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OPINION	:	No. 81-217
of	:	NOVEMBER 13, 1981
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THE HONORABLE EDWARD V. ROBERTS, DIRECTOR, DEPARTMENT OF REHABILITATION, has requested an opinion on the following question:

Was Government Code section 31009, which, prior to its amendment in 1980, authorized a county to require as a condition of employment an applicant who does not meet prescribed physical standards due to physical impairment to execute a waiver of rights to disability retirement resulting from such impairment or an aggravation thereof, in conflict with any federal or state law? Is Government Code section 31009, as amended, terminating such authority as of January 1, 1981, except as to waivers executed prior thereto, in conflict with any federal or state law?

CONCLUSION

Government Code section 31009 neither was prior to its amendment in 1980 nor is now in conflict with the constitution or laws of this state or of the United States.

ANALYSIS

Government Code section 31009[1] as amended (Stats. 1980, ch. 1343, § 1) provides:

> "*Prior to January 1, 1981, an* applicant for employment who does not meet the physical standards established for his employment because of a physical impairment existing on the date of his employment may be required by the county as a condition to such employment to execute a waiver of any and all rights to a disability retirement under the County Employees Retirement Law of 1937 arising as a result of such impairment or any aggravation thereof while in county service. The county shall provide the applicant with written notice of the rights and benefits which such applicant is being required to waive. The applicant shall give written acknowledgement of the receipt of such notice.
>
> "No earlier than two years after employment an employee who has waived rights pursuant to this section may apply to the retirement board to review such waiver to determine if it shall remain in force. The employee shall submit a physician's report concerning the condition for which such a waiver was required with such request for review. The retirement board may require, at county expense, an examination of such employee by a physician of such board's choosing. The retirement board, following a hearing, may release such employee from all or part of a waiver given pursuant to this section. An employee may not require such a review more often than every two years, although such board in its sole discretion may allow a review at more frequent intervals."

By the 1980 amendment the italicized words were substituted for the word "Any" at the beginning of the section as enacted in 1965. (Stats. 1965, ch. 650, § 1.) Thus the authority of a county to require as a condition of employment an applicant who does not meet prescribed physical standards due to physical impairment to execute a waiver of rights to disability retirement resulting from such impairment or aggravation thereof was effectively repealed as of January 1, 1981, except as to waivers executed prior to that date. The question presented is whether section 31009 either was prior to its amendment in 1980 or is now in conflict with any federal or state law.

We begin with the preamended version as originally enacted in 1965. The

[1] Hereinafter all section references unless otherwise indicated are to the Government Code.

statute was not then in conflict with any federal or state law. Neither the federal Rehabilitation Act nor the state statute adding the physically handicapped as a protected group covered by the Fair Employment Practice Act (now the Fair Employment and Housing Act, § 12900 *et seq*.) were enacted until 1973. The issue then is whether the federal or state legislation superseded or repealed the authority conferred under section 31009.

Section 504 of the federal Rehabilitation Act of 1973 as amended (tit. 29 U.S.C. § 794) provides:

> "No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . ."[2]

(*Cf*. 45 C.F.R. pt. 84 (1978).) Although we have previously suggested otherwise (62 Ops. Cal. Atty. Gen. 180, 188 fn. 4 (1979)), the clear weight of appellate authority is now to the effect that the federal statute does not apply to the employment practices of recipients of federal aid except where the primary objective of the federal financial assistance is to provide employment. (*United States* v. *Cabrini Medical Ctr.* (1981) 639 F. 2d 908, 910–911.)

Similarly, section 122 of the State and Local Fiscal Assistance Act of 1972 as amended (tit. 31 U.S.C. § 1242, subd. (a)) provides:

> "(1) In general.—No person in the United States shall, on the ground of race, color, national origin, or sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity of a State government or unit of local government, which government or unit receives funds made available under subchapter I of this

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[2] Title 29 United States Code section 706(7)(B) provides:

"Subject to the second sentence of this subparagraph, the term 'handicapped individual' means, for purposes of subchapter IV and V of this chapter, any person who (i) has a physical or mental impairment which substantially limits one or more of such persona major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment For purposes of sections 793 and 794 of this title as such sections relate to employment, such term does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others."

chapter. *Any prohibition against discrimination* on the basis of age under the Age Discrimination Act of 1975 or *with respect to an otherwise qualified handicapped individual as provided in section 794 of Title 29 shall also apply to any such program or activity*. Any prohibition against discrimination on the basis of religion, or any exemption from such prohibition, as provided in the Civil Rights Act of 1964 or title VIII of the Act of April 11, 1968, hereafter referred to as Civil Rights Act of 1968, shall also apply to any such program or activity.

"(2) Exceptions.—

"(A) Funding.—The provisions of paragraph (1) of this subsection shall not apply where any State government or unit of local government demonstrates, by clear and convincing evidence, that the program or activity with respect to which the allegation of discrimination has been made is not funded in whole or in part with funds made available under subchapter I of this chapter.

"(B) Construction projects in progress.—The provisions of paragraph (1), relating to discrimination on the basis of handicapped status, shall not apply with respect to construction projects commenced prior to January 1, 1977" (Emphases added.)

(*Cf*. 31 C.F.R. pt. 51, subpt. E (1977).) This act, applicable to participants in federal revenue sharing, expressly incorporates and is subject to the same limitations as section 794 of the Rehabilitation Act (See 31 C.F.R. § 51.51, subd. (f).) Hence, the prohibitions of the federal statutes are directed to the participation in the benefits of federally funded programs and activities as distinguished from the employment practices of federal aid recipients. Section 31009 is not therefore in conflict with federal law.[3]

The California Fair Employment Practice Act was amended (Stats. 1973, ch. 1189, § 6), effective July 1, 1974, to include the physically handicapped as a protected classification. Section 12940 (now part of the Fair Employment and Housing Act, added by Stats. 1980, ch. 992, § 4) provides in part:

"It shall be an unlawful employment practice, unless based upon a

[3] We do not proceed to examine and express no opinion as to the more narrow inquiry whether section 31009 would conflict with federal law in those limited instances in which the primary objective of federal assistance is to provide employment.

bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:

"(a) For an employer, because of the race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, or sex of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge such person from employment or from a training program leading to employment, or to discriminate against such person in compensation or in terms, conditions or privileges of employment.

"(1) Nothing in this part shall prohibit an employer from refusing to hire or discharging a physically handicapped employee, or subject an employer to any legal liability resulting from the refusal to employ or the discharge of a physically handicapped employee, where the employee, because of his or her physical handicap, is unable to perform his or her duties, or cannot perform such duties in a manner which would not endanger his or her health or safety or the health and safety of others."[4]

The Fair Employment and Housing Commission acting under section 12935(a) has adopted regulations to interpret, implement, and apply section 12940 as it pertains to the physically handicapped. (Tit. 2, Cal. Admin. Code, §§ 7293.5 to 7294.2.) Section 7294.2 provides:

"It shall be unlawful to condition any employment decision regarding a physically handicapped applicant or employee upon waiver of any fringe benefit."

Section 12940 applies to counties. (§ 12926(c).) Although the form of the inquiry presented is whether section 31009 is "in conflict" with section 12940, the pertinent issue to be resolved is whether, *assuming* such conflict, the provisions of section 12940 prevail. In the event of an ostensible conflict between two state statutes, the more specific enactment will control over the more general one. (*Mitchell* v. *County Sanitation Dist.* (1958) 164 Cal. App. 2d 133, 141; 64 Ops. Cal. Atty. Gen. 425, 429 (1981).) Thus, it is generally stated

[4] Within the meaning of the statute the term "physical handicap" includes impairment of sight, hearing, or speech, or impairment of physical ability because of amputation or loss of function of coordination, or any other health impairment which requires special education or related services. (§ 12926(h), and *cf.* tit. 2, Cal. Admin. Code, § 7293.6.)

that where the same subject matter is covered by inconsistent provisions, one of which is special and the other general, the special one, whether or not first enacted, is an exception to the general statute and controls unless an intent to the contrary clearly appears. (*Warne* v. *Harkness* (1963) 60 Cal. 2d 579, 588; 62 Ops. Cal. Atty. Gen. 494, 497, 498 (1979).) While section 12940 applies to employers generally, both public and private (§ 12926(c)), section 31009 applies specifically to counties subject to the county Employees Retirement Law of 1937. Further, while section 12940 pertains generally to employment discrimination, section 31009 pertains specifically to the waiver of rights to disability retirement. Hence, section 12940 would not prevail over section 31009.

In 1977 sections 19230 *et seq.*, pertaining to employment of the physically handicapped by the state and its political subdivisions, were enacted. (Stats. 1977, ch. 1196, § 2.) Section 19230 provides:

> "The Legislature hereby declares that:
>
> "(a) It is the policy of this state to encourage and enable disabled persons to participate fully in the social and economic life of the state and to engage in remunerative employment.
>
> "(b) It is the policy of this state that qualified disabled persons shall be employed in the state service, the service of the political subdivisions of the state, in public schools, and in all other employment supported in whole or in part by public funds on the same terms and conditions as the nondisabled, unless it is shown that the particular disability is job related."[5]

As in the case of section 12940, the more specific provisions of section 31009 would, in the event of any ostensible conflict with section 19230, prevail.

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[5] Section 19231 provides:

"As used in this article, 'disabled person' means any person who (1) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) has a record of such impairment, or (3) is regarded as having such an impairment.

"A disabled individual is 'substantially limited' if he or she is likely to experience difficulty in securing, retaining, or advancing in employment because of a disability."

And see title 22, California Administrative Code, section 98250 *et seq*.

Also in 1977 sections 11135 through 11139.5 were enacted. (Stats. 1977, ch. 972, § 1.)[6] Section 11135 provides:

> "No person in the State of California shall, on the basis of ethnic group identification, religion, age, sex, color, or physical or mental disability, be unlawfully denied the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is funded directly by the state or receives any financial assistance from the state."

This section applies to local agencies. (§ 11136; 62 Ops. Cal. Atty. Gen. 180, 184 (1979).) Even assuming that, unlike the concomitant provisions of section 504 of the federal Rehabilitation Act of 1973, *supra*, and of title VI of the Civil Rights Act of 1964, title 42, United States Code, section 2000d (*cf.* 62 Ops. Cal. Atty. Gen., *supra*, 188 fn. 4), section 11135 extends to employment practices of recipients of financial aid even where the primary objective of such aid is not to provide employment, the general provisions of section 11135 would not prevail over the special authorization conferred by section 31009. In any event, the ultimate test of legislative intent with regard to the continued force and effect of section 31009 is conclusively demonstrated by its 1980 amendment expressly retaining preexisting waivers. Section 31009 is not therefore "in conflict" with any other state statute.

Continuing our consideration of the preamended version of section 31009, there remains the issue of constitutional sufficiency. As previously stated in 63 Ops. Cal. Atty. Gen. 583, 586 (1980):

> "It is well established that no person may be denied government employment because of factors unconnected with the responsibilities of that employment. (*Morrison* v. *State Board of Education* (1969) 1 Cal. 3d 214, 234; *Vielehr* v. *State Personnel Board* (1973) 32 Cal. App. 3d 187, 192; *Hetherington* v. *State Personnel Board* (1978) 82 Cal. App. 3d 582, 592.) Similarly, a number of federal cases have held that there must be some reasonably foreseeable specific connection between the disqualifying quality or conduct of an individual and the efficiency of the public service. (*Mindel* v. *United States Civil Service Commission* (N.D. Cal. 1970) 312 F. Supp. 485, 488; *Norton* v. *Macy* (D.C. 1969) 417 F.2d 1161, 1164; *Society for Individual Rights, Inc.* v. *Hampton* (N.D. Cal. (1973) 63 F.R.D. 399, 401; *Beazer* v. *New York City Trans. Auth.* (S.D.N.Y. 1975) 399 F. Supp. 1032,

[6] These provisions supplanted the preexisting executive order dated October 1, 1971, known as the "California Code of Fair Practices."

1057.)"

Section 31009 refers to "an applicant for employment who does not meet the physical standards established for his employment because of a physical impairment." Every intendment favors the constitutional validity of legislation. (*Department of Alcoholic Bev. Cont.* v. *Superior Court* (1968) 268 Cal. App. 2d 67, 74.) As a corollary to that doctrine, it is also settled that a statute should be construed in the light of constitutional constraints. (*County of Los Angeles* v. *Riley* (1936) 6 Cal. 2d 625, 628–629.) In the context in which they appear, and in accordance with constitutional limitations, the words "physical standards" can only refer to those standards which would restrict the employment of applicants with job-related impairments.

A physical impairment is related to the job, however, not only where it would preclude the present performance of required duties and tasks (*cf. Hardy* v. *Stumph* (1978) 21 Cal. 3d 1,8; 62 Ops. Cal. Atty. Gen., *supra*, 182), but also where it may be reasonably foreseen that the nature of such duties and tasks are such that they may be expected to aggravate the physical condition, enhancing the probability of disability and consequent retirement. (*Cf. Smith* v. *Olin Chemical Corp.* (CA 5, 1977) 555 F.2d 1283, 1287–1288.) The cost to the employer attendant to premature disability retirement is not a "factor unconnected" with such employment or with the "efficiency of the public service." Nor is such an applicant similarly situated with those who meet the prescribed standards. (*Cf. Bilyeu* v. *State Employees' Ret. System* (1962) 58 Cal. 2d 618, 623; 62 Ops. Cal. Atty. Gen. 106, 107 (1979).) Thus, the waiver of disability retirement benefits arising as a result of such impairment or aggravation thereof, as a condition of employment of an applicant who does not meet the physical standards therefor, thus providing such applicant with an employment option not otherwise available, is constitutionally sufficient.

We turn next to the amended version repealing, as of January 1, 1981, the authority conferred under section 31009 except as to waivers executed prior to that date. Section 31009 as originally enacted was obviously intended and designed to encourage the employment of applicants with physical impairment who would otherwise have been disqualified for failure to meet established job-related physical standards. The government is not, however, constitutionally required to continue indefinitely a benefit program once initiated, nor is it compelled to divest those who were employed under the program of their vested rights and status. If, however, the Legislature has by statutory pronouncement declared that public employers may not discriminate against the physically handicapped who are capable at the time of employment of performing the required duties and tasks *without regard* to the likelihood or reasonable expectation of disability arising as a result of physical impairment or aggravation thereof, then the question would arise as to whether chose who executed waivers prior to January 1, 1981, would not be similarly situated with those subsequently employed under the nondiscrimination statute, and entitled to relief.

Focusing on section 12940, *supra*, the specific inquiry is whether those who executed waivers prior to January 1, 1981, and after July 1, 1974 (the operative date of Stats. 1973, ch. 1189, § 6 adding the physically handicapped as a group protected by the Fair Employment Practice Act), are entitled to relief notwithstanding the amended version of section 31009. The resolution of this constitutional issue is not required since it is determined for reasons hereinbelow set forth that the Legislature has not required the employment of the physically handicapped without regard to future risk.

Again, subdivision (a)(1) of section 12940 provides:

> "Nothing in this part shall prohibit an employer from refusing to hire or discharging a physically handicapped employee, or subject an employer to any legal liability resulting from the refusal to employ or the discharge of a physically handicapped employee, where the employee, because of his or her physical handicap, is unable to perform his or her duties, *or cannot perform such duties in a manner which would not endanger his or her health or safety* or the health and safety of others." (Emphasis added.)

Interpreting this provision the Fair Employment and Housing Commission has adopted section 7293.8 of title 2, California Administrative Code:

> "(a) In addition to any other defense provided herein, any defense permissible under Subchapter 1 shall be applicable to this subchapter.
>
> "(b) Health and Safety of Qualified Handicapped Individual. It is a permissible defense for an employer or other covered entity to demonstrate that after reasonable accommodation the applicant or employee cannot perform the essential job functions of the position in question in a manner which would not endanger his or her health or safety because the job imposes an *imminent and substantial degree of risk* to the applicant or employee.
>
> "(c) Health and Safety of Others. It is a permissible defense for an employer or other covered entity to demonstrate that after reasonable accommodation has been made, the applicant or employee cannot perform the essential job functions in a manner which would not endanger the health or safety of others to a greater extent than if a non-handicapped individual performed the job.
>
> "(d) Future Risk. However, it is no defense to assert that a qualified handicapped individual has a condition or a disease with a future risk, so long as the condition or disease does not *presently interfere* with his or her ability

to perform the job in a manner that will not *immediately endanger* the handicapped individual or others, *and the individual is able to safely perform the job over a reasonable length of time*. 'A reasonable length of time' is to be determined on an individual basis.

"(e) Factors to be considered when determining the merits of the defenses enumerated in Section 7293.8(b)-(d) include, but are not limited to:

"(1) Nature of the physical handicap;

"(2) Length of the training period relative to the length of time the employee is expected to be employed;

"(3) Type of time commitment, if any, routinely required of all other employees for the job in question; and

"(4) Normal workforce turnover." (Emphases added.)

In 64 Ops. Cal. Atty. Gen. 425, 429 (1981) we stated in part:

"Rules adopted by an administrative agency must be within the scope of authority conferred by the relevant enabling legislation, and in accordance with standards prescribed by other provisions of law. (Gov. Code, § 11342.1; *Selby* v. *Department of Motor Vehicles* (1980) 110 Cal. App. 3d 470, 474–475.) The fundamental precepts relating to the sufficiency of quasi-legislation were reiterated in *Agricultural Labor Relations Board* v. *Superior Court* (1976) 16 Cal. 3d 392, 411, as follows:

" 'An administrative regulation, however, must also comport with various statutory prerequisites to validity. At the outset we take note of certain principles which govern our consideration of the matter; although these rules have been often restated, it would be well to remember that they are not merely empty rhetoric. First, our task is to inquire into the legality of the challenged regulation, not its wisdom. (*Morris* v. *Williams* (1967) 67 Cal. 2d 733, 737 [63 Cal. Rptr. 689, 433 P. 2d 697].) Second, in reviewing the legality of a regulation adopted pursuant to a delegation of legislative power, the judicial function is limited to determining whether the regulation (1) is "within the scope of the authority conferred" (Gov. Code, § 11373) and (2) is "reasonably necessary to effectuate the purpose of the statute" (Gov. Code, § 11347). (Footnote omitted.) Moreover, "these issues do not present a matter for the independent judgment of an appellate tribunal; rather, both come to this court freighted with the strong presumption of regularity accorded administrative

rules and regulations." (*Ralphs Grocery Co.* v. *Reimel* (1968) 69 Cal. 2d 172, 175 [70 Cal. Rptr. 407, 444 P. 2d 79].) And in considering whether the regulation is "reasonably necessary" under the foregoing standards, the court will defer to the agency's expertise and will not "superimpose its own policy judgment upon the agency in the absence of an arbitrary and capricious decision." (*Pitts* v. *Perluss* (1962) 58 Cal. 2d 824, 832 [27 Cal. Rptr. 19, 377 P. 2d 83].)' "[7]

The commission has defined the word "endanger" in terms of the degree of risk. Specifically, the degree of risk which may serve as a defense must be neither remote nor insubstantial. (2 Cal. Admin. Code, § 7293.8, subd. (b).) Nor will *future* risk provide a defense where the physical impairment does not presently interfere with the ability to perform the job in a manner that will not immediately endanger the individual or others, *and* the individual is able to safely perform the job for a reasonable length of time. (2 Cal. Admin. Code, § 7293.8, subd. (d); and *cf*. 62 Ops. Cal. Atty. Gen. 180, *supra*, 185–186.)

In our view, the regulations constitute a reasonable interpretation of the legislative mandate[8] (*cf*. *Agricultural Labor Relations Board* v. *Superior Court*, *supra*, 16 Cal. 3d 392, 412; *Ralphs Grocery Co.* v. *Reimel* (1968) 69 Cal. 2d 172, 176; 64 Ops. Cal. Atty. Gen. 425, *supra*, 430), and are consistent with the legislative declaration that the opportunity to seek, obtain and hold employment without discrimination because of physical handicap is a civil right (§§ 12920, 12921; 62 Ops. Cal. Atty. Gen. 180, *supra*, 183 fn. 1) and with the public policy expressed in other related provisions (§ 19230, *supra*). While the commission has undertaken to define the parameters of permissible defenses, however, it has not suggested, contrary to the express statutory terms, that the element of future risk or danger to health or safety must be disregarded. Section 31009, as amended, does not therefore present any significant constitutional question, nor is it, for the reasons hereinabove set forth, in conflict with any state or federal law.

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[7] Sections 11373 and 11374 cited in the text have been renumbered sections 11342.1 and 11342.2, respectively.

[8] *Cf*. *Sterling Transit Co.* v. *Fair Employment Practice Com.* (1981) 121 Cal. App. 3d 791, 795, 798–800, petition for hearing pending.