



Caldwell Leslie



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Christine Baker, Director
Department of Industrial Relations
Office of the Director
1515 Clay Street, 17th Floor
Oakland, CA 91612
cbaker@dir.ca.gov

George Parisotto, Acting Administrative Director
Department of Industrial Relations; Division of Workers' Compensation
1515 Clay Street, 17th Floor
Oakland, CA 91612
gparisotto@dir.ca.gov

Dr. Raymond Meister, Interim Executive Medical Director
Department of Industrial Relations; Division of Workers' Compensation
1515 Clay Street, 18th Floor
Oakland, CA 91612
rmeister@dir.ca.gov

Dear Director of Industrial Relations Baker, Acting Administrative Director Parisotto, and Interim Executive Medical Director Meister:

We write on behalf of California women who have been subject to unlawful sex discrimination in California's workers' compensation system. California's workers' compensation scheme penalizes women workers on the basis of stereotypes about gender and women's reproductive biology. This discrimination is a direct result of policies and practices permitted and condoned by the State:

- *First*, in the disability apportionment process, women's benefits are reduced on the basis of the "predisposing condition" of gender or assumptions based on women's reproductive biology. In contrast, men's benefits are not reduced on the basis of gender, and conditions unique to male reproductive biology are never assumed to be a basis for paying lower benefits to men than to women.
- *Second*, the disability rating scheme undervalues harms suffered by women by assigning a negligible—and in some cases, *zero*—disability rating to breast cancer. In contrast, similar harms suffered by men that are unique to men are never assigned a negligible or zero disability rating.

As detailed further below, the State of California's failure to address and correct the systemic sex discrimination in California's workers' compensation scheme violates federal and state anti-discrimination law, including the federal Constitution, the California State Constitution, and California statutes.

Being a woman is not a preexisting condition. The State's failure to root out gender-based stereotypes in the workers' compensation system is unlawful. It also perpetuates women's unequal status in the workplace by degrading the value of women's work and contributing to the gender pay gap. And it permits employers to evade the costs of workplace injuries, at the expense of workers, families, and California taxpayers.

The California Department of Industrial Relations is responsible for administering the state system of workers' compensation. Cal. Lab. Code § 3201. Yet, although gender discrimination in the workers' compensation system is well-known to the State and has been the subject of substantial legislative testimony and statewide media attention, the State has taken no action to address this gender bias. In fact, last September Governor Brown vetoed AB 305, a bill passed by the California State Legislature that would have addressed many of the issues discussed in this letter.

We urge you to take immediate action to eliminate gender-based discrimination in the workers' compensation system by acknowledging and committing to remedy the violations of federal and state anti-discrimination law identified in this letter.

I. Gender Discrimination in California's Workers' Compensation System

The California workers' compensation scheme discriminates against women workers with respect to the calculation of permanent disability benefits. Permanent disability benefits "are intended to compensate workers for both physical loss and the loss of some or all of their future earning capacity." *Brodie v. Workers' Comp. App. Bd.*, 40 Cal. 4th 1313, 1320 (2007). To calculate these benefits, since 2004 California law has provided that when an injured worker's condition becomes "permanent and stationary"—that is, when it will no longer improve—a medical evaluator must make both a "total disability rating" and an "apportionment" determination. The total disability rating reflects how disabled the individual is as a result of the workplace injury or illness and is expressed as a percentage—0% indicating no long-term physical loss or impact on future earning capacity, 100% indicating a disability that will prevent the employee from ever working again. The apportionment determination reflects how much of the permanent disability is the responsibility of the employer, and the total disability rating is then reduced in accordance with this determination.

California women injured in the workplace are subject to gender discrimination in both the apportionment and the disability rating process. As you are aware, a number of examples of such gender bias have already been admitted into testimony before the State legislature and widely discussed in the media.

Gender Discrimination in Apportionment Determinations: California women's permanent disability benefits have been reduced as a result of impermissible apportionment to

the “predisposing condition” or “risk factor” of the female gender and women’s reproductive biology. The medical reports documenting these apportionment determinations expressly reduce the benefits to which women workers are entitled on the basis of gender-based stereotypes.

A number of women subject to these discriminatory apportionment determinations have discussed their experiences in the press and at the state legislature. For example, a medical examiner determined that the arthritis suffered by one injured worker “did not result from a single injury.” Instead, he attributed the disability in part to “*the risk factor of the female gender.*” Another worker with carpal tunnel syndrome experienced the reduction of her permanent disability benefits due to apportionment to “*nonindustrial predisposing conditions such as the female gender, age, postmenopausal status, and obesity.*”

Gender Discrimination in Disability Rating for Breast Cancer: Since 2004, disability ratings in California have been determined with reference to the percentage assigned the relevant impairment under the American Medical Association *Guides to the Evaluation of Permanent Impairment* (the “AMA Guides”). The AMA Guides currently assign a double mastectomy resulting from work-induced breast cancer an impairment rating of **zero** for women past childbearing age and a maximum of 5% for women who can still bear children. In contrast, removal of the male prostate as a result of prostate cancer generally receives an impairment rating of 16% - 20%.

For example, a county sheriff has testified before the state legislature that she underwent a mastectomy after a diagnosis of breast cancer resulting from work-related exposure to cancer-causing toxins, including vehicle fires, ammunition, exhaust fumes, gasoline, diesel fuel, structure fires, and narcotics. The initial disability rating she received based on the AMA Guides for the breast cancer and mastectomy was 0%. This figure is particularly striking because the workers’ compensation scheme precludes remedy at tort for injuries occurring in the course of employment, even when caused by an employer’s negligence. As a result, workers’ compensation is the only compensation she will ever receive for the physical loss of her breast.

The Division of Workers’ Compensation: The discriminatory benefits determinations described above are not isolated incidents. They are representative of systemic gender-based discrimination that is the inevitable consequence of the State’s deliberate indifference. The State’s administration of the workers’ compensation system has not only failed to prevent or prohibit impermissible gender discrimination, but has affirmatively perpetuated and contributed to gender bias through its appointment and certification practices.

In particular, the Division of Workers’ Compensation and its Medical Unit are responsible for appointing and certifying the qualified medical evaluators (“QMEs”) who examine workers in disputed workers’ compensation cases. Cal. Code Regs. Tit. 8, § 11. The medical evaluators appointed and certified by the State are overwhelmingly male. In some areas and specialties, for example, less than 3% of medical evaluators are women. The State has set forth numerous requirements for QME certification, including a State-administered competency evaluation, prescribed training course, and continuing education requirements. Cal. Lab. Code § 139.2; Cal. Code Regs. Tit. 8, §§ 11, 11.5. Yet, no portion of this system of training and certification addresses or is designed to remediate issues of gender bias and discrimination,

despite extensive evidence, made known to administrators, that gender discrimination is taking place.

II. Gender Discrimination in the Workers' Compensation Scheme Violates Federal and State Antidiscrimination Law.

Federal and state antidiscrimination law is clear that women workers may not be denied full benefits of the workers' compensation system on the basis of stereotypes about the female gender or women's reproductive biology.

A. Apportionment to the "Predisposing Condition" of Gender or Risk Factors Related to Women's Reproductive Biology is Unlawful.

1. Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution

The Director of Industrial Relations, the Administrative Director of the Department of Workers' Compensation, and the Executive Medical Director of the Department of Workers' Compensation are legally responsible for ensuring that California's workers' compensation scheme does not violate the Equal Protection Clause of the U.S. Constitution. 42 U.S.C. § 1983 subjects state officials to legal liability for depriving individuals of a constitutional or federal statutory right, whether by affirmative action or failure to perform a legally required duty. *See Preschooler II v. Clark Cty. Sch. Bd. of Trustees*, 479 F.3d 1175, 1183 (9th Cir. 2007).

California's Workers' Compensation system runs afoul of the Equal Protection Clause by impermissibly classifying by gender in the permanent disability apportionment process. The U.S. Supreme Court has made clear that "classifications based upon sex, like classifications based upon race, alienage, and national origin, are inherently suspect and must therefore be subjected to close judicial scrutiny." *Frontiero v. Richardson*, 411 U.S. 677, 682 (1973). Gender-based classifications are impermissible absent an "exceedingly persuasive" justification. *United States v. Virginia*, 518 U.S. 515, 533 (1996).

State-trained and -certified medical evaluators reduce women's permanent disability benefits by apportionment to the "risk factor" or "predisposing condition" of being a woman, both expressly and through reliance on stereotypes about female reproductive biology, such as the effects of menopause or past pregnancy. The law is clear that benefits may not be distributed on the basis of stereotypes or overbroad generalizations about the different capacities of men and women. As the U.S. Supreme Court emphasized in *City of Los Angeles v. Manhart*, "[e]ven a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply." 435 U.S. 702, 708 (1978). These gender-based stereotypes are employed to disadvantage women exclusively: we are aware of no instance in which a male worker's award was reduced due to the "risk factor of the *male* gender." The effect is to deny women workers permanent disability benefits to which they are otherwise entitled, depriving women of compensation equal to that of similarly situated men.

2. California Constitution

The equal protection clause of the California Constitution likewise prohibits discrimination on the basis of gender. Cal. Const. Art I, § 7(a). Under the state Constitution, “a classification based on gender is considered ‘suspect’ for purposes of an equal protection analysis,” and is therefore subject to strict judicial scrutiny. *Woods v. Horton*, 167 Cal. App. 4th 658, 670 (2008); *see also Connerly v. State Personnel Bd.*, 92 Cal. App. 4th 16, 33 (2001) (explaining that classifications subject to strict judicial scrutiny “may be upheld only if they are shown to be necessary for furtherance of a compelling state interest and they address that interest through the least restrictive means available”). Accordingly, the unconstitutional apportionment practices discussed above run afoul of the equal protection guarantee found in the state Constitution.

3. California Statutes

The legal prohibition on gender-based discrimination is similarly codified in a number of California statutes. Most notably, California Government Code § 11135 prohibits discrimination on the basis of a number of protected characteristics, including sex, in any program or activity “conducted, operated, or administered by the state or by any state agency.” California courts have applied Section 11135 in the workers’ compensation context to prohibit apportionment on the basis of characteristics protected by the statute. In *Vaira v. Workers’ Compensation Appeals Board*, the California Court of Appeal held that apportioning 40% of a worker’s permanent disability rating to the worker’s age would violate Section 11135, as the workers’ compensation scheme “may not reduce petitioner’s benefits simply because she is older than another similarly situated worker.” No. C054948, 2007 WL 4227253, at *10 (Ct. App. 2007).

B. The Irrationally Low Disability Rating for Breast Cancer Runs Afoul of the Federal and State Constitutions.

The paltry disability rating assigned to breast cancer—5% for women able to bear children, and *zero* for all other women—reflects a profound and unlawful disregard for harms particular to women. To assign breast cancer and its sequelae, a disability that almost exclusively impacts women, such a low impairment rating, while prostate cancer and its sequelae, a disability that exclusively impacts men, is assigned an impairment rating between 16% and 20%, reflects a discriminatory indifference to injuries suffered by women that is absent with respect to conditions peculiar to men..

The workers’ compensation system’s severe undervaluation of breast cancer and the consequent loss of a breast cannot meet even a rational basis standard. “The Supreme Court ‘consistently has required [at a minimum] that legislation classify the persons it affects in a manner rationally related to legitimate governmental objectives.’” *Navarro v. Block*, 72 F.3d 712, 717 (9th Cir. 1995), *as amended on denial of reh’g* (Jan. 12, 1996) (quoting *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981)). The Ninth Circuit has noted that “[a]lthough we may not substitute our personal notions of good public policy for those of the legislature, the rational-basis standard is ‘not a toothless one.’” *Id.* (quoting *Schweiker*, 450 U.S. at 234).

The legislative denial of any significant or long-term consequences of breast cancer irrationally ignores the concrete and medically-documented harms of breast cancer and the loss of a breast. Permanent disability benefits compensate for *physical loss* as well as loss of future income. *See Brodie*, 40 Cal. 4th at 1320. Women diagnosed with breast cancer who must undergo a mastectomy not only experience the physical loss of one or both breasts, but often long-term numbness, pain, and restricted range of movement, as well as post-traumatic stress and impact on the individual's sense of identity, confidence, and sexual relations. These harms are reflected in the value assigned to the loss of a breast in other disability rating systems. For example, the Veteran's Administration assigns the removal of breasts a disability rating ranging from 30% for a simple mastectomy of one breast, up to 80% for a radical mastectomy of both breasts. 38 C.F.R. § 4.116 (7626).

The indefensibly low disability rating assigned to breast cancer is predicated on no more than gender-based stereotypes, which cannot supply a rational basis sufficient to justify government classifications. *See, e.g., Romer v. Evans*, 517 U.S. 620, 632 (1996) ("A statute cannot withstand rational basis review if based on 'animus toward the class it affects.'"). The disparity between disability ratings for the loss of a breast and impairments affecting exclusively men such as prostate cancer reflects a legislative judgment that harms particular to women are not serious and do not merit compensation. And the fact that only those women able to bear children are permitted to recover any compensation at all for the loss of a breast reflects outdated and impermissible stereotypes about women's traditional roles as mothers and that women's bodies are valuable only in their capacity to bear children.

III. The State Must Take Immediate Action to Address Unlawful Gender Discrimination.

We urge you to take immediate action to remedy the legal deficiencies in the workers' compensation system outlined above.

First, the State must acknowledge that the following policies violate the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, the California Constitution, and California Government Code § 11135:

- the apportionment of permanent disability awards to risk factors based on gender or female reproductive biology, including, but not limited to, menopause and pregnancy history (collectively, "gender-based risk factors"), and
- the assignment of a zero to five percent disability rating to breast cancer.

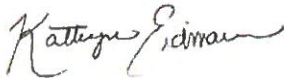
Furthermore, the State must cease enforcement of these unlawful policies and practices and appropriately notify the Department of Industrial Relations and Division of Workers' Compensation, its employees and agents (including medical evaluators) of the policy change.

Second, the Department of Industrial Relations and Division of Workers' Compensation must take immediate steps to establish a system of accountability to ensure that permanent disability awards are no longer apportioned to gender-based risk factors, including by, at a minimum:

- informing all employees and agents (including medical evaluators), by reasonable and effective means, that permanent disability awards may not be apportioned to gender-based risk factors,
- establishing appropriate training, continuing education, and certification requirements,
- monitoring and identifying potential violations, and
- imposing commensurate sanctions, disciplinary action, or disqualification.

We look forward to working with you on this issue critical to securing women's equal status in the workplace. Please respond within 30 days to indicate in concrete terms how you intend to comply with your legal duties, or we will have no alternative but to pursue litigation to vindicate the equal protection rights of women workers in California. We can be reached at 213-385-2977 if you have any questions or wish to discuss this matter further.

Sincerely,



Kathryn Eidmann
Staff Attorney, Opportunity Under Law
Public Counsel
610 South Ardmore Avenue
Los Angeles, CA 90005



Robyn C. Crowther
Partner
Caldwell Leslie & Proctor, PC
725 South Figueroa Street, 31st Floor
Los Angeles, CA 90017



Catherine L. Fisk
Chancellor's Professor of Law
School of Law, University of California-Irvine
(for identification purposes only)
3500E Law Building
401 East Peltason Drive
Irvine, CA 92697



Jennifer Reisch
Legal Director
Equal Rights Advocates
1170 Market Street, Suite 700
San Francisco, CA 94102

cc: Kamala Harris
Attorney General

Lorena Gonzalez
California State Assembly, District 80