

FEHC Dec. No. 11-08 (Cal.F.E.H.C.), 2011 WL 4400929

Fair Employment and Housing Commission

State of California

In the Matter of the Accusation of the  
DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING

v.

ACME ELECTRIC CORPORATION, a division of ACTUANT  
CORPORATION, a Wisconsin Corporation, Respondent.

CHARLES R. WIDEMAN, Complainant.

Case Nos. E-200708-A-1193-00-pe, C 08-09-086, 11-08

Dated: July 14, 2011

#### DECISION

\*1 Administrative Law Judge Joan Herrington heard this matter on behalf of the Fair Employment and Housing Commission from May 3 through 5, 2010, in San Rafael, California. Frank G. Tiesen, Senior Staff Counsel, and Susan Saylor, then Acting Chief Counsel, represented the Department of Fair Employment and Housing. Linda M. Doyle, Esq. of McDermott, Will & Emery, LLP, represented Acme Electric Corporation. Complainant Charles (Rich) Wideman and Acme Electric Corporation's representative Kathy Stimes, Human Resource Leader, attended the proceedings throughout.

At the conclusion of the evidentiary hearing and receipt of the transcripts, the parties' post-hearing briefs were timely filed, and on July 11, 2010, the matter was deemed submitted. (Cal. Code Regs., tit. 2, § 7432(b).) On October 27, 2010, Administrative Law Judge Joan Herrington issued her proposed decision.

On February 2, 2011, the Commission decided not to adopt this proposed decision and notified the parties of the opportunity to file further argument (NOFA) by March 28, 2011. (Cal. Code Regs., tit. 2, § 7434, subd. (b).) The parties timely filed written argument.

After consideration of the entire record and review of the parties' further argument, we issue our per curiam decision, setting out the findings of fact, determination of issues and order.

#### FINDINGS OF FACT

##### Parties and Jurisdiction.

1. On June 6, 2008, Charles "Rich" Wideman (complainant or Wideman) filed a written, verified complaint with the Department of Fair Employment and Housing (DFEH or Department) against Acme Electric Corporation, a division of Actuant Corporation, a Wisconsin corporation. The complaint alleged that Acme Electric failed to engage in a timely, good faith, interactive process with Wideman regarding reasonable accommodation, failed to provide him reasonable accommodation, and discriminated against him based on his physical disability (cancer) and medical condition (cancer) by issuing a negative 2007 performance evaluation criticizing Wideman "for not being able to travel and perform at the same rate as non-disabled employees" and by terminating his employment, in violation of the Fair Employment and Housing Act, Government Code section 12900, et seq. (FEHA).

2. The DFEH is an administrative agency empowered to issue accusations under Government Code section 12930, subdivision (h). On June 5, 2009, Phyllis W. Cheng, in her official capacity as Director of the DFEH, issued an accusation against Acme Electric.

3. The DFEH alleged that Acme Electric Corporation, a division of Actuant Corporation, a Wisconsin corporation (respondent or Acme Electric) denied Wideman medical leave for his own serious health condition (cancer), in violation of Government Code section 12945.2 of the California Family Rights Act (CFRA).<sup>1</sup> The accusation also alleged that, on a continuing basis, Acme Electric failed to engage with Wideman in a timely, good faith, interactive process regarding reasonable accommodation; failed to provide him reasonable accommodation for his travel limitations; discriminated against him based on his physical disabilities, or perceived physical disabilities, by criticizing his performance based on his travel limitations and “false and misleading statements,” and by terminating his employment; retaliated against him; and failed to take all reasonable steps to prevent discrimination and harassment from occurring, in violation of Government Code section 12940, subdivisions (n), (m), (a), (h), and (k), respectively.

\*2 4. On June 15, 2009, the DFEH filed a first amended accusation, correcting various factual allegations regarding the February 21, 2008 meeting in which Acme Electric notified Wideman that his employment was being terminated, but otherwise realleging the allegations set forth in the original accusation.

5. At all relevant times, Acme Electric was a limited liability corporation based in Lumberton, North Carolina. Acme Electric manufactured and sold primarily power conversion equipment, such as transformers, to two types of customers: distributors (sales representatives, who bought the product to resell at a margin to local customers) and original equipment manufacturers (“OEMs,” who bought directly from Acme Electric). At all relevant times, Acme Electric directly employed more than 50 employees nationwide, including Wideman, who worked from his home office in Novato, California. Acme Electric was an “employer” within the meaning of sections 12926, subdivision (d), and 12945.2, subdivision (c)(2), of the Government Code.

6. At all relevant times, Actuant Corporation wholly owned Key Components, Limited Liability Corporation (KCI), which wholly owned Acme Electric, Maringo, and other companies whose names are not relevant to these proceedings. KCI's subsidiaries sold electrical components to different niche markets. Maringo manufactured and sold electronic components for marine industrial use at a facility located in Napa, California, and directly employed more than fifty (50) employees within seventy-five (75) miles of Novato, California.

7. Complainant Wideman was an employee of Acme Electric from February 3, 2004 to March 1, 2008, who developed kidney cancer in 2006 and prostate cancer in 2007.

#### Wideman's Pre-Cancer Job Performance

8. On February 3, 2004, Acme Electric's Sales Manager, John Currall, hired Wideman as a Regional Sales Manager of the Western Region, which then consisted of Hawaii, Washington, Oregon, California, Idaho, Nevada, Montana, Wyoming, Utah, Colorado, Arizona, New Mexico, North Dakota, South Dakota, and Minnesota. Each region was divided into territories assigned to a sales representative (usually an agency that manufactured electronic components).

9. Although the Western Region was geographically larger than Acme Electric's other regions (Northeast, Southeast, and Midwest), at the time of Wideman's hire, it generated the least sales. Under Wideman's predecessor, sales in all but three territories in the Western Region (Southern California, Southern Nevada, and Arizona) had declined below sales in territories in Acme Electric's other regions.

10. Wideman had worked in the electrical supply industry throughout his career, and was widely known and well-connected. Burton Schraga, chairman of two leading electrical supply industry associations (National Association of Electrical Distributors and Elite Distributors Insurance Company), and owner of Bell Electrical Supply, had dealt professionally with Wideman for

over 25 years. Schraga was familiar with Wideman's reputation as a reliable, personable regional sales manager of electrical supply components, who could gain invaluable access to any potential customer. Wideman was also unusually highly qualified for a Regional Sales Manager, in that he had a degree in electrical engineering. Customers, such as Schraga, could, and did, discuss their electronic component needs with Wideman on a professional level. Wideman brought valuable experience and contacts to his position as Regional Sales Manager of Acme Electric's Western Region in that he had worked in a similar position for a rival company, Cooper Bussmann, during the previous five years.

\*3 11. Nick Arena, then General Manager of Acme Electric, required Wideman, as a Regional Sales Manager, to develop the territories in his region by servicing existing customers and sourcing new ones. Arena did not require Acme Electric's Regional Sales Managers to travel throughout their respective regions provided that they increased sales sufficiently. Because Wideman was already so familiar with his customer base, he dealt with his customers by telephone and email more than Acme Electric's other Regional Sales Managers.

12. As part of Wideman's duties as a Regional Sales Manager, Arena authorized him to sign contracts with sales representatives, assign them territories based on their local contacts in the electrical supply industry, and terminate contracts of underperforming sales representatives. For example, at the time of Wideman's hire, his supervisor, John Currall, encouraged Wideman to terminate the contract of the Minnesota sales representative, Grissinger-Johnson, but gave Wideman discretion to see if he could work with this agency. Wideman traveled with a Grissinger-Johnson representative three times, with several months' gap between trips to allow for follow-up, before replacing this agency with another, AJB.

13. On December 31, 2004, Actuant Corporation (Actuant), a holding company based in Wisconsin, bought KCI. Although Actuant distributed its own employee handbook to its subsidiaries' employees, Wideman did not receive one, so had no notice of his disability rights or how to obtain them. Actuant's employee handbook relied on federal law and did not reference California law.

14. At all relevant times, Acme Electric's employees used Actuant's policies, procedures, and forms for their personnel review processes. Performance reviews covered Acme Electric's fiscal year that began on September 1 and ended on August 31. Actuant's 2005 personnel review form was divided into two parts: "Individual Goals," which assessed the extent to which an employee had achieved the previous year's mutually agreed upon goals; and "Behavioral Rating," which assessed an employee's "behavior critical to the success of Actuant."

15. Actuant used a four step process to evaluate its personnel: (1) the employee and supervisor reviewed the previous year's mutually agreed upon goals and gathered data regarding them; (2) the employee completed a written self-assessment, proposed next year's goals, and requested any help or training needed to achieve them; (3) the supervisor assessed the employee's performance, reviewed the goals, then met with the employee to discuss and elicit approval of the performance review and next year's goals; and (4) the Human Resources Department arranged any requested training. According to Actuant's performance review instructions, "Mutual goal setting, effective discussion about performance, and developmental planning are all critical to the success of the entire performance management process."

\*4 16. On June 11, 2005 Actuant Corporation sent a letter to Wideman detailing his change in pension benefits under "Acme Electric Division's" new 401K pension plan. Under Acme Electric's 401K plan, Wideman would receive an "Enhanced Matching Contribution" equal to 75% of the first six percent of eligible pay (i.e., four and a half percent of compensation) until 2015, plus a three percent "Core Contribution," totaling seven and a half percent of his pay (salary plus bonus). Based on his birth date of June 13, 1948, Actuant assessed Wideman's "normal retirement date" as July 1, 2013.

17. In December 2005, Wideman learned that Currall had met and discussed performance reviews with the other Regional Sales Managers, so asked Currall about his performance review.

18. On December 27, 2005, Currall sent Wideman his first performance review since his hire, and asked Wideman to sign and return it immediately so that Currall could meet his December 31 deadline. Currall summarized Wideman's competency as follows: “[Wideman] has a lot of knowledge about the industry, and specific markets within his region. An experienced sales manager, [Wideman] has a solid perspective of the customer and market needs while always keeping the company's interests in mind. [Wideman] has solid knowledge of the product applications and the wants and needs of the end user.” In the Goals section, Wideman stated that Acme Electric sales increased by 13.5 percent while the Western Region increased 3.9 percent. Wideman attributed the 9.7 percent (i.e., \$465,000) shortfall to Acme Electric's non-competitive pricing because Acme Electric had declined several competitively priced offers that Wideman had elicited. Of the 25 behaviors evaluated, Currall found Wideman's performance ““marginal” in three: demonstrating strategic focus, positive effect on other's performance, and adaptability.

19. When rating Wideman's demonstration of strategic focus, Currall criticized Wideman for his lack of business planning, such as failing to develop a “Plan B” for each territory. Acme Electric's “Plan B” was a contingency plan for dealing with the loss of a customer or sales representative. Wideman believed that Acme Electric's problems were due more to its pricing strategy than underperforming sales representatives. For example, Wideman's Northern California sales representative (name unknown) had defected to a leading rival (Hammond Electric) to gain a larger margin on more sales. To recruit a new Northern California sales representative (ESU — a manufacturing agency), Wideman developed a competitive pricing strategy and distribution business plan instead of writing a Plan B contingency plan. In summarizing Wideman's leadership skills, Currall concluded that his “decisions and recommendations are thoroughly thought out and backed with facts.”

20. When rating Wideman's positive effect on other's performance, Currall noted, “[Wideman] has worked well with the [sales representative] in California where most of his efforts were focused, however, performance in the balance of the region were (sic) disappointing.” Currall was referencing the competitive pricing strategy that Wideman developed with ESU that resulted in Acme Electric's fifth highest increase in sales nationally.

\*5 21. When rating Wideman's adaptability, Currall stated that Wideman ““always followed company policy,” yet criticized Wideman for “appearing resistant” to new policies and being “negative” and “cynical” about them. Currall noted elsewhere in the performance review that Wideman's “cynicism” was “often confused with his sense of humor,” praised Wideman's willingness to create change; and concluded that he “[i]s willing to discuss alternative solutions and has an open mind for getting to the right response/course of action.”

22. Currall did not meet with Wideman about his 2005 performance review, but discussed it with him for about five minutes on the telephone. Consequently, Wideman had no chance to address Currall's internal inconsistencies regarding his negative evaluations. Wideman signed off on his 2005 performance assessment because he believed that the “input” he had formally requested from Currall would allow him to understand and meet Currall's expectations regarding strategic planning, such as “Plan B.”

23. Wideman's mutually agreed upon goals for 2006 included increasing the Western Region's sales by Acme Electric's customary rate of twice the annual growth rate of the Gross Domestic Product (i.e., 5%) after price attainment. Acme Electric measured sales growth in dollars, and twice increased its national prices in 2006 due to sales growth throughout all of its regions.

#### Wideman's Cancer

24. On June 9, 2006, Timothy Murphy, M.D., Wideman's primary care physician, told Wideman that the series of tests that he had taken earlier that month showed that he had kidney cancer. Dr. Murphy referred Wideman to urologist Gary Grossfeld, M.D. to discuss surgical options. Shortly thereafter, Wideman telephoned Currall, told him about his cancer, and asked to be excused from attending some meetings that conflicted with his doctors' appointments. Without any further discussion or request for medical documentation, Currall granted Wideman's request.

25. On June 16, 2006, Dr. Grossfeld told Wideman that the results of the second series of tests showed that Wideman's kidney cancer had advanced to a stage that required open, rather than laparoscopic, surgery. Shortly thereafter, Wideman telephoned Currall, relayed this information to him, and asked for full time leave from June 29, 2006 to approximately July 17, 2006, followed by several weeks of part-time work at home to allow him to gradually resume regular duties. Currall did not respond to Wideman, but relayed this information to his supervisor, Nick Arena (then General Manager) and Jennifer Andy (then Human Resources Manager).

26. A few days later, Andy sent Wideman information about Acme Electric's paid disability leave under its insurance policy, but did not provide him with any information about CFRA medical leave, or recuperative leave as a reasonable accommodation of a disability under the FEHA. Wideman did not apply for Acme Electric's paid disability leave because he planned to work as much as possible.

\*6 27. On June 29, 2006, Wideman underwent kidney cancer surgery.

28. On July 4, 2006, Dr. Grossfeld released Wideman from the hospital with a restriction precluding heavy lifting for six weeks, and a referral to oncologist Alex Metzger, M.D. for chemotherapy. That same day, Wideman began working part-time at home.

29. On July 24, 2006, Dr. Metzger offered Wideman a chance to participate in a study of self-administered chemotherapy drugs designed to prevent recurrence of his kidney cancer. To clear a participant to receive each cycle of drugs, various doctors and laboratories would conduct a series of medical tests, often on different days, and forward the results to Dr. Metzger. After Dr. Metzger received the results, he would examine the participant, and order the series of tests for the next cycle of drugs, including any extra tests that were needed. Dr. Metzger would continue to monitor participants of the drug study for five years.

#### Wideman's Post-Cancer Job Performance

30. By August 2006, Wideman was performing his regular, full-time duties.

31. In September 2006, Actuant changed its performance review system to an online one. Actuant's revised system followed the same four step process as before, but relabeled the two parts of the performance review form: "Objective Rating" and "Competency Rating." To protect an employee's right to privacy, at each step, access to the form was restricted to the person responsible for the next step. Acme Electric experienced some technical difficulties implementing this new online performance review system.

32. In September 2006, Wideman completed his portion of the new online performance review form, and "released" it for access by Currall. Wideman had met or exceeded his sales' goals of increasing sales by at least five percent after price attainment, and increasing new product sales by at least 28 percent.

33. Currall did not complete Wideman's 2006 performance review, or those of other Regional Sales Managers. So, Currall did not give Wideman a 2006 performance review, or discuss his 2006 performance and 2007 goals with him. However, Currall's 2006 sales charts showed that three of the five top performing agencies nationally were Wideman's: Keyline Sales (in New Mexico), AJB (in Minnesota), and ESU (in Northern California). Currall's 2006 sales charts also showed that the Western Region led the nation with increased sales of 13 percent followed by the Southeast Region at nine percent, the Midwest Region at five percent, and the Northeast Region at zero percent. According to Currall and Arena, in 2006, the Western Region began generating at least 30 percent of Acme Electric's sales.

34. On September 13, 2006, Wideman began the first cycle of the study drugs.

35. The next day, Wideman met with Currall and told him about the kidney cancer drug study. Wideman explained that if he was receiving the real drugs rather than the placebos, he would experience the cumulatively worsening side effects typical of chemotherapy, such as fatigue, hypertension, hair loss, intestinal problems, and skin problems.

\*7 36. By October 2006, Wideman began experiencing these side-effects, and informed Currall during his weekly telephonic status report that he was taking the real drug.

37. On October 6, 2006, Currall wrote to Wideman about his performance. Currall criticized Wideman for continued “disappointing” sales, “imbalanced” coverage of his region, “lack of direct interaction with the representatives and customers,” and unsatisfactory reporting. Currall placed Wideman on a 90-day Performance Improvement Plan requiring: (a) a balanced travel schedule with three full days spent in a territory, followed by a telephone call report summarizing the events of each trip; (b) a more comprehensive monthly report covering all territories using other Regional Managers' reports as a model; and (c) a “Plan B” for each territory, including a business plan developed jointly with its sales representative.

38. The requirement that Wideman spend three full days in a territory per trip further restricted Wideman's ability to travel because of his outpatient appointments. By October 6, 2006, Wideman had spent approximately 20 days attending outpatient appointments related to his kidney cancer. Some of these appointments occurred midweek, or a few days apart in the same week, precluding Wideman from traveling to his territories during that week.

39. Wideman responded to Currall's October 6, 2006 letter immediately by email, promising a detailed response by letter. In his email, Wideman protested that Currall was being “a bit unfair” to criticize his lack of coverage of his territory when his “air travel was delayed before and after surgery due to multiple tests and body scans.” Wideman apologized for the brevity of his monthly report, but explained that he had copied the format of the one that Currall had previously provided to him as a model. Wideman wondered why it had taken Currall two years to criticize the “quality and content” of Wideman's reporting. Nonetheless, Wideman assured Currall that he would comply with whatever Currall wanted.

40. Wideman received no response from anyone to his October 6, 2006 email to Currall.

41. On October 11, 2006, Wideman sent the promised letter to Currall protesting that his regional sales could not be described as “disappointing” when Wideman had exceeded his sales goal. Wideman agreed that the Western Region needed to be less dependent on California, but asked Currall for further guidance on what he meant by a “balanced travel schedule.” Wideman again protested, “... my travel this summer had been virtually eliminated by my kidney cancer, subsequent surgery, recovery, and on-going medical regime, but since summer I have had trips to Denver, Spokane, Casper (WY), Las Vegas, and Southern California twice. Future trips are planned consistent with Acme's goals, although subject to accommodations or modifications as my medical condition and ongoing treatments may necessitate.” Wideman promised to submit a new business plan for each territory, including a “Plan B,” by the end of the year.

\*8 42. Wideman received no response from anyone to his October 11, 2006 letter to Currall, and heard nothing further about his 90-day performance improvement plan.

43. During October 2006, Wideman recommended to Currall that the Salt Lake sales representative (John White & Associates) be replaced because the representative relied on a single, large customer (Codale). Currall vetoed Wideman's recommendation because of the risk of losing the Codale account. Wideman was also concerned about the sales representative in Denver (name unknown). Although Wideman had increased sales in Denver by 50 percent, he still considered it an underdeveloped market.

44. On October 25, 2006, Dr. Metzger examined Wideman, noting that Wideman had lost ten percent of his ability to perform activities of daily living during the first cycle of chemotherapy. Wideman reported to Dr. Metzger that he was continuing to travel, and complained only of mild fatigue. Dr. Metzger concluded that Wideman was tolerating the chemotherapy “fairly well,” so dispensed the second cycle of the study drugs, and ordered the regular tests.

45. On November 13, 2006, Wideman's regular tests indicated that he might have prostate cancer, and his chest scans showed a suspicious "abnormal" growth. Dr. Metzger ordered a series of extra tests, including a biopsy for prostate cancer on December 26, 2006.

46. By December 2006, Wideman had submitted to Currall a new business plan for each territory, including a "Plan B."

47. On January 1, 2007, Monte Roach replaced Arena as General Manager of Acme Electric, while Arena became Sales, Marketing, and Business Development Manager.

48. Under Roach's leadership, the duties of a Regional Sales Manager did not change significantly. Roach expected them to develop sales in their region by contingency planning, treating their sales representatives like employees, dealing directly with larger customers, and dealing indirectly with smaller customers through their sales representatives. Like Arena, Roach did not require Regional Sales Managers to spend time in their territories provided they achieved their sales goals and served their customers satisfactorily. Roach "was concerned with getting the job done more than how long [a Regional Sales Manager spent] in the territory." "If the job was getting done, ... [[Roach did not] care if [the Regional Sales Manager] was standing on his head underwater."

49. On January 5, 2007, Dr. Grossfeld confirmed Wideman's prostate cancer diagnosis, and scheduled surgery for February 13, 2007. The latest chest scans showed that the "abnormal" growth was unchanged, so required only regular monitoring.

50. In January 2007, Wideman met with Currall in Las Vegas, and told him about his scheduled prostate cancer surgery. Wideman asked for accommodation in the form of full-time recuperative leave from February 13, 2007 to approximately February 27, 2007 and part-time work at home for another month or so. Wideman also asked Currall to expunge from his personnel file any performance deficiencies that were attributable to his kidney cancer and its treatment. Wideman received no response from anyone to these requests.

\*9 51. During a business trip in mid-January 2007, Wideman telephoned his wife distraught over the sudden loss of his body hair in the shower.

52. Throughout January 2007, Wideman worried whether he should continue taking the experimental drug because of the difficulties of complying with the drug study protocols and the worsening side-effects. In January 2007, Wideman was forced to reschedule several medical appointments because of his travel schedule.

53. At the January 31, 2007 quarterly managers' meeting at Lumberton, North Carolina (the January 2007 meeting), Roach met Acme Electric's Regional Sales Managers, including Wideman, for the first time. Each Regional Sales Manager reported on the growth of his region's sales, and his business plan for the next quarter. Wideman did not create a good first impression. Roach thought that Wideman was the "least prepared" of the Regional Sales Managers, and that his report was not as "in depth" as the others. During a "Plan B" discussion, Roach asked each Regional Sales Manager to identify an underperforming sales representative that he might replace. When it was Wideman's turn, he responded, "If you want me to fire reps, I'll fire them, but that's not our problem." Roach did not ask, so Wideman did not elaborate that he considered that Acme Electric's pricing strategy was the problem, rather than underperforming sales representatives.

54. During the next break, Arena ordered Wideman to meet him in his office. Although Acme Electric's policy was to encourage its managers to question its policies and procedures, Arena orally reprimanded Wideman for doing so in a way that he considered "flippant" and "disrespectful" to Roach. Arena told Wideman that he was familiar with Currall's October 6, 2006 letter placing Wideman on a performance improvement plan, and Wideman's October 11, 2006 response to it, and asked Wideman if he were trying to force Arena to fire him. Wideman apologized, and explained the impact the cancers and their treatments were having on him. Arena understood that Wideman was attributing his conduct to his cancers and their treatment, but neither he, nor

anyone else at Acme Electric, discussed with Wideman whether he needed further accommodation to meet Acme Electric's performance standards.

55. Currall told Roach about Wideman's kidney and prostate cancers shortly after the January 2007 meeting.

56. On February 1, 2007, on the advice of the chair of the drug study, Naomi Watts, M.D., Wideman discontinued the chemotherapy for his kidney cancer.

57. On February 13, 2007, Wideman underwent prostate cancer surgery. Two days later, Dr. Grossfeld released Wideman from the hospital with a restriction precluding heavy lifting for four weeks. Wideman took full time leave for approximately three weeks, and gradually resumed his regular, full-time work by April 20, 2007. By then, Wideman had spent at least another 20 days attending out-patient appointments for his cancers. On April 19, 2007, Dr. Metzger examined Wideman noting that Wideman had been "completely asymptomatic since stopping the drug" and that "[h]is quality of life had improved." "His energy has improved ... he is maintaining good weight ... and his hair is coming back." Dr. Metzger continued regularly monitoring Wideman's health.

\*10 58. On June 4, 2007, Actuant Corporation hired Kathy Stimes as Human Resources Leader, Professional Electrical, Actuant Corporation.

59. As part of Roach's plan to familiarize himself with Acme Electric's staff and operations, he travelled for a day with each of the Regional Sales Managers. On July 24, 2007, Roach travelled with Wideman to Seattle, but took charge of the agenda so that he could introduce Wideman to a potential OEM customer, and a few smaller customers that Roach knew from his previous employment.

60. On July 31, 2007, Roach emailed Wideman his assessment of Wideman's performance during their trip to Seattle. Roach acknowledged that Wideman's reputation gained him access anywhere he wished, then stated in pertinent part, "In terms of my observations, I don't see a strong sense of urgency and self-initiative and drive. As Regional Manager, I would expect you to take the lead in relationships with customers and be their voice back to us." The next day, Wideman responded by email indicating that during the trip, he had been deferring to Roach as Business Leader, and that he hoped to correct Roach's perceptions.

61. In September 2007, Acme Electric's sales declined sharply due to the global recession. Sales to two OEM customers dropped from 35-40 million dollars to 10-15 million dollars. Smaller distributors who were dependent on the housing construction industry also reduced sales sharply.

62. In September 2007, Roach used the annual "Human Capital Review" to plan a reduction in force. The "Human Capital Review" involved reviewing each manager's previous year's performance review, and checking any progress made on the stated goals during the current year. Financial performance was placed on one axis and behaviors on the other axis in order to assess each manager's ability to make the right decisions in the future. The managers, including Wideman, were then ranked in order of elimination. Roach terminated Midwestern Regional Sales Manager, Doug Patton, for poor performance, and replaced him with an internal candidate. After discussions with Currall, Arena, and Stimes, Roach decided to terminate Wideman's employment next.

63. Acme Electric's initially stated reasons for terminating Wideman's employment were the imbalance of sales in the Western region, which Currall, Arena, and Roach attributed to his lack of face-to-face interaction with his customers and potential customers outside California; customer complaints about not seeing Wideman; and Wideman's cynicism, masked as humor, when confronting policy changes. At the same time, Acme Electric identified only one job requirement that Wideman did not meet: "Complainant stayed more in one specific portion of his territory instead of being visible or in touch with [[representatives] in the entire territory in person and via telephone." In deciding to terminate Wideman's employment, Roach failed to consider

whether Wideman's cancers, or their resulting limitations and accommodations, contributed to his reported performance deficiencies.

\*11 64. In September 2007, Wideman completed his portion of his 2007 performance review, and forwarded it to Currall.

65. On October 5, 2007, Dr. Metzger examined Dr. Wideman, and noted that his weight was stabilized at 250 pounds. Because of Wideman's high risk cancers, Dr. Metzger ordered a series of CT scans every 6 months for 2 years, then yearly until the end of the drug study in 2011.

66. On December 21, 2007, Currall gave Wideman his 2007 performance review. Wideman's 2007 performance was objectively outstanding in that he had exceeded all of his goals, sometimes by over 300 percent, and led all the other Regional Sales Managers in sales growth. For example, two goals were to increase sales to the Border States (e.g., the Dakotas) by \$50,000 and Codale by \$30,000. Wideman increased Border States sales by \$174,000 and Codale sales by \$90,000. Currall rated Wideman's sales growth as "94 percent of target", and explained the 6 percent shortfall by commenting that "[Wideman]'s sales did improve but there is still an imbalance of sales in California." Decreasing the Western Region's dependence on California sales by four percent was the next stated goal, which Wideman exceeded, yet Currall continued to criticize Wideman by commenting, "... Region continues to be too weighted towards California"

67. Currall's ratings of the subjective criteria used to assess Wideman's 2007 performance were internally inconsistent with his comments explaining the rating. For example, Currall commented that Wideman "is extremely customer focused" and "displays a high level of integrity," but rated Wideman's competency for "Customer Focused" and "Integrity" as "marginal," and identified Wideman's "need to be more hands on with his representatives" as one of three "'Areas for Development.'" Similarly, Currall's negative subjective ratings were contradicted by positive objective criteria, such as Currall rating Wideman's nationally-leading sales growth as "marginal." Currall praised Wideman for his "'solid analytical skills" which he "frequently uses ... to propose 'outside the box' solutions and strategies to win over new business or maintain threatened customers" while nonetheless identifying "difficulty being open-minded to changes in structure and business philosophy" as another "Area for Development." Currall criticized Wideman for not taking non-existent training. Finally, Currall identified "cynicism" as Wideman's last "Area for Development" and criticized Wideman's teamwork, using his remark to Roach during the January 2007 meeting as an example of Wideman's "expressed cynicism and marginal behavior to the new business leader that was detrimental to him personally at the meeting but also took away from the whole effectiveness of the entire group ...." Currall did not mention any customer complaints about Wideman.

\*12 68. Neither Wideman's former supervisor, Currall, nor his new supervisor, Earl, discussed Wideman's proposed 2008 goals with him.

69. Wideman considered his 2007 performance review unfair, so refused to sign off on it. Until Wideman received his 2007 performance review, he did not know, and could not reasonably be expected to know, that Currall and Arena had failed to adjust his job performance records to account for his travel limitations due to his cancers.

70. On January 2, 2008, Stimes emailed Wideman offering her help in obtaining his signature. Wideman, to explain why he thought his 2007 performance evaluation was unfair, sent Stimes a copy of his October 11, 2006 letter to Currall protesting Currall's unfairness in criticizing Wideman's performance when his cancers limited his ability to travel, and requesting accommodations of "his medical condition and ongoing treatments."

71. Roach substantially reorganized the regions, including the Western Region, which lost Minnesota and the Dakotas, and gained Western Canada instead. Roach hired Brian Earl to replace Currall as Sales Manager, while Currall became Sales and Marketing Manager.

72. On February 21, 2008, Arena and Stimes met with Wideman in Novato, and notified him that he was being terminated as of March 1, 2008, but refused to explain why he was being discharged.

73. Stimes offered Wideman a severance package conditioned on him signing a general release of liability. The release identified Actuant as Wideman's employer, and Stimes as Actuant's signatory. Wideman refused to sign it.

74. Actuant issued Wideman's last two paychecks on February 22 and March 8, 2008.

75. At the time of the termination of his employment, Wideman earned \$80,000 a year as a base salary paid every two weeks ("bi-weekly"), plus a semi-annual "bonus," and medical, dental, and pension benefits.

76. Acme Electric's "bonus plan" was actually a commission plan based on the degree to which a Regional Sales Manager achieved the common regional sales goal, customarily set semi-annually at twice the rate of growth of the gross domestic product. Wideman's bonus was determined according to the formula provided in the plan, which stated in pertinent part: 1% of base salary for every 1% of regional sales from 90% to 100% of (goal); 1.5% of base salary for every 1% of regional sales from 100% to 120% of (goal); or

0.25% of base salary for every 1% of regional sales above 120% of (goal). Additionally, if 60% or more of a region's territories exceed 90% of their individual territorial sales programs, an extra 0.25% of base salary will be paid for every full 1% of regional sales between 100% and 120% of (goal).

77. Since 2005, Wideman earned an average annual bonus of approximately \$10,166 per year (\$32,425 2005-2008 earned bonuses ÷ 83 pay periods = \$391 x 26 pay periods per year), as follows:

| Year | Total Earned Wages  | Salary    | Earned Bonuses | No. of Pay Periods |
|------|---------------------|-----------|----------------|--------------------|
| 2005 | \$ 88,134           | \$ 80,000 | \$ 8,134       | 26                 |
| 2006 | 93,120              | 80,000    | 13,120         | 26                 |
| 2007 | 88,104 <sup>2</sup> | 80,000    | 8,104          | 26                 |
| 2008 | 18,452              | 15,385    | 3,067          | 5                  |
|      |                     |           | \$32,425       | 83                 |

\*13 78. Acme Electric contributed a matching seven and a half percent of Wideman's pay (salary plus bonus) to his 401(k) pension plan each year, averaging a contribution valued at \$6,762 (\$80,000 salary + \$10,166 average bonus x 7.5%) per year, resulting in compensation of \$96,928 (\$80,000 salary + \$10,166 average bonus + \$6,762 average pension contribution) per year.

79. Acme Electric provided Wideman with medical and dental benefits to which Wideman contributed \$107.25 per bi-weekly pay period, totaling \$232 per month (\$107.25 x 26 pay periods = \$2,788.50 ÷ 12 months). From May 1, 2008 to May 31, 2010, Wideman paid a total of \$28,529 for COBRA and Cal-COBRA health care benefits as follows:

$$\text{May-December 2008} = \$1,178.76 \text{ per month} \times 8 \text{ months} = \$ 9,430.08$$

|   |   |             |
|---|---|-------------|
| January-October 2009 = \$1,131.03 per month x 10 months | = | 11,310.30   |
| November 2009-December 2009 = \$1,062.20 x 2 months     | = | 2,124.40    |
| January 2010  | = | 1,062.20    |
| February 2010   | = | 1,058.00    |
| March 2010  | = | 1,060.10    |
| April 2010  | = | 1,241.92    |
| May 2010  | = | 1,241.92    |
|   |   | \$28,528.92 |

During this same 25 month period, Wideman would have contributed \$5,800 ( $\$232 \times 25$  months) for health care insurance. Thus, for this 25 month period from May 1, 2008 to May 31, 2010, Wideman paid \$22,729 (\$28,529 — \$5,800) more for medical and dental benefits than he would have paid if Acme Electric had not terminated his employment.

80. Wideman will continue to lose \$7,070 ( $\$1,242$  cost -  $\$232$  previous contribution =  $\$1,010$  month x 7 months) in medical and dental benefits from June 2010 to December 2010, and at the rate of \$12,120 ( $\$1,242$  monthly cost -  $\$232$  previous monthly contribution =  $\$1,010$  month x 12 months) per year thereafter.

81. Wideman had intended to work for Acme Electric until he retired on June 15, 2015 at age 67. By that time, both Wideman and his wife would be eligible for Social Security, and their son should have completed his college education.

82. As a result of Acme Electric's termination of his employment, Wideman suffered from depression, laid awake at night worrying about the financial strain caused by his discharge, and was constantly in fear of losing his house and being unable to pay for his son's college education. Further, Wideman, and his family, have cut back on their social life, such as dinners out together, that they previously enjoyed.

83. Since the termination of his employment, Wideman has searched diligently for another electrical supply sales position, but was unable to find comparable work.

84. In March 2008, Roach reduced staff at Acme Electric by ten percent, including eliminating Arena's and Currall's positions.

85. Acme Electric intended to hire another Western Region Sales Manager to replace Wideman, and did so in September 2008. Unlike Wideman, his replacement, Alan Nelson, is fluent in Spanish. Consequently, Roach reorganized the Western Region to include South America.

\*14 86. Acme Electric provided accommodation for the disabilities of three employees: Ronnie Locklear, a Plant Supervisor, and Pradeep Narechania, an Engineering Manager, both received six months' disability leave for cancer and a reduced work schedule after their return to work, and Norma Harris, a Customer Service Representative with an inability to climb stairs due to arthritis in her ankle, was relocated to a first floor office.

87. The DFEH's expert witness, Craig Enos, is a Certified Public Accountant with Ueltzen & Company, L.L.P. Enos is accredited in Business Valuation and certified in Financial Forensics by the American Institute of Certified Public Accountants, and is also certified as a Fraud Examiner by the Association of Certified Fraud Examiners. Enos has testified as an expert in economic damages for both plaintiffs and defendants on numerous occasions in California courts.

88. As of May 3, 2010, the general inflation rate was 2.4 percent, based on the 4.4 percent United States Treasury Bond Yield with a 20-year maturity minus the 2.0 percent United States Inflation Indexed Security rate. The medical inflation rate was 3.9 percent, based on the general inflation rate of 2.4 percent, plus a 1.5 percent premium to account for the more rapid rate of increase in health insurance costs than the general inflation rate. The compensation inflation rate was 3.4 percent, based on the general inflation rate of 2.4 percent, plus a 1.0 percent premium to account for the more rapid rate of increase in compensation costs than the general inflation rate.

## DETERMINATION OF ISSUES

### Liability

The DFEH alleged that Acme Electric denied Wideman medical leave for his own serious health condition (kidney and prostate cancer) in violation of Government Code section 12945.2 of the CFRA. The DFEH also alleged that, on a continual basis, Acme Electric failed to engage in a timely, good faith, interactive process with Wideman regarding reasonable accommodation; failed to provide him reasonable accommodation; discriminated against him based on his physical disability; retaliated against him because of his disability, his objections to a false and misleading performance review, and his need for accommodation; and failed to take all reasonable steps to prevent discrimination and harassment from occurring in violation of Government Code section 12940, subdivisions (n), (m), (a), (h), and (k), respectively. The DFEH argued that Wideman's reported performance deficiencies were caused by Acme Electric's continuing failure to provide him with accommodation for his ongoing travel limitation due to his physical disabilities (kidney cancer and prostate cancer), and resulted in a "false and misleading" 2007 performance evaluation and subsequent unlawful termination of his employment.

Acme Electric denied these allegations, and asserted that it granted Wideman all the accommodation he requested or needed, and that the company terminated Wideman's employment as part of a reduction in force due to his poor performance.

### Whether Complainant's Cancers Are Disabilities

**\*15** The DFEH argued that Wideman's two diseases, kidney cancer and prostate cancer, were disabilities within the meaning of the Act because they limited his major life activity of working, including traveling for work purposes, from June 29, 2006 to April 19, 2007. Acme Electric countered that Wideman's medical records showed that his cancers did not limit his ability to travel except for the short periods when Acme Electric provided him with recuperative leave as an accommodation.

Under the FEHA, a physical disability includes any disease that affects a body system, and limits a major life activity. (Gov. Code, §§ 12926, subd. (k), 12926.1, subd. (d).) When determining whether a disease limits a major life activity, mitigating measures (such as medications) may be considered only if the mitigating measures themselves limit a major life activity. (Gov. Code, § 12926, subd. (k)(1)(B)(i).)

Under FEHA, '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. (Gov. Code § 12926.1, subd. (c).) The record showed that neither former General Manager Nick Arena nor current General Manager Monte Roach required Acme Electric's Regional Sales Managers to travel, provided they increased sales by serving existing customers and sourcing potential customers. For Wideman, however, traveling was part of the major life activity of working as of October 2006. Wideman's supervisor, John Currall, in his October 6, 2006 letter to Wideman, ordered Wideman to travel more to territories outside California, and to spend at least three full days in a territory during each trip. Further, Currall and Arena continued to criticize Wideman for insufficient travel.

The record showed that Acme Electric excused Wideman from traveling during the 13 weeks of the two recuperative leaves it granted as an accommodation for his cancers. In 2006, Wideman took full-time leave for his kidney cancer from approximately

June 29 to July 4,<sup>3</sup> and gradually resumed his regular duties by August 1, 2006. In 2007, Wideman took full time leave from approximately February 13 to March 6, and gradually resumed his regular duties by April 20, 2007.

The record is clear that Wideman's numerous cancer-related outpatient appointments, from June 1, 2006 through April 19, 2007, limited his ability to travel as ordered by Currall, and that Wideman communicated this to his employer. On October 6, 2006, Wideman emailed Currall stating that his "air travel was delayed before and after surgery due to multiple tests and body scans." And, on October 11, 2006, Wideman wrote to Currall stating that "... my travel this summer had been virtually eliminated by my kidney cancer, subsequent surgery, recovery, and on-going medical regime ... Future trips are planned consistent with Acme's goals, although subject to accommodations or modifications as my medical condition and ongoing treatments may necessitate." This evidence showed that Wideman unequivocally attributed his travel limitation, not only to his "medical condition," but also to his "multiple tests and body scans," "on-going medical regime," and need for "ongoing treatments." Wideman's medical records confirm that he spent at least 40 days between June 1, 2006 and April 19, 2007 attending out-patient appointments related to his cancers. As Currall required Wideman to spend three full days in a territory during each trip, Wideman could not travel during the 16 weeks<sup>4</sup> where he had a mid-week outpatient appointment or two outpatient appointments in the same week.

\*16 Accordingly, the DFEH established that Wideman's need for full-time leave from June 29 to July 4, 2006 and February 13 to March 6, 2007; limitation to working part-time from home from July 4 to August 1, 2006 and March 6 to April 19, 2007, and need to attend numerous medical appointments from June 1, 2006 through April 19, 2007 because of his kidney and prostate cancers limited Wideman's ability to engage in the major life activity of working, including traveling duties.

Thus, the DFEH has met its burden of proof that complainant Wideman was an employee with a disability.

#### A. Failure to Engage In Good Faith In An Interactive Process

The DFEH alleged that Acme Electric continually failed to engage in a timely, good faith, interactive process regarding accommodation of Wideman's known physical disability. The DFEH asserted that Wideman requested "ongoing" accommodation of his kidney cancer in his October 6, 2006 email and October 11, 2006 letter to Currall, which triggered Acme Electric's duty to engage in an interactive consultation. The DFEH further asserted that Acme Electric did not respond to Wideman's requests for accommodation, resulting in a breakdown in the interactive process. Acme Electric countered that Wideman only requested accommodation in the form of recuperative leaves from June 29 to August 1, 2006, and from February 13 to March 7, 2007, which Acme Electric immediately granted, so it had no duty to engage in an interactive process.

The FEHA provides that it is an unlawful employment practice for an employer "to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition." (Gov. Code, § 12940, subd. (n).) When an employer receives an employee's request for an accommodation, it has only two legal alternatives: it can either grant the request or initiate discussions with the employee regarding other alternatives. (*Humphrey v. Memorial Hospitals Assn.* (9th Cir. 2001) 239 F.3d 1128, 1138.)<sup>5</sup> An employee is not required to request a specific form of accommodation to trigger the employer's duty to engage in the interactive process. (*Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 954-955.)

"[T]he interactive process requires communication and good-faith exploration of possible accommodations between employers and individual employees' with the goal of 'identify[ing] an accommodation that allows the employee to perform the job effectively.' [Citation]. ... [F]or the process to work, '[b]oth sides must communicate directly, exchange essential information and neither side can delay or obstruct the process.'"<sup>D</sup> (*Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 261.) "Reasonable accommodation of a disability is often an ongoing process rather than a single action." (*Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 822.) Accordingly, "[t]he employer's obligation to engage in the interactive process extends beyond the first attempt at accommodation and continues when the employee asks for a different accommodation or where the employer is aware that the initial accommodation is failing and further accommodation is needed." (*Humphrey v. Memorial Hospitals Assn., supra*,

239 F.3d at p. 1138.) When a claim is brought for failure to reasonably accommodate the claimant's disability, the fact finder's ultimate obligation is to ““isolate the cause of the breakdown ... and then assign responsibility’ so that ‘[I]ability for failure to provide reasonable accommodations ensues only where the employer bears responsibility for the breakdown.’”D’ (*Dept. Fair Empl. & Hous. v. California Dept. of Corrections*, FEHC Dec. No. 03-06-P [2003 WL 21689610, at \*13 (Cal.F.E.H.C.)] citing *Jensen v. Wells Fargo Bank, supra*, 85 Cal.App.4th at p. 261.)

**\*17** The DFEH established that Wideman requested further accommodation for the travel limitation caused by his cancers. Wideman, in his October 6, 2006 email to Currall, notified his employer that his travel schedule needed to be ““subject to accommodations” of his cancer.

Acme Electric established that it fulfilled its initial duty to engage in an interactive consultation with Wideman about his two recuperative leave requests by granting them immediately. (*Humphrey v. Memorial Hospitals Assn., supra*, 239 F.3d at p. 1138.) Wideman's October 2006 correspondence to Currall, however, undermines Acme Electric's assertion that Wideman's two requests for recuperative leave were the only requests for accommodation that Wideman made.

In addition, the record showed that on January 31, 2007, Wideman notified Nick Arena, then Sales, Marketing, and Business Development Manager, that he needed further accommodation. In response to Arena's oral reprimand regarding Wideman's remark to Roach at the manager's meeting, Wideman told Arena of the difficulties he was experiencing from his cancer. Arena testified that he understood that Wideman was attributing his criticized conduct to his cancers.<sup>6</sup> Arena's awareness that Wideman might need further accommodation to address his criticized job performance also triggered Acme Electric's duty to engage in an interactive consultation. (*Humphrey v. Memorial Hospitals Assn., supra*, 239 F.3d at p. 1138.)

Wideman's October 2006 requests for further accommodation and Arena's awareness on January 31, 2007 that Wideman might need further accommodation triggered Acme Electric's duty to open a dialogue with Wideman to determine whether his medical appointments for his cancer were limiting, and would continue to limit, his travel during his chemotherapy; and if so, to determine what accommodation would be effective for Wideman without creating an undue hardship for Acme Electric. The record showed that, instead, Acme Electric did nothing in response to Wideman's request for further accommodation. Accordingly, the DFEH established that Acme Electric caused the breakdown in the interactive process.

Thus, the DFEH established that Acme Electric is liable for failing to engage in good faith in an interactive process in violation of Government Code section 12940, subdivision (n).

#### **B. Failure to Provide Reasonable Accommodation**

The DFEH alleged that Acme Electric failed to provide Wideman reasonable accommodation for his known physical disabilities, in violation of Government Code section 12940, subdivision (m). The DFEH argued that Wideman was limited in his ability to travel, from June 29, 2006 to April 19, 2007, due to both his kidney cancer and prostate cancer and their treatments. The DFEH also argued that, in his October 2006 correspondence to Currall, Wideman notified Acme Electric of this travel limitation and requested accommodation in the form of intermittent leave and pro-rated performance standards.

**\*18** Acme Electric countered that Wideman was not limited in his ability to travel except for the short periods during which he was granted leave as an accommodation. Acme Electric denied that Wideman needed or requested further accommodation, and therefore, did not contend that providing further accommodation would have created an undue hardship.

Under the FEHA, it is unlawful for an employer to fail to make reasonable accommodation for the known physical or mental disability of an employee unless doing so would pose an undue hardship on the employer. The DFEH must establish, by a preponderance of the evidence, that the employee has a disability covered by the FEHA, that the employer knew of the limitation(s) arising from the employee's disability, and that the employer failed to provide the reasonable accommodation for the employee's disability-related limitation(s) that would enable the employee to perform his or her essential job functions.

(Gov. Code § 12940, subd. (m); Cal. Code Regs., tit. 2, § 7293.9; *Prilliman v. United Airlines, Inc.*, *supra*, 53 Cal.App.4th at pp. 951-952, 954; *Wilson v. County of Orange* (2009) 169 Cal.App.4th 1185, 1192.)

### 1. Wideman's Leave as an Accommodation

The DFEH contended that Acme Electric failed to accommodate Wideman's known travel limitation due to his cancers when Currall criticized Wideman for insufficient travel and inadequate reporting, and when Roach relied on this criticism to terminate Wideman's employment. Acme Electric asserted that Currall accommodated Wideman by granting him all the leave that he requested.

To penalize a salesperson for failing to meet a production standard because s/he took leave as an accommodation makes the leave an ineffective accommodation. (Cf EEOC's *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the ADA* (Notice 915.02) (10/17/02) at Question No. 19.)

The DFEH established that Currall knew about Wideman's kidney cancer and its treatment, and granted Wideman recuperative leave from June 29 to August 1, 2006, as an accommodation. The DFEH also established that on October 6, 2006, Currall criticized Wideman for “lack of direct interaction with the representatives and the customers” and the “quality and content of the reporting”, and placed him on a performance improvement plan. The DFEH further established that Roach similarly relied on Wideman's limited travel when he decided to terminate Wideman's employment. Roach testified that, he not only relied on Currall's criticism of Wideman's performance, but also on Wideman's less comprehensive reporting at the January 31, 2007 managers' meeting, which resulted from Wideman's limited travel. Roach admitted that he failed to consider whether Wideman's cancer-related limitations and accommodations had contributed to Wideman's reported performance deficiencies.

In criticizing Wideman for his inability to travel and write comprehensive monthly reports “covering conditions and events in all territories,” Acme Electric converted Wideman's previously taken recuperative leave into an ineffective accommodation.

### 2. Wideman's Requests for Further Accommodation

**\*19** The DFEH contended that Wideman repeatedly asked for further accommodation of his travel limitation due to his cancers. Acme Electric denied that Wideman needed or requested further accommodation.

“An employer “knows” an employee has a disability when the employee tells the employer about his condition, or when the employer otherwise becomes aware of the condition, such as through a third party or by observation.” (*Faust v. California Portland Cement Co.* (2007) 150 Cal. App. 4th 864, 887 [internal citations omitted].)

The DFEH established that, in addition to Wideman's previously discussed October 2006 and January 31, 2007 requests for accommodation, Wideman tried three more times to obtain ongoing accommodation of pro-rated performance standards for his known travel limitations due to medical appointments for his cancers. At a meeting in Las Vegas in January 2007, Wideman asked his supervisor, Currall, to expunge from his personnel file any reported performance deficiencies that were related to his need for accommodation of his cancers. In December 2007, Wideman protested to Currall that his last performance review was “unfair” because it did not take his travel limitations due to his cancers into account, and refused to sign it. In January 2008, in order to explain why he thought his 2007 performance evaluation was unfair, Wideman sent Stimes a copy of his October 11, 2006 letter to Currall asking for a pro-rata assessment of his performance because his ability to travel was limited by his need to attend medical appointments for his cancers. In light of this evidence, Acme Electric's contention that Wideman did not request further accommodation is untenable.

Acme Electric's denial of Wideman's need for further accommodation other than the two short periods of leave, means that in evaluating Wideman's 2007 performance, Currall failed to take into account that Wideman's travel limitations due to his cancers extended from June 1, 2006 through April 19, 2007. As a result, when evaluating Wideman's 2007 performance, Currall

failed to fully accommodate Wideman's travel limitations by modifying his travel and reporting requirements on a pro-rata basis. Currall's failure to do so resulted in Wideman's termination because Roach relied on Currall's unmodified evaluation of Wideman's 2007 performance when he decided to terminate Wideman's employment.

The record showed that, instead of granting Wideman intermittent leave and pro-rating its production standards to adjust for the leave Wideman had taken, Acme Electric did nothing in response to these requests for accommodation of Wideman's cancers. Accordingly, the DFEH established that, in addition to converting Wideman's previously granted leave into an ineffective accommodation, Acme Electric denied Wideman further accommodation of his known travel limitations due to medical appointments for his cancers.

Thus, the DFEH established that Acme Electric is liable for failing to provide reasonable accommodation in violation of the Act. (Gov. Code, § 12940, subd. (m).)

### C. Disability Discrimination

\*20 The DFEH alleged that Acme Electric gave Wideman an unfavorable 2007 performance review and terminated his employment because of his physical disabilities, in violation of the FEHA. (Gov. Code § 12940, subd. (a).)

Acme Electric countered that it gave Wideman an unfavorable 2007 performance review and terminated his employment because of performance deficiencies that predated his cancer, so were unrelated to his cancer. Acme Electric also asserted that Wideman's discharge was part of a reduction in force.

To prove disability discrimination, the DFEH must establish that (1) complainant was an employee with a disability, (2) complainant could perform the essential functions of complainant's job with or without reasonable accommodation, and (3) respondent took an adverse employment action against complainant because of complainant's disability. (Cal. Code Regs., tit. 2, § 7293.7; *Green v. State of California* (2007) 42 Cal.4th 254, 263.) When leave is the accommodation, an employee's ability to perform the essential job functions is assessed after the employee returns to work from leave. Discrimination is established if complainant's disability was one of the factors that influenced respondent's adverse employment actions. The evidence need not demonstrate that complainant's disability was the sole or even the dominant cause of the adverse action. (*Dept. Fair Empl. & Hous. v. Church's Fried Chicken, Inc.* (Aug. 16, 1990) No. 90-11, FEHC Precedential Decs. 1990-91, CEB 5, at p. 11, [1990 WL 312878 (Cal.F.E.H.C.)]; *Mxon v. Fair Empl. & Hous. Com.* (1987) 192 Cal.App.3d 1306, 1317.)

The DFEH argued that Wideman was a qualified individual with disabilities, who could perform his regular duties with or without accommodation. Acme Electric did not contest Wideman's physical ability to perform his essential job functions after it had provided him with accommodation in the form of leave for his travel limitation. The record showed that by the end of Wideman's leave on April 19, 2007, he was performing his regular duties without the need for any further accommodation. Accordingly, the DFEH established that Wideman was an otherwise qualified employee with disabilities.

#### 1. Whether Wideman's Unaccommodated Travel Limitation Is Linked to His Reported Performance Deficiencies

The DFEH argued that Acme Electric revealed its discriminatory motive by relying on Wideman's unaccommodated travel limitation due to his cancers to evaluate his performance as unsatisfactory, thereby justifying his termination. Acme Electric denied that it discriminated against Wideman, and averred that it terminated Wideman's employment because he managed the Western Region too “remotely,” and because of “customer complaints” and his “cynicism.”<sup>7</sup>

“The link between the disability and the termination is particularly strong where it is the employer's failure to reasonably accommodate a known disability that leads to termination for performance inadequacies resulting from the disability.” (*Humphrey v. Memorial Hospitals Assn.*, *supra*, 239 F.3d at pp. 1139-1140.)

\*21 The DFEH previously established that Acme Electric failed to accommodate Wideman's travel limitation due to his cancers by assessing his travel and reporting requirements on a pro-rata basis that excluded the periods of time in which Wideman was unable to travel because of his cancers. The DFEH also established that Acme Electric criticized Wideman for his limited travel. According to respondent's discovery responses, the only job requirement that Wideman did not meet was that he "stayed more in one specific portion of his territory [sic] instead of being visible or in touch with [representatives] in the entire territory [sic] in person and via telephone."<sup>8</sup> In the October 6, 2006 performance improvement plan, Currall criticized Wideman for not undertaking "increased travel" to decrease the Western Region's dependence of California sales. In doing so, Currall failed to take into account that Wideman's "travel had been virtually eliminated" by his kidney cancer since June 1, 2006. In evaluating Wideman's 2007 performance, Currall also failed to take into account that Wideman's travel limitation extended through April 19, 2007 due also to his prostate cancer. The record showed that Currall, Arena, and Roach attributed the Western Region's dependence of California sales to Wideman's lack of face to face interaction with his customers and potential customers outside California. In other words, Acme Electric discharged Wideman primarily because of his limited travel due to his cancers.

Accordingly, Acme Electric's failure to accommodate Wideman's disabilities is directly linked to his reported performance deficiencies.

## 2. Whether Wideman's Reported Performance Deficiencies Were False or Pretextual

The DFEH argued that Acme Electric revealed its discriminatory motive by giving Wideman a "bogus" 2007 performance review, to justify its prior decision to terminate his employment. Acme Electric countered that Wideman's 2007 performance evaluation and termination were justified by his performance deficiencies that predated his cancer, so were unrelated to his cancers. Acme Electric also contended that Wideman's firing was part of a reduction in force.

"Proof that defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive ... In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose." (*Reeves v. Sanderson Plumbing Prod. Inc.* (2000) 530 U.S. 133, 147.) "[I]n an appropriate case, an inference of dissembling may arise where the employer has given shifting, contradictory, implausible, uninformed, or factually baseless justifications for its actions." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal. 4th 317, 363). An employer's failure to counsel an employee about alleged performance deficiencies may raise an inference of discrimination. (*Logan v. Denny's Inc.* (6th Cir. 2001) 259 F.3d 558, 574-575 [[lack of reliable evidence of customer complaints or counseling about them established pretext].) Further, "A nondiscriminatory reason for an adverse employment action may be found to have been a pretext for discrimination when the action is the result of subjective standards." (*Dept. Fair Empl. & Hous. v. C. E. Miller Corp.* (Jan. 6, 1984) No. 84-02, FEHC Precedential Decs. 1984-85, CEB 1, at p. 15 [1984 WL 54282 (Cal.F.E.H.C.)].)

\*22 The DFEH established that, in discharging Wideman because of his limited travel, Acme Electric not only ignored Wideman's need for accommodation, but also failed to take into account his dramatically improved job performance. Wideman's 2007 performance review showed that, despite his cancers and travel limitations, Wideman exceeded his goal of lessening the Western Region's dependence on California sales by four percent. Acme Electric's showing that Currall had criticized Wideman for the imbalance of sales in the Western Region before Wideman was diagnosed with cancer did not countervail this evidence of Wideman's satisfactory performance, which Acme Electric ignored. Accordingly, the DFEH established that Acme Electric's primary stated reason for terminating Wideman's employment was factually baseless.

Moreover, the evidence showed that Wideman met or exceeded all of his 2007 goals, and that Currall's evaluation of Wideman's 2007 performance as inadequate was based on internally inconsistent, subjective criteria, such as Wideman's alleged "cynicism." Currall, Arena, Roach, and Stimes each referenced Wideman's remark to Roach at the January 2007 meeting, to the effect that underperforming sales representatives were not the real problem, as the prime example of Wideman's so-called cynicism. Acme Electric's speculation that Wideman's alleged cynicism "might bleed through into the marketplace" is contradicted by the Western Region's leading sales growth in 2006-2007.

Acme Electric tried to discount Wideman's leading sales performance in 2006-2007 by attributing it to national price increases. We note, however, that these price increases applied equally to all regions, so could not affect Wideman's ranking. Acme Electric also argued that it was easier for Wideman to achieve sales growth because the Western Region's sales were smaller. Logically, the Western Region should have generated 25% of the four region's sales. Although sales in the Western Region were smaller at the time of Wideman's hire, Acme Electric's argument failed to consider that Wideman's competitive pricing strategy increased his region's sales dramatically. Arena testified that sales in the Western Region generated 25 to 35 percent of Acme Electric sales by 2007.<sup>9</sup> Although sales dropped in the fall of 2007, it is uncontested that this was due to the declining economy rather than Wideman's performance. The record showed that, notwithstanding the economy's downturn, Wideman recovered sales in the Western Region rapidly. By the time of the termination of his employment in 2008, Wideman was on track to earn his highest sales commission of his tenure with Acme Electric.

Accordingly, the DFEH established that Acme Electric's reliance on subjective criteria in evaluating Wideman's performance, and justifying his termination, was also factually baseless and pretextual.

Acme Electric also contended that Wideman's discharge was part of a reduction in force, and that customers had complained about not seeing Wideman. Although Acme Electric did reduce its workforce in March 2008, Wideman's position was not eliminated. Instead, Alan Nelson replaced Wideman as Regional Sales Manager of the Western Region. The evidence showed that Acme Electric always intended to replace Wideman, and did so as soon as it found a suitable candidate. Acme Electric's additional stated reason that Wideman's termination was part of a reduction in force was false.

**\*23** Acme Electric further contended that Wideman delayed too long in replacing the Minnesota, Salt Lake, and Denver sales representatives. The evidence showed that Acme Electric tolerated delay in replacing sales representatives. For example, Wideman's predecessor had decimated sales in the Western Region before Currall finally replaced him; yet, Currall remained employed until his position was eliminated in March 2008. Further, most of this criticism was itself delayed. Wideman replaced the Minnesota sales representative in 2005. Wideman recommended replacing John White and Associates as the Salt Lake sales representative in 2006, and Currall vetoed his recommendation for fear of losing the Codale account, which generated the vast majority of the Salt Lake territory's income. Thus, the criticism about the delay in replacing the Salt Lake sales representative was not only stale, it was misdirected. Currall, not Wideman, was responsible for any delay in replacing the Salt Lake sales representative.

Roach and Stimes both alleged at hearing that small, Seattle-based customers had complained to Roach about not seeing Wideman, and his lack of follow-up when they did see him, during their July 2007 trip there, and that these customer complaints were one of the reasons that Acme Electric fired him. This testimony is found to be not credible. None of these customers testified, so Acme Electric's contention relied entirely on uncorroborated hearsay. No one at Acme Electric shared this critical feedback with Wideman during his employment. Roach did not mention customer complaints in his July 31, 2007 email to Wideman assessing Wideman's performance during their Seattle trip to these customers during the prior week. And Wideman's alleged "lack of follow-up" is contradicted by Currall's 2007 evaluation that Wideman "can be depended on to getting things done."

Roach admitted in his testimony at hearing that Wideman was never informed about the alleged customer complaints during his employment with Acme Electric, and thus was given no opportunity to explain or to rectify any alleged problems. Although Roach gave Wideman critical feedback in a July 31, 2007 email the week after their Seattle trip, notably, there is no mention of any customer complaints that Roach asserted he had just received.

The DFEH countered that Wideman had a widespread reputation as a highly professional Regional Sales Manager, particularly on the West Coast. According to the DFEH investigator, Currall characterized Wideman's dealings with customers as "professional." This hearsay evidence is corroborated by Burton Schraga, who testified that, as president of two leading national electrical supply industry associations, he was familiar with Wideman's reputation in the industry as an unusually qualified and

well respected sales manager. Schraga's account of Wideman's reputation in the electrical supply industry was consistent with his own personal experience as a long-time customer of Wideman's both at Acme Electric and previously at Cooper Bussman.

**\*24** The unreliability of the hearsay, uncorroborated complaints, and the inexplicable failure of Roach to tell Wideman contemporaneously about these complaints when other negative aspects of the trip were shared, raise the inference that this reason for Wideman's discharge — customer complaints — was pretextual.

In sum, the record showed that Acme Electric not only failed to accommodate Wideman's travel limitation due to his cancers, but also used Wideman's travel limitation to fault his performance, thereby justifying his termination. The record also showed that Acme Electric offered factually baseless, false, pretextual, and shifting reasons for Wideman's termination; relied on internally inconsistent, subjective criteria when deciding to terminate Wideman's employment; and failed to counsel Wideman about alleged customer complaints. In the totality of the circumstances in this case, particularly the plurality of factually baseless reasons, each of Acme Electric's proffered reasons raises an inference of disability discrimination.

Thus, the DFEH established that Acme Electric is liable for discriminating against complainant Wideman based on his disabilities, in violation of the Act. (Gov. Code, § 12940, subd. (a).)

#### D. CFRA Violation

The DFEH asserted that Acme Electric was a CFRA-covered employer. The DFEH argued that Actuant was also Wideman's employer, and owned both Acme Electric and Marinco, an electrical supplies factory near Wideman's home office. The DFEH further argued that because both Acme Electric and Marinco were divisions of Actuant, Wideman could count Marinco's 150 employees to meet the CFRA-eligible employee requirement of at least 50 employees within 75 miles of his workplace. The DFEH also asserted that Acme Electric denied Wideman CFRA medical leave for his cancers, in violation of Government Code section 12945.2, subdivision (a). Acme Electric denied that it was a CFRA-covered employer under the “integrated enterprise” test,<sup>10</sup> on the grounds that Actuant's subsidiaries (such as Acme Electric and Marinco) were separately-run businesses, but nonetheless asserted that it granted Wideman all the medical leave that he requested.

An “employer” for the purposes of CFRA is any person who *directly* employs 50 or more persons to perform services for a wage or salary.” (Gov. Code § 12945.2, subd. (c)(2)(A) [emphasis added].) “Directly employs” means that the employer maintains an aggregate of at least 50 part or full time employees on its payroll(s), for each working day during each of the 20 or more calendar workweeks in the current or preceding year ...” (Cal. Code Regs., tit. 2, § 7297.0, subd. (d)(1).) Although these 50 employees may be located anywhere in the United States, it is not an unlawful employment action for an employer that employs fewer than 50 employees within 75 miles of complainant's worksite to deny a request for leave. (Cal. Code Regs., tit. 2, § 7297.0, subd. (d); Gov. Code, § 12945.2, subd. (b).)

**\*25** The DFEH established that Acme Electric is an employer within the meaning of CFRA, even though Wideman was its only employee in California at the time of his requests for leave in June 2006 and February 2007. (Gov. Code § 12945.2, subd. (c)(2)(A); Cal. Code Regs., tit. 2, § 7297.0, subd. (d).) The DFEH, however, failed to establish that Acme Electric and Marinco were divisions of Actuant, or that Actuant was Wideman's employer. Although the record showed that Actuant issued Wideman's final paychecks in February 2008, the DFEH failed to show that Wideman was on Actuant's payroll at the time of his requests for leave in June 2006 and February 2007.

Thus, the DFEH failed to establish that Acme Electric is liable for denying Wideman CFRA-protected medical leave in violation of the CFRA. (Gov. Code § 12945.2, subd. (a).)

#### E. Retaliation

The DFEH alleges that Acme Electric violated Government Code section 12940, subdivision (h), when it terminated Wideman's employment because he opposed practices prohibited by the FEHA by refusing to sign his 2007 performance evaluation. Acme Electric did not address the retaliation cause of action in its closing brief.

Government Code section 12940, subdivision (h), makes it an unlawful employment practice “[f]or an employer ... to discharge ... or otherwise discriminate against any person because that person has opposed any practices forbidden under this part ...” A violation under Government Code section 12940, subdivision (h), is established by proving by the preponderance of the evidence that complainant engaged in a protected activity, respondent took an adverse employment action against complainant, and that there is a causal connection between the protected activity and the adverse employment action. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal. 4th 1028, 1042.)

An employee's internal complaint to the employer about discrimination, harassment, or retaliation is a protected activity. “An employee is not required to use legal terms or buzzwords when opposing illegal activity.” (*Yanowitz v. L'Oreal USA, Inc.*, *supra*, 36 Cal. 4th at p. 1134.) “An employee is protected against retaliation if the employee reasonably and in good faith believed that what he or she was opposing constituted unlawful employer conduct [under the FEHA].” (*Miller v. Dept. of Corrections*, *supra*, 36 Cal. 4th at p. 473.) Even vague protests about “unfairness” are sufficient to trigger an employer's duty to investigate. (*Miller v. Dept. of Corrections*, *supra*, 36 Cal. 4th at p. 474.)

The record showed that Roach made the decision to terminate Wideman's employment in September 2007, although this decision was not implemented until March 1, 2008. In December 2007, Wideman told Currall that his performance review was “unfair” because it faulted his inability to travel when he could not do so because of his cancers, and refused to sign off on it. On January 2, 2008, Stimes emailed Wideman and asked him if he wanted her help to resolve the matter. To explain why he thought this performance review was unfair, Wideman sent Stimes a copy of the October 11, 2006 letter he had sent to Currall protesting criticism of his performance based on his inability to travel due to his kidney cancer and its treatment and requesting ongoing accommodation.

**\*26** The protected activity that the DFEH alleged gave rise to Acme Electric's retaliatory firing, Wideman's December 2007 refusal to sign his unfavorable 2007 performance review, occurred three months *after* Acme Electric's September 2007 decision to terminate Wideman's employment. Logically, based on this timing, Wideman's protest cannot have caused the termination of his employment. Accordingly, the DFEH did not establish Acme Electric's retaliatory motive for terminating Wideman's employment.

Thus, the DFEH failed to establish that respondent Acme Electric is liable for retaliating against complainant Wideman for opposing unlawful employment practices in violation of the FEHA. (Gov. Code, § 12940, subd. (h).)

#### F. Failure to Take All Reasonable Steps

The DFEH asserts that Acme Electric failed to take all reasonable steps to prevent disability discrimination from occurring, in violation of the FEHA. (Gov. Code, § 12940, subd. (k).) Acme Electric contended that there was no evidence that Acme Electric failed to investigate discrimination claims, and that it had adequate anti-discrimination policies in place. Respondent further argued that its grant of recuperative leave to Wideman, and Stimes interactions with two other employees with cancer showed that its investigation and accommodation of employees was reasonable.

Government Code section 12940, subdivision (k), makes it an unlawful employment practice “[f]or an employer...to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring.” The duty to prevent and remedy unlawful employment practices includes a duty to promptly and thoroughly investigate all allegations of discrimination. (*California Fair Empl. & Hous. Com. v. Gemini Aluminum Corp.* (2004) 122 Cal. App. 4th 1004, 1024, citing *Northrop Grumman Corp. v. Workers' Compensation Appeals Board* (2002) 103 Cal. App. 4th 1021, 1035.)

The record showed that, on October 6 and 11, 2006, and again on January 30 and 31, 2007, and finally on January 2, 2008, Wideman protested to Currall, then Arena, then Stimes, that his reported performance deficiencies were due to his cancers.

Wideman's protests triggered Acme Electric's duty to investigate. Through the testimony of Arena, Roach, and Stimes, Acme Electric admitted that it did nothing in response to Wideman's internal complaints. These admissions negate respondent's contention that there was no evidence that Acme Electric failed to promptly investigate discrimination claims. Further, Acme Electric's failure to consider whether Wideman's cancers and their treatments contributed to his reported performance deficiencies resulted in a denial of accommodation, an unfavorable performance evaluation, and termination of Wideman's employment, in violation of Government Code section 12940, subdivisions (a) and (m).

Neither party presented documentary evidence of Acme Electric's anti-discrimination policies that were in place during Wideman's employment.<sup>11</sup> Although the record showed that Acme Electric had created an anti-discrimination policy, the absence of a copy of this policy from the evidence precluded a determination of its textual adequacy. Based on the results in this case, however, Acme Electric's anti-discrimination policy was inadequate, or its enforcement was ineffective, or both. Evidence that Acme Electric provided full-time and intermittent leave to other employees with cancer does not countervail the evidence that it failed to accommodate Wideman's cancers, and discriminated against him because of his cancers.

\*27 Thus, the DFEH established that Acme Electric is liable for failing to take all reasonable steps to prevent discrimination from occurring, in violation of the FEHA. (Gov. Code, § 12940, subd. (h).)

#### REMEDY

Having established that respondent Acme Electric violated the Act, the DFEH is entitled to whatever forms of relief are necessary to make complainant Wideman whole for any loss or injury he suffered as a result. The DFEH must demonstrate, where necessary, the nature and extent of the resultant injury, and Acme Electric must demonstrate any bar or excuse it asserts to any part of these remedies, including any lack of mitigation of damages. (Gov. Code, § 12970, subd. (a); Cal. Code Regs., tit. 2, § 7286.9; *Donald Schriver, Inc. v. Fair Empl. & Hous. Com.* (1986) 220 Cal.App.3d 396, 407; *Dept. Fair Empl. & Hous. v. Madera County* (Apr. 26, 1990) No. 90-03, FEHC Precedential Decs. 1990-91, CEB 1, at pp. 33-34 [1990 WL 312871 (Cal.F.E.HC)]; *Parker v. Twentieth Century-Fox Film Corporation* (1970) 3 Cal.3d 176, 181-182.)

The DFEH seeks back pay, front pay, compensatory damages for complainant's emotional distress, an administrative fine, and affirmative relief.<sup>12</sup> Acme Electric contended that Wideman failed to mitigate his damages, and that it was entitled to an offset of Wideman's unemployment benefits. Neither party considered that reinstatement was a viable option, and Acme Electric argued that front pay was inappropriate also. Acme Electric did not contest the expertise of the DFEH's expert witness, Craig Enos, as a forensic economist,<sup>13</sup> or any of his calculations of Wideman's economic damages.<sup>14</sup>

#### A. Back Pay

The DFEH requested back pay of \$201,675 in lost salary, bonuses/commissions, and retirement benefits from the date of termination of Wideman's employment to the effective date of the decision. Acme Electric did not challenge the accuracy of data or the manner used to calculate Wideman's back pay, but asserted that Wideman failed to mitigate his back pay damages.

Wideman is entitled to receive back pay for the salary, bonuses/commissions, and retirement and medical benefits he otherwise could have been expected to earn but for Acme Electric's violation of the FEHA, less any mitigation proved by Acme Electric. (Gov. Code, § 12970, subd. (a)(1); *Donald Schriver, Inc. v. Fair Empl. & Hous. Com.*, *supra*, 220 Cal.App.3d at p. 407; *Zhang v. American Gem Seafoods, Inc.* (9th Cir. 2003) (estimated bonuses consistent with contract terms and prior sales history may be awarded).)

The Commission awards back pay from the date that complainant's earnings loss accrued to the first day of hearing. (*Dept. Fair Empl. & Hous. v. Acosta Tacos* (June 16, 2009) No. 09-03-P [2009 WL 2595487, at \*10 (Cal.F.E.H.C.)].) Accordingly, Wideman's back pay is calculated from March 1, 2008, the date of termination of his employment, until the first day of hearing on May 3, 2010.

### 1. Calculation of Wideman's Back Pa

\*28 At the time of his termination of employment on March 1, 2008, Wideman was earning a base salary of \$80,000 per year, paid every two weeks (bi-weekly). Acme Electric also provided its Regional Sales Managers, such as Wideman, a semi-annual "bonus," a commission based on the degree to which they achieved the common regional sales goals, set at twice the rate of growth of the gross domestic product. Since 2005, Wideman had earned an average annual bonus of \$10,166 due in part to his successful work record of developing competitive pricing strategies for difficult markets. Although Acme Electric's sales declined sharply in September 2007, the evidence showed that sales in the Western Region recovered rapidly. Wideman was on track to earn a bonus of approximately \$15,948 in 2008.<sup>15</sup> Wideman's average annual bonus of \$10,166 per year, therefore, takes into account the recent declining economy, as well as Wideman's ability to earn bonuses notwithstanding difficult markets.

Accordingly, the Commission finds that Wideman is entitled to a bonus/commission of \$10,166 per year. Wideman's \$80,000 salary plus \$10,166 bonus amounts to gross pay of \$90,166 per year.

Acme Electric provided Wideman with a matching contribution to his 401(k) retirement plan of seven and a half percent of his gross pay valued at approximately \$6,762 ( $\$90,166 \times 7.5\%$ ) per year. Wideman would have earned an salary of \$80,000 plus annual bonus of \$10,166 plus an annual retirement benefit of \$6,762, resulting in lost annual income of \$96,928 ( $\$80,000 + \$10,166 + \$6,762$ ). Accordingly, Wideman lost \$8,077 per month ( $\$96,928 \text{ gross pay} \div 12 \text{ months}$ ) for the 26 months from March 1, 2008 to April 30, 2010, a total of \$210,002 in back pay.

Thus, Wideman would have earned back pay of approximately \$210,002 for lost salary, bonus, and retirement benefits from the date of his discharge on March 1, 2008 to the first day of hearing on May 3, 2010.

### 2. Out of Pocket Expenses for Lost Past Health Insurance Benefits

Acme Electric provided Wideman with medical and dental benefits to which he contributed \$107.25 per bi-weekly pay period. From May 1, 2008 to May 31, 2010,<sup>16</sup> Wideman paid \$28,529 in health insurance benefits to replace those he lost when Acme Electric terminated his employment. The amount of Wideman's lost past health insurance benefits was calculated by deducting \$5,800 ( $\$232 \times 25 \text{ months}$ ) - the amount he would have contributed to health care benefits, from \$28,529 - the amount that he paid for health insurance benefits from May 1, 2008 to May 31, 2010.

Accordingly, as of the date of the hearing, Wideman had paid out-of-pocket expenses of \$22,729 ( $\$28,529 - \$5,800$ ) for past medical and dental benefits.

### 3. Whether Wideman Mitigated His Back Pay Damages

Respondent contended that Wideman had failed to mitigate his damages because he applied for positions within the electrical industry only, and because he was unwilling to relocate himself and his family to accept a new position.

\*29 While complainant has a duty to mitigate his or her damages, respondent bears the burden of proving, by a preponderance of the evidence, that complainant failed to do so. (Cal. Code Regs., tit. 2, § 7286.9, subd. (a)(1)(A).) Respondent must prove: (1) that "comparable" or "substantially similar" employment was available to complainant; (2) that complainant failed to use "reasonable diligence" to obtain and retain such employment throughout the period for which back pay is sought; and (3) the amount that complainant earned or with reasonable efforts might have earned from other employment. (*Parker v. Twentieth*

*Century-Fox Film Corp.*, *supra*, 3 Cal.3d at p. 181-182; *West v. Bechtel Corp.* (2002) 96 Cal.App.4th 966, 985; *Ford Motor Co. v. EEOC* (1982) 458 U.S. 219, 231-232.)

To mitigate damages, complainant “need not go into another line of work” (*Ford Motor Co. v. EEOC*, *supra*, 458 U.S. at p. 231; *Parker v. Twentieth Century-Fox Film Corp.*, *supra*, 3 Cal.3d at p. 183.), nor seek or accept work that is a significant distance from his or her residence. (*Parker v. Twentieth Century-Fox Film Corp.*, *supra*, 3 Cal.3d at p. 183; *Rasimas v. Michigan Dept. of Mental Health* (6th Cir. 1983) 714 F.2d 614, 625.) Such work is not “comparable.” (*Parker v. Twentieth Century-Fox Film Corp.*, *supra*, 3 Cal.3d at p. 183.)

The DFEH established that Wideman looked diligently for work after Acme Electric terminated his employment. Wideman testified credibly that he checked job postings daily for a comparable position in the electrical supply industry where his skills, education, experience, and value lay. Wideman applied for every comparable position in his area that he found as a result of his daily job search. Wideman sent out 32 applications to potential employers, and interviewed with a number of them. The record showed that Wideman's inability to obtain comparable employment as of the time of the hearing was attributable, at least in part, to the declining economy that impacted the electrical industry severely, resulting in loss of jobs.

Respondent's assertions that Wideman was required to apply for jobs outside the electrical industry, and to relocate, if necessary, to accept an alternative position is untenable. Further, respondent failed to establish the existence of a comparable job that Wideman, with the exercise of reasonable diligence, should have obtained.

Thus, respondent did not prove that Wideman failed to mitigate his damages.

#### 4. Whether Respondent is Entitled to an Offset of Unemployment Benefits

Respondent contended that it was entitled to an offset for any unemployment benefits that Wideman received.

“[Unemployment compensation...shall not normally be utilized in considering mitigation of back pay.” (Cal. Code Regs., tit. 2, § 7286.9, subd. (a)(1)(A), *Monroe v. Oakland Unified School Dist.* (1981) 114 Cal.App.3d 804, 811 [[Unemployment compensation benefits “are intended to alleviate the distress of unemployment and not to diminish the amount which an employer must pay as damages for the wrongful discharge of an employee.”]; accord, *EEOC v. Ford Motor Co.*, *supra*, 645 F.2d at 195.)

\*30 Respondent's unsupported assertion that it was entitled to an offset for Wideman's unemployment benefits is contrary to well-settled law.

#### 5. Wideman's Entitlement to Back Pay

Acme Electric having failed to prove either a failure to mitigate or any wage offset, the Commission awards Wideman \$210,002 in back pay for lost earnings. Interest will accrue on this amount, at the rate of ten percent per year, compounded annually, from the effective date of the earnings accrued until the date of payment. (Code Civ. Proc., § 685.010.) The Commission also awards Wideman \$22,729 in out-of-pocket expenses for replacement of his health care benefits. Interest shall accrue on this amount at the rate of ten percent per year, compounded annually, from the effective date the expenses accrued until the date of payment. (*Ibid.*)

#### B. Front Pay

Reinstatement or front pay in lieu of reinstatement, is a prospective relief component of complainant's make-whole remedy. (Cal. Code Regs., tit. 2, § 7286.9, subd. (b)(1).)

#### 1. Whether Reinstatement is Feasible

In its closing brief, the DFEH withdrew its request for reinstatement, and requested front pay instead. The parties agreed that reinstatement was not feasible.

Reinstatement is not feasible when it requires displacement of an incumbent employee. (*Cloud v. Casey* (1999) 76 Cal. App. 4th 895, 908.)

The record showed that reinstatement to Wideman to his former position would require displacing Alan Nelson, respondent's current Western Regional Sales Manager. Accordingly, we agree with the parties that reinstatement is not feasible in this case.

## 2. The Extent of Respondent's Duty to Provide Wideman Front Pay

The DFEH requested front pay to June 30, 2015 based on Wideman's testimony that he planned to work for Acme Electric until he turned 67 years of age on June 13, 2015. Acme Electric argued Wideman's testimony was insufficient to support an award of front pay, and that there was no guarantee that Acme Electric would have continued to employ him, particularly given his lack of fluency in Spanish.

Respondent's obligation to pay complainant front pay continues from the date of hearing until complainant is "made whole" for the losses he or she suffered because of respondent's discrimination. (*Dept. Fair Empl. & Hous. v. Smitty's Coffee Shop*, (Sep. 14, 1984) No. 84-25, FEHC Precedential Decs. 1984-85, CEB 10, at p. 18, [1984 WL 54305 (Cal.F.E.H.C.)]; *Cloud v. Casey*, *supra*, 76 Cal. App. 4th at 910 [an award of front pay is required in "the amount and extent ... necessary to make [plaintiff] whole."]; *Pollard v. E.I. du Pont de Nemours & Co.* (2001) 532 U.S. 843, 848 [front pay continues until the date of actual remedying of discrimination].)

Front pay until retirement is appropriate where the evidence shows that the employee reasonably expected to remain employed by defendant for the rest of his or her career. (*Bihun v. AT & T Information Systems, Inc.* (1993) 13 Cal. App. 4th 976, 996-997 [front pay award of wage differential in the alternative position secured by the employee that will persist over the employee's working life was appropriate].) In *Hope v. California Youth Auth.* (2005) 134 Cal. App. 4th 577, the jury implicitly determined that, but for unlawful harassment, Hope, then 41 years of age, would have remained employed by defendant until retirement age, notwithstanding his HIV-positive status, and that the defendant had failed to prove that Hope could mitigate his future lost earnings. In upholding the award of front pay to Hope until his retirement, the court stressed that it is the employer's burden to prove that such an award is inappropriate, stating:

\*31 "The general rule is that the measure of recovery ... is the amount of salary ... for the period of service, less the amount which the employer affirmatively proves the employee has earned or with reasonable effort might have earned from other employment." (*Id.* at p. 594 [emphasis in original].)

Wideman testified that he had planned to work for Acme Electric until age 67 on June 13, 2015.<sup>17</sup> By that time, Wideman's wife, Shawn Wideman, would be 62 years of age and eligible for social security, and their son would have completed his college education. Complainant's wife, Shawn Wideman, corroborated that Wideman intended to work at least until they were both eligible for social security. Acme Electric's custom of conducting a Human Capital Review each fall to determine which employees should be terminated established that, absent unlawful discrimination, Wideman's recent history of objectively outstanding job performance would have provided him with job security.

Respondent's contention that Wideman could not expect to remain employed by Acme Electric because he lacked fluency in Spanish depends on whether fluency in Spanish became an essential job function after termination of his employment.

Under the FEHA, "essential functions" are "the fundamental job duties of the employment position the individual with a disability holds or desires." (Gov. Code, § 12926, subd. (f).) The inquiry into whether a function is essential is a highly fact-

specific determination, which includes the following factors: whether the position exists to perform that function; whether there are a limited number of employees available among whom the performance of that job function can be distributed; and whether the function is so highly specialized that a particular individual is hired for his or her expertise or ability to perform the particular function. (Gov. Code, § 12926, subd. (f)(1); Cal. Code Regs., tit. 2, § 7293.8, subd. (g)(1).) Evidence that a given job function is essential includes: the employer's judgment as to which functions are essential; written job descriptions prepared before advertising or interviewing applicants for the job; the amount of time spent on the job performing the function; the consequences of not requiring the incumbent to perform the function; the terms of a collective bargaining agreement; the work experiences of past incumbents in the job; and the current work experience of incumbents in similar jobs. (Gov. Code, § 12926, subd. (f)(2); Cal. Code Regs., tit. 2, § 7293.8, subd. (g)(2).)

Acme Electric's Regional Sales Manager position existed to generate sales, not to speak Spanish. The amount of time spent on the job speaking Spanish would be very limited since respondent's Western Region still consisted primarily of the western states of the United States, where sales are negotiated in English. Further, sales in the small, Spanish-speaking portion of the reorganized Western Region could be accomplished through the use of an interpreter. Since Spanish is not the official language of some countries in South America, such as Brazil, respondent essentially conceded that sales in the South American territory could be accomplished through the use of an interpreter. Finally, Acme Electric did not previously require its Regional Sales Managers to be fluent in Spanish, and restricted this requirement to only one of its four Regional Sales Manager positions. Accordingly, Acme Electric did not establish that the ability to speak Spanish was an essential function of Acme Electric's Regional Sales Manager position.

\*32 Accordingly, Wideman's expectation that he would remain employed by Acme Electric until his retirement at age 67 was reasonable.

### 3. Calculation of Wideman's Front Pay

The DFEH established that Wideman would have earned \$8,077 per month from May 1, 2010 through June 15, 2015, as a measure of the loss of his future pay. Wideman's future pay was calculated by multiplying his monthly pay of \$8,077 per month by 61.5 months (May 1, 2010 to June 15, 2015), resulting in \$496,736 in future pay damages. According to Enos, the present value of this amount is determined by reducing it by the compensation inflation rate of 3.4% ( $\$496,736 \times 3.4\% = \$16,889$ ), resulting in \$479,847 ( $\$496,736 - \$16,889$ ) as the present value of Wideman's lost future pay.

In the chart below, the present value of Wideman's lost future pay is calculated year by year from May 1, 2010 (start of Wideman's front pay) to June 15, 2015 (Wideman's retirement).

| Dates           | Mos. | Lost Future Pay<br>(\$8,077/month) | Cumulative<br>Lost Future<br>Pay (CLFP) | PV Deduction<br>(CLFP x 3.4%) | Present Value<br>of CLFP |
|-----------------|------|------------------------------------|---|-------------------------------|--------------------------|
| 5/10 -<br>12/10 | 8    | \$ 64,616                          | \$ 64,616                               | \$ < 2,197 >                  | \$ 62,419                |
| 1/11 -<br>12/11 | 12   | 96,924                             | 161,540                                 | < 5,492 >                     | 156,048                  |
| 1/12 -<br>12/12 | 12   | 96,924                             | 258,464                                 | < 8,788 >                     | 249,676                  |
| 1/13 -<br>12/13 | 12   | 96,924                             | 355,388                                 | < 12,083 >                    | 343,305                  |

|                 |     |        |         |          |         |
|-----------------|-----|--------|---------|----------|---------|
| 1/14 -<br>12/14 | 12  | 96,924 | 452,312 | <15,379> | 436,933 |
| 1/15 -<br>06/15 | 5.5 | 44,424 | 496,736 | <16,889> | 479,847 |

In May 2008, Wideman paid \$1,179 per month for COBRA health insurance. By May 2010, Wideman's monthly payment for health insurance had increased to \$1,242. To calculate the amount of Wideman's lost future health insurance per month, \$1,242 was reduced by the \$232 Wideman contributed monthly ( $\$107.25 \times 26$  pay periods = \$2,789 ÷ 12 months) towards the medical and dental benefits Acme Electric provided him before his discharge (\$1,242 cost - \$232 contribution per month), resulting in \$1,010 per month of lost future health insurance benefits. Wideman's lost future health insurance benefit for from June 1, 2010 to June 15, 2015 is \$61,105 ( $\$1,010 \times 60.5^{18}$  months). According to Enos, the present value of Wideman's lost future health insurance benefit is determined by reducing \$61,105 by the 3.9 percent medical insurance inflation rate ( $61,105 \times 3.9\% = \$2,383$ ), resulting in a present value of \$58,722 ( $\$61,105 - \$2,383$ ) for his lost future health insurance benefits.

| Dates              | Mos | Lost Benefits<br>(\$1010/month) | Cumulative Lost<br>Benefits (CLB) | PV Deduction<br>(CLB x 3.9%) | Present<br>Value of CLB |
|--------------------|-----|---------------------------------|-----------------------------------|------------------------------|-------------------------|
| 6/10 -<br>12/10    | 7   | \$ 7,070                        | \$ 7,070                          | \$ <276>                     | \$ 6,794                |
| 1/11 -<br>12/11    | 12  | 12,120                          | 19,190                            | <748>                        | 18,442                  |
| 1/12 -<br>12/12    | 12  | 12,120                          | 31,310                            | <1,221>                      | 30,089                  |
| 1/13 -<br>12/13    | 12  | 12,120                          | 43,430                            | <1,694>                      | 41,736                  |
| 1/14 -<br>12/14    | 12  | 12,120                          | 55,550                            | <2,166>                      | 53,384                  |
| 1/15 -<br>06/15/15 | 5.5 | 5,555                           | 61,105                            | <2,383>                      | 58,722                  |

**\*33** When the present value of Wideman's lost future pay (\$479,847) is added to his lost future health insurance (\$58,722), it results in a total future damages award of \$538,569 ( $\$479,847 + \$58,722$ ), less any reduction proven by respondent. The chart below shows the present value of Wideman's total cumulative future damages year by year from May 1, 2010 to June 15, 2015.

| Dates                | PV of<br>Cumulative<br>Lost Future Pay | PV of<br>Cumulative<br>Lost Benefits | Total Cumulative<br>Future Damages |
|----------------------|--|--------------------------------------|------------------------------------|
| 5/1/10 -<br>12/31/10 | \$ 62,419                              | \$ 6,794                             | \$ 69,213                          |
| 1/1/11 -<br>12/31/11 | 156,048                                | 18,442                               | 174,490                            |
| 1/1/12 -<br>12/31/12 | 249,676                                | 30,089                               | 279,765                            |

|                      |         |        |         |
|----------------------|---------|--------|---------|
| 1/1/13 -<br>12/31/13 | 343,305 | 41,736 | 385,041 |
| 1/1/14 -<br>12/31/14 | 436,933 | 53,384 | 490,317 |
| 1/1/15 -<br>06/15/15 | 479,847 | 58,722 | 538,569 |

#### 4. Whether Respondent Proved that Wideman, with Reasonable Diligence, Should Be Able to Obtain Comparable Employment

Respondent asserted that Wideman failed to mitigate his damages, but did not specifically address whether Wideman is likely to be able to mitigate his front pay damages.

The DFEH having established the amount, length, and present value of Wideman's front pay, the burden of proof then shifted to Acme Electric to establish the amount by which Wideman's front pay award should be reduced. (*Hope v. California Youth Auth.*, *supra*, 134 Cal. App. 4th at 594; *Barbour v. Merrill* (D.C. Cir. 1995) 48 F.3d 1270, 1279, *cert. dismissed*, (1996) 516 U.S. 1155.)

In passing the FEHA, the California Legislature recognized the difficulties that older workers with disabilities face in seeking, obtaining, and holding employment, and their need for protection from unlawful discrimination. (Gov. Code, § 12920.) In amending the FEHA to clarify its protections for older workers, the California Legislature referenced the “unique obstacles” they still face “in the later phases of their careers.” (Gov. Code, § 12941.) In *Mamola v. Group Manufacturing Services, Inc.*, Slip Copy, 2010 WL 4510980 (D.Ariz.), the district court found that a 55 year old salesman's “relative age and seniority with Group suggest that his age may pose some additional challenge to him in finding, and training for, other comparable employment.” Accordingly, the district court awarded Mamola front pay from the date of his termination in 2008 to the date of his retirement in 2017. (*Id.* at \*3)

Wideman was almost 60 years old at the time of termination of his employment, and thus, was five years older than Mamola at the time of termination of Mamola's employment. Like Mamola, Wideman's age “may pose some additional challenges in him finding, and training for, other comparable employment,” and these difficulties will only increase as he ages.

Given the nature of his work as a Regional Sales Manager, Wideman's difficulty in obtaining alternative comparable employment will also increase with the passage of time. The record showed that Wideman could not perform his job duties successfully without maintaining a continuous relationship with his customers. Wideman's determination to return to work as soon as possible after his cancer surgeries evidenced his concern about losing contact with the customers for even a few months. Respondent's termination of Wideman's employment has severed his contact with his former customers for over three years to date. The record showed that Acme Electric hired Wideman in part because he had extensive knowledge of the electrical supply industry and its customers in its Western Region. The record also showed that Acme Electric valued Wideman primarily for his ability to gain access to any prospective customer due to his reputation. Accordingly, it is reasonable to assume that Wideman's value to other prospective employers, already damaged by the blemish on his resume, will continue to decrease in direct proportion to the erosion of his relationship with his customer base. In sum, Wideman's value to prospective employers diminishes daily.

**\*34** Accordingly, the Commission finds that Wideman, despite his continuing efforts, is unlikely to find comparable employment in the future.

Thus, the Commission awards Wideman \$538,569 in front pay. Interest will accrue on this amount, at the rate of ten percent per year, compounded annually, from the effective date of the decision until the date of payment. (Code Civ. Proc., § 685.010.)

#### C. Emotional Distress

The DFEH seeks an award of \$100,000 in emotional distress damages to complainant. (Gov. Code, § 12970, subd. (a)(3).) Government Code section 12970, subdivision (a) authorizes an award of actual damages for emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses in an amount not to exceed, in combination with any administrative fines imposed, \$150,000 per aggrieved person per respondent. (Gov. Code, § 12970, subd. (a)(3).) In determining whether to award damages for emotional injuries, and the amount of any award for these damages, the relevant factors for consideration are the effects of discrimination on the aggrieved person with respect to: physical and mental well-being; personal integrity, dignity, and privacy; ability to work, earn a living, and advance in his or her career; personal and professional reputation; family relationships; and, access to the job and ability to associate with peers and coworkers. The duration of the injury and the egregiousness of the discriminatory practice are also factors to be considered. (Gov. Code, § 12970, subd. (b).); *Dept. Fair Empl. & Hous. v. Aluminum Precision Products, Inc.* (Mar. 10, 1988) No. 88-05, FEHC Precedential Decs. 1988-89, CEB 4, pp. 8-10 [1988 WL 242635 (Cal.F.E.H.C.)].)

At hearing, complainant credibly testified that he experienced emotional distress stemming from Acme Electee's termination of his employment on March 1, 2008. Following complainant's discharge, he suffered from depression, and was constantly in fear of losing his house. Throughout the hearing, Wideman maintained a professional demeanor, and never tried to dramatize his situation to elicit sympathy. For example, Wideman testified matter-of-factly that losing his income “impacts unfortunately, everything you do .... You don't do a lot of the stuff you used to do, frankly, because you don't want to deplete your asset base. And when you sincerely feel you didn't bring this upon yourself, it just kind of leaves you with a hollow feeling.” However, Wideman's distress resulting from his discharge finally caused tears to threaten and his voice to choke as he testified about his fear that he would no longer be able to pay for his son's college education, as he and his wife had planned. Complainant's wife, Shawn Wideman, credibly testified that Wideman lay awake at night worrying about the financial strain that termination of his employment had caused, and that the family had cut back on their social life, such as dinners out together, that they had previously enjoyed.

**\*35** Wideman's distress about losing his job and being unemployed was compounded by the fact that he was almost 60 years of age when Acme Electric terminated his employment, had a medical history of kidney cancer and prostate cancer, and he was seeking work in the midst of a national recession, which made it nearly impossible to find comparable work in his field. Wideman lost not only his job, but also his career.

Wideman's distress and anxiety about his family's financial situation did not abate, but continued through the hearing.

Considering the facts of this case in light of the factors set forth in Government Code section 12970, subdivision (a)(3), and the duration of his injury as set forth in Government Code section 12970, subdivision (b), Acme Electric will be ordered to pay complainant \$50,000 in damages for his emotional distress. This amount does not reflect any emotional distress attributable to complainant's cancers or the side effects of the experimental drug he took in 2006-2007.

Accordingly, Acme Electric shall be ordered to pay the sum of \$50,000 in compensatory damages for complainant's emotional distress. Interest will accrue on this amount, at the rate of ten percent per year, compounded annually, from the effective date of this decision until the date of payment. (Code Civ. Proc., § 685.010.)

#### D. Administrative Fine

The DFEH also requested an order for an administrative fine of \$50,000 against Acme Electric because respondent's conduct was “willful and malicious.” In its closing brief, the DFEH asserted that an administrative fine is appropriate because Acme Electric's “treatment of Mr. Wideman has been reprehensible and it has demonstrated no remorse,” then argued that Acme Electric was “uncooperative from the commencement of this proceeding.” Acme Electric denied these allegations, and that any such administrative fine is appropriate.

To warrant an award of an administrative fine, Government Code section 12970, subdivision (d), requires clear and convincing evidence of “oppression, fraud, or malice, expressed or implied, as required by section 3294 of the Civil Code.” (Gov. Code, § 12970, subd. (d); *Dept. Fair Empl. & Hous. v. Wal-Mart* (June 7, 2005) No. 05-04-P [2005 WL 1703228, \*13-14 (Cal.F.E.H.C.)].) “‘Oppression’ is ‘despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person’s rights.’” (Civ. Code, § 3294, subd. (c).) “Malice” is defined to include conduct intended to cause injury or despicable conduct, which is undertaken with a “willful and conscious disregard” of an employee’s rights. (*Id.*) In determining the appropriate amount of an administrative fine, the relevant evidence includes, but is not limited to, the following: willful, intentional, or purposeful conduct; refusal to prevent or eliminate discrimination; conscious disregard for the rights of the complainant; commission of unlawful conduct; intimidation or harassment; conduct without just cause or excuse, or multiple violations of the FEHA. (Gov. Code, § 12970, subd. (d).) Any administrative fine is payable not to complainant but to the state’s General Fund, and may not exceed, in combination with any award of compensatory damages for emotional distress, \$150,000 per complainant, per respondent. (Gov. Code, § 12970, subs. (a)(3); (b)(6)(c); and (b)(6)(d).)

**\*36** The DFEH has provided sufficient evidence to establish Acme Electric’s pattern of oppressive, fraudulent, and malicious conduct towards Wideman. The record showed that although Acme Electric initially provided Wideman with leave for his cancer, it then penalized him for taking that leave by failing to provide Wideman accommodation in the form of a pro-rata reduction of his travel requirements that took his leave time into account. As a result, Currall placed Wideman on a performance improvement plan on October 6, 2006, and issued him an unfavorable 2007 performance review. Further, Currall, Arena, Roach and Stimes ignored Wideman’s six separate requests for ongoing accommodation of his continuing need to attend medical appointments for his cancer, and Wideman’s request that they expunge from his personnel file any criticism of his performance that resulted from this denial of accommodation. The criticism of Wideman’s performance resulting from the denial of ongoing accommodation led to termination of his employment. Acme Electric’s repeated failure to provide Wideman the accommodation that he repeatedly requested showed its “willful and conscious disregard” of Wideman’s disability rights that resulted in multiple violations of the Act. (Civ. Code, § 3294, subd. (c).)

The record showed that Acme Electric knew that failing to accommodate Wideman’s travel limitations due to his cancers would adversely affect his job performance results, including the amount of his bonuses, and would lead to termination of his employment. Acme Electric knew or should have known that Wideman had little or no hope of securing alternative, comparable employment with the blemish of discharge on his resume, given the declining economy, his age, and his cancer history. Yet, Acme Electric terminated Wideman’s employment because of his cancers, thereby depriving Wideman of his career, livelihood, and - given the high-risk nature of his cancers - his crucially necessary medical benefits. Accordingly, Acme Electric engaged in “despicable conduct that [subjected Wideman] to cruel and unjust hardship in conscious disregard of that [his] rights.” (Civ. Code, § 3294, subd. (c).)

Further, Currall, Arena, Roach and Stimes tried to disguise their discriminatory motive by falsely asserting that Wideman’s termination was part of a reduction in force, and that they had good cause to terminate Wideman’s employment based on his reported poor performance and complaints from small customers. Yet, Wideman exceeded his 2007 performance goals, was never apprised of these customer complaints during his employment by Acme Electric, and also was not directly responsible for servicing small customers within his region.

Accordingly, the DFEH has met its burden of proving by clear and convincing evidence that Acme Electric willfully and consciously disregarded its obligations as a California employer in denying Wideman his rights to an interactive process, reasonable accommodation of his cancers, and a workplace free from discrimination. Accordingly, this proposed decision will order an administrative fine against Acme Electric in the sum of \$25,000, payable to the state’s General Fund, together with interest on this amount, at the rate of ten percent per year, compounded annually, from the effective date of this decision until the date of payment. (Code Civ. Proc., § 685.010.)

#### E. Affirmative Relief

**\*37** The DFEH requested that, within 90 days of the effective date of this decision, respondent be ordered to: (a) develop a written policy prohibiting retaliation, (b) undergo training in the FEHA, and (c) post a notice at respondent (sic) and other businesses located in the State of California in which respondent has at least ten percent (10%) ownership interest, stating that respondent violated the FEHA, and specifying the remedies ordered by the Commission, and provide proof to the Department, within one-hundred (100) days of the Commission's order that such posting has occurred. Acme Electric did not address these requests for affirmative relief in its closing brief.

Government Code section 12970, subdivision (a)(5) authorizes an order for affirmative relief to effectuate the purposes of the Act. (Gov. Code, § 12970, subd. (a)(5).)

The record showed that, at the time of the hearing, Acme Electric had no employees in California, and the DFEH failed to present any evidence that Acme Electric intends to have any employees based in California in the foreseeable future.

In the event that Acme Electric employs any individual within California in the future, it will be ordered to post a notice of employees' rights and obligations regarding unlawful discrimination under the Act (Attachment A) at each of its California facilities. In addition, Acme Electric will be ordered to develop, implement, and disseminate a policy that advises management and supervisors of their FEHA obligation to make reasonable accommodation for Acme Electric employees' physical or mental disabilities and to engage in a timely, good faith, interactive process with Acme Electric employees to determine what accommodations are appropriate. Finally, Acme Electric will be ordered to provide training on that policy to supervisors and managers within California.

Accordingly, the DFEH's request for affirmative relief is granted on the condition that Acme Electric employs any individual within California in the future.

#### ORDER

1. Within 60 days of the effective date of this decision, respondent Acme Electric Corporation shall pay to complainant Charles R. Wideman the amount of \$210,002 in back pay. Interest shall accrue on this amount at the rate of ten percent per year, compounded annually, from the effective date the earnings accrued until the date of payment.

2. Within 60 days of the effective date of this decision, respondent Acme Electric Corporation shall pay to complainant Charles R. Wideman the amount of \$22,729 in out-of-pocket expenses. Interest shall accrue on this amount at the rate of ten percent per year, compounded annually, from the effective date the expenses accrued until the date of payment.

3. Within 60 days of the effective date of this decision, respondent Acme Electric Corporation shall pay to complainant Charles R. Wideman the amount of \$538,569 in front pay. Interest shall accrue on this amount at the rate of ten percent per year, compounded annually, from the effective date of this decision until the date of payment.

**\*38** 4. Within 60 days of the effective date of this decision, respondent Acme Electric Corporation shall pay to complainant Charles R. Wideman the amount of \$50,000 in emotional distress damages. Interest shall accrue on this amount at the rate of ten percent per year, compounded annually, running from the effective date of this decision to the date of payment.

5. Within 60 days of the effective date of this decision, respondent Acme Electric Corporation shall pay to the state's General Fund the amount of \$25,000 as an administrative fine. Interest shall accrue on this amount at the rate of ten percent per year, compounded annually, running from the effective date of this decision to the date of payment.

6. Within 100 days after the effective date of this decision, Acme Electric Corporation shall in writing notify the Department of Fair Employment and Housing and the Commission of the nature of its compliance with sections one through five of this order.

7. In the event that respondent Acme Electric Corporation employs any individual within California in the future, it shall post a notice of employees' rights and obligations regarding unlawful discrimination under the Act (Attachment A) at each of its facilities within California. In addition, respondent Acme Electric Corporation shall develop, implement, and disseminate a policy that advises management and supervisors of their FEHA obligation to make reasonable accommodation for respondent Acme Electric Corporation employees' physical or mental disabilities and to engage in a timely, good faith, interactive process with its employees to determine what accommodations are appropriate. Finally, respondent Acme Electric Corporation shall provide training on that policy to supervisors and managers within California.

Any party adversely affected by this decision may seek judicial review of the decision under Government Code section 11523, Code of Civil Procedure section 1094.5 and California Code of Regulations, title 2, section 7437. Any petition for judicial review and related papers should be timely served on the Department, Commission, respondent and complainant.

Fair Employment and Housing Commission

Patricia Perez  
Stuart Leviton  
Linda Ng  
Kristina Raspe

**ATTACHMENT A**

**DISABILITY DISCRIMINATION AND REASONABLE ACCOMMODATION OF DISABILITIES**

**\*39** Employees and applicants are entitled to be free from discrimination on the basis of an actual or perceived physical or mental disability and entitled to reasonable accommodation for that disability as allowed by law. A physical disability includes having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that affects one or more of the body's major systems and limits a major life activity. A mental disability includes having any mental or psychological disorder or condition that limits a major life activity. If, because of your actual or perceived disability, an employer:

- refuses to hire or promote you,
- fails to provide you reasonable accommodation that is not an undue hardship to your employer,
- fails to engage in a timely, good faith interactive process to determine reasonable accommodation,
- retaliates against you,
- terminates your employment, or
- otherwise discriminates against you in your terms and conditions of employment, that employer may have violated the Fair Employment and Housing Act.

If you feel that any of these illegal practices have happened to you, or that you have been retaliated against because you opposed these practices, you have one year to file a complaint with the state Department of Fair Employment and Housing, at (800) 884-1684.

The DFEH will investigate your complaint. If the complaint has merit, the DFEH will attempt to resolve it. If no resolution is possible, the DFEH may prosecute the case with its own attorney before the Fair Employment and Housing Commission. The Commission may order the unlawful activity to stop, and require your employer to reinstate you, to pay back wages and other

out-of-pocket losses, damages for emotional injury, an administrative fine, and to give other appropriate relief. Alternately, you may retain your own attorney to take your case to court.

Dated:

By: \_\_\_\_\_

Authorized Representative for Acme Electric Corporation

THIS NOTICE IS REQUIRED TO BE POSTED UNDER PENALTY OF LAW BY THE CALIFORNIA FAIR EMPLOYMENT AND HOUSING COMMISSION. IT SHALL BE POSTED INDEFINITELY, AND SHALL NOT BE ALTERED, REDUCED, OBSCURED, OR OTHERWISE TAMPERED WITH IN ANY WAY THAT HINDERS ITS VISIBILITY.

#### Footnotes

- 2 Wideman's bonus for 2007 was based on his social security wages, rather than his gross wages, because the portion of his 2007 W2 stating his gross wages was not in evidence. Consequently, Wideman's 2007 bonus would have been at least \$8,104, but the extra amount of bonus was not ascertainable from the record.
- 1 The Moore-Brown-Roberti Family Rights Act of 1993 is commonly referred to as the California Family Rights Act, or CFRA. (Cal. Code Regs., tit 2, § 7297.0, subd. (b).)
- 3 Although Wideman was granted full-time leave until July 12, 2006, the records showed that he began working part-time from home as soon as he was released from the hospital.
- 4 These 16 weeks were in addition to the 13 weeks during which Currall excused Wideman from traveling.
- 5 Given the similarity of the goals shared by the FEHA and Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000, et seq.) (Title VII), it is appropriate to examine federal precedent for assistance in construing the FEHA. (See *Miller v. Dept. of Corrections* (2005) 36 Cal.4th 446, 463.)
- 6 Acme Electric argued that Wideman's testimony that he still believed that he was correct in challenging the "Plan B" policy at the January 31, 2007 managers' meeting showed that his criticized conduct was not caused by his cancers. Acme Electric's argument fails to consider that Arena agreed that Wideman was correct in challenging this policy, but reprimanded him for doing so in a manner that Arena characterized as "flippant" and "disrespectful." Moreover, one of the purposes of the interactive process is to determine whether an employee's performance deficiencies are caused by a disability that needs reasonable accommodation. (*Humphrey v. Memorial Hospitals Assn.*, *supra*, 239 F.3d at p. 1138.)
- 7 Exhibit 12, Acme Electric's discovery responses at Nos. 6 & 16.
- 8 Exhibit 12, Acme Electric's discovery responses at No. 6.
- 9 This range of figures is consistent with Currall's statement reported by the DFEH investigator that the Western Region generated about 30 percent of Acme Electric' sales by 2007. Acme Electric's further argument that Wideman's lack of a merit increase showed that his performance was inadequate failed to consider that denial of a merit increase to Wideman when his region ranked the highest in sales growth in 2006-2007 may also be interpreted as another instance of discriminatory treatment.
- 10 The "integrated enterprise" test is applicable to the Family and Medical Leave Act of 1993 (FMLA, Pub. Law 103-3, 29 U.S.C. §§ 2600, *et seq.*), which, in contrast to CFRA, covers a person who directly *or indirectly* employs 50 or more persons. (29 U.S.C. § 2611, subd. (4)(A)(i) and (ii) (emphasis added).)
- 11 During discovery, respondent had produced Acme Electric's 2009 Employee Handbook to the DFEH instead of the employee handbook that was in effect during Wideman's employment. At hearing, the parties withdrew the irrelevant handbook from evidence, and instead stipulated that Acme Electric's Employee Handbook referenced only federal law. Respondent could not rely on Exhibits 28 (KCI's 2003 Employee Handbook) and 31 (news article about Actuant's acquisition of KCI) because these exhibits were not in evidence.
- 12 In its amended accusation, the DFEH asked the Commission to award both "exemplary or punitive damages" and a civil penalty under Government Code section 12987. The Commission has no authority to award either punitive damages (Gov. Code § 12970, subd. (d)) or civil penalties in employment discrimination cases; the latter is appropriate only in Ralph Act (Civ. Code § 51.7; Gov. Code § 12970, subd. (e)) and housing discrimination cases (Gov. Code § 12987, subd. (a)(3)). The appropriate award in employment

discrimination cases for a respondent found guilty of oppression, fraud or malice, express or implied, as required by Civil Code section 3294, is an administrative fine. (Gov. Code § 12970, subd. (c).)

- 13 Acme Electric properly challenged Enos's expertise as a vocational rehabilitation expert, but did not challenge Enos's expertise as an economic damages expert. Absent a challenge to the expertise of a witness, the court is not required to rule during trial that a witness is an expert, and the court may rely on that witness's opinions. (*People v. Rodriguez* (1969) 274 Cal. App. 2d 770, 775-776 [“In short, while Evidence Code sections 720, subdivision (a), and 802 provide that the person testifying as an expert must be qualified by special knowledge, skill and experience, these foundational requirements need not be established in the absence of a specific objection or unless the court, in its discretion, requires it.”]) Here, the evidence established that Enos was an expert in economic damages based on his qualifications set forth in Exhibit 24, and his acceptance as an expert witness in economic damages in numerous California courts, as set forth in Exhibit 25. (Evid. Code, §§ 720, subd. (a) and 802.) Accordingly, the Commission relied on Enos's determination of general, compensation, and medical inflation rates.
- 14 The Commission did not rely on Enos's calculation of back pay used by the DFEH. Enos calculated interest on Wideman's back pay at the California Constitutional rate of 7 percent per year, rather than the statutory rate of 10 percent per year to which Wideman is entitled. (Code Civ. Proc., § 685.010.) Further, Enos was not provided with the evidence that Acme Electric set its common regional sales goal (which provided the basis for the bonus calculation) at twice the rate of growth of the gross domestic product, thereby automatically adjusting for any decline in the economy. Consequently, in calculating the amount of Wideman's future bonuses, Enos over-compensated for the recent decline in the economy.
- 15 Wideman's projected bonus for 2008 was calculated based on wages from January 1, 2008 through his termination on March 1, 2008. In this period of time, he earned a bonus of \$3,067 (\$18,452 gross wages minus \$15,385 in salary payments) over five bi-weekly pay periods (1/5/08, 1/19/08, 2/2/08, 2/16/08, and 3/1/08). Wideman received a bonus payment in early January 2008 based on some 2007 sales. This amount was then annualized to a 2008 bonus amount of \$15,948 ( $\$3,067 \div 5$  bi-weekly pay periods x 26 bi-weekly pay periods per year).
- 16 Wideman did not buy medical insurance for March and April 2008, so these periods were not included in the calculations of his out-of-pocket expenses.
- 17 Acme Electric's pension plan identifying age 65 at the “normal” retirement age was disregarded because Government Code section 12942, subdivision (a) provides:
- (a) Every employer in this state shall permit any employee who indicates in writing a desire in a reasonable time and can demonstrate the ability to do so, to continue his or her employment beyond the retirement date contained in any private pension or retirement plan. This employment shall continue so long as the employee demonstrates his or her ability to perform the functions of the job adequately and the employer is satisfied with the quality of work performed.
- 18 Unlike Wideman's lost future pay, which runs from approximately May 1, 2010 (based on the first day of hearing on May 3, 2010) Wideman's lost future medical benefit runs from June 1, 2010 because Wideman paid for medical benefits through May 31, 2010, which was compensated as an out-of-pocket expense.

FEHC Dec. No. 11-08 (Cal.F.E.H.C.), 2011 WL 4400929