \textit{Pensinger}, the Fourth Appellate District came to a very different
conclusion. In \textit{Muller v. Automobile Club},\textsuperscript{112} the Fourth Appellate
District of the California Court of Appeals found that it was “clear the
Legislature intended to conform California’s employment discrimination
statutes to the ADA by extending protection to persons with mental
disabilities, and intended, in accordance with the ADA, to uniformly
define ‘mental disability’ as a mental impairment that substantially limits
a major life activity.”\textsuperscript{113} The court reached its conclusion despite the
contrary finding in \textit{Pensinger}.\textsuperscript{114}

Undoubtedly, the Legislature was aware of the definitions of mental and physical
disability included in the ADA because it referred to it repeatedly in enacting
the [1992] amendment to the FEHA. Undoubtedly, the Legislature also knew
how to amend the FEHA to include a requirement that a mental disability effect
must limit a major life activity, if it wished that result. This is evident from the
other provisions of California law that were amended in 1992 along with the
FEHA; specifically, Business and Professions Code section 125.6; Civil Code
section 54; Education Code section 44101; and Government Code section 11135.
In each of these sections the Legislature amended the definition of “disability” to
mirror that of the ADA, and include a requirement that the physical or mental
disability “substantially limits one or more of the major life activities of the
individual.” Yet, it did not include this requirement in the definition of mental
disability under the FEHA.

\textit{Id.} at 722.

\textsuperscript{110} \textit{Id.}

\textsuperscript{111} \textit{Id.} (citing California \textit{v. Woodhead}, 43 Cal. 3d 1002, 1007 (Cal. 1987)).

\textsuperscript{112} 71 Cal. Rptr. 2d 573 (Cal. Ct. App. 1998).

\textsuperscript{113} \textit{Id.} at 580.

\textsuperscript{114} \textit{Id.} at 580 n.6.; \textit{contra Pensinger}, 60 Cal. App. 4th at 722. In \textit{Perez \textit{v. Proctor &
Gamble Mfg. Co.}}, 161 F. Supp. 2d 1110 (E.D. Cal. 2001), the court briefly discussed the
split among the lower state courts:

The California courts of appeal are split on whether a plaintiff must show the
mental disorder limits a major life activity. One California court of appeal has
held that the FEHA, like the ADA, requires that the mental disorder
The court acknowledged that the definition of "mental disability" in section 12,926, unlike the definition of "physical disability," contains no qualifying language. The court recognized that, on its face, the definition of "mental disability" was unambiguous; however, the court went on to say that, "viewed in the overall context of section 12,926, it creates an ambiguity as to whether the Legislature intended to provide to employees with minor or temporary mental disorders protection that is denied to employees with minor or temporary physical disorders."

_Pensinger v. Bowsmith, Inc._, 60 Cal.App.4th 709, 722, 70 Cal.Rptr.2d 531 (1998), has held that the plaintiff need only establish that he or she suffers from a mental disability and need not show that the disorder limits his or her life in any way. Muller v. Auto. of S. Cal., 61 Cal.App.4th 431, 442-443, 71 Cal.Rptr.2d 573 (1998).

This matter is further complicated by recent amendments to the FEHA. Effective January 1, 2001, the definition of "mental disability" was amended as follows:

"Mental disability" includes, but is not limited to, all of the following: (1) Having any mental or psychological disorder or condition, such as mental retardation, organic brain syndrome, emotional or mental illness, or specific learning disabilities, that limits a major life activity . . . . Cal.Gov.Code § 12926(i) (West 2001) (emphasis added).

With respect to whether the FEHA, as it existed prior to the 2001 amendments, required a plaintiff to show that his or her mental disorder limits one or more of the major life activities, the court agrees with the decision in _Pensinger_ and respectfully disagrees with the decision in Muller, and finds that prior to the 2001 amendments, a plaintiff was not required to show that his or her mental disorder limits, substantially or otherwise, one or more of the major life activities. In reaching this same conclusion, the _Pensinger_ court noted that although the definition of physical disability required that the physical disorder limit one of the major life activities, the definition of mental disability did not. The court further noted that while the Legislature amended the FEHA in 1992 to include "mental disability" as one of the prohibited bases for discrimination in employment, it did not include the limitation requirement. Finding no ambiguity in the plain language of the statute, the _Pensinger_ court held that an employee with a mental disorder need not show that such disorder limits one or more of his major life activities. The court finds this reasoning persuasive.

_Id_. at 1120-21 (footnote omitted).

115. _Muller_, 71 Cal. Rptr. 2d at 579.

116. _Id_. at 579 (emphasis in original). The _Muller_ court described its analysis of the statute, in pertinent part, as follows:

When interpreting a statute, we must ascertain legislative intent so as to effectuate the purpose of a particular law. Of course our first step in determining that intent is to scrutinize the actual words of the statute, giving them a plain and commonsense meaning. When the words are clear and unambiguous, there is no need for statutory construction or resort to other indicia of legislative intent, such as legislative history. But language that appears unambiguous on its face may be shown to have a latent ambiguity; if so, a court may turn to customary rules of statutory construction or legislative history for guidance.
Moreover, the court compared the definition of “mental disability” contained in section 12,926 to the definition contained in section 12,955.3, which pertains to housing discrimination. As the court noted, section 12,955.3 defines disability as “[a] physical or mental impairment that substantially limits one or more of a person’s major life activities.” While the definition contained in the housing section of the FEHA was quite specific, the terms “emotional illness” and “mental illness” used in section 12,926 could be “broadly construed to include [a] myriad [of] temporary mental or psychological disorders that are not truly disabling because they do not impair any of the afflicted person’s major life activities.”

In light of the numerous other California statutes that use the ADA-style definition of mental disability, the court could “think of no good reason why the Legislature would define ‘mental disability’ more broadly in the context of employment discrimination than in the context of housing discrimination.” In sum, the court equated the definitional discrepancies to mere “legislative oversight.”

c. Swenson v. Los Angeles: Expanding Pensinger

In Swenson v. Los Angeles, the Second Appellate District of the California Court of Appeals held that the FEHA’s “legislative definition does not require that an individual have a qualifying mental disability
that 'substantially limits' or even 'limits' a major life activity.' In *Swenson*, the plaintiff suffered from a learning disability which compromised his ability to complete tasks related to his job. The plaintiff requested several accommodations, but the employer did not respond. The employer eventually terminated the plaintiff, who later brought suit under the FEHA.

The trial judge instructed the jury that "an employee has a mental disability when he has or is regarded by his employer as having any mental disorder or condition which affects one or more major life activities." The judge refused to give the defendant's proposed jury instruction that would have defined a disability as "a physical or mental impairment that substantially limits one or more of the major life activities of an individual." After the plaintiff received a favorable jury verdict, defendant appealed contending that the trial court erred in not instructing the jury in accordance with the ADA's definition of disability.

Under the FEHA, the definition of mental disability, which was not included in the FEHA until 1992, includes:

> Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. However, "mental disability" does not include conditions excluded from the federal definition of "disability" pursuant to Section 511 of the Americans with Disabilities Act of 1990 (42 U.S.C. § 12211). Additionally, for purposes of this part, the unlawful use of controlled substances or other drugs shall not be deemed, in and of itself, to constitute a mental disability.

The appeals court suggested that the statutory "definition contains no express requirement as to the degree of disability that must result from a condition in order to trigger the statutory protection it provides."

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125. *Id.* at 573-74.
126. *Id.* at 574.
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.* The plaintiff was awarded $532,000 in economic damages and $370,000 in non-economic damages, as well as $268,210 in attorney's fees. *Id.*
132. *See supra* notes 77-78.
134. *Swenson*, 89 Cal. Rptr. 2d at 575.
The court stated further that while the ADA contains a single definition for both physical and mental disabilities, the FEHA contains separate definitions of each term. Although the ADA’s single definition of disability requires a showing of a substantial limitation to a major life activity, the court noted that “[n]either the plain language of the FEHA definitions of ‘mental disability’ or of ‘physical disability’ contains such a requirement.” Hence, “[t]he legislative definition [under the FEHA] does not require that an individual have a qualifying mental disability that ‘substantially limits’ or even ‘limits’ a major life activity.” Ultimately, the court concluded that the clear text of the FEHA imposes a different standard than the ADA.

Swenson was under review when AB 2222 became effective on January 1, 2001. On January 24, 2001, pursuant to rule 29.4(c) of the California Rules of Court, the court dismissed review as improvidently granted.

2. California Appellate Courts: Post-AB 2222

Since January 1, 2001, the date on which AB 2222 became effective, the California appellate courts have focused on the statute’s retroactive effect. The Second Appellate District of the California Court of Appeals has lead the way in this regard and has seen an internal split develop on the issue.

135. Id. (citing 42 U.S.C. § 12,102(2)).
136. Id.
137. Id.
138. Id.
139. Id. at 574.
140. Swenson v. Los Angeles, 89 Cal. Rptr. 2d 53 (Cal. 2001).
141. Rule 29.4(c) of the California Rules of Court, entitled Dismissal of Review, states:

The Supreme Court may dismiss review of a cause as improvidently granted and remand the cause to the Court of Appeal. The order of dismissal and remand is final forthwith and shall be sent by the clerk to all parties and to the Court of Appeal. On filing of the order in the Court of Appeal, the decision of the Court of Appeal shall become final and the clerk of the Court of Appeal shall issue a remittitur forthwith. The opinion of the Court of Appeal remains unpublished, under rule 976(d), unless the Supreme Court expressly orders otherwise.

CAL. RULES OF COURT 29.4(c). The Advisory Committee Comment notes that:

If the Supreme Court dismisses review as improvidently granted under subdivision (c), the cause is restored to the posture it had before the Supreme Court granted review: the decision of the Court of Appeals is final. If the Supreme Court wishes to reconfer jurisdiction on the Court of Appeal, it will do so by transfer under subdivision (b), (d), or (e).

Id.

142. Swenson, 89 Cal. Rptr. 2d at 572.
a. Jensen v. Wells Fargo Bank: Assuming Retroactivity

Jensen v. Wells Fargo Bank, a case which arose prior to AB 2222, was not decided until after the Governor signed the bill. In Jensen, the Second Appellate District of the California Court of Appeals held that “the plain meaning of the language used in the FEHA’s definition of mental disability, and the absence of any potential absurd result from following the plain language, require us to follow the Legislature’s language and give a broader meaning to mental disability than to physical disability.” The court expressly rejected the Fourth Appellate District’s reasoning in Muller.

The court followed the rationale it employed in Swenson. However, it found its position supported by the enactment of AB 2222. The court stated that “[a]ssuming [AB 2222] represents a legislative attempt to clarify the existing statute, it would apply to cases which predate its passage.”


In Colmenares v. Braemar Country Club, Inc., a decision superseded by California Supreme Court review, a panel for the Second Appellate District of the California Court of Appeals came to a different conclusion than the judges in Swenson and Jensen. The Colmenares panel concluded that the provisions contained in AB 2222 should be applied

144. The case was decided on December 5, 2000, twenty-six days before AB 2222 became effective on January 1, 2001.
145. Jensen, 102 Cal. Rptr. 2d at 64.
146. Id.
147. See supra Part I.C.1.c.
148. Jensen, 102 Cal. Rptr. 2d at 64.
149. Id. at 64 (citing W. Sec. Bank v. Superior Court, 15 Cal. 4th 232 (Cal. 1997)) (emphasis added).
150. 109 Cal. Rptr. 2d 719 (Cal. Ct. App. 2001), superseded by, 111 Cal. Rptr. 2d 336 (Cal. 2001). On August 22, 2001, the California Supreme Court granted review of the Second Appellate District’s decision in Colmenares v. Braemar Country Club, Inc., 111 Cal. Rptr. 2d 336 (Cal. 2001). In accordance with the court’s grant of review and the California Rules of Court 976, 977, and 979, the Second District’s decision may not be cited as authority. CAL. RULES OF COURT 29.4(c).
151. Colmenares, 111 Cal. Rptr. 2d 336 (Cal. 2001).
152. The panel in Colmenares consisted of Judge Vogel, Presiding Judge Spencer, and Judge Ortega. In Jensen, the panel consisted of Judge Curry, Acting Presiding Judge Epstein, and Judge Hastings.
prospectively because it resulted in a significant change to the law surrounding the definition of physical disability.\textsuperscript{153}

First, the court stated that the statute’s construction and grammatical structure speaks to the state of the law at some future time.\textsuperscript{154} Second, the court found that sections 12,926.1 and 12,926(k) substantially changed existing law and expanded the burden on employers to accommodate employees.\textsuperscript{155} The court concluded that with these changes, “[t]he true meaning of the statute [did] not remain the same.”\textsuperscript{156} Third, the panel relied on the old saying that “it is unfair to change the ‘rules of the game’ in the middle of a contest.”\textsuperscript{157} The court noted that this interpretation has special application when legal doctrines are involved.\textsuperscript{158} Fourth, the panel stated that the courts are the final arbiter of a statute’s meaning, not the legislature.\textsuperscript{159} The court questioned how the California Legislature could speak authoritatively when AB 2222 was enacted eight years after the 1992 Amendments to the FEHA and seven years after the California Supreme Court’s decision in Cassista.\textsuperscript{160}

The panel also addressed the earlier decision in Jensen v. Wells Fargo Bank\textsuperscript{161} by dismissing it.\textsuperscript{162} Reflecting on the Jensen panel’s interpretation

\textsuperscript{153.} Colmenares, 107 Cal. Rptr. 2d at 722-23.

\textsuperscript{154.} Id. In explaining that the Legislature’s intent in enacting AB 2222 was prospective, the Colmenares panel stated that:

[T]he statute is intended to result in broader coverage, that state law is to be interpreted to require only a limitation that makes a major life activity “difficult,” not a “substantial limitation” and that, notwithstanding the [California] Supreme Court’s decision in Cassista [v. Cmty. Foods, 856 P.2d 1143 (Cal. 1993) (en banc)], the Legislature’s present intent is to require a different interpretation in the future.

Id. at 723.

\textsuperscript{155.} Id. The court noted that:

These amendments substantially change existing law so that an employer must now make accommodations for not only those employees who met the “substantial limitation” test articulated in Cassista, but also for those with limitations that are not substantial but merely make “the achievement of [a] major life activity difficult.”

Id. (citing CAL. GOV’T CODE §§ 12,926.1(d), 12,926(k)(1)(B)(ii)).

\textsuperscript{156.} Id. (citing W. Sec. Bank v. Superior Court, 15 Cal. 4th 232, 243 (Cal. 1997)).

\textsuperscript{157.} Id.

\textsuperscript{158.} Id. (citations omitted).

\textsuperscript{159.} Id. (citing W. Sec. Bank, 15 Cal. 4th at 244).

\textsuperscript{160.} Id. at 723-24. The panel stated that “‘there is little logic and some incongruity in the notion that one Legislature may speak authoritatively on the intent of an earlier Legislature’s enactment when a gulf of decades separates the two bodies.’” Id. at 723 (quoting W. Sec. Bank, 15 Cal. 4th at 244)). For a thorough discussion of the 1992 Amendments to the FEHA, see supra Part I.A.3. For a thorough discussion of Cassista, see supra Part I.B.

\textsuperscript{161.} 102 Cal. Rptr. 2d 55 (Cal. Ct. App. 2000); see also Part I.C.2.a.
regarding AB 2222's role in clarifying the pre-existing law in California, the Colmenares court stated that it had no binding effect. As such, it cannot be considered legal authority to support any proposition.

c. Wittkopf v. Los Angeles: AB 2222 Merely Clarifying Existing Law

In Wittkopf v. Los Angeles, a reconfigured Second Appellate District panel concluded that AB 2222 has "no true retrospective effect" because it merely clarifies the existing law and does not change it. The Wittkopf decision was issued less than two months after the Second Appellate District's Colmenares decision. The Wittkopf panel based its decision on principles of statutory construction and a chronic misreading by courts of the California Supreme Court's seminal decision in Cassista.

The court stated that statutes operate prospectively unless the legislature is clear that the statute should be retroactively applied. The court also stated, however, that this principle is inapplicable when the statute is intended merely to clarify the existing state of the law. In Wittkopf, the panel found the exception controlling because AB 2222 does not create a radical change in California's disability law, but only serves to clarify it.

The most significant aspect of the Wittkopf decision is its treatment of the decision in Cassista. The court stressed the facial differences between the definitions of physical disability contained in the FEHA and the ADA. The court then noted that "[n]otwithstanding the significant

162. Colmenares, 107 Cal. Rptr. 2d at 724.
163. Id.
164. Id. (citing Aguilar v. Avis Rent A Car Sys., Inc., 21 Cal. 4th 121, 143 (Cal. 1999)).
165. 109 Cal. Rptr. 2d 543 (Cal. Ct. App. 2001), superseded by, 113 Cal. Rptr. 2d 23 (Cal. 2001). On October 10, 2001, the California Supreme Court granted review of the Second Appellate District's decision in Wittkopf v. Los Angeles, 113 Cal. Rptr. 2d 23 (Cal. 2001). In accordance with the court's grant of review and the California Rules of Court 976, 977, and 979, the Second District's decision may not be cited as authority. CAL. RULES OF COURT 29.4(c).
166. Id. at 549.
167. The panel in Wittkopf consisted of Judges Boland, Acting Presiding Judge Johnson, and Judge Woods. In Colmenares, the panel consisted of Judge Vogel, Presiding Judge Spencer, and Judge Ortega. See supra note 152.
168. Wittkopf, 109 Cal. Rptr. 2d at 54. For a thorough discussion of Cassista, see supra Part I.B.
170. Id. at 548-49.
171. Id. at 549.
172. Id. The court noted that:
gap in the language of these two statutes, a number of courts have mistakenly equated FEHA’s standard with the more exacting definition in the ADA.” The Wittkopf court attributed this “significant gap” on the courts’ “misreading” of the Cassista decision.

In parsing Cassista, the panel pointed to the decision’s language stating that the 1992 amendments to the FEHA finally caught up to its implementing regulations. The Wittkopf court considered this language mere dicta. The panel stated that the Cassista court’s holding is found in the following passage:

[I]t is a relatively simple matter to harmonize the current and former versions of section 12926. Under both, the touchstone of a qualifying . . . disability is an actual or perceived physiological disorder which affects a major body system and limits the individual’s ability to participate in one or more major life activities.

Despite the “admittedly confusing” dicta in the opinion, the court concluded that between FEHA’s clear language and the holding in Cassista, the statutory definition of physical disability under the FEHA has never required a plaintiff to show more than an impairment that “limits” a major life activity.

The Wittkopf court found its decision supported by two events. First, it found that after Cassista the FEHA’s implementing regulations were amended to define a “physical disability” as a condition that “limits an individual’s ability to participate in major life activities.” Second, unlike the panel in Colmenares, the Wittkopf panel relied on the

When Wittkopf was terminated in 1998, FEHA defined physical disability, in pertinent part, as any physiological disorder or condition that affects an enumerated body system, including the special sense organs, and “limits an individual’s ability to participate in major life activities.” As written, section 12926 omitted any mention of the “substantial” limitation on a person’s ability to participate in major life activities required by federal law. In contrast to the language in FEHA, an individual is “disabled” under the ADA’s definition only if he or she has “a physical or mental impairment that substantially limits one or more of the major life activities of such an individual,” or has a record of or is regarded as having such an impairment.

Id. (citations omitted).

173. Id. at 549.
174. Id.
175. Id.
176. Wittkopf, 109 Cal. Rptr. 2d at 549-50.
177. Id. at 550 (quoting Cassista v. Cmty. Foods, 5 Cal. 4th 1050, 1061 (Cal. 1993) (en banc)) (emphasis added).
178. Id.
179. Id. (quoting CAL. CODE REGS. tit. 2, § 7293.6(e)(1)(A)(1)-(2)) (emphasis added).
legislature’s declaration that the FEHA has always provided more protections than the ADA. Ultimately, the court concluded that AB 2222 was intended only to clarify the FEHA and therefore cannot be retroactive.

3. The California Supreme Court to Provide the Final Word on Retroactivity

At the time this article is going to print, the California Supreme Court is in the process of determining the retroactivity issue. To date, several courts have weighed in on the issue.

For example, in Perez v. Proctor & Gamble Manufacturing Company, the court found that AB 2222 did not apply retroactively. The court found that the definition for physical disability had not changed but made a different finding for the definition of mental disability:

[P]rior to the 2001 amendments, FEHA’s definition of mental disability did not require a limitation of any kind. As amended, FEHA’s definition of mental disability requires a limitation.

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180. Id. at 550-51; see supra note 14.
181. Id. (citing W. Sec. Bank v. Superior Court, 15 Cal. 4th 232, 243-44 (Cal. 1997)). In recognizing that its decision contradicted the earlier decision in Colmenares, the Wittkopf court stated:

We are aware a different result was recently reached on this issue in Colmenares v. Braemar Country Club, Inc. (2001) 89 Cal.App.4th 778. Respectfully, we disagree with that decision. In concluding that the language of the 2000 amendment implied a legislative intention that, for cases filed after January 2001, FEHA’s definition of physical disability would depart dramatically from the path it had shared with the ADA, Colmenares ignores the explicit legislative recognition that, at and before the time of this amendment, the law in California “in the area of disabilities provide[d] protections independent from those in the [ADA],” and had “always” done so.

Moreover, in concluding that the 2000 amendment created a new definitional “distinction” between FEHA, which requires a mere “limitation” on one’s ability to participate in one or more major life activities, and the ADA which has always required such a limitation be “substantial” which the Legislature intended to apply only “in a time yet to come,” Colmenares also ignores the fact that this very “distinction” has always existed in the language of the two statutes. For the reasons discussed above, we conclude that the true definition of physical disability in FEHA remains unchanged. Now, as before, a plaintiff need demonstrate only that his physical disability impairs at least one major life activity.

Id. at 550 n.1.
184. Id. at 1121.
Accordingly, the meaning of the term mental disability has changed, and thus, the 2001 amendments are not a mere clarification as they apply to the definition of mental disability, and thus, apply prospectively only.\(^{185}\)

The state courts that have commented on the issue have been less definitive. In *Rebhan v. Atoll Holdings, Inc.*,\(^{186}\) the court intimated that the California Supreme Court would likely uphold the *Colmenares* decision and find that AB 2222 is not retroactive.\(^{187}\) Conversely, in *Vaughan v. Jacobs & Jacobs*,\(^{188}\) the same panel made the assumption that the amendments were retroactive.\(^{189}\) In other words, the *Vaughan* panel assumed that the California Supreme Court would overturn *Colmenares* and uphold *Wittkopf*.\(^{190}\) If the California Supreme Court concludes that the amendments are to be applied retroactively, the practical effect will be that many lawsuits that would have been dismissed under the previous standard will proceed to trial.

### II. STATUTORY COMPARISON

One of the main components of AB 2222 is section 12,926.1, which consists of five relatively short subsections.\(^ {191}\) Section 12,926.1(a) states

\(^{185}\) *Id.*

\(^{186}\) No. B140612, 2001 WL 1190434 (Cal. Ct. App. Oct. 2, 2001) (unpublished), *rehearing denied* Nov. 1, 2001. CAL. RULE OF COURT 977(b) prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by 977(b). This opinion has not been certified for publication or ordered published for purposes of CAL. RULE OF COURT 977.

\(^{187}\) *Id.* at *3* (“Even if our Supreme Court concludes the FEHA amendments and addition are prospective only, Escorp’s position would not be advanced.”).

\(^{188}\) No. B144394, 2001 WL 1383170 (Cal. Ct. App. Nov. 8, 2001) (unpublished), *review granted* Jan. 29, 2002. CAL. RULE OF COURT 977(b) prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by 977(b). This opinion has not been certified for publication or ordered published for purposes of CAL. RULE OF COURT 977.

\(^{189}\) *Id.* at *2* (“Assuming the legislation is retroactive . . . .”).

\(^{190}\) See *id.*

\(^{191}\) Section 12,926.1 states:

(a) The law of this state in the area of disabilities provides protections independent from those in the federal Americans with Disabilities Act of 1990 (Public Law 101-336). Although the federal act provides a floor of protection, this state’s law has always, even prior to passage of the federal act, afforded additional protections.

(b) The law of this state contains broad definitions of physical disability, mental disability, and medical condition. It is the intent of the Legislature that the definitions of physical disability and mental disability be construed so that applicants and employees are protected from discrimination due to an actual or perceived physical or mental impairment that is disabling, potentially disabling, or perceived as disabling or potentially disabling.
that "[a]lthough the [ADA] provides a floor of protection, this state's law has always, even prior to passage of the federal act, afforded additional protections." Regardless of whether the California Supreme Court concludes that AB 2222 is a change or clarification of the existing law, section 12,296.1 dramatically alters the landscape for disability discrimination claims in California. Although the three categories below are discussed discretely, they are significantly interrelated.

A. Limitation Versus Substantial Limitation

1. The ADA's "Substantial Limitation" Requirement

The ADA defines a disability as "a physical or mental impairment that substantially limits one or more . . . major life activities." The ADA also contains provisions for people who have a record of or are regarded as having a physical or mental impairment.

(c) Physical and mental disabilities include, but are not limited to, chronic or episodic conditions such as HIV/AIDS, hepatitis, epilepsy, seizure disorder, diabetes, clinical depression, bipolar disorder, multiple sclerosis, and heart disease. In addition, the Legislature has determined that the definitions of "physical disability" and "mental disability" under the law of this state require a "limitation" upon a major life activity, but do not require, as does the Americans with Disabilities Act of 1990, a "substantial limitation." This distinction is intended to result in broader coverage under the law of this state than under that federal act. Under the law of this state, whether a condition limits a major life activity shall be determined without respect to any mitigating measures, unless the mitigating measure itself limits a major life activity, regardless of federal law under the Americans with Disabilities Act of 1990. Further, under the law of this state, "working" is a major life activity, regardless of whether the actual or perceived working limitation implicates a particular employment or a class or broad range of employment.

(d) Notwithstanding any interpretation of law in Cassista v. Community Foods (1993) 5 Cal.4th 1050, the Legislature intends (1) for state law to be independent of the Americans with Disabilities Act of 1990, (2) to require a "limitation" rather than a "substantial limitation" of a major life activity, and (3) by enacting paragraph (4) of subdivision (i) and paragraph (4) of subdivision (k) of Section 12,926, to provide protection when an individual is erroneously or mistakenly believed to have any physical or mental condition that limits a major life activity.

(e) The Legislature affirms the importance of the interactive process between the applicant or employee and the employer in determining a reasonable accommodation, as this requirement has been articulated by the Equal Employment Opportunity Commission in its interpretive guidance of the Americans with Disabilities Act of 1990.


192. Id. § 6(a).
194. Id. §§ 12,102(2)(b) & (c).
An impairment is classified as "substantially limiting" if it renders an individual "[u]nable to perform a major life activity that the average person in the general population can perform." Additionally, an individual that is "significantly restricted as to the condition, manner, or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity" is also substantially limited under the ADA.

In Sutton v. United Air Lines, Inc., the Supreme Court stated that "[t]he ADA does not define 'substantially limits,' but 'substantially' suggests 'considerable' or 'specified to a large degree.' To determine whether a person is substantially limited in a major life activity, the following factors should be considered: (1) the nature and severity of the impairment; (2) its duration or anticipated duration; and (3) its long-term impact. Because each inquiry is fact specific, determining whether an individual is substantially limited is made on a case-by-case basis.

2. AB 2222's Clarification of FEHA's "Limitation" Requirement

In contrast, section 12,296.1(c) states, in pertinent part, that:

[T]he Legislature has determined that the definitions of "physical disability" and "mental disability" under the law of this state require a "limitation" upon a major life activity, but do not require, as does the Americans with Disabilities Act of 1990, a "substantial limitation." This distinction is intended to result in broader coverage under the law of this state than under that federal act.

The legislature reinforces this point by stating that "[n]otwithstanding any interpretation of law in Cassista v. Community Foods (1993) 5 Cal. 4th 1050, the Legislature intends . . . (2) to require a 'limitation' rather

198. Id. at 491.
200. See, e.g., Soileau v. Guilford of Maine, Inc., 105 F.3d 12 (1st Cir. 1997) (noting that although the plaintiff had a mental impairment, he was not substantially limited because the condition was short-lived and not sufficient to impose a legal duty); Mondzelewski v. Pathmark Stores, Inc., 162 F.3d 778, 783-84 (3d Cir. 1998) (noting that a substantially limiting impairment for one individual may not be substantially limiting for another individual with different characteristics).
201. See AB 2222, § 6(c), 1999-2000 Leg., Reg. Sess. (Cal. 2000) (codified at CAL. GOV'T CODE § 12,926.1(c)).
than a ‘substantial limitation’ of a major life activity . . . .” 202 Under AB 2222, an impairment will now be found to “limit” a major life activity if it merely makes the achievement of the major life activity “difficult.” 203

Prior to the passage of AB 2222, subsection (k) of section 12,926 stated that “[i]t is the intent of the Legislature that the definition of ‘physical disability’ in this subdivision shall have the same meaning as the term ‘physical handicap’ formerly defined by this subdivision and construed in American National Insurance Company v. Fair Employment & Housing Commission.” 204 The current legislation drops the reference to the “unusually difficult” standard found in the American National decision, 205 and states that the disability must make a major life activity “difficult.” 206 The California Legislature provides no further statutory guidance regarding these terms.

AB 2222 diverges from the ADA by including a non-exhaustive list of chronic or episodic conditions that are per se physical or mental impairments. 207 These per se conditions include: “HIV/AIDS, hepatitis, epilepsy, seizure disorder, diabetes, clinical depression, bipolar disorder, multiple sclerosis, and heart disease.” 208 This differs from the case-by-case inquiry required under the ADA. 209

B. Consideration of Mitigating Measures

On June 22, 1999, the Supreme Court issued a series of opinions holding that mitigating measures, such as eyeglasses, medication, or the body’s own systems, must be assessed to determine whether an impairment “substantially limits one or more major life activities.” 210 Thus, the Supreme Court disagreed with a majority of the circuit courts that had previously ruled on the issue, 211 as well as the weight of the legislative history, 212 and the EEOC’s Interpretive Guidance. 213

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202. Id. § 6(d) (codified at CAL. GOV’T CODE §§ 12,926.1(d)).
203. Id. §§ 5.5(i)(1)(B), (k)(1)(B)(ii) (codified at CAL. GOV’T CODE §§ 12,926(i)(1)(B), (k)(1)(B)(ii)).
204. CAL. GOV’T CODE § 12,926(k) (West 2000).
205. 32 Cal. 3d 603, 609 (Cal. 1982).
206. AB 2222, § 5.5(k), 1999-2000 Leg., Reg. Sess. (Cal. 2000) (codified at CAL. GOV’T CODE 12,926(k)).
207. Id. § 6(c) (codified at CAL. GOV’T CODE § 12,926.1(c)).
208. Id.
209. See supra note 200.
1. EEOC Regulations & Interpretive Guidance

Under the ADA, the EEOC was given the responsibility of developing the regulations necessary to properly enact Title I, the section of the ADA dealing with employment. On July 26, 1991, the EEOC promulgated its final regulations defining each of the three components of the statutory term for a disability. Simultaneously, the EEOC published an appendix to the regulation, entitled Interpretive Guidance.

When the ADA was enacted, the EEOC’s “Interpretive Guidance” stated that “[t]he determination of whether an individual is substantially limited in a major life activity must be made on a case-by-case basis, without regard to mitigating measures such as medicines, or assistive or

("A majority of the federal circuit courts of appeals had agreed with the position adopted by the EEOC and ruled that whether or not the individual’s impairment substantially limits a major life activity should be determined by an examination of the effects the impairment would have in the absence of mitigating measures.").

212. See Wendy E. Parmet, Plain Meaning and Mitigating Measures: Judicial Interpretations of the Meaning of Disability, 21 BERKELEY J. EMP. & LAB. L. 53, 64 (2000). In her article, Professor Parmet concludes:

The drafters of the ADA were remarkably cognizant of the mitigating measures issue. The matter was addressed explicitly in several committee reports. For example, the Report of the Senate Committee on Labor and Human Resources stated clearly that “whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids.” Identical language appeared in the Report of the House Committee on Education and Labor. That report further stated that:

For example, a person who is hard of hearing is substantially limited in the major life activity of hearing, even though the loss may be corrected through the use of a hearing aid. Likewise, persons with impairments, such as epilepsy or diabetes, which substantially limit a major life activity are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication. The House Committee on the Judiciary made similar observations.

This is not to say that there is no ambiguity in the legislative history. For example, the drafters were clear that the ADA should be generally read in accordance with the Rehabilitation Act precedent. Yet, while most cases decided under that Act either interpreted the definition of disability broadly, or simply assumed the existence of a disability, by the late 1980s a few courts had begun to parse the statute’s definition of disability, questioning its application to certain “non-traditional” disabilities. None of these courts, however, appears to have relied explicitly upon the existence of mitigating measures as a rationale for rejecting a finding of disability.

Id. (citations omitted).

213. See infra note 217.
216. Id. at 35,726 & 35,734 (1991) (codified at 29 C.F.R. § 1630, app. § 1630 (1991)).
prosthetic devices.” Further, the EEOC suggested that “[t]he existence of an impairment is to be determined without regard to mitigating measures . . .” However, it is critical to note that these guidelines do not carry the force of either law or regulation but are merely, as the Eleventh Circuit noted, based on a “permissible construction” of the ADA.

The Supreme Court strongly disagreed with the EEOC’s position when it issued its series of decisions concerning mitigating measures. On June 8, 2000, the EEOC issued an amended final rule rescinding portions of its Interpretive Guidance, making its suggestions consistent with the position of the Supreme Court.

2. Supreme Court Weighs In On Mitigating Measures: The Sutton Trilogy


In Sutton v. United Air Lines, Inc., the petitioners were identical twin sisters who were denied positions as global airline pilots because they failed to meet the airline’s minimum visual requirements due to their severe myopia. The sisters sued the airline alleging that the minimum visual requirements were discriminatory and therefore violated the ADA. Although the sisters’ visual acuity was 20/200, or worse, in each of their eyes, with the use of corrective lenses they both had 20/20 vision. The claims stated that not only did they have a disability under the ADA, but also that the airline “regarded” them as having a disability. The trial court dismissed the claims on the grounds they failed to prove that their condition qualified as a disability under the

217. 29 C.F.R. § 1630, app. § 1630.2(j) (1999).
218. Id., app. § 1630.2(h) (1999) (citations omitted).
221. 65 Fed. Reg. 36,327 (June 8, 2000) (“This rule rescinds several sentences of the [EEOC] Interpretive Guidance on Title I of the Americans with Disabilities Act that address mitigating measures used by persons with impairments. This action is necessary as a result of recent Supreme Court rulings.”).
223. Id. at 475-76.
224. Id. at 476.
225. Id. at 475.
226. Id. at 476; see also supra note 23 and accompanying text.
On appeal, the Tenth Circuit affirmed the judgment of the district court. The Supreme Court granted the petitioners’ writ of certiorari to resolve the conflict that had arisen among the circuits.

The Supreme Court determined that petitioners were not disabled within the meaning of the ADA since their corrected vision was 20/20 in both eyes and could function fully with corrective lenses. The Court held that the positive and negative effects of the measures taken to mitigate an impairment must be considered in determining if a person is disabled under the ADA. The Court found that petitioners failed to state a claim under section 12,102(2)(A) of the ADA. The Court’s holding was based on three separate provisions of the ADA.

First, the majority examined the language and grammatical structure of the ADA’s definition of disability. The ADA defines a disability as “a physical or mental impairment that substantially limits one or more of the major life activities of such individual.” By focusing on “limits,” the

227. Sutton v. United Air Lines, Inc., No. 96-S-121, 1996 WL 588917, at *6 (D. Colo. Aug. 28, 1996), aff’d, 130 F.3d 893 (10th Cir. 1997). The district court determined that because the sisters’ visual impairment could be fully corrected, they were not substantially limited in any major life activity and, therefore, failed to state a recoverable claim under the ADA. Id.

228. Sutton v. United Air Lines, Inc., 130 F.3d 893, 906 (10th Cir. 1997), aff’d, 527 U.S. 471 (1999). The circuit court determined that the petitioners’ condition could be categorized as a physical impairment under the ADA. Id. However, the court also stated that mitigating measures should be considered when making the determination of whether the impairment substantially limits one or more major life activities. Id. The Tenth Circuit concluded that the sisters’ corrected vision could not be categorized as a disability limiting the major life activity of seeing. Id. at 903.

229. Compare Murphy v. United Parcel Service, Inc., 141 F.3d 1185 (10th Cir.) (mitigating measures should be taken into account when determining a disability), aff’d, 527 U.S. 516 (1999), and Sutton v. United Air Lines, Inc., 130 F.3d 893, 902 (10th Cir.) (same), aff’d, 527 U.S. 471 (1999), with Bartlett v. N.Y. State Bd. of Law Examiners, 156 F.3d 321, 329 (2d Cir. 1998) (self-accommodations cannot be considered when determining a disability), vacated, 527 U.S. 1031 (1999); Baert v. Euclid Beverage, Ltd., 149 F.3d 626, 629-30 (7th Cir. 1998) (disabilities determined without reference to mitigating measures), and Matczak v. Frankford Candy & Chocolate Co., 136 F.3d 933, 937-38 (3d Cir. 1997) (same), and Washington v. HCA Health Servs. of Texas, Inc., 152 F.3d 464, 470-71 (5th Cir. 1998) (some impairments should be determined in their uncorrected state), vacated, 199 F.3d 192 (5th Cir. 1999).

230. Sutton, 527 U.S. at 488-89.

231. Id. at 482.

232. Id. at 488-89.

233. Id. at 482 (stating that “[t]hree separate provisions of the ADA, read in concert, lead us to this conclusion”).

234. Id. at 482-83.

Court noted that this is the present indicative form of the verb. As such, the term "limits" denotes an impairment that presently limits a major life activity and not one that could limit a major life activity at some future point. Therefore, a person whose disability has been corrected through the use of a mitigating measure does not have a disability that substantially limits a major life activity.

Second, the Court noted that the EEOC's guidelines, requiring the evaluation of disabilities in an unmitigated state, would create a system where employers must make disability determinations based on general information about how an unmitigated condition generally affects people. This is contrary to the majority's opinion, which noted that the ADA's definition of a disability requires the evaluation "with respect to an individual." The Court found that this system was "contrary to both the letter and the spirit of the ADA."

Third, the Court studied the legislative history of the ADA and determined that Congress did not intend to provide statutory protection to all of the people whose unmitigated impairments could potentially fit under the Act's definition of a disability. The Court found that forty-three million Americans have one or more disabilities. Although the forty-three million figure was higher than that of several other studies that attempted to quantify the number of disabled Americans, the Court concluded that if Congress had intended to include all unmitigated impairments, then the number would have been much larger. Additionally, the Court pointed to 100 million people that have vision impairments. The Court also pointed to the more than twenty-eight million people who are hearing impaired, and nearly fifty million people who suffer from high blood pressure.

236. *Sutton*, 527 U.S. at 482.
237. *Id.*
238. *Id.* at 483.
239. *Id.* at 481-83.
240. *Id.* at 472; see also 42 U.S.C. § 12,102(2) (1994).
242. *Id.*
243. *Id.*
244. *See id.* at 484-85.
245. *Id.* at 487.
247. *Id.* (citing NATIONAL INSTITUTES OF HEALTH, NATIONAL STRATEGIC RESEARCH PLAN: HEARING AND HEARING IMPAIRMENT V (1996)).
248. *Id.* (citing BAILIÈRE TINDALL, STALKING A SILENT KILLER: HYPERTENSION, BUSINESS & HEALTH 37 (1998)).
Although the Court declined to extend ADA protection to the petitioners’ correctable myopia, the Court clarified that mitigating measures are not in themselves a per se disqualifier under the ADA. In addressing the petitioners’ second claim, the majority noted that a party who has taken mitigating measures may still qualify for disability protection if they are regarded as being disabled.

b. Murphy v. United Parcel Service, Inc.

In Murphy v. United Parcel Service, Inc., the petitioner was terminated from his position as a mechanic due to his high blood pressure. One of the essential functions of the petitioner’s job was to drive commercial motor vehicles. The petitioner’s unmedicated blood pressure was approximately 250/160 and was still a very high 186/124 in its mitigated state. Petitioner’s blood pressure exceeded the levels allowable under the Department of Transportation (DOT) regulations permitting the operation of a commercial motor vehicle. Notwithstanding the petitioner’s high blood pressure, he began work for his employer. Once the oversight was detected, petitioner’s blood pressure was retested and still measured between 160/102 and 164/104.

249. Id. at 488-89, 492-93. The Court cited the example of a person who used a prosthetic foot. Id. at 488. He could still be substantially limited in the major life activity of walking because of a substantial limitation on his ability to walk or run. Id.
250. Id.
252. Id. at 518.
253. Id. at 519.
254. Id. In a blood pressure reading systolic pressure represents the pressure while the heart is beating and diastolic pressure is the pressure while the heart is resting between beats. About High Blood Pressure, http://www.americanheart.org/presenter.jhtml?identifier=468 (last visited Nov. 8, 2001). The American Heart Association states that:

Blood pressure of less than 140 over 90 is considered a normal reading for adults.
A systolic pressure of 130 to 139 or a diastolic pressure of 85 to 89 needs to be watched carefully. A blood pressure reading equal to or greater than 140 (systolic) over 90 (diastolic) is considered elevated (high).

Id.
255. Murphy, 527 U.S. at 519. The DOT Regulations mandate that “[a] person shall not drive a commercial motor vehicle unless he/she is physically qualified to do so and . . . has on his/her person . . . a medical examiner’s certificate that he/she is physically qualified to drive a commercial motor vehicle.” Id. (citing 49 C.F.R. § 391.41(a) (1998)). Under the regulations, a motor vehicle operator may have “no current clinical diagnosis of high blood pressure likely to interfere with his/her ability to operate a commercial vehicle safely.” Id. (citing 49 C.F.R. § 391.41(b)(6) (1998)).
256. Id. at 520.
257. Id.; see also supra note 254 for interpretation of the blood pressure readings.
The petitioner filed suit under the ADA asserting that he was disabled under the Act, and alternatively, that he was “regarded as disabled” when he was terminated. In granting the respondent's motion for summary judgment, the district court determined that the petitioner's “impairment should be evaluated in its medicated state.” The district court decided that “when petitioner is medicated he is inhibited only in lifting heavy objects but otherwise functions normally,” and is therefore not disabled under the ADA. The Tenth Circuit affirmed the district court's decision on the grounds that the petitioner's medicated condition did not prevent him from functioning normally. The Supreme Court affirmed the Tenth Circuit's decision.

c. Albertson's, Inc. v. Kirkingburg

In Albertson's, Inc. v. Kirkingburg, a truck driver claimed that he was fired because he had an uncorrectable eye condition. The employer claimed that they were forced to release Kirkingburg because he failed to meet the federal mandates concerning truck drivers.

Before starting his employment, Kirkingburg underwent an eye examination to determine if he met the federal vision standards for commercial truck drivers. The DOT regulations require a “distant visual acuity of at least 20/40 in each eye and distant binocular acuity of at least 20/40.” Kirkingburg was diagnosed as having amblyopia, an uncorrectable eye condition that produces monocular vision. Despite

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258. Murphy, 527 U.S. at 518-19.
259. Id. at 520 (citing Murphy v. United Parcel Service, Inc., 946 F. Supp. 872, 881 (D. Kan. 1996)).
260. Id. (citing Murphy, 946 F. Supp. at 881-82). Moreover, the district court rejected petitioner's "regarded as" claim because the employer fired the petitioner because he was not a certifiable driver under the DOT regulations and not because they regarded him as being disabled. Id. (citing Murphy, 946 F. Supp. at 882).
261. Id. (citing Murphy v. United Parcel Service, Inc., 141 F.3d 1185 (10th Cir. 1999); Sutton v. United Air Lines, Inc., 130 F.3d 893, 902 (10th Cir. 1997)). The Tenth Circuit also denied petitioner's claim that he was regarded as disabled stating that his termination was not based "on an unsubstantiated fear that [petitioner] would suffer a heart attack or stroke," but 'because his blood pressure exceeded the DOT's requirements for drivers of commercial vehicles." Id. at 520-21 (citation omitted).
262. Id. at 521. Justice Stevens, joined by Justice Breyer, dissented from the majority's opinion on the same grounds as in Sutton. Id. at 525 (Stevens, J., dissenting).
264. Id. at 559-60.
265. Id. at 560-61.
266. Id. at 558.
267. Id. at 558-59 (quoting 49 C.F.R. § 391.41(b)(10) (1998)).
268. Id. at 559.
his amblyopia, the doctor mistakenly certified that Kirkingburg met the DOT requirements. As a result of his certification, he began his job as a commercial truck driver for his employer.

Approximately two years later, Kirkingburg’s eyes were re-examined and the previous mistake was detected. The doctor informed him that his condition did not comport with the DOT regulations, and he would be required to obtain a waiver. Kirkingburg eventually obtained a waiver, but not until after his employer terminated him. Moreover, the employer refused to rehire Kirkingburg once he obtained his waiver. Kirkingburg brought an action under the ADA in federal district court. The district court granted Albertson’s motion for summary judgment, stating that there was no duty to allow additional time to obtain a DOT waiver as a reasonable accommodation. The Ninth Circuit reversed the decision of the lower court and the Supreme Court granted certiorari.

In reversing the Ninth Circuit, the Supreme Court determined that monocular vision is not a per se disability under the ADA. The Court focused on three areas where the court of appeals made “missteps.” First, the Court noted that the Ninth Circuit’s decision undercut the requirement that an impairment substantially limit a major life activity to be considered a disability by substituting “difference” for “significant restriction.” Second, the circuit court disregarded the ability of Kirkingburg’s own body to naturally compensate for its condition and

269. Id.
270. Id.
271. Id.
272. Id. at 559-60.
273. Id.
274. Id. at 560.
275. Id. at 560-61.
276. Id.
279. Id. at 566 (“While some impairments may invariably cause a substantial limitation of a major life activity, we cannot say that monocularity does.” (citation omitted)); see also Sutton v. United Air Lines, Inc., 527 U.S. 471, 490 (1999) (“Standing alone, the allegation that respondent has a vision requirement in place does not establish a claim that respondent regards petitioners as substantially limited in the major life activity of working.”).
280. Albertson’s, 527 U.S. at 562-67.
281. Id. at 564-65.
therefore, mitigate his disability.\textsuperscript{282} Third, the Ninth Circuit disregarded the statutory obligation that disabilities be determined on a case-by-case basis.\textsuperscript{283} Moreover, the Supreme Court held that under the ADA, an employer “who requires as a job qualification that an employee meet an otherwise applicable federal safety regulation,” is not required to “justify enforcing the regulation solely because its standard may be waived in an individual case.”\textsuperscript{284}

3. Mitigating Measures Under the FEHA

Contrary to the current state of the federal law, AB 2222 states that “[u]nder the law of [California], whether a condition limits a major life activity shall be determined without respect to any mitigating measures, unless the mitigating measure itself limits a major life activity, regardless of federal law under the Americans with Disabilities Act of 1990.”\textsuperscript{285}

This action brought the FEHA in line with the EEOC’s 1991 Interpretive Guidance.\textsuperscript{286}

In AB 2222’s legislative history, the California Legislature, in no uncertain terms, stated that it disagreed with the \textit{Sutton} decisions. The legislative history, citing the Fair Employment and Housing Commission’s support of AB 2222, stated that:

AB 2222 is significant legislation because, among other things, the bill would clarify that a physical disability under California law is to be determined without consideration of mitigating measures such as medications, assistive devices, corrective lenses, etc. The bill would send a clear message that California is not in accord with the recent trilogy of United States Supreme Court decisions in \textit{Sutton v. United Air Lines} (1999) 119 S. Ct. 2139, \textit{Murphy v. UPS} (1999) 119 S. Ct. 2133, and \textit{Albertson’s v. Kirkingburg} (1999) [119] S. Ct. 2162 that found that, in determining whether a person has a disability under the ADA, consideration must be given to such mitigating measures.\textsuperscript{287}

\begin{itemize}
\item \textsuperscript{282} \textit{Id.} at 565-66 (concluding that “[w]e see no principled basis for distinguishing between measures undertaken with artificial aids, like medications and devices, and measures undertaken, whether consciously or not, with the body’s own systems”).
\item \textsuperscript{283} \textit{Id.} at 556 (citing 42 U.S.C. § 12,101(2) (1994)).
\item \textsuperscript{284} \textit{Id.} at 558.
\item \textsuperscript{285} AB 2222, § 6(c), 1999-2000 Leg., Reg. Sess. (Cal. 2000) (codified at CAL. GOV’T CODE 12,926.1(c)).
\item \textsuperscript{286} \textit{See supra} Part II.B.1.
\item \textsuperscript{287} Senate Rules Committee, Third Reading, August 28, 2000, http://www.leginfo.ca.gov/pub/99-00/bill/asm/ab_2201-22205.../ab_2222_cfa_20000829_091548_sen_floor.html.
\end{itemize}
Further, the Legislature noted that "AB 2222 . . . expressly disavows the holdings in the three recent decisions [Sutton, Murphy, and Albertson's], which interpret the ADA." 288

C. Definition of Major Life Activity

1. ADA's Definition of "Major Life Activity"

The EEOC defines major life activities as those that an "average person in the general population can perform with little or no difficulty." 289 The examples of such activities cited by the EEOC include walking, seeing, hearing, speaking, breathing, learning, working, performing manual tasks, caring for oneself, sitting, standing, lifting, and reading. 290 The Tenth Circuit has found that sleeping is a major life activity because it "is a basic activity that the average person in the general population can perform with little or no difficulty, similar to the major life activities of walking, seeing, hearing, speaking, breathing, learning, working, sitting, standing, lifting, and reaching." 291

In Sutton, the plaintiffs claimed that their condition substantially limited them in the major life activity of working. 292 Although the Court avoided the issue of whether working is a major life activity, 293 it noted that "[t]he inability to do a specific job does not substantially limit the major life activity of working." 294 The EEOC regulations cited by the Court identify several factors that courts should consider when making the determination of whether an individual is substantially limited in the major life activity of working. 295 These factors include "the geographical area to which the individual has reasonable access, and 'the number and types of jobs utilizing similar training, knowledge, skills or abilities,

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288. Id. The Legislature noted that:
California courts often use federal precedent in interpreting state employment discrimination law, because "(F)ederal employment discrimination legislation in many ways is quite similar in wording and intent to the FEHA, and California courts have found it helpful to rely on federal precedent to interpret the analogous portions of state law."

Id. (citing Mixon v. Fair Emp. & Housing Comm'n, 192 Cal. App. 3d 1306 (Cal. Ct. App. 1987)). However, the Legislature expressly stated that "California courts are not bound by federal interpretations of employment discrimination law." Id.

289. 29 C.F.R. § 1630, app. § 1630.2(i) (2001).
290. See id.
293. Id. at 492.
294. Id. at 491 (citing 29 C.F.R. § 1630.2(j)(3)(i) (2001)).
within the geographical area, from which the individual is also disqualified.”

In Sutton, the Court determined that the substantial limitation classification in the major life activity of working is one in which the person “must be precluded from more than one type of job, a specialized job, or a particular job of choice.” The Court further noted that “[i]f jobs utilizing an individual’s skills (but perhaps not his or her unique talents) are available, one is not precluded from a substantial class of jobs.” And that “if a host of different types of jobs are available, one is not precluded from a broad range of jobs.”

The Court found that since the position of “global airline pilot” was a single job and not a class of jobs, the plaintiffs were unable to support their claim that they were substantially limited in the major life activity of working. The Court cited a number of similar jobs, such as regional pilot and pilot instructor, for which the plaintiffs would have been qualified.

In Duncan v. Washington Metropolitan Area Transit Authority, a recent decision from the District of Columbia Court of Appeals, Judge Randolph outlined several problems with labeling working as a major life activity. First, Judge Randolph pointed out the circular nature of pleading working as a major life activity. While a “person claims to be excluded from work because of his impairment . . . the nature of his impairment [is] ‘exclusion from work.’” Second, he pointed out that several potential inconsistencies arise when “working” is selected as the impaired major life activity.

296. Sutton, 527 U.S. at 492 (citing 29 C.F.R. § 1630.2(j)(3) (ii)(A), (B) (2001)).
297. Id. at 492.
298. Id.
299. Id.
300. Id. at 493.
301. Id. at 493.
302. The EEOC’s Interpretive Guidance indicates that “an individual who cannot be a commercial airline pilot . . . but who can be a commercial airline co-pilot or a pilot for a courier service, would not be substantially limited in the major life activity of working.” Id. (citing 29 C.F.R. § 1630, app. § 1630.2(j) (1999)).
303. 240 F.3d 1110 (D.C. Cir. 2001).
304. Id. at 1117-18 (Randolph, J., concurring).
305. Id. at 1117 (Randolph, J., concurring).
306. Id. at 1118. (Randolph, J., concurring). Judge Randolph stated: When “working” is used [as the impaired major life activity], the existence of a disability will necessarily turn on factors other than the individual’s physical characteristics or medical condition. To illustrate, suppose there is an economic downturn and unemployment is high. Then more people will be found to be
Judge Randolph's principle concern was the lack of consistency that is prevalent when dealing with the major life activity of working. He notes that the inquiry is likely to shift from the individual's actual impairment to "whether there are jobs in some undefined region 'utilizing an individual's skills (but perhaps not his or her unique talents)' . . ."307 Despite the extensive discussion that "working as a major life activity" received in Duncan, the District of Columbia Circuit did not decide whether it is appropriate to treat working as a major life activity for ADA purposes.308 Only the Second and Fifth Circuits have definitively held that working is a major life activity under the ADA.309

2. FEHA's Broad Definition of "Major Life Activity"

Section 12,926 of the California Government Code instructs the reader that "major life activities shall be broadly construed and shall include physical, mental, and social activities and working."310 The express inclusion of working in the statute, as opposed to its inclusion merely in the regulation, expands FEHA's definition far beyond that of the ADA.311

The existing regulation relating to physical disability, which was promulgated prior to the passage of AB 2222, identified major life activities as "functions such as caring for one's self, performing manual

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308. Id. (Randolph, J., concurring) ("[B]efore we decide whether to join the two circuits which, after Sutton, treat 'working' as a major life activity under the ADA."
309. See supra note 308 and accompanying text.
310. CAL. GOV'T CODE § 12,926(i)(1)(C) (West 2001) (emphasis added).
311. Id.
tasks, walking, seeing, hearing, speaking, breathing, learning, and working.” Additionally, the regulation noted that, “[p]rimary attention is to be given to those life activities that affect employability, or otherwise present a barrier to employment or advancement.”

As noted in *Sutton*, when asserting that the major life activity of working is limited, a plaintiff must demonstrate that he is precluded from a range or broad class of jobs. Under section 12,926.1, there is no doubt that working is deemed to be a major life activity. Section 12,926.1(c) states, in pertinent part, that “under the law of this state, ‘working’ is a major life activity, regardless of whether the actual or perceived working limitation implicates a particular employment or a class or broad range of employments.” This directly contradicts the ADA.

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313. Id.
314. See supra notes 298-99. In *Duncan v. Washington Metropolitan Area Transit Authority*, 240 F.3d 1110 (D.C. Cir. 2001), cert. denied, 122 S. Ct. 49 (2001), Judge Tatel, in a concurring opinion, analyzed the passage from *Sutton* relating to the exclusion from a broad class or range of jobs as follows:

This passage [*Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 491-92 (1999)] gives plaintiffs attempting to prove disability on the basis of a substantial limitation in the major life activity of working a choice: they may demonstrate that their impairment excludes them from “either a class of jobs or a broad range of jobs in various classes.” As the penultimate sentence explains, plaintiffs attempting to prove exclusion from a “class of jobs” must show that their impairment disqualifies them from jobs utilizing their skills. In *Sutton*, for example, the Supreme Court said that airline pilots who have impairments that preclude them from working as global pilots but who can nonetheless hold “a number of other positions utilizing [their] skills, such as regional pilot and pilot instructor” cannot claim to be substantially limited in the major life activity of working. Id. at 493. According to the final sentence in the *Sutton* passage, plaintiffs attempting to prove exclusion from a “broad range of jobs”--the second of the two options--must show that there is not a “host” of different types of jobs available to them. As an example of a person who might claim to be precluded from a broad range of jobs, the EEOC Interpretive Guidance describes an individual who “has an allergy to a substance found in most high rise office buildings, but seldom found elsewhere, that makes breathing extremely difficult.” 29 C.F.R. pt. 1630, App. § 1630.2(j). Of course, after *Sutton*, such a person would also have to show that jobs not in high rise buildings are unavailable, leaving some doubt as to whether plaintiffs would any longer attempt to make such a claim.

Id. at 1119 (Tatel, J., concurring).
316. See discussion supra Part II.B.
III. IMPLICATIONS OF AB 2222

AB 2222 clearly signals that a lower standard applies for determining whether an employee has a disability under the FEHA as compared with the ADA. This is underscored when (1) any reference to Cassista and the adoption of the “substantially limited” standard is expressly removed from the statute, and (2) the “unusually difficult” language derived from American National was also dropped. The requirement that a disability need only limit a major life activity to the point of making it difficult, significantly reduces the claimant’s hurdle. This is easily distinguishable from the Supreme Court’s guidance in Sutton, where it was noted that although “[t]he ADA does not define ‘substantially limits,’ . . . ‘substantially’ suggests ‘considerable’ or ‘specified to a large degree.’

Prior to the passage of AB 2222, approximately eighty percent of disability claims were dismissed prior to trial because the plaintiff was not deemed to be disabled under the statute. As one commentator stated, “‘[t]he definition of disability is the whole ballgame in these cases.’ One immediate effect of AB 2222’s expansive definition of disability is that more discharge and failure to hire cases will survive summary judgment motions and move towards final resolution at the trial stage, where the battle will be whether or not there was a “reasonable accommodation” or if such an accommodation creates an

317. See supra note 205 and accompanying text.
318. See supra note 206.
321. Margaret Steen, New California Law Challenges the Definition of Disability, SAN JOSE MERCURY NEWS, Dec. 12, 2000, at 3C.
322. CAL. GOV’T CODE § 12,940(a) (West 2001). As amended by AB 2222, section 12,940(a) of the California Government Code states:

(1) This part does not prohibit an employer from refusing to hire or discharging an employee with a physical or mental disability, or subject an employer to any legal liability resulting from the refusal to employ or the discharge of an employee with a physical or mental disability, where the employee, because of his or her physical or mental disability, is unable to perform his or her essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger his or her health or safety or the health or safety of others even with reasonable accommodations.

(2) This part does not prohibit an employer from refusing to hire or discharging an employee who, because of the employee’s medical condition, is unable to perform his or her essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger the employee’s health or safety or the health or safety of others even with reasonable accommodations. Nothing in this part shall subject an employer to any legal
"undue hardship." Although the precise definitions of "limits" and "difficult" are not fleshed out in the statutory language and will have to be addressed by the courts, it is clear that the barrier to being classified as disabled has been significantly lowered.

The areas of "reasonable accommodation" and "undue hardship" are more problematic for employers because they invariably create a triable issue of fact. Under Prilliman v. United Air Lines, Inc., in order to comply with the reasonable accommodation provisions, employers have

 liability resulting from the refusal to employ or the discharge of an employee who, because of the employee's medical condition, is unable to perform his or her essential duties, or cannot perform those duties in a manner that would not endanger the employee's health or safety or the health or safety of others even with reasonable accommodations.

Id. (emphasis added). The FEHA defines a "reasonable accommodation" as either of the following:

(1) Making existing facilities used by employees readily accessible to, and usable by, individuals with disabilities.
(2) Job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

Id. § 12,926(n); see also CAL. CODE REGS. tit. 2, § 7293.9(a) (2001) ("Reasonable accommodation may, but does not necessarily, include, nor is it limited to, such measures as: (1) Accessibility . . . (2) Job restructuring, reassignment to a vacant position . . . .").

323. CAL. GOV'T CODE § 12,940(m) (West 2001). As amended by AB 2222, section 12,940(m) of the California Government Code states:

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

Id. (emphasis added).

324. In Barnett v. U.S. Air, Inc., 228 F.3d 1105 (9th Cir. 2000), cert. granted in part, 532 U.S. 970 (2001), the Ninth Circuit reversed a grant of summary judgment, finding that the defendant's:

[F]ailure to engage in the interactive process, liability would be appropriate if a reasonable accommodation would otherwise have been possible. There remains conflicting evidence in the record as to whether a reasonable accommodation without undue hardship to the employer was possible. Thus, a triable issue of facts exists on this issue.

Id. at 1117. See also Rowe v. San Francisco, No. C 00-03676 BZ, 2002 WL 257585, at *3 (N.D. Cal. Feb. 13, 2002) ("[A]n employer cannot prevail at the summary judgment stage if there is a genuine dispute as to whether the employer engaged in good faith in the interactive process.") (citing Barnett, 228 F.3d at 1116; Prilliman v. United Air Lines, Inc, 62 Cal. Rptr. 2d 142, 152 (Cal. Ct. App. 2001) ("Ordinarily, the reasonableness of an accommodation is an issue for the jury.") (quoting Schmidt v. Safeway, Inc., 864 F. Supp. 991, 997 (D. Or. 1994)).

an affirmative duty under the FEHA to advise disabled employees of alternative positions.\textsuperscript{326} The \textit{Prilliman} duty, coupled with AB 2222's affirmative duty to engage in the interactive process,\textsuperscript{327} places a considerable burden on employers who are made aware that an employee is disabled.

Although the new statutory scheme lowers the bar for employees bringing claims of physical disability, it arguably erects a hurdle for employees claiming a mental disability.\textsuperscript{328} At the time of AB 2222's passage, the California Supreme Court's decision in \textit{Cassista} made it clear that the “substantially limited” test applied to physical disabilities.\textsuperscript{329} However, the courts were split regarding the test for mental disabilities.

In \textit{Pensinger}, the court stated that “[f]or some reason, the Legislature imposed a requirement that a physical disability must limit a major life activity without imposing the same requirement for a mental disability.”\textsuperscript{330} In \textit{Swenson}, the court of appeals followed the interpretation in \textit{Pensinger} and noted that the FEHA’s “legislative definition does not require that an individual have a qualifying mental disability that ‘substantially limits’ or even ‘limits’ a major life activity.”\textsuperscript{331} However, in \textit{Muller} another court of appeals disagreed and attributed any difference between the definitions of physical and mental disability to “mere legislative oversight.”\textsuperscript{332} The synchronization of the definitions for mental and physical disabilities is one rational aspect of AB 2222. Nonetheless, the burden for proving a disability is now too low. The over-inclusiveness of AB 2222 perverts the true purpose of the statute, namely to provide protection to people with \textit{actual} disabilities, and erects a framework that protects people with only marginal disabilities that may have no effect on their ability to perform their duties.

Compounding the boundless definition of disability is the fact that AB 2222 creates \textit{per se} limitations, including: “HIV/AIDS, hepatitis, epilepsy, seizure disorder, diabetes, clinical depression, bipolar disorder, multiple

\textsuperscript{326} Id. at 950-51. For a thorough discussion of \textit{Prilliman v. United Air Lines, Inc.}, see Martinez, supra note 51, at 74-75.

\textsuperscript{327} See supra note 16.


\textsuperscript{329} See supra notes 90-99 and accompanying text.


\textsuperscript{331} Swenson v. Los Angeles, 89 Cal. Rptr. 2d 572, 575 (Cal. Ct. App. 2000); see supra Part I.C.1.c.

\textsuperscript{332} See supra note 122.
sclerosis, and heart disease.” Because these conditions are evaluated regardless of whether they are “chronic” or merely “episodic,” they will create a significant group of people that will automatically qualify for coverage under the Act, rather than on an individualized basis. By creating these per se limitations, the new FEHA removes one more potential barrier for plaintiffs to be deemed disabled. Because the statute provides no clear guidance regarding the terms “chronic” or “episodic,” it is likely that will be a key battleground in the courts.

In addition to a more inclusive statutory definition of disability, the California Legislature’s mandate to ignore mitigating measures expands the number of people who will be covered under the FEHA. The Sutton trio of cases significantly narrowed the class of persons entitled to protection under the ADA by requiring the consideration of mitigating measures. One commentator noted prior to the passage of AB 2222 that:

The new ADA decisions [Sutton, Murphy, and Albertson’s] may also have little immediate impact on California employers. The California Fair Employment and Housing Act (“FEHA”) definition of disability is similar to the ADA: a physical or mental impairment that “substantially impacts” a “major life activity.” However, recently one California appellate court ruled that a mental impairment need not substantially impact a major life activity to be a “disability.” Further, the California Supreme Court has held that employees may maintain common law claims for “workplace injury discrimination” if the injury rises to the level of a “disability.” Unfortunately, the court offered no guidance as to what type of “disability” could give rise to such a common law claim. While the California courts might look to the recent U.S. Supreme Court decisions for guidance, in the meanwhile cautious California employers should interpret the term “disability” broadly to include virtually any type of workplace injury or mental impairment.

333. AB 2222, § 6(e), 1999-2000 Leg., Reg. Sess. (Cal. 2000) (codified at CAL. GOV’T CODE § 12,926.1(c)).
334. See supra note 201.
335. The dictionary defines “chronic” as “marked by long continuation or frequent recurrence.” WEBSTER’S THIRD INT’L DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 402 (3d ed. 1993). The dictionary defines “episodic” as “made up of separate esp. loosely connected episodes.” Id. at 765.
336. CAL. GOV’T CODE § 12,926.1(c) (2001).
337. See supra Part II.B.
338. Davis, Wright, Tremaine, LLP, Phil Clements & Tahl Tyson, Contributing Editors: Anne Denecke & Liz Staggs-Wilson, Supreme Court Restricts ADA Definition of
The FEHA's new framework, as amended by AB 2222, makes these words prophetic.

Under AB 2222, the Legislature clarifies that disabilities are to be determined regardless of mitigating measures. As a result, employers may be forced to make disability determinations based on general information about various conditions, rather than individualized information regarding the individual's condition. By following a less restrictive view than the one espoused by the Supreme Court in Sutton, California is creating a potential pool of plaintiffs that rivals the state's population. However, one practitioner stated that, "I think the saving grace for companies is this: It would be incredibly difficult for an employee to prove that he was terminated for a disability in a case where the mitigating measure completely corrected the disability . . . ."

Moreover, the express inclusion of working as a major life activity will expand the constituent group covered by the statute. Federal law defines the major life activity of "working" as a class or broad range of jobs in a given field. In Sutton, the Supreme Court stated that "[w]hen the major life activity under consideration is that of working, the statutory phrase 'substantially limits' requires, at a minimum, that plaintiffs allege they are unable to work in a broad class of jobs." Because of the broad class requirement, plaintiffs have a more difficult time proving that their disability implicates the major life activity of working. The Sutton Court alluded that had the plaintiffs claimed that they were limited in the major life activity of "seeing," the outcome might have been different.


339. AB 2222, § 6(c), 1999-2000 Leg., Reg. Sess. (Cal. 2000) (codified at CAL. GOV'T CODE § 12,926.1(c)).


343. See supra Part II.C.1.

344. Sutton, 527 U.S. at 491.

345. See Sinkler v. Midwest Prop. Mgmt. Ltd. P'ship, 209 F.3d 678, 685 (7th Cir. 2000) (affirming lower court's holdings that plaintiff's phobia that left her unable to drive in unfamiliar areas did not substantially limit her major life activity of working because a broad range of jobs remained available). Plaintiff was precluded from asserting other major life activities because she only pled working at the trial court. Id. at 684.

346. Sutton, 527 U.S. at 492-94. The Court stated:
Assuming without deciding that working is a major life activity and that the EEOC regulations interpreting the term "substantially limits" are reasonable,
The inclusion of "working" in AB 2222, however, means that the impairment need only limit a particular job held by the employee, as opposed to the broad class or range of jobs. This expansion moves working from a residual major life activity to a primary one. This removes a major impediment for plaintiffs when choosing which major life activity is affected. Although the plaintiffs in Sutton were unsuccessful in their attempts to be classified as substantially limited in the major life activity of working under the ADA, there is little doubt that they would have succeeded under AB 2222. As suggested by Judge Randolph's concurring opinion in Duncan, this could lead to individuals petitioners have failed to allege adequately that their poor eyesight is regarded as an impairment that substantially limits them in the major life activity of working. They allege only that respondent regards their poor vision as precluding them from holding positions as a "global airline pilot." Because the position of global airline pilot is a single job, this allegation does not support the claim that respondent regards petitioners as having a substantially limiting impairment. See 29 CFR § 1630.2(j)(3)(i) (1998) ("The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working"). Indeed, there are a number of other positions utilizing petitioners' skills, such as regional pilot and pilot instructor to name a few, that are available to them. Even under the EEOC's Interpretative Guidance, to which petitioners ask us to defer, "an individual who cannot be a commercial airline pilot because of a minor vision impairment, but who can be a commercial airline co-pilot or a pilot for a courier service, would not be substantially limited in the major life activity of working." 29 CFR pt. 1630, app. § 1630.2.

Petitioners also argue that if one were to assume that a substantial number of airline carriers have similar vision requirements, they would be substantially limited in the major life activity of working. Even assuming for the sake of argument that the adoption of similar vision requirements by other carriers would represent a substantial limitation on the major life activity of working, the argument is nevertheless flawed. It is not enough to say that if the physical criteria of a single employer were imputed to all similar employers one would be regarded as substantially limited in the major life activity of working only as a result of this imputation. An otherwise valid job requirement, such as a height requirement, does not become invalid simply because it would limit a person's employment opportunities in a substantial way if it were adopted by a substantial number of employers. Because petitioners have not alleged, and cannot demonstrate, that respondent's vision requirement reflects a belief that petitioners' vision substantially limits them, we agree with the decision of the Court of Appeals affirming the dismissal of petitioners' claim that they are regarded as disabled.

Id. (citations omitted).

347. Id. at 492 (quoting 29 C.F.R. pt. 1630, app. § 1630.2(j) (1998)) (stating that "working [should be] viewed as a residual life activity, considered, as a last resort, only [i]f an individual is not substantially limited with respect to any other major life activity") (emphasis omitted).

348. See supra Part II.C.1.

349. Sutton, 527 U.S. at 482.
being classified as disabled based on economic and geographic factors, rather than their actual physical or mental condition.\(^{356}\)

The expansion of the FEHA's definition of disability through any one of the above-mentioned changes would have significantly increased the number of potential plaintiffs; however, the cumulative effect of all three areas of expansion creates the potential that a significant percentage of the state's population will be classified as disabled. The practical effect of AB 2222 is the removal of several statutory filters preventing a person from being classified as disabled. One practitioner recently stated, "I wonder what is not going to be considered a disability."\(^{355}\)

Quite surprisingly, there was little organized resistance to AB 2222. While more than thirty groups actively supported the bill's passage,\(^{352}\) only seven groups officially opposed the bill.\(^{353}\) With such token public opposition, the bill sailed through the Assembly with fifty-eight percent of the vote,\(^{354}\) and passed the Senate by a vote of nearly two to one.\(^{355}\)

Several questions remain unanswered. First, how far will the Commission be willing to go when drafting the new regulations implementing AB 2222? Second, will the courts strictly adhere to the statutory language or be more cautious with their rulings? Third, will the courts treat AB 2222 as a "change" or "clarification" to disability law in California, as stated in section 12,926.1? Finally, how important of a role will federal case law play?

The answers to the above questions will likely establish the direction of disability law in California. In the immediate future, however, it is likely that the courts will be flooded with many questionable, if not meritless, claims; a result rejected by Justice Stevens in his dissenting opinion in Sutton.\(^{356}\) It is difficult to imagine how the courts will accommodate this
expected increase in FEHA claims. In the meantime, it seems as though the ADA is a dead letter in California, especially in light of the superior remedies available under the FEHA.\textsuperscript{357}

IV. CONCLUSION

Following the federal government’s passage of the Vocational Rehabilitation Act in 1973, and the ADA in 1990, the FEHA and its predecessor, have borne strong resemblance to its federal counterparts. However, effective January 1, 2001, California’s disability law expressly diverges from federal law, and in doing so, establishes a statutory scheme that is without rival in the area of disability protection.\textsuperscript{358}

AB 2222 diverges from the ADA in four basic areas. First, AB 2222 broadens the definition of the term “disability” to extend laws prohibiting discrimination in public accommodations, business transactions, access to public places, and employment in the state civil service system.\textsuperscript{359} Second, it creates a duty for employers to engage in a timely, good faith, interactive process to assess potential accommodations.\textsuperscript{360} Third, it prohibits any medical or physical examinations of either applicants or employees, unless such an examination is job related and consistent with business necessity.\textsuperscript{361} Finally, AB 2222 expands statutory protection to individuals against discrimination on the basis of an actual or perceived physical or mental disability, potential disability, or one perceived as such.\textsuperscript{362}

Although each of these areas provides greater protection to individuals with disabilities, it is the broader definition of disability that will have the most noticeable impact on litigation in California. AB 2222 expands the definition of disability in three ways: (1) lowering the threshold of “limitation” required; (2) explicitly disregarding mitigating measures; mitigated by measures as ordinary and expedient as wearing eyeglasses, a flood of litigation will ensue. This suggestion is misguided.”).\textsuperscript{357}

357. See Commodore Home Sys., Inc. v. Superior Court, 649 P.2d 912, 914 (Cal. 1982) (noting that the remedies available under the FEHA are broader than those available under the ADA, including unlimited compensatory damages for pecuniary losses, damages for emotional distress, and punitive damages).

358. Brad Seligman, Executive Director of Berkeley’s Impact Fund, a nonprofit public interest foundation, stated that “[w]ith the passage of AB 2222, California clearly has the strongest American with Disabilities law in the country.” Joe, supra note 320.


360. Id. § 6(e) (codified at CAL. GOV’T CODE § 12,926.1(e)); see also supra note 16.


362. Id. § 6(b) (codified at CAL. GOV’T CODE § 12,926.1(b)).
and (3) treating working expressly as a major life activity without regard to the “broad class” or “range of jobs” requirement. The cumulative effect of these three changes will make it significantly more difficult for employers being sued to challenge an individual’s status as disabled at the summary judgment phase. The true effect of AB 2222 must not be gauged until the FEHC issues new regulations and the courts begin to construe the new statutory framework, but it is likely that there is going to be an explosion of disability claims brought under the FEHA.

363. In recognizing the import of AB 2222 on the summary judgment phase, in Cripe v. San Jose, 261 F.3d 877 (9th Cir. 2001), the Ninth Circuit stated:

[A grant of summary] judgment for a defendant as to an ADA claim will not necessarily lead to a similar judgment with respect to a FEHA claim. Conversely, however, a defendant who is not entitled to [summary] judgment with respect to an ADA claim, is a fortiori not entitled to one with respect to a FEHA claim.

Id. at 895 (emphasis in original); see also Thornton v. McClatchy Newspapers, Inc., 261 F.3d 789, 798 (9th Cir. 2001) (vacating district court’s grant of summary judgment on FEHA claims and remanding in light of section 12,926.1 and expressing no view on the merits).