LOS ANGELES
Daily Journal
www.dailyjournal.com
TUESDAY, MAY 3, 2016
PERSPECTIVE

Closer look at discrimination ruling raises some concerns

By Steven J. Kaplan

At first glance, the recent decision in *Wallace v. County of Stanislaus*, 245 Cal. App. 4th 109 (2016), seems to fill a curious gap in California employment discrimination law by clarifying that an employee need not show hostility, malice or "ill will" to prove unlawful disability discrimination. Perusal of the decision, however, reveals some flawed reasoning that could hurt employee plaintiffs as much as help them. For in holding that evidence of ill will is not necessary to establish disability discrimination, the court incorrectly observed that this type of evidence might be necessary to prove race, sex, or other forms of discrimination.

The court's observation leaves undecided a nettlesome question that many but not all federal courts have answered by rejecting an ill will or malice requirement. And inexplicably, *Wallace* makes no mention of these federal cases or other authorities that bear on the ill will question. As a result, *Wallace* may make it harder for future victims of employment discrimination to establish liability or survive motions for summary judgment. It is a wolf in sheep's clothing.

In *Wallace*, the Stanislaus County Sheriff's Department accommodated plaintiff, a deputy with a knee problem, by posting him to a light duty bailiff position. Based on an updated medical report, the department then removed plaintiff from the bailiff position, believing — erroneously but in good-faith that he could no longer satisfy the requirements of the job.

The deputy sued for disability discrimination, claiming his physical condition did not prevent him from performing the bailiff job. As a general rule in California, an employer commits unlawful discrimination under the Fair Employment and Housing Act (FEHA) if the employee's protected characteristic (e.g., race, sex, age, disability) is a "substantial motivating reason" for an adverse employment decision. *Harris v. City of Santa Monica*, 56 Cal. 4th 203 (2013). In *Wallace*, the sheriff's department argued that, for the deputy to prevail, he needed to prove not merely technical causation, but also that the employer harbored animus or ill will toward him because of his disability. In Deputy Wallace's case, the department explained, there was no such evidence, because at worse the department made an honest and non-malicious mistake.

The department's argument has obvious surface appeal. Title VII and similar anti-discrimination laws were born of the battle to end racism and other forms of oppression. It is not unreasonable to think that some nefarious motivation should underlie a claim for intentional discrimination.

Wallace rejected this proposition — though only for disability discrimination — by focusing on two things that distinguish disability discrimination from other forms of employment discrimination. First, under FEHA, employers are obligated to reasonably *accommodate* employees with actual or perceived disabilities. An employer may not discriminate against a disabled employee who can do essential job functions with an accommodation, but may discriminate against a disabled employee for whom there is no available reasonable accommodation. Unlawful discrimination may thus occur without ill will, such as where an employer reaches a good faith but mistaken conclusion that the employee's disability prohibits him/her from performing the essential functions of the job. According to *Wallace*, "no parallel" exists for other forms of discrimination.

Second, in most discrimination cases the employer deliberately conceals its unlawful motive, and the employee must prove discriminatory intent using circumstantial evidence under the now ubiquitous *McDonnell Douglas* test. In contrast, disability discrimination is almost always proven by direct evidence. Employers typically admit they acted because of the disability, and defend on the ground that the disability prevented the employee from performing the essential features of the job.

Wallace explained that, while the word discrimination is most often used in a "pejorative sense," in the disability context there is sometimes a "legitimate discriminatory reason" for an adverse employment action. No one would fault a taxi company from discriminating against blind job applicants. *Wallace* concluded that evidence of ill will is not required for most disability discrimination cases, but is an appropriate requirement for other forms of discrimination established using circumstantial evidence. This is the first time a California appellate court mentioned ill will as a possible requirement for proving employment discrimination.

This ill will requirement has occasionally reared its head in federal anti-discrimination law like Title VII, but such a requirement is inconsistent with the structure and purpose of anti-discrimination law. Ill will or conscious hostility may be a sufficient basis for proof of other forms of discrimination, but it should not be a necessary condition. Although a few courts have held that evidence of "prejudice, spite or ill will" is required, s*ee generally Liese v. Indian River Cnty. Hosp. Dist.*, 701 F.3d 334 (11th Cir. 2012), most disagree. *E.g., EEOC v. Joe's Stone Crab Inc.*, 220 F.3d 1263 (11th Cir. 2000) (plaintiff "need not prove ... 'animus' or 'malice'"); *Hopkins v. Price Waterhouse*, 825 F.2d 458 (D.C. Cir.), aff'd, 490 U.S. 228 (1989).

Wallace's conceptual premises are also dubious. Disability discrimination law is not without "parallel," as there are many forms of discrimination that occur without ill will. Illustrative are the so-called "customer preference" cases. In *Diaz v. Pan American World Airlines*, 442 F.2d 385 (5th Cir. 1971), the 5th U.S. Circuit Court of Appeals famously held that an airline could not cater to its customer preferences by hiring only female flight attendants, even though the hiring policy was based on solid practical business reasons and evinced no animus against men. In *Johnson v. Zema Sys. Corp.*, 170 F.3d 734 (7th Cir. 1999), the court held that an employer could not assign African American salespersons to serve predominantly African American accounts and white salespersons to accounts frequented by whites. In neither case did plaintiffs need to prove ill will or hostility to establish unlawful discrimination, and in *Johnson* both blacks and whites were hired, but given assignments based on practical business considerations.

Wallace's observation that disability discrimination is unique in allowing good faith discrimination to take place is also contradicted by the bona fide occupational qualification (BFOQ) defense that is generally accepted — if rarely used — in many areas of discrimination law. Like the disabled person who cannot do the job even with a reasonable accommodation, BFOQ cases involve a situation where someone cannot do the job because of their race, sex or other characteristic. Certainly no one would fault New Line Cinema for casting five young black actors to play the leads in "Straight Outta Compton." *Kern v. Dynalectron Corp.*, 577 F. Supp. 1196 (N.D. Tex. 1983), approved discrimination against non-Muslims hired to work in Saudi Arabia. Not only was there an absence of ill will toward non-Muslims, the action was taken benignly to protect them from possible beheadings.

"Adverse impact" doctrine is another area of discrimination law where ill will or hostility needn't be established. Under most anti-discrimination laws, employment practices are unlawful if they have a disproportionate adverse impact on members of a particular class, even if the practice was adopted without any ill will or hostility toward members of that protected class.

Until now, there has been no ill will requirement for employment discrimination, and *Harris*, the most recent Supreme Court discussion of motivation, makes no mention of it. Nor is it found in the CACI jury instruction for employment discrimination (No. 2500). An ill will requirement, if it gains general acceptance, would radically alter the landscape of employment discrimination. It would reinsert into the causation equation a threshold evidentiary requirement of evil motive that FEHA and Title VII jurisprudence has carefully avoided. Plaintiffs will need to resist future arguments from employers — which are likely to increase as a result of *Wallace* — that they need to prove ill will or conscious hostility in order to prevail in non-disability discrimination cases.


STEVEN KAPLAN
Employment lawyer

Steven J. Kaplan *is an employment lawyer in Los Angeles.*