

June 22, 2011

U.S. Equal Employment Opportunity Commission Meeting
EEOC Executive Officer
131 M Street, N.E.
Washington, D.C. 20507

Re: Comments of California Legal Services Offices on Leave as Reasonable
Accommodation

Submitted via Electronic Mail to commissionmeetingcomments@eoc.gov

Dear EEOC Executive Officer:

We applaud the Commission's plan to offer formal guidance on leaves of absence as a form of reasonable accommodation for workers with disabilities. This submission is offered on behalf of non-profit legal organizations that are part of the formal California legal services system.¹ We appreciate this opportunity to offer our insights on the importance of clearly enumerated, appropriate leave entitlements for our legal services clients in California.

As documented in 2010 U.S. census data, California is currently the most populous state in the union, with over 37 million residents. Unfortunately, as of 2009, 14.2% of state residents were living below the poverty level — which translates to over 5 million low-income Californians.² Regrettably, it is entirely possible to work full-time in California, and nevertheless reside in a household that is below federal poverty

¹ The California legal services system is empowered to offer free civil legal services to persons with incomes of 125% or less of the current federal poverty guidelines — meaning, generally, households with incomes from approximately \$20,000 to \$47,000 (depending on size of family). Additionally, the system is empowered to serve persons eligible for Supplemental Security Income or free services under the Older Americans Act or Developmentally Disabled Assistance Act. See Cal. Bus. & Prof. Code § 6213(d). For more than two decades, the Disability Rights Education & Defense Fund (DREDF) has provided disability rights expertise to the formal California legal services system. We are joined in this submission by 16 other legal services offices, as listed on the final page of this letter.

² See U.S. Census QuickFacts, available at <http://quickfacts.census.gov/qfd/states/06000.html>.

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| **Doing**

disability justice

guidelines.³ Consequently, our legal services clients include thousands of low-wage workers throughout California.

Many low-wage workers do intensely physical jobs, repetitive jobs, or jobs in high risk environments, and are thus particularly exposed to workplace injuries that can necessitate leaves. Low-wage workers also tend to have less schedule flexibility, and are extremely vulnerable to the economic implications of leave denials, regardless of the reason for the leave. Our clients also face language barriers and significant power imbalances that prevent them from easily accessing information about their employment rights, and render them — often more than other workers — at the mercy of their employers.

The signatories to this letter are aware of the testimony that was submitted to the Commission at the June 8, 2011, EEOC Meeting in Washington, D.C.⁴ In particular, we commend the testimony provided by Claudia Center from the Legal Aid Society–Employment Law Center (which is itself a California legal services office). Additionally, we commend the testimony of Brian East from Disability Rights Texas, which is the designated “protection and advocacy” system for people with disabilities in Texas. To avoid redundancy, we do not reiterate the detail offered in those June 8 submissions, but simply inform the Commission that we endorse and incorporate the Center and East legal analyses into our own comments.

However, because we are uniquely positioned to witness and share the implications of workplace leave policies and practices on our clients, we take this opportunity to identify the key elements of leave guidance that are necessary to protect the low-wage workers and other eligible clients whom we serve throughout the state of California.

◆ **Confirmation of union — as well as employer — obligations as to reasonable accommodation leaves**

Title I of the Americans with Disabilities Act (ADA) imposes a disability nondiscrimination mandate on “covered entities.” 42 U.S.C. § 12112(a). This mandate is construed, in statute, to include a reasonable accommodation obligation. 42 U.S.C. § 12112(b)(5)(A). Pursuant to Title I of the ADA, the term “covered entities” is defined in

³ Current California minimum wage is \$8.00 per hour, which results in a \$16,320 annual salary, based on a 2040 hour work year. See <http://www.dol.gov/whd/minwage/america.html>. The U.S. Department of Health and Human Services (HHS) has recently set the 2011 federal poverty guidelines range between \$10,890 and \$37,630 for most families, depending on size of household. For example, the poverty guideline for a four-person household is \$22,350, and thus a family of four with one full-time wage-earner receiving minimum wage would be well under this threshold. See 76 Fed. Reg. 3637-3638 (Jan. 20, 2011).

⁴ See testimony posted at <http://www.eeoc.gov/eeoc/meetings/6-8-11/index.cfm>.

statute to include “an employer, employment agency, labor organization, or joint labor-management committee.” 42 U.S.C. § 12111(2). See also 29 C.F.R. §§ 1630.4, 1630.2(b) and 1630.9(a). Thus, ADA statutory language clearly establishes that unions — as well as employers — must be attentive to reasonable accommodation requirements.

Low-wage workers often derive critical workplace rights protections from the collective bargaining process. Because collective bargaining agreements often address leave entitlements and protocols, it is important for EEOC guidance to clearly acknowledge that unions — as well as employers — must act to ensure appropriate disability-related leave policies.

◆ **Recognition of leaves of absence as an appropriate form of reasonable accommodation**

While the ADA statutory definition of “reasonable accommodation” does not explicitly identify “leave,” it does explicitly include “part-time or modified work schedules.” 42 U.S.C. § 12111(9)(B). The EEOC and courts considering the issue have correctly concluded that leave can be an appropriate form of accommodation. See 29 C.F.R. § 1630.2(o); and *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243 (9th Cir. 1999).

Leaves of absence serve to accommodate workers with disabilities in a variety of ways, including enabling employees to recover and rehabilitate from workplace injuries. Such leaves are of particular importance to low-wage workers, who often have heightened exposure to workplace hazards because they perform intensely physical jobs, repetitive jobs, or jobs in high-risk environments. Low-wage workers also tend to have less schedule flexibility both in their workplace, and in their private lives. Workplace flexibility generally comes with more highly paid, highly skilled, or managerial and professional work, and flexibility to arrange one’s private life is often a function of having resources available to pay for child care, transportation, or other critical needs. Low-wage workers are also extremely vulnerable to the economic implications of leave denials, regardless of the reason for the leave, as they often have little or no financial savings to weather inappropriately structured leaves, or discriminatory interruptions in employment. Finally, low-wage workers may have difficulty identifying alternative, appropriate employment when they lose a current job, particularly if they have been denied the leave time necessary to recover or rehabilitate. These factors make it crucial for low-wage workers to be protected by leave rights that enable them to retain existing employment if at all possible.

◆ **Leave of absence should be granted barring undue hardship**

Consistent with the general ADA statutory framework, leaves of absence should be granted unless the defense of undue hardship is established by the employer. Appropriate assessment of undue hardship requires an individualized inquiry that takes into account the particular workplace in question. See 42 U.S.C. § 12111(10); 29 C.F.R. § 1630.2(p); and *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002). Because

our low-wage clients often face language barriers or significant power imbalances in the workplace, it is particularly important that employers have clear guidance about their affirmative obligations to modify standard leave policies, to correctly identify and individually analyze leave requests, and to establish undue hardship as an employer defense. EEOC guidance should also clearly instruct that extended leave — and in particular, leave in excess of standard company policies or of Family Medical Leave Act entitlements — may be required under the ADA.

◆ **Interactive Process is Crucial to Protecting Low-Wage Employees**

The Ninth Circuit has appropriately recognized that the employer obligation to engage in an interactive process is a mandatory aspect of ADA nondiscrimination protections. See *Barnett v. U.S. Airways*, 228 F.3d 1105 (9th Cir. 2000)(this aspect of the ruling unaffected by subsequent U.S. Supreme Court consideration in *U.S. Airways v. Barnett*, *supra*); see also 42 U.S.C. § 12112(b)(5)(A) and 29 C.F.R. § 1630.2(o)(3). For the same reasons that guidance is needed as to the required individualized undue hardship analysis, the EEOC should clarify and confirm the important and mandatory nature of the interactive process obligation in the leave context.

Again, we commend the EEOC for its consideration of these important leave of absence issues, and urge your careful attention to the Center and East testimony that was submitted at the meeting on June 8, 2011.

Respectfully Submitted,



Linda D. Kilb, Esq.

Director, DREDF California Legal Services Trust Fund Program

Additional California Legal Services Offices Signatories:

Bay Area Legal Aid
California Advocates for Nursing Home Reform
California Rural Legal Assistance
California Women's Law Center
Center for Human Rights and Constitutional Law
Central California Legal Services
Disability Rights California
Disability Rights Legal Center
The Impact Fund
Law Foundation of Silicon Valley
Legal Aid Foundation of Los Angeles
Legal Services of Northern California
Mental Health Advocacy Services
National Senior Citizens Law Center

Public Advocates
Worksafe