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Reasonable Accommodation and the Interactive Process--A Cautionary Reminder

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The First Appellate District's recent decision of *Nadaf-Rahrov v. Neiman Marcus Group, Inc.* highlights the importance of exhausting all possibilities of accommodating an employee regardless of what the employee's medical certifications state. In that case, the plaintiff, who was a fitter for Neiman Marcus, went on medical leave in November 2003 for pain related to osteoarthritis. The plaintiff's medical certifications stated that she was unable to perform work of any kind, and subsequent certifications extended the plaintiff's leave through August 2004. Although Neiman Marcus' human resources manager had some discussions and correspondence with the plaintiff about returning to work, the plaintiff's doctor never released her to return to work, and as a result, after the plaintiff had exhausted her sick leave and vacation benefits, Neiman Marcus terminated her employment on July 14, 2004.

The trial court granted summary judgment to Neiman Marcus on the plaintiff's claims for disability discrimination based on termination of employment, failure to accommodate, and failure to engage in the interactive process, and the plaintiff appealed. On appeal, the Court reversed summary judgment for the disability discrimination claims and the national origin discrimination claim.

Regarding the disability discrimination claim based on termination of employment, the Court of Appeal rejected all three of Neiman Marcus' arguments that the plaintiff could not have performed the essential functions of any vacant position, with or without accommodation.

First, the Court of Appeal found that the doctor's certifications that the plaintiff was unable to perform work of any kind did not require summary judgment because: (1) the doctor intended the certification forms to indicate only that the plaintiff was unable to perform the essential functions of her current job; (2) the doctor sent Neiman Marcus a letter after the certification forms stating that he would "strongly support" the plaintiff's change to a position that did not involve bending, standing or kneeling; and, (3) the doctor did not release the plaintiff to return to work because he did not believe she could perform her job as a fitter, and Neiman Marcus had not offered her any other positions for him to evaluate. Based on that additional evidence, the medical certifications alone did not establish that the plaintiff was unable to perform work of any kind at the time of the termination of her employment or in the foreseeable future.

Second, the Court of Appeal found that the plaintiff's admissions in deposition that she was so severely physically disabled that she was unable to perform most ordinary household chores or activities of daily living, as physical activity increased her pain, did not mandate summary judgment. The Court, while noting that these physical restrictions were "substantial," found that they did not "obviously preclude" the plaintiff from performing desk jobs with accommodation. The Court of Appeal found that the plaintiff had raised a triable issue of fact about "whether vacant desk jobs" were available for which the plaintiff would be qualified.

Third, although Neiman Marcus submitted a declaration from its human resources manager stating that the plaintiff was not able to perform a laundry list of various positions that were available up to the date of the plaintiff's termination, the Court of Appeal found that the plaintiff raised a triable issue of fact by pointing to jobs that came open, at least some of which came open after the plaintiff's employment terminated. Specifically, the plaintiff produced evidence that other jobs were available at Neiman Marcus through November 2004, more than three months after her employment terminated, several of which the plaintiff's doctor opined that she could have performed. The Court of Appeal found that jobs available for an "extended period" after termination are relevant because "it may have been a reasonable accommodation for Neiman Marcus" to give the plaintiff an extension on her leave of absence "for a limited period of time until a position became available," especially if the employer could have anticipated the

future opening. For this same reason, the Court of Appeal also reversed summary judgment on the plaintiff's failure to accommodate claim.

Finally, regarding the plaintiff's failure to engage in the interactive process claim, the Court of Appeal determined that, consistent with the federal rule, an employer cannot be liable for failing to engage in the interactive process where no reasonable accommodation would have enabled the plaintiff to perform the essential functions of the job held or sought, rejecting two prior Court of Appeal cases holding that FEHA imposes liability for failure to engage in the interactive process even if no reasonable accommodation would have been possible. The Court of Appeal, however, found that there was a triable issue of fact as to whether Neiman Marcus was responsible for the breakdown in the interactive process by requiring plaintiff to provide a release to return to work listing her restrictions before discussing other open job positions, as providing information about available positions could have assisted the plaintiff and her doctor in providing specific work restrictions. Moreover, the Court of Appeal found that a reasonable jury could determine that Neiman Marcus' decision to terminate plaintiff's employment without advance warning or further discussion was unreasonable and caused a break down in the interactive process.

The lesson to be learned from this case is that the employer cannot rely on the doctor's leave certificates to terminate employment without exhausting all possibilities for accommodation with the employee. Employers should always make one last final attempt to engage in the interactive process with the employee before terminating employment. The employer should ask if any accommodations would permit the employee to return to work in his/her current position at that current time or in the reasonably foreseeable future. The employer should also give the employee information about all of the open job positions at that time (to the extent they are not promotions) as well as any job positions that the employer believes will come open in the foreseeable future, and provide job descriptions for the employee to review with his/her doctor to determine whether the employee can be accommodated in any of these positions. If the employer has more than one location, the employer should provide information about open positions in all of the locations to which the employee is willing to relocate. Finally, the employer should not require a release to return to work prior to this type of an exchange.