

## **Employers Face a High Burden to Accommodate Returning Employees: Nadaf-Rahrov v. Neiman Marcus Group, Inc.**

Posted on September 20, 2008 by

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On September 10, the First District Court of Appeal issued what I believe is the very important disability discrimination case of [Nadaf-Rahrov v. Neiman Marcus Group, Inc.](#) The decision is important not because it alters pre-existing disability law, but because it applies the law to the most common scenarios and real-life issues faced by employers and employees.

The case involved a clothes fitter at Neiman Marcus who had gone out on a medical leave because she was "unable to work" according to a doctor's note. When her leave expired and she did not submit a release to return to work she was terminated. The trial court initially granted summary judgment to Neiman Marcus on the grounds that the plaintiff was still unable to perform the "essential duties" of her job.

The appellate court reversed, however, on the ground that Neiman Marcus had not done enough to investigate the plaintiff's actual condition or to explore potential alternate positions. The Court noted that the employer does not have to offer a substitute job that would constitute a "promotion." But otherwise, the appellate decision merely illustrated how exhaustive the employer's efforts must be if it expects to avoid legal liability. For example:

- The employer cannot avoid looking at alternate positions merely because a doctor's note states that the employee is "unable to work." This language can be interpreted to mean that the employee is only unable to perform her *original* job, and may not apply to all potential substitute jobs.
- The employer must consider *all* vacant positions that the worker could perform. For example, clerical jobs must be considered for employees who formerly performed only physical duties.
- The employer must consider positions that are not yet vacant. In other words, extending the employee's leave until a new position opens up is part of the "reasonable accommodation."
- The employer must consider vacant positions at other facilities and locations. If the employee signals a willingness to relocate, this may conceivably require a nationwide search for vacant positions that the employee could perform.

Satisfying this type of internal job search may not be easy or convenient but it is imperative to avoid liability under the ADA or the FEHA. The lesson for employers is to never assume anything about the employee's condition or the nature of substitute positions without a specific, diligent investigation.

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