A Trend Toward Harmonizing Reasonable Accommodation and Interactive Process Claims Under the FEHA and ADA?

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Nadaf-Rahrov v. Neiman Marcus Group, Inc., et al.: A Trend Toward Harmonizing Reasonable Accommodation and Interactive Process Claims Under the FEHA and ADA?

The Court of Appeal for the First Appellate District in *Nadaf-Rahrov v. Neiman Marcus Group, Inc., et al.* (Sept. 10, 2008, Cal. Ct. App. 1st) __ Cal.App.4th __ [2008 DJDAR14314] held the federal definition of "reasonable accommodation" applies to disability-based discrimination claims under California's Fair Employment and Housing Act, Government Code section 12940 et seq. (the "FEHA"), perpetuating a split among California Courts of Appeal regarding the scope of protections available under the FEHA to qualified disabled workers. The following holdings are of particular significance.

First, *Nadaf-Rahrov* holds that an employer is liable for failing to provide a reasonable accommodation under Government Code section 12940, subdivision (m) ("Section 12940(m)") "only if the work environment could have been modified or adjusted in a manner that would have enabled the employee to perform the essential functions of the job." (Id. at p. 14322, italics added.) This holding directly conflicts with that in *Bagatti v. Department of Rehabilitation* (2002, Cal. Ct. App. 3d,) 97 Cal.App.4th 344, which rejected application of the ADA definition of "reasonable accommodation" under the FEHA and held that liability under Section 12940(m) may attach even if the plaintiff is not able to perform the essential functions of the position held or desired. (Id. at p. 362.)

Second, *Nadaf-Rahrov* holds that the availability of an effective, reasonable accommodation is a material element of a claim against an employer for failing to engage in a good faith, interactive process under Government Code section 12940, subdivision (n) ("Section 12940(n)"). (*Nadaf-Rahrov, supra*, __ Cal.App.4th at p. __ [2008 DJDAR at p. 14325].) Thus, absent proof of the availability of a reasonable accommodation, an employer cannot be held liable for failing to engage in the interactive process. This

directly conflicts with *Wysinger v. Automobile Club of Southern California* (2007, Cal. Ct. App. 2d) 157 Cal.App.4th 413, which held that the FEHA imposes liability on employers under Section 12940(n) regardless of the availability of a reasonable accommodation. (Id. at p. 425.)

Third, under *Nadaf-Rahrov*, the employee bears the burden of proving the availability of a reasonable accommodation for purposes of Sections 12940(m) and (n), to wit: that he or she was qualified to perform the essential functions of the job held or desired and that the job was available. (*Nadaf-Rahrov, supra*, __ Cal.App.4th at pp. __ [2008 DJDAR at pp. 14323, 14325].) In so holding, the *Nadaf-Rahrov* court recognized that "[a]lthough it would be unfair to require and employee in the workplace to unilaterally identify available accommodations, an employee in litigation can use discovery procedures to do so." (Id. at p. __ [2008 DJDAR at p. 14325].) Thus, while it is the employee's burden under Section 12940(n) to identify the availability of an accommodation for which he or she is qualified, the employer is liable if such a position is identified to have existed for the first time during litigation.

Finally, regarding Section 12940(n), it is not enough that an employer consider reassigning an employee only to vacant positions in the employee's immediate workplace or to those which the employee specifically requests reassignment if a vacancy exists elsewhere in the employer's organization that would not amount to a promotion. (Id. at p. __ [2008 DJDAR at pp. 14319-14320].) Thus, an employer's failure to consider vacancies outside the employee's immediate workplace may provide grounds for liability under Section 12940(n), as well as justify broad discovery regarding vacancies within the employer's organization.

In adopting the federal definition of "reasonable accommodation," *Nadaf-Rahrov* harmonizes certain protections afforded to disabled workers under the FEHA and the ADA. Other California courts, however, continue to view the FEHA's protections as broader. Because this division among California's Courts of Appeal runs to the very elements required to state a claim under Section 12940, subdivisions (m) and (n), the issue is ripe for Supreme Court review.

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