

Reasonable Accommodation's Mandate in Employment Statute Does Not Require Employer to Cut Essential Job Functions

By Susan E. Groff and Angela Quiles Nevarez on February 26, 2015

On January 21, 2015, a California Appeals Court affirmed the trial court's ruling in *Nealy v. City of Santa Monica*, 2015 Cal. App. LEXIS 139 (February 13, 2015) granting summary judgment for the City of Santa Monica ("City") on claims of disability discrimination, failure to provide reasonable accommodation, failure to engage in the interactive process, and retaliation by a City employee.

Nealy began his employment with the City in 1996. In 1997, he transferred departments and became a recycling worker, a position the City later retitled "solid waste equipment operator." Nealy injured his right knee in July 2003 when his foot slipped as he was moving a large bin full of food waste. A doctor declared him temporarily totally disabled after his injury. He had knee surgeries in 2003 and 2004. His temporary total disability extended to May 25, 2005, when his doctor released him to "light duty" work with restrictions.

Nealy and the City participated in an accommodations meeting in 2005 which led to his transfer to a new position. In October 2005, he began working as a groundskeeper – a vacant position for which Nealy could safely perform the essential functions of the position. In early 2006, Nealy and the City participated in another accommodations meeting because he was having trouble performing some of his duties. The committee agreed to update the duties for groundskeeper and Nealy was determined to be able to perform the groundskeeper position without restrictions. Then in August 2006, Nealy sustained a second injury – lower back pain – while operating a small tractor in a baseball field at work. He was declared temporarily totally disabled for a few weeks and then was cleared to return to work 13 days later with restrictions. The City did not have any work available that met Nealy's restrictions, and he remained off work as temporarily totally disabled. Nealy never did return to work after his August 1, 2006 emergency room visit.

Nealy and the City participated in additional accommodations meetings in 2008 and 2010. He also had a third knee surgery in 2009. During the accommodations meetings, they discussed his limitations and vacant positions to which Nealy could potentially be reassigned. In the end, the City determined on August 3, 2010, that it was unable to provide Nealy with a reasonable accommodation into an alternative position because he was not minimally qualified for any available position.

In January 2011, Nealy filed a complaint with the California Department of Fair Employment and Housing and

obtained a right-to-sue notice. He then filed a lawsuit against the City on February 7, 2011. The City moved for summary judgment and the court granted the motion in November 2012. Nealy filed a timely notice of appeal from the judgment.

On his claim for reasonable accommodation, Nealy argued that one of the City's essential functions was, in fact, nonessential. He also argued that there were triable issues on whether reasonable accommodations would have allowed him to perform the essential functions of the job and whether reassignment was available. FEHA does not obligate the employer to accommodate the employee by excusing him or her from the performance of essential functions. *Liu v. City and County of San Francisco* (2012) 211 Cal.App.4th 962, 985. Nealy further argued that reasonable accommodation could include reassignment to a vacant position. FEHA does not require a reassignment if there is no vacant position for which the employee is qualified. *Cuiellette v. City of Los Angeles* (2011) 194 Cal.App.4th 757, 767. To the extent Nealy argued that the City had a duty to await a vacant position to arise, he is incorrect. An employer can prevail on summary judgment on a claim of failure to reasonably accommodate by establishing through undisputed facts that "there simply was no vacant position within the employer's organization for which the disabled employee was capable of performing with or without accommodation ..." *Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 263.

The take-away from this case is two-fold:

- An employer is not required to redefine the essential requirements of a position to reasonably accommodate an employee's disability.
- Reassignment to another position is not required if there is no vacant position for which the employee is qualified. Moreover, FEHA does not require the employer to provide an indefinite leave of absence to await possible future vacancies.