

Employment

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Collaboration Is Key to Accommodating Injured Workers

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Over the last several years, California employers have faced a barrage of court opinions that have reinforced that employers must be proactive in trying to find reasonable accommodations for an employee who claims a disability. These decisions have been set against the backdrop of the California employer's obligation to not only provide a reasonable accommodation, but to comply with their separate and distinct obligation under California Government Code Section 12940(n) to engage in a "timely, good faith interactive process" with the employee to try and find a reasonable accommodation. The Legislature, and the court decisions interpreting the applicable statutes, have not established the manner in which to engage in the interactive process, but the process normally manifests itself as meetings between an employee and various members of the employer's management team to come up with a reasonable accommodation that can allow the employee to retain his or her employment within the company.

The California Court of Appeal's recent decision in *Nadaf-Rahrov v. Neiman Marcus Group, Inc., et al.*, 2008 DJDAR 14314, continues the trend of California courts requiring employers to be exceptionally proactive in finding ways to retain disabled employees, and reminds employers to exhaust all possible avenues of potential accommodations. In *Neiman Marcus*, Nadaf-Rahrov had worked as a fitter for Neiman Marcus since 1985. Starting in 1997 and continuing through 2004, she experienced recurring problems with back and joint pain, carpal tunnel syndrome and osteoarthritis. Nadaf-Rahrov's treating physician had informed Neiman Marcus that her conditions required various accommodations, including time off work and a shortened workweek, which Neiman Marcus provided. It was not until November 2003 that Nadaf-Rahrov requested an extended leave of absence due to her various ailments.

In support of her November 2003 request for a leave of absence, Nadaf-Rahrov submitted her doctor's signed Certification of Health Care Provider, which included responses to various questions, including "[i]s the employee unable to perform work of any kind?" to which the doctor responded "yes." After Neiman Marcus accepted Nadaf-Rahrov's initial request for a one-month leave, her FMLA medical leave was extended several times and for several months by her doctor.

After about 10 weeks of leave, Nadaf-

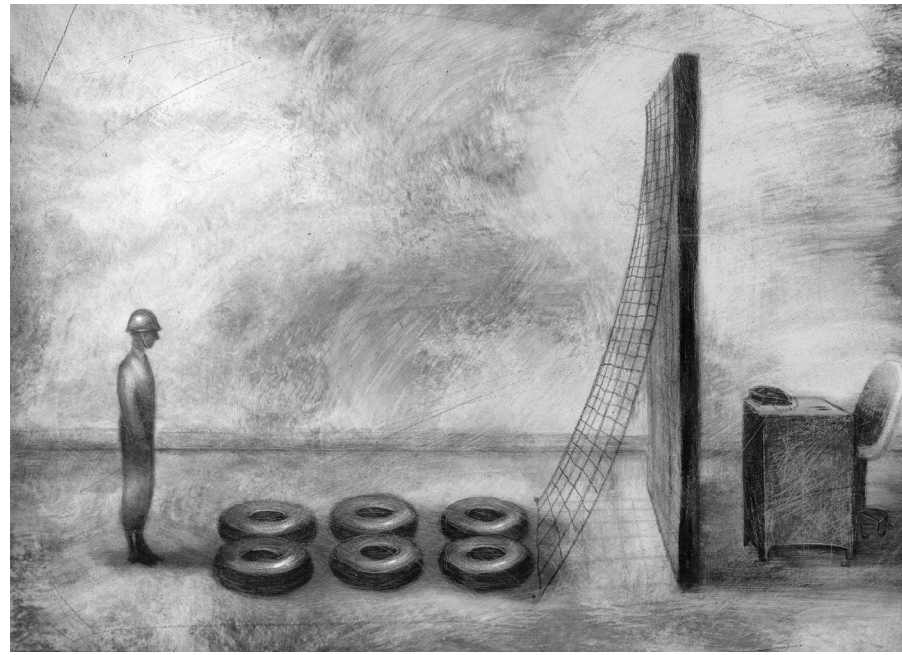
Rahrov informed Neiman Marcus that she would not be able to return to her original job as a fitter, but she requested that she be assigned to another position at Neiman Marcus. Nadaf-Rahrov's doctor confirmed in writing her disability and recommended that she be reassigned to another position. Neiman Marcus's local human resources director engaged in extended dialogue with Nadaf-Rahrov to discuss her request to be reassigned, her work restrictions and her qualifications. The HR director, however, concluded that there was no point in discussing alternative positions with Nadaf-Rahrov until Neiman Marcus received confirmation from her that she was no longer restricted from performing work of "any kind." Nadaf-Rahrov acknowledged in her deposition that she agreed to call the HR director when she was released to return to work.

When her FMLA leave expired in February 2004, she wrote a letter to the company advising that she was still under a doctor's care. Her physician issued a number of letters extending her leave, including the last letter that indicated "I believe she may be able to return to work on 8/16/04 but not in her previous position." In July 2004, Neiman Marcus sent a notice of termination. The HR director's justification for her decision was that she had exhausted her FMLA leave, vacation days and sick leave; Neiman Marcus had not yet received a release from doctor for her to perform work of any kind and even if there had been a release, the HR director believed that she would not have been qualified to fill an available position at Neiman Marcus based on the director's understanding of her condition and the available positions.

In response to the notice of termination, Nadaf-Rahrov filed suit against Neiman Marcus, claiming unlawful employment discrimination based on disability and national origin in violation of the Fair Employment and Housing Act, Government Code Section 12940 et seq. The trial court granted Neiman Marcus' motion for summary judgment finding that Nadaf-Rahrov could not prevail on her claims, as she was not able to perform the essential functions of her fitter position or any other available position, and Neiman Marcus had reasonably accommodated her by providing six months of leave.

Claim of Disability Discrimination

As there was no dispute over whether Nadaf-Rahrov could have performed her original job as a fitter, the court focused on whether she could overcome summary judgment by demonstrating that there was a



trial issue of fact as to whether she could have performed the essential functions of a vacant position at Neiman Marcus.

Despite Neiman Marcus' arguments that there was no triable issue of fact as to whether she was able to perform the essential functions of an available vacant position because of the doctor's statement that she was not fit to do work "of any kind," Nadaf-Rahrov's own statements regarding her physically disabling condition, and the HR director's professional opinion that she could not have performed the essential functions of any vacant position, the Court of Appeal held that there was a triable issue of fact as to whether she was unable to perform "work of any kind" due to her disability. The court's decision largely hinged on the fact that Nadaf-Rahrov was able to present evidence that the doctor's note stating that she could not do work "of any kind" was only intended to be an evaluation of her ability to perform her job as a fitter, and was not a reflection of the doctor's opinion on her ability to perform other jobs.

The court expanded on this holding by noting that prior case law supported the fact that in some cases, it may be reasonable for an employer to affirmatively seek out a medical release or to obtain a clarification from the medical provider as to what is actually required before an employee can be reassigned to a new position. The court also found, despite the requirement that an assignment be to a comparable position and despite her own testimony that as of August 2005, she still was so severely disabled

that she was unable to do ordinary household chores, that Nadaf-Rahrov presented evidence that there were available positions that only required "clerical work" that she may have been able to fill. The court discounted her testimony of pain and inability to work, stating that "although these physical restrictions are substantial, they did not self-evidently prevent Nadaf-Rahrov from performing any work whatsoever with or without accommodation." Therefore, the court found that a reasonable fact-finder could conclude she was able to perform desk work with accommodation notwithstanding her medical issues. The court concluded that Nadaf-Rahrov had raised a triable issue of fact as to whether she could be reasonably accommodated by being placed in a vacant position for which she was qualified. The court reached this conclusion although some of the other positions included: clerical, cook, customer service representative, food preparation, gift wrapper, restaurant hostess and sales. The court reasoned that "jobs available during the extended time period are relevant because it may have been a reasonable accommodation for Neiman Marcus to extend Nadaf-Rahrov's leave of absence for a limited period of time until a position became available that Nadaf-Rahrov could perform, particularly if Neiman Marcus could have anticipated the future opening."

A Breakdown in the Interactive Process

In determining the issue of whether

Neiman Marcus failed to engage in the interactive process under Section 12940(n), the court disagreed with the recent decision of *Wysinger v. Automobile Club of Southern California*, 157 Cal.App.4th 413 (2007), and concluded that the employee bears the burden of proving a reasonable accommodation was available before the employer can be held liable for failing to engage in the interactive process. However, although Neiman Marcus engaged in extensive dialogue with the employee, the court concluded that there was a triable issue of fact as to the breakdown in the interactive process being attributed to Neiman Marcus. The court found that Nadaf-Rahrov had raised a triable issue of fact because of the HR director's insistence on receiving a medical release before discussing the vacant open positions, and because Neiman Marcus terminated Nadaf-Rahrov without telling her it would consider her for a different position if she obtained a medical release. It is unclear from the decision how the courts would expect an employer to discern which positions would even be in the realm of discussion if the employer did not have a clear understanding of the applicable restrictions and the employee had not provided a medical release.

The court's holding in *Neiman Marcus* has essentially translated into a recommendation for the California employer to provide an employees' physician with information about open available positions in order to have the doctor opine as to the ability of the employee to perform the essential functions of that position.

What is therefore clear from the *Neiman-Marcus* decision is two-fold. First, the employer should begin to discuss with the employee all open available positions that the employee is qualified for, even if the employer believes the employee may be over-qualified for the position, or if the restrictions are not clearly known to the employer. And second, the employer is to work closely with the employee and the employee's doctor to review all possible accommodations and determine if the employee can perform the essential functions of an open available position, with or without accommodation.

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