

B212326

IN THE

**COURT OF APPEAL**

**STATE OF CALIFORNIA**

SECOND APPELLATE DISTRICT

Division 7

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WILLIAM LARKIN  
Plaintiff & Appellant,

vs.

CITY OF LOS ANGELES  
Defendant & Respondent.

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Appeal from the Superior Court of California, County of Los Angeles  
The Hon. Soussan G. Bruguera, Judge (case number BC365114)

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**APPELLANT'S OPENING BRIEF**

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## INTRODUCTION

This is an appeal of a judgment following a bench trial in an action under the California Fair Employment and Housing Act. Plaintiff and appellant was a Los Angeles City police officer — with an outstanding performance evaluation — who developed very high blood pressure and was diagnosed with hypertension. After being off work for a few months to allow his condition to stabilize, he returned with a doctor’s note asking to be accommodated with a low-stress position involving little or no public contact. Such positions do exist within the Los Angeles Police Department. Indeed, the officer had previously served in such a position with distinction. Moreover, the supervisor of that unit wanted him back to fill a vacancy.

Despite that, his commanding officer ordered him home, saying that he could not be accommodated. The Department made no effort to engage in the statutorily-required “interactive process” to try to find an accommodation. Eventually, the officer applied for and received a disability pension. It was either that or living without an income. But he made clear that this was not his choice.

The trial court, finding for the City, applied a standard requiring *any* police officer to be capable of performing *any* of the functions of *any* serving officer. But that essentially rules out accommodations for disability, which, by definition, are made when someone has *reduced* functionality.

## **STATEMENT OF APPEALABILITY**

This appeal is taken pursuant to Code of Civil Procedure section 904.1, subdivision (a)(1), from a final judgment following a trial.

### **PROCEDURAL HISTORY**

On January 23, 2007, plaintiff and appellant William Larkin filed a complaint against the City of Los Angeles. (Appellant's Appendix ("App.") at 1.) The complaint arose out of Larkin's employment as a police officer with the Los Angeles Police Department. (App. 2:10-4:10.) It contained three causes of action: (1) Employment discrimination in violation of Government Code section 12940, subdivision (a); (2) refusal to accommodate a disability in violation of Government Code section 12940, subdivision (m); and (3) bad faith refusal to discuss accommodation in violation of Government Code section 12940, subdivision (n). (App. 4:21-7:11.) The complaint sought compensatory damages, equitable relief, and attorney fees. (App. 7:14-23.)

The matter proceeded to a bench trial, which took place over six days. (App. 74-84.) On August 11, 2008, the court issued a ruling finding for defendant on all issues. (App. 86.) Plaintiff timely requested a statement of decision on August 14, 2008. (App. 88.) In response, the court ordered counsel for defendant to prepare one. (App. 91.) The court received a proposed statement of decision on September 5, 2008. (App. 93.) On

September 9, 2008, plaintiff timely filed objections. (App. 94.) On September 17, 2008, the court overruled the objections, signing the statement of decision and entering judgment on the same day. (App. 100, 102, 106.)

Notice of entry of judgment was served on September 24, 2008. (App. 117.) On November 20, 2008, plaintiff filed a timely notice of appeal. (App. 118.)

### **STATEMENT OF FACTS**

**1. Officer Larkin had served with the LAPD since 1988 and had an exemplary record**

Officer William Larkin was first employed by the Los Angeles Police Department (“LAPD”) in January 1988. (Reporter’s Transcript (“RT”) 658:20-22.) At the time of trial, he was 51 years old. (RT 605:1-2.)

It was undisputed at trial that Officer Larkin had an excellent record as a police officer. A performance evaluation in December 2004 — a month before the events at the heart of this litigation — stated: “Larkin is a dependable, reliable, hardworking employee. He is a welcome addition to the Squad Room and to the Detective Administrative Unit. His willingness to pitch in and help others demonstrates what being a team player is all about.” (RT 608:25-609:26; App. 59 [trial exhibit 5, p.5].) It also said: “Officer Larkin is extremely ethical and exemplifies high standards and

moral conduct.” (App. 56 [trial exhibit 5, p.2].) It said that he was encouraged to seek promotion. (App. 55 [trial exhibit 5, p.1].) It referred to him as having “a mild mannered demeanor.” (App. 58 [trial exhibit 5, p.4].)

**2. In 2004, Larkin was on “light duty” status because of orthopedic injuries received in the line of duty**

In 2003, Officer Larkin was assigned to the detective desk in the LAPD’s Northeast Division. (RT 606:14-24.) This job entailed fielding questions from the public, both in person and over the phone, about a range of subjects, including ongoing investigations, general law enforcement matters, and procedures. (RT 606:28-607:10.) It also involved a range of other tasks, such as releasing impounded vehicles, registering sex offenders, reviewing communications from the FBI and Secret Service about matters such as terrorist threats, and helping out detectives in a variety of ways. (RT 607:11-18.)

In January 2004, Officer Larkin was still at the detective desk and was on what is known as “light duty” status. (RT 609:27-610:6.) “Light duty” is where an officer has an unfit condition that prevents him or her from engaging in a full range of police officer functions, but that allows him or her to do some things around the police station. (RT 610:7-18.)

The reason Officer Larkin was on light-duty at that time was that he had been involved in four car crashes — all in the line of duty and none of

them his fault — that had resulted in a variety of orthopedic injuries. (RT 615:3-28.) However, as shown below, it was another medical condition that led to the events giving rise to this lawsuit.

**3. In April 2004, Larkin was diagnosed with extremely high blood pressure and was off work**

In April 2004, Officer Larkin was diagnosed with very high blood pressure — in the order of “300 over 140” or higher. (RT 612:18-614:17.) As a result, Dr. Greg Maddex — his personal physician — put him on medication and took him off work. (RT 333:23-334:19, 336:6-8, 614:19-28.)

Officer Larkin returned to work in June 2004. (RT 617:4-6.) He handed in a doctor’s note saying that he could return without restrictions. (RT 617:15-618:5.)

**4. Soon after Larkin returned to work in June 2004, he was reassigned to a higher-stress position**

Officer Larkin initially returned to the detective desk, but soon afterwards was reassigned to the front patrol desk. (RT 618:11-19.) Two other officers took his place at the detective desk. (RT 618:19-20.)

Officer Larkin was glad to be back at work, but the hectic pace and long hours of the front patrol desk were not good for his blood pressure. (RT 618:22-26.) The job involved being in the “front line” — dealing face-to-face with people coming to the police station for any reason, ranging from

reporting crimes to having just been in accidents or fights. (RT 619:1-13.) In addition, he had to monitor the police radio and arrange for support if an officer was in trouble. (RT 619:15-22.) He found this position to be stressful. (RT 619:24-26.)

In August 2004, Officer Larkin's blood pressure again began to spike. (RT 620:4-7.) Dr. Maddex wrote a note specifying various work restrictions, which included the need for a low-stress environment with limited contact with the public. (RT 337:12-23, 620:1-10; App. 61 [trial exhibit 8, p.16].) Dr. Maddex testified that this was necessary, because Larkin suffered from a condition known as "labile hypertension," a form of hypertension that could involve unpredictable bursts due to external stimuli. (RT 337:19-27.) Other restrictions covered by the note — those to do with prolonged standing and bending — were for orthopedic reasons. (RT 337:28-338:4.) The restrictions in that note were temporary. (RT 338:5-10.)

Officer Larkin handed in the note at work. (RT 620:13-14.) However, his assignment was not changed as a result. (RT 620:15-22.)

**5. In September 2004, skyrocketing blood pressure made Larkin's doctor take him off work**

In September 2004, Officer Larkin began feeling worsening symptoms of his blood pressure — including "semi-blackouts" and "profuse sweating." (RT 621:3-9.) When he reported his condition to a senior officer,

he was told to take a five-minute break and to get back on the job. (RT 621:11-16.)

But Dr. Maddex found that Officer Larkin's blood pressure was "skyrocketing" and took him off work that month. (RT 338:11-339:3, 621:17-21; App. 62 [trial exhibit 8, p.22].) It took a while for Larkin's blood pressure to be brought under control with the help of medication. (RT 621:22-28.) Eventually, his condition did stabilize temporarily. (RT 339:4-12.)

**6. Larkin attempted to return to work in January 2005 with a doctor's note calling for "a low-stress position with little or no public contact"**

On January 18, 2005, Officer Larkin attempted to return to work after telling Dr. Maddex that he wished to do so. (RT 344:8-11, 622:1-14.) Dr. Maddex wrote a note stating that Larkin should be restricted to "a low-stress position with little or no public contact." (RT 340:6-10; App. 63 [trial exhibit 8, p.23].)

Dr. Maddex believed that by January 2005, Officer's Larkin's condition had become, presumptively, permanent. (RT 339:13-17.) In the case of a police officer, this was equivalent to saying that Larkin had a permanent disability. (RT 339:18-21.)

However, the note referred to "temporary work restrictions/

accommodations.” (App. 63 [trial exhibit 8, p.23].) Dr. Maddex testified that the reason for making the restrictions temporary at that time was that while he considered the high blood pressure itself to be a permanent condition, he felt that the “lability” — i.e., its propensity to suddenly change — was not necessarily so. (RT 344:17-25.) He did not know at that point whether the restrictions would, ultimately, need to be permanent or whether they could be lifted at some point. (RT 345:3-16.)

**7. After reporting for work, Larkin was told by his commanding officer that there was nothing available for someone with his restrictions and was sent home**

When he arrived for work that morning in January 2005, Officer Larkin gave the doctor’s note to a person at the Northeast Division named Joanne Walsh. (RT 623:5-10.) Walsh was the “sick and IOD coordinator” at the Division at all relevant times (“IOD” standing for “injured on duty”). (RT 1087:27-1088:4.) Her duties involved processing the paperwork for all injured, sick, and disabled police officers at the division. (RT 1088:11-16.)

Walsh testified that when Officer Larkin came to see her that morning, he wished to return to work. (RT 1089:14-24.) She told him that Captain Carol Aborn wanted to see him later that morning. (RT 623:11-20.) Captain Aborn was Officer Larkin’s commanding officer and had been since May 2003. (RT 657:5-7, 1261:19-21.) She had never disciplined him in any way,

nor was she ever involved in giving him a less-than-satisfactory performance evaluation. (RT 657:12-21.) Captain Aborn believed that Officer Larkin had been competent in his work at the detective desk. (RT 1246:6-25.)

Officer Larkin went to see Captain Aborn as requested, meeting privately in her office behind closed doors. (RT 623:25-624:10.) Captain Aborn asked him to sit down and then read the doctor's note. (RT 624:11-17.)

Officer Larkin described her response and his reaction as follows: "She said she couldn't think of any place in Northeast that would, you know, accept this return-to-work note. And I was kind of taken off guard. But — I was kind of a little bit in shock, but she's the Captain. And then she — she basically went on to say she couldn't think of any place in the entire City of Los Angeles that would accept this return-to-work note. And she asked me if I would change the note. Then, you know, she may reconsider it. So I said, you know, out of — just respectfully, I said, 'well, I'm not a doctor, but I'll have my doctor look at it and consider what you said, because I was having difficulty with my blood pressure. But, you know, I'll see what he says, if he could change it.' And she basically, you know, got up and — got up and held the door open for me to leave." (RT 624:17-625:7.)

On cross-examination, Officer Larkin agreed that Captain Aborn had said not just that she might reconsider if the note were changed, but also that

she might do so if the requested restriction were clarified. (RT 695:22-27.)

During that meeting, Larkin did not offer any suggestion about specific assignments he could fill, given the necessary work restriction. (RT 696:22-26.) And he did not say anything about his desire to seek an accommodation of a permanent medical condition or disability. (RT 697:27-698:2.)

Captain Aborn did not offer any position, nor did she indicate to Officer Larkin that she had even considered any position for him. (RT 625:8-12.) Exiting Captain Aborn's office, Larkin told Walsh that the Captain had ordered him home. (RT 625:13-20.) He did not subsequently take the issue up with the Medical Liaison section of the LAPD, because he thought that this might be considered as going outside the chain of command and that it could lead to disciplinary consequences. (RT 909:11-912:2.)

Captain Aborn herself only "vaguely recalled" the meeting with Officer Larkin that morning and could not "recall any specifics." (RT 1204:25-1205:3.) She did, however, recall reviewing the doctor's note. (RT 1205:4-14.) Asked whether Officer Larkin was accommodated when he came back to work in January 2005, she testified about the outcome as follows: "My independent recollection is these [papers, including the doctor's note] were presented to me and I found these restrictions so significant that I could not allow him to return to work because I could not

guaranty that I could provide him a low stress position.” (RT 1208:8-21.) In her view, every job within the LAPD has the potential to cause stress. (RT 1252:20-1253:6.)

Captain Aborn did not doubt that Officer’s Larkin’s disability was genuine. At trial, she testified that hypertension was the root cause. (RT 1259:11-26.) She said that three doctors — including the City’s own doctor — had found that to be the case. (*Ibid.*) She did not indicate that she had thought otherwise in January 2005.

Captain Aborn confirmed that she sent Officer Larkin home. (RT 1209:1-3.) She also confirmed that she knew that while he would receive pay for a while, he would at some point stop being paid. (RT 1209:20-23.) However, she maintained that she had not made a permanent determination that he would not be able to come back to work as a police officer for the LAPD. (RT 1353:16-21.)

The doctor’s note that Officer Larkin handed in that morning bore a handwritten annotation saying: “1/18/05 can not accommodate per Capt. Aborn.” (App. 63 [trial exhibit 8, p.23].) Walsh testified that it was she who had written that. (RT 1090:13-28.) But Walsh herself played no part in the decision. (RT 1091:10-14.) She testified that it was solely Captain Aborn’s decision. (RT 1091:15-17.)

Captain Aborn did not ask Walsh to find out if there were any jobs

available. (RT 1091:20-22.) Moreover, Captain Aborn herself testified that she did not interview incumbents performing any jobs to find out whether their job duties matched what Officer Larkin could do in January 2005. (RT 1241:20-1242:1.)

**8. The issues of whether Larkin’s condition was temporary or permanent and whether he had filled in the right paperwork were not behind the fact that he was not accommodated**

The issue of whether Officer’s Larkin’s disability was temporary or permanent did not drive the decision about whether he could be accommodated. Captain Aborn confirmed that the issue with regard to accommodation was *not* whether a disability was temporary or permanent, but, rather, whether there was a job that could fit the disability. (RT 1255:12-1257:14.) Likewise, Walsh testified that she had never come across a situation where whether there would be an effort to accommodate a restriction depended on whether that restriction was temporary or permanent. (RT 1115:15-25.)

Another issue that was not a factor was whether Officer Larkin had completed all the LAPD paperwork formalities for someone in his position. Walsh was asked at trial about paperwork that officers in Larkin’s position needed to fill out. Referring to a form titled “Request for Disability/Medical Accommodation,” she testified that she had never actually seen that form

completely filled out and that it was not even a form she would give out in 2005 to injured officers requesting accommodation. (RT 1093:1-1094:6; App. 43 [trial exhibit 1, p.9].)

Soon afterwards, she went even further saying: “It wasn’t used. I never recall seeing it.” (RT 1095:10-13.) Captain Aborn agreed that completion of that form was *not* required for the Department to have found a job for Officer Larkin. (RT 1223:18-1224:5.)

**9. Larkin’s doctor felt unable to change the restrictions**

Officer Larkin discussed with Dr. Maddex what Captain Aborn had told him, but the doctor explained that he could not change the work restrictions. (RT 652:20-653:4.) In Dr. Maddex’s opinion, the unpredictable nature of police work involving the public or being on the street made such roles medically unsuitable for Larkin. (RT 340:11-24.) Dr. Maddex considered that “any job in the station that’s not the first point person at the front desk who greets all comers would be a reasonable accommodation.” (RT 340:25-341:8.)

During his trial testimony, Dr. Maddex gave a number of examples of suitable accommodations: Work at a desk involving filing reports, making phone calls, and contacting witnesses; handing out equipment, such as guns, to officers in a property room; collecting urine samples from other officers (for drug testing purposes); processing subpoenas that are served on police

officers (which involves accepting and reviewing them, contacting the officers, and coordinating dates for court appearances); and other desk jobs involving filing reports and answering phone calls. (RT 342:8-344:7.)

Dr. Maddex testified that it was common in such circumstances for the employer to contact him to discuss the employee's restrictions. (RT 346:8-24.) Had he been contacted, he would have been willing to explain how Officer Larkin's medical restrictions impacted his ability and inability to perform certain types of work. (RT 347:1-5.) However, he never was contacted by any official from the LAPD about the medical restrictions he placed in January 2005. (RT 346:3-7.)

**10. There was undisputed evidence about a specific vacancy that was suitable for Larkin in January 2005**

At trial, Officer Larkin identified a range of jobs he could have done at that time — going back to the detective desk, in-house training, kit room duties, subpoena control, and risk management. (RT 626:5-627:1.) As noted earlier, the work at the detective desk did involve some public contact. (RT 606:28-607:10.) But the requested accommodation did not exclude *any* public contact — it specifically allowed for a “little.” (App. 63 [trial exhibit 8, p.23].)

Moreover, there was undisputed evidence that there was at least one *specific vacancy* at that time for which a supervisor was *recommending*

Officer Larkin and which would have been a suitable accommodation. The supervisor of the detective desk between 2003 and 2005 was Detective Neel. (RT 75:1-12, 76:14-16.) Detective Neel knew Larkin from the latter's time at the desk. (RT 75:21-27.) He described Larkin as a "godsend" in terms of his job performance and thought that he was able to do the job of two people. (RT 79:20-80:2.)

Detective Neel testified that there was a large shortage of detectives and there were vacancies. (RT 77:9-18, 81:4-19.) So on his next working day after being told by Officer Larkin that he was being sent home, Detective Neel asked Captain Aborn whether Larkin could, instead, return to the detective desk, where — he said — he would be able to fill the duties of two people. (RT 81:20-82:12, 82:15-18.) The answer from Captain Aborn was: "No." (RT 82:13-14.)

**11. The Department did not follow its own procedures to determine whether Larkin could be accommodated**

Trial exhibit 2 consisted of paperwork that should have been filled out when there was a determination being undertaken to find out whether an injured officer could be reasonably accommodated. (RT 1095:22-1097:8; App. 48-54.) In February 2006 — a little over a year after Captain Aborn told Larkin that his disability could not be accommodated — Medical Liaison sent Walsh blank forms with respect to Larkin. (RT 1098:6-9,

1099:3-11.) Walsh passed them on to the Captain, the adjutant (the Captain's right-hand person), or to Larkin's supervisor. (RT 1102:5-9.) By then, Captain Aborn was no longer in charge of Northeast Division, having been transferred. (RT 1107:13-25.)

Walsh testified that she was never asked to fill out the form, that she did not know whether it had been filled out, and that the correct procedure if it had been filled out would have been for her to have got it back. (RT 1102:10-1103:7.) She did, however, think she had probably earlier made Captain Aborn aware of the need to fill out the form. (RT 1104:28-1105:4.)

Lieutenant Leslie Lutz served for almost 38 years in the LAPD before retiring. (RT 85:11-15, 86:6-16.) He had authored the LAPD policy for the handling of medical accommodations, which was effective in January 2005. (RT 92:11-93:11; App. 35-47 [trial exhibit 1].)

Lieutenant Lutz testified that part of what was required was something called the "interactive process," which requires a supervisor trying to handle a reasonable accommodation request to interview people holding certain positions — and their supervisors — to determine the suitability of such positions for the person seeking an accommodation. (RT 97:2-99:6.) (As noted later in this brief, that was actually required not just by the internal LAPD procedures, but by the California Fair Employment and Housing Act.) He further testified that in Officer Larkin's case, the LAPD did not

follow its own policies. (RT 107:21-109:12.)

Walsh agreed that she did not complete the interactive process with respect to Officer Larkin and did not know whether it ever was completed by anyone else. (RT 1105:13-1106:8.)

Lieutenant Lutz testified that the LAPD had never had a policy that it could not — or would not — accommodate an officer whose restriction requires a “low stress” environment. (RT 115:26-116:7.) Hypertension was viewed by the police department as a disabling condition. (App. 37 [trial exhibit 1, p.3].)

Lieutenant Lutz testified that what Officer Larkin needed to do in order to request reasonable accommodation was to report to the workplace, present a doctor’s note to his supervisor outlining the restrictions, and state whether he was available to come back to work within those restrictions. (RT 302:9-21.) That should have triggered the interactive process.

Lieutenant Lutz believed that Larkin had satisfied all of those requirements in January 2005. (RT 302:22-303:6.)

Asked about the paperwork that internal rules apparently required relating to requests for accommodations, but which was not, in fact, completed by Officer Larkin, Lieutenant Lutz confirmed the testimony of Captain Aborn and Walsh that, in practice, this was seldom, if ever, used. (RT 487:1-23.) Furthermore, assuming that Larkin’s restrictions did not

change, he was not obliged to renew or restate his request once it was made. (RT 304:4-12.)

**12. It was undisputed that the LAPD was moving toward a policy that *all* officers should be capable of performing *all* police functions**

Lieutenant Lutz testified that he had conversations with LAPD Chief Bratton in 2005 and 2006 in which the Chief expressed a desire to rid the Department of “light duty” officers. (RT 466:10-23.) During argument on a motion for nonsuit, counsel for the City said this testimony by Lieutenant Lutz showed that Chief Bratton’s “goal and hope” was “that all police officers in LAPD be capable of doing all of those [police] functions,” which counsel identified as including patrolling the community, and, if necessary, pursuing, arresting, and searching people. (RT 1373:17-27.) Counsel said that this was the “whole point of having police officers.” (RT 1373:17-18.) This amounted to an endorsement by the City at trial that Lieutenant Lutz had properly described the LAPD’s position as relayed by Chief Bratton.

Captain Aborn confirmed that as of January 2005, Chief Bratton had communicated his concern to her and other command officers about the large number of restricted-duty personnel within the LAPD. (RT 1203:25-1204:5.)

**13. Larkin was unofficially advised that he should retire**

Two days after he went home, Officer Larkin was visited at his home

by two police officers — one a Lieutenant — who told him that they had come to see how he was doing. (RT 629:27-630:19.) The Lieutenant told him he should go and see the Department psychologist. (RT 630:26-28.) Soon after that, Larkin received a phone call from Dr. Newquist, the Chief Psychiatrist from the LAPD. (RT 631:11-16.) Dr. Newquist wanted Larkin to come in and see him. (RT 632:1-14.)

Officer Larkin went to see Dr. Newquist as requested. (RT 632:15-16.) Dr. Newquist told him that the LAPD Chief was trying to get rid of sick and injured personnel, adding that he could get into trouble for revealing that. (RT 632:26-633:5.) Dr. Newquist suggested that Officer Larkin apply for a medical disability retirement. (RT 633:9-12.) However, Officer Larkin did not consider that to be an order or directive. (RT 906:26-907:4.)

Earlier, Officer Larkin had visited a union official and received the same advice — essentially, that the Department wanted to get rid of “light duty” personnel and that he should think about taking retirement. (RT 627:2-629:26.) But, again, he did not take that as an “order” from the LAPD itself. (RT 905:9-906:13.)

**14. Larkin applied for a medical disability pension after finding that he was up against a brick wall**

Officer Larkin did not pursue the retirement option immediately. (RT 633:16-18.) He continued to try to resolve the situation. (RT 633:18-19.) But

on February 21, 2005, after meeting with negative reactions, he filed for a medical disability pension. (RT 633:19-25.) He did so because he felt that he was being forced into retirement and that he was running into a brick wall. (RT 633:26-634:10.) The alternative was a future with neither work nor income. (RT 634:11-20.)

When he applied for retirement, Officer Larkin indicated on the form that he was unable for medical reasons to perform the duties of a police officer — which, in essence, was what he had been told — but he testified at trial that he, personally, felt that he *could* perform some, although not all, duties. (RT 912:23-915:28.) That was entirely consistent with his request for accommodations.

Captain Aborn heard about Officer Larkin’s application soon after it was made and concluded that he would not be coming back to work. (RT 1353:22-1354:20.) But she claimed that she did not — either in January 2005 or subsequently — have any intention to “rid” the Department of him. (RT 1354:21-25.)

Asked at trial why he had never gone back to ask Captain Aborn to reconsider after the meeting in January 2005, Officer Larkin replied: “LAPD is a paramilitary organization. It was drilled into us in boot — in training, in recruit camp, for six months, that you don’t question the orders of your superiors, especially a commanding officer of the station, or commanding

officer of patrol, or a captain. If a captain gives you an order to do something, you do it. That's it.... Captain Aborn gave me an order and I followed it. She was the top of the food chain. I'm pretty much the low rung of the ladder. And I had no authority to question her judgment.” (RT 638:8-22.)

**15. Larkin made clear to the Pensions Board that it was not his choice to retire, while the LAPD told the Board that it did not have a job for him**

At the hearing before the Board of Fire and Police Pension Commissioners at which his retirement application was considered, Officer Larkin — through his attorney — made it clear that retirement was *not* his preferred choice. His attorney told the Board: “[T]he Department’s not allowing him to return to work. *It’s not his choice, it’s their choice.* And I think [that] there has [to be] some reference to this.” (RT 1073:20-1074:6; App.72-73 [trial exhibit 110, pp.56-57, emphasis added].)

Moreover, Captain Lance Smith — the officer-in-charge of the LAPD’s Medical Liaison section — told the Board that the Department did *not* have a job for Officer Larkin, confirming what Captain Aborn had told Larkin earlier. (RT 1070:17-1073:19, 1399:13-1400:27; App. 70-71 [trial exhibit 110, pp.50-51].) This was because of the medical recommendation

that Larkin perform administrative duties and because he could not return to the field. (RT 1416:24-1417:25.)

Captain Smith explained at trial that his view was that the decision “not to create a position” was a matter of supporting Officer Larkin’s decision to retire, rather than forcing him to retire. (RT 1419:18-23.) He said that this represented a change from previous LAPD policy, when the Department would oppose pension applications in circumstances where they felt a disability could be accommodated. (RT 1420:28-1421:10.) Previously, he said, the position was “no matter what the circumstance, we will always have a position for you.” (*Ibid.*) According to Captain Smith’s trial testimony, the *only* reason the Department didn’t have a job for Larkin was because the policy was not to oppose officers who sought a disability retirement. (RT 1427:4-10.)

Officer Larkin could have withdrawn his disability pension application while it was pending, but never did. (RT 1515:8-23.) But nor did the LAPD try to accommodate him during that time. It was undisputed that throughout the period leading up to the approval of the pension — while Larkin remained a member of the LAPD — the Captains of his division received regular reports stating that he was not at work and they knew that the reason for that was the medical restriction that, in the judgment of the

Department, could not be accommodated. (RT 1127:1-1128:7.) But nowhere in the record is there any evidence of an offer to accommodate him.

Moreover, during the period of roughly six months between the Board hearing at which Captain Smith testified and the time when the disability pension was actually approved by the Board, the LAPD did not try to come up with a job for Officer Larkin, despite his lawyer's confirmation at the hearing that it was *not* his choice to head up the retirement path. (RT 1074:7-18.) Larkin testified that during that time, he would have gone back to work in a heartbeat if he had been given the chance. (RT 1074:19-24.)

Captain Smith testified that he had never talked to Officer Larkin, although he had made some effort to contact him. (RT 1406:2-24.) He said that had Larkin told him at that time that he wanted to return to work, he would have looked into it and engaged in the "interactive process." (RT 1406:28-1407:19.) That is hard to square with the fact that Captain Smith knew from the hearing — if from no other way — that Officer Larkin *did* want to return to work.

Moreover, Captain Smith acknowledged having seen early in 2006 a letter that Larkin sent to a Los Angeles City Council member in January of that year, in which he — Larkin — complained of being "forced to retire" and of not being accommodated on account of his injuries. (RT 1410:14-1411:25; App. 64-65 [trial exhibit 14].) Asked to explain how it was

that he did not know that Larkin wanted to work even though he had read that letter, Captain Smith replied that what people write in letters was not, in his experience, always what they actually think when one sits down and talks with them. (RT 1412:4-24.)

**16. Larkin’s pension was approved with the Board making findings that the LAPD did not have a position for him on account of his service-related injuries**

Officer Larkin’s disability pension was approved in November 2006. (RT 639:27-640:2.) The Board of Fire and Police Pension Commissioners made findings of fact that included the following: (1) Officer Larkin had been examined by three licensed, practicing physicians in the medical specialties of cardiology, orthopedics, and neurology; (2) the LAPD did not have a position available to accommodate Larkin’s medical restrictions; and (3) Larkin was disabled and his disability was “due to his service related injuries.” (RT 1368:21-1369:24; App. 67-68 [trial exhibit 110, pp.4-5.]

The pension that Officer Larkin ended up getting was 45 percent of his final salary. (RT 1075:9-18.) At the time of trial, he was unemployed. (RT 605:3-4.) He was still being treated for high blood pressure and hypertension by Dr. Maddex. (RT 345:23-28.)

As a retired officer, Larkin is still allowed to carry a badge, a firearm, and police identification. (RT 608:14-18.)

## ARGUMENT

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### **A. THE TRIAL COURT’S LEGAL CONCLUSIONS SHOULD BE REVIEWED DE NOVO AND ITS FACTUAL FINDINGS FOR SUBSTANTIAL EVIDENCE**

In this appeal, Officer Larkin challenges the trial court’s findings with respect to all three of his causes of action. The appeal calls for a mixed standard of review. In part, the review is for substantial evidence, to the extent that Larkin argues that the court reached factual conclusions for which there was no substantial evidence and that it expressly found an absence of *any* evidence in Larkin’s favor in a key area in which there was plenty of such evidence.

However, part of Larkin’s argument concerns what the LAPD’s obligations to him actually *were* under the law. The trial court applied what Larkin contends were incorrect standards. Issues of law are subject to de novo review. (*Monterroso v. Moran* (2006) 135 Cal.App.4th 732, 736.)

### **B. LARKIN SATISFIED ALL THE ELEMENTS OF HIS FIRST CAUSE OF ACTION FOR DISABILITY DISCRIMINATION**

#### **(i) The Fair Employment and Housing Act is to be liberally construed**

Larkin’s first cause of action was for employment discrimination in

violation of Government Code section 12940, subdivision (a). That section is part of the California Fair Employment and Housing Act (“FEHA”), which is found in Part 2.8 of the Government Code, beginning with section 12900 and ending with section 12996.<sup>1</sup> (Govt. Code, § 12900.) The Act — by its own terms — is to be liberally construed. (Govt. Code, § 12993(a).) And because FEHA is remedial legislation, which declares the “opportunity to seek, obtain and hold employment without discrimination” to be a civil right, and expresses a legislative policy that it is necessary to protect and safeguard that right, a court must construe the FEHA broadly, not restrictively. (*Vernon v. State* (2004) 116 Cal.App.4th 114, 123.)

Section 12940, subdivision (a), provides: “It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:.. (a) For an employer, because of the... physical disability... of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to

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<sup>1</sup> All further statutory citations are to the Government Code unless stated otherwise.

discriminate against the person in compensation or in terms, conditions, or privileges of employment.”

Section 12940, subdivision (a)(1), qualifies this by allowing for exceptions where the employee’s physical disability means that he or she is “unable to perform his or her essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger his or her health or safety or the health or safety of others even with reasonable accommodations.”

**(ii) There are eight elements of a cause of action for disability discrimination**

The elements of a cause of action for disability discrimination under section 12940, subdivision (a), are as follows:

1. That defendant was an employer;
2. That plaintiff was an employee of defendant;
3. That defendant knew that plaintiff had a physical condition that limited a major life activity;
4. That plaintiff was able to perform the essential job duties with reasonable accommodation for his condition;
5. That defendant took an adverse employment action toward plaintiff;

6. That plaintiff's physical condition was a motivating reason for the adverse employment action;
7. That plaintiff was harmed; and
8. That defendant's conduct was a substantial factor in causing plaintiff's harm.

(See *Judicial Council of California Civil Jury Instruction 2540* [Disability Discrimination, Essential Factual Elements].)

Larkin will review each of those eight elements in turn as they apply to this case.

**(iii) First element: The City is an employer**

It is undisputed that the City of Los Angeles — of which the LAPD is part — is an employer.<sup>2</sup> So there is no doubt that Larkin satisfied the first element of his first cause of action.

**(iv) Second element: Larkin was an employee of the City**

It was also undisputed that Officer Larkin was an employee of the City. Some authority holds that satisfactory job performance is also an element of an employment discrimination plaintiff's prima facie case. (*Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 199-200.) Larkin amply satisfied that additional element. His performance evaluation was outstanding. (RT 608:25-609:26; App. 55-60 [trial exhibit

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<sup>2</sup> For the purposes of this argument, the City and the LAPD are synonymous.

5].) Even Captain Aborn — who sent him home — described his work as “competent.” (RT 1246:6-25.)

(v) ***Third element: The City knew that Larkin had a physical condition that limited a major life activity***

There are two parts to this element — the existence of a physical condition covered by FEHA and the City’s knowledge of it. For the purposes of FEHA, “physical disability” includes — but is not limited to — any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that both affects various body systems, including cardiovascular, and limits an individual’s ability to participate in major life activities. (Govt. Code, § 12926(k)(1).) “Major life activities” for the purposes of FEHA include employment. (*Maloney v. ANR Freight System, Inc.* (1993) 16 Cal.App.4th 1284, 1287.)

By statute, heart disease is included in the range of possible physical disabilities.<sup>3</sup> (Govt. Code, § 12926.1(c); .) Furthermore, hypertension is a disability under FEHA. (*American Nat’l Ins. Co. v. Fair Employment & Housing Comm’n* (1982) 32 Cal.3d 603, 609 [decided under former statute].)

The Legislature has stated its intent that “physical disability” be

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<sup>3</sup> FEHA contains similar provisions covering what are referred to as “medical conditions.” However, that term refers to either cancer or genetic characteristics. (See Govt. Code, § 12926(h); see also Cal.Code Regs., Tit. 2, § 7293.6(g).) Thus, the provisions covering “physical disabilities” are more appropriate to the present case.

construed so that applicants and employees are protected from discrimination due to an actual or perceived physical impairment that is disabling, potentially disabling, or perceived as disabling or potentially disabling. (Govt. Code, § 12926.1(b).)

Here, it was undisputed that Officer Larkin had a medical condition that prevented him from performing the full duties of a police officer. (RT 340:6-10; App. 63 [trial exhibit 8, p.23]; RT 1368:21-1369:24; App. 67-68 [trial exhibit 110, p.4-5].) The City, to its credit, has never suggested that Larkin's condition was anything other than very real.

The City cannot try to argue that Larkin's condition — real though it was — was not *sufficiently* limiting to require accommodation. Quite apart from the fact that there would be no evidence in the record to support such a conclusion, FEHA requires only that the disability “limit” a person's activity, in contrast with the federal Americans with Disabilities Act (“ADA”), which restricts its coverage to physical or mental conditions that “substantially limit” a major life activity. “This distinction is intended to result in broader coverage under the law of this state than under that federal Act.” (Govt. Code, § 12926.1(c),(d)(2); see also *Bryan v. United Parcel Service, Inc.* (N.D.Cal. 2004) 307 F.Supp.2d 1108, 1115 [FEHA designed to render broader protection for the rights of the disabled than the ADA].)

Larkin acknowledges that in January 2005, it may have appeared

unclear to the City whether his condition was temporary or permanent. For example, the doctor's note offered in January 2005 spoke of "temporary accommodations," even though his doctor testified at trial that there was a permanent underlying condition by this time. (RT 339:13-17, 344:17-25, 345:3-16; App. 63 [trial exhibit 8, p.23].)

But this distinction is immaterial to the issue of whether or not the City's obligations under FEHA were triggered. It might have been a factor if the suit had been under federal law, but not so under California law. "Because the FEHA requires only a "limitation" (not a "substantial limitation") on a major life activity, individuals with *short-term or temporary conditions* may qualify for protection under the FEHA though the same condition likely would not qualify under the ADA." (California Practice Guide: Employment Litigation (Rutter) § 9:2093.1, citing to *Diaz v. Federal Express Corp.* (C.D.Cal. 2005) 373 F.Supp.2d 1034, 1051-1052 [unlike ADA, FEHA has no durational requirement for evaluation of whether condition constitutes disability].)

Furthermore, it was undisputed that whether a condition is temporary or permanent is not a factor in how the LAPD processes accommodation requests. (RT 1255:12-1257:14 [Captain Aborn testimony]; 1115:15-25 [Walsh testimony].) So the "temporary versus permanent" factor is simply not an issue.

As noted above, the second part of this element deals with the City's knowledge of Officer Larkin's condition. It was undisputed that when Larkin reported for duty in January 2005, he had with him a doctor's note explaining his condition, which was given to his commanding officer, as well as to the person in his division who processed these types of matters. (RT 340:6-10, 622:1-14, 623:5-10, 624:11-17, 657:5-7, 1087:27-1088:4, 1088:11-16, 1089:14-24, 1261:19-21; App. 63 [trial exhibit 8, p.23].)

It was, therefore, undisputed that the City knew of Larkin's condition in January 2005. There is no finding in the statement of decision to the contrary. (App. 102-104.)

Furthermore, no finding adverse to Larkin can be implied on this element. Larkin's request for a statement of decision included a request for a finding as to whether the City knew that Larkin had a physical condition that limited his ability to work. (App. 88:18-19.) Furthermore, his objections to the proposed statement of decision included an objection to the fact that it did not make requested findings. (App. 94:17-23.)

A sufficient objection to a proposed statement of decision avoids the inference that the findings in question support the judgment — i.e., so long as the defect was timely raised, “it shall not be inferred on appeal... that the trial court decided in favor of the prevailing party as to those facts or on that issue.” (Code Civ. Proc., § 634; see *Marriage of Arceneaux* (1990) 51 Cal.3d

1130, 1133.) Therefore, no implied finding can be construed from the statement of decision as signed, which — as noted above — was silent on this issue.<sup>4</sup> (Code Civ. Proc., § 634; see *Marriage of Arceneaux*, *supra*, 51 Cal.3d at 1133.)

Thus, both parts of the third element of Larkin’s first cause of action were satisfied.

**(vi) *Fourth element: Larkin was able to perform the essential job duties with reasonable accommodation for his condition***

The court wrote in its statement of decision: “Plaintiff failed to establish, or even to present evidence, that he was capable of performing the essential functions of the job of Los Angeles Police officer at any time during the relevant time period. Plaintiff’s first cause of action therefore fails as a matter of law.” (App. 102:24-26.)

The statement of decision cited to *Green v. State* (2007) 42 Cal.4th 254, 257-258, 260-266, for the proposition that it was Larkin’s burden to establish that he was capable of performing the essential functions of a police officer. It was, indeed, Larkin’s burden to do so. But he carried — indeed, exceeded — that burden with evidence that included the following:

- ▶ Dr. Maddex — Larkin’s doctor — provided a number of examples

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<sup>4</sup> The statement of decision was drafted by the City, as the caption reveals. (App. 102:1-5.) The court signed the statement of decision making no changes, other than striking out the word “proposed.” (App. 102-104.)

of specific jobs that Larkin could do. These included: Working at a desk involving filing reports, making phone calls, and contacting witnesses; handing out equipment, such as guns, to officers in a property room; collecting urine samples from other officers; processing subpoenas that are served on police officers (which involves accepting and reviewing them, contacting the officers, and coordinating dates for court appearances); and other desk jobs involving filing reports and answering phone calls. (RT 342:8-344:7.)

- ▶ Larkin himself identified a range of jobs he could have done at that time — going back to the detective desk, in-house training, kit room duties, subpoena control, and risk management. (RT 626:5-627:1.)
- ▶ Then there was also the testimony of Detective Neel — the supervisor of the detective desk between 2003 and 2005 — that he had a job available that fitted in with Larkin’s requested accommodations and for which Larkin was qualified. (RT 75:1-12, 75:21-27, 76:14-16, 77:9-18, 79:20-80:2, 81:4-82:18.) Indeed, Detective Neel testified that Larkin was capable of doing the job of *two* other officers in such a position. (RT 79:20-80:2.)
- ▶ Lieutenant Lutz confirmed the fact that there was a need for the

type of work that “light duty” personnel could do. (RT 467:3-26.)

He went as far to say that “the station wouldn’t be able to run without” them. (RT 467:20-25.)

Furthermore, the statement of decision did not make any adverse credibility determinations with regard to either Larkin or any of the witnesses on whom he relied. (App. 102-104.) So this isn’t a case where one could say that even though the party that lost at trial did present evidence, the finder of fact was not obliged to believe that evidence.

Rather, the fact that the court found that there was *no* evidence indicates that it did not *consider* the evidence in reaching its decision. That in itself is error. A court is plainly not obliged to *believe* evidence. But it is required to *consider* it. (Code Civ. Proc., § 631.8, subd. (a) [“The court as trier of the facts *shall* weigh the evidence...” (emphasis added); California Practice Guide: Civil Trials and Evidence (Rutter) § 16:12 [judge in bench trials has “duty” to weigh the evidence].) Simply stating that there was *no* evidence as to a material issue — when, regardless of the credibility, such evidence *was* present — cannot be consistent with the trial court’s duty to weigh the evidence. Logically, a court cannot weigh that which it fails to recognize exists.

That is one way of finding error with this part of the court’s decision. One can, however, also look at it another way. The trial court’s finding that

there was no evidence that Larkin could “perform the essential functions of the job of police officer” would be true only if one defined “the essential functions of the job of police officer” as comprising *all* of the functions carried out by *any* police officer in good health. But to adopt that approach is — in effect — to exclude the *possibility* of a job involving only desk-work and other back-room, light-duty assignments in a police station.

In other words, to adopt that definition is, in essence, to say that there can *never* be a reasonable accommodation for a police officer who is injured or in poor health. Larkin was, indeed, treated as though that were the case. But if that was the premise on which the court was reviewing the case, then it was applying an incorrect legal standard — *incorrect, because it would be in conflict with what FEHA demands*. The LAPD was *obliged* — by law — to try to make a reasonable accommodation. (Govt. Code, § 12940.)

Viewed this way, the issue presented is one of law for this Court’s independent review. Viewed the other way, the issue is one of substantial evidence. *Either way, there was error*.

The point of “reasonable accommodation” is that an employee suffering from disability is a “qualified individual” under FEHA if he or she can perform the essential functions of a position to which *reassignment* is sought, *rather than* the essential functions of the existing position. (*Perez v. Proctor and Gamble Mfg. Co.* (E.D.Cal. 2001) 161 F.Supp.2d 1110, 1121.)

(Larkin will develop this point with further authority in the argument concerning the second cause of action.)

Not only did Officer Larkin present evidence that he could do the job of a police officer — providing that reasonable accommodations were made — but there was no evidence to the contrary, other than Captain Aborn’s contention that *all* jobs potentially entailed some stress. But that glib assertion missed the point. Larkin was not requesting an accommodation that would guarantee the complete absence of *any* stress. Dr. Maddex’s note requested a “low-stress position,” not a *zero*-stress one. (App. 63 [trial exhibit 8, p.23].) Larkin was prepared to return to the detective desk job, as well as perform various other back-office roles, thereby signaling that these *were* within an acceptable stress level. (RT 626:5-627:1.)

The notion that no accommodation *could* be made — even if there was willingness, in principle, to do so — does not withstand scrutiny. This is because the undisputed evidence at trial was that, in the past, the Department *had* made accommodations in these circumstances. (See, e.g., RT 1420:28-1421:10 [trial testimony by Captain Smith, Medical Liaison head, that the Department had moved away from its position of wanting to make accommodations in all cases].) In other words, the undisputed evidence at trial was that the decision not to come up with an accommodation was a *policy* choice, *not* a practical necessity (notwithstanding the fact that it was

inconsistent with the published LAPD policies that were supposedly in effect).

Indeed, as noted in the statement of facts, there was evidence at trial from a number of sources that the Department, at the behest of its chief, had begun trying to rid itself of light-duty officers. (See, e.g., RT 466:10-23 [testimony by Lieutenant Lutz].) Moreover, during argument to the trial court on a motion for nonsuit, counsel for the City said the testimony by Lieutenant Lutz's showed that Chief Bratton's "goal and hope" was "that all police officers in LAPD be capable of doing all of those [police] functions," which counsel identified as including patrolling the community, and, if necessary, pursuing, arresting, and searching people. (RT 1373:17-27.) Counsel for the City said that this was the "whole point of having police officers." (RT 1373:17-18.)

This amounted to an endorsement by the City at trial that Lieutenant Lutz had properly described the LAPD's position with regard to not wanting to keep light-duty injured officers. But the problem with that position is that it was unlawful, in that it trounced the Department's obligations under FEHA.

Captain Aborn claimed that she never had any intention to "rid" the Department of Officer Larkin. (RT 1354:21-25.) But Larkin does not suggest that this was something personal directed against him in particular. To

support a claim of employment disability discrimination under FEHA, an employee need only show animus directed at the *disability*; an employee need not show employer “had it in for him.” (*Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 54, fn. 14.) “It is of no moment that the employer has no ill will against the plaintiff (or anyone else with [the same disability]).” (*Ibid.*)

**(vii) *Fifth element: The LAPD took an adverse employment action toward Larkin***

Turning to the fifth element of Larkin’s first cause of action, an “adverse employment action” under FEHA occurs when an employment action materially affected the “terms and conditions of employment,” with that term being liberally construed. (*Yanowitz v. L’Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1049.)

Here, it was undisputed that Officer Larkin was told that he could not be accommodated on the basis of the doctor’s note and accommodations request as submitted. (RT 624:17-625:7, 1208:8-21.) And it was undisputed that Officer Larkin was then sent home — *that was the interpretation of both Larkin himself and Captain Aborn.* (RT 624:17-625:7, 625:13-20, 1209:1-3.) Sending someone home against their wishes is surely an action that materially affects the terms and conditions of employment.

Larkin did not walk away from the job. He was ordered to go home.

Could he have gone back and asked for reconsideration? Maybe. But the law does not require him to have done so in order to preserve his claims under FEHA. He was — as his personnel records indicate — a “mild mannered” person. (App. 58 [trial exhibit 5, p.4].) He was also, as he explained, operating in an environment where subordinates are not expected to question the orders of a superior. (RT 638:8-22.)

Nonetheless, the statement of decision made a finding that the City “did not engage in any adverse employment action against plaintiff.” (App. 103:1-2.) That finding is unsustainable. Either it fails under the substantial evidence test, because the undisputed evidence put forward by both sides shows the existence of an adverse employment action. Or there was error as a matter of law if the finding rested on an incorrect definition of what constitutes an “adverse employment action.” So, again, there was error whichever standard of review is applied.

**(viii) *Sixth element: Larkin’s physical condition was a motivating reason for the adverse employment action***

Assuming that sending Larkin home did constitute an adverse employment action, it was undisputed that the reason for that action was Larkin’s physical condition. Captain Aborn said as much at trial: “My independent recollection is these [papers, including the doctor’s note] were presented to me and I found these restrictions so significant that I could not

allow him to return to work because I could not guaranty that I could provide him a low stress position.” (RT 1208:8-21.)

The trial court’s statement of decision did not contain any finding that Larkin was sent home for any reason other than his physical condition. Again, no implied finding can be construed, because Larkin requested a finding on this element and objected when none was made. (App. 88:24-25, 94:17-23; see: Code Civ. Proc., § 634; *Marriage of Arceneaux, supra*, 51 Cal.3d at 1133.)

Moreover, the City did not try to make any argument that the decision to send Larkin home was motivated by anything other than his physical disability. Put simply, “[i]f the employer cannot articulate a nondiscriminatory reason for the adverse employment decision, the plaintiff wins as a matter of law.” (*Caldwell v. Paramount Unified School Dist.*, *supra*, 41 Cal.App.4th at 204.)

**(ix) *Seventh element: Larkin was harmed***

The pension that Officer Larkin ended up getting was 45 percent of his final salary. (RT 1075:9-18.) At the time of trial, he was unemployed. (RT 605:3-4.) Plainly, he suffered harm as a result of the events complained of. These facts were not in dispute at trial.

The statement of decision did not contain any finding on this element, either. Once again, no implied finding can be construed, because Larkin

requested a finding on this element and objected when none was made. (App. 88:26, 94:17-23; see: Code Civ. Proc., § 634; *Marriage of Arceneaux*, *supra*, 51 Cal.3d at 1133.)

**(x) *Eighth element: The City’s conduct was a substantial factor in causing Larkin’s harm***

Larkin made clear — right up to the end — that retiring was not his choice. As his lawyer told the Board of Fire and Police Pension Commissioners: “[T]he Department’s not allowing him to return to work. *It’s not his choice, it’s their choice.*” (RT 1073:20-1074:6; App.72-73 [trial exhibit 110, pp.56-57, emphasis added].) At that point, the City could still have done something about it. Larkin still wanted to return to work. (RT 1074:19-24.) But it did not do so.

The term “substantial factor” has no precise definition, but “it seems to be something which is more than a slight, trivial, negligible, or theoretical factor in producing a particular result.” (*Espinosa v. Little Co. of Mary Hospital* (1995) 31 Cal.App.4th 1304, 1314.) Applying that definition, it is impossible to conclude other than that the City’s conduct was a substantial factor in causing Larkin’s harm.

Once again, the statement of decision did not contain any finding on this element. And, once again, no implied finding can be construed, because Larkin requested a finding on this element and objected when none was

made. (App. 88:27-28, 94:17-23; see: Code Civ. Proc., § 634; *Marriage of Arceneaux, supra*, 51 Cal.3d at 1133.)

**C. LARKIN SATISFIED ALL THE ELEMENTS FOR HIS  
SECOND CAUSE OF ACTION FOR FAILURE TO MAKE A  
REASONABLE ACCOMMODATION**

- (i) It is unlawful for an employer to fail without good cause to make reasonable accommodation for the known physical disability of an employee**

Larkin’s second cause of action was brought under Government Code section 12940, subdivision (m), which makes it unlawful for an employer “to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee.” That is qualified by an exception in the same subdivision allowing an employer to show “undue hardship.”

*(Ibid.)*

- (ii) Reasonable accommodations include changing work responsibilities or reassigning employees to vacant positions**

The elements for a cause of action for failure to provide a reasonable accommodation are quite similar to those discussed above for disability discrimination. (*See* Judicial Council of California Civil Jury Instruction 2541.)

That said, one significant difference is that a plaintiff need not establish that he suffered adverse employment action due to his disability in order to state a reasonable accommodation claim under FEHA; rather, the employer's failure to reasonably accommodate disabled individual is violation of FEHA *in and of itself*. (*King v. United Parcel Service, Inc.* (2007) 152 Cal.App.4th 426, 442; *Perez v. Proctor and Gamble Mfg. Co.*, *supra*, 161 F.Supp.2d at 1119; *see also* Judicial Council of California Civil Jury Instruction 2541 [no such element listed].) Thus, even if this Court were to conclude that the "adverse employment action" element was not satisfied with respect to Larkin's first cause of action, that would not bar his second.

Other than that, and using the CACI jury instructions as a guide to the elements, the main distinguishing one with this cause of action is the sixth: "That defendant failed to provide reasonable accommodation for plaintiff's physical condition." (Judicial Council of California Civil Jury Instruction 2541.)

"Reasonable accommodation" of a plaintiff's disability under FEHA means a modification or adjustment to the workplace that enables the employee to perform the essential functions of the job held or desired. (*Scotch v. Art Institute of California-Orange County, Inc.* (2009) 173 Cal.App.4th 986, 1010.) CACI provides some examples of what this can

entail, which include “[c]hanging job responsibilities or work schedules” and “[r]eassigning the employee to a vacant position.” (Judicial Council of California Civil Jury Instruction 2542.) Similar examples appear in the FEHA regulations. (*Scotch v. Art Institute of California-Orange County, Inc.*, *supra*, 173 Cal.App.4th at 1010, citing to Govt. Code, § 12926, subd. (n); Cal.Code Regs., Tit. 2, § 7293.9, subd. (a); accord, 42 U.S.C. § 12111(9).)

There is nothing — *not a shred of evidence* — in the record that the City, in response to Larkin’s doctor’s note in January 2005, did either of the above or anything else to provide a “reasonable accommodation.”

“Reasonable accommodation,” within meaning of FEHA, is to be interpreted flexibly; the law and regulations “clearly contemplate not only that employers remove obstacles that are in the way of the disabled, but that they actively re-structure their way of doing business in order to accommodate needs of their disabled employees.” (*Sargent v. Litton Systems, Inc.* (N.D.Cal. 1994) 841 F.Supp. 956, 961.) The “hallmark” of FEHA with regard to accommodation is “flexibility.” (*Id.* at 962.)

Under FEHA, an employer’s responsibility to reassign a disabled employee who cannot be otherwise accommodated does not require creating a new job, moving another employee, promoting the disabled employee, or violating another employee’s rights under a collective bargaining agreement, but it does entail affirmative action; an employer has a duty to reassign a

disabled employee if an already funded, vacant position at the same level exists. (*Spitzer v. The Good Guys, Inc.* (2000) 80 Cal.App.4th 1376, 1389.)

Here, we know that there *was* a vacant position. Detective Neel’s uncontradicted testimony makes that clear. (RT 77:9-18, 81:4-82:18.)

Plaintiffs asserting disability discrimination claims and those asserting failure-to-accommodate claims under FEHA must both establish that they suffer from a disability covered by FEHA and that they are a qualified individual. (*Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 256.) But the law is clear that for the purposes of a claim for failure to make reasonable accommodations, “the plaintiff proves he or she is a qualified individual by establishing that *he or she can perform the essential functions of the position to which reassignment is sought, rather than the essential functions of the existing position.*” (*Ibid.* [emphasis added; decided under previous numbering system when subdivision (k) was the equivalent of what is now subdivision (m)].)

So the issue is not, as the trial court seemed to believe, whether Larkin could perform the essential functions of *any* police officer. *Obviously he couldn’t — otherwise there would be no need for accommodation.* The issue is whether there was some police officer position whose essential functions could be performed by him. And, as noted earlier, we know that there *was* — we know it from multiple parts of the record, including Larkin’s stated wish

to return to the detective desk, where he had served before, and Detective Neel's testimony.

Further authority for this interpretation of the City's obligations can be found in *McGregor v. National R.R. Passenger Corp.* (9th Cir. 1999) 187 F.3d 1113, a federal case dealing with the ADA. Because FEHA is modeled on the ADA, analogous federal cases are useful in deciding cases under FEHA. (*King v. United Parcel Service, Inc., supra*, 2007) 152 Cal.App.4th at 433, fn.3.)

In *McGregor*, the Ninth Circuit dealt with a case where an employer had repeatedly told an employee that she could not return to work or bid on any other position until she was "100% healed." (*McGregor v. National R.R. Passenger Corp.*, 187 F.3d at 1116.) The Ninth Circuit held that policies precluding employees from returning to work unless "100% healed" are *per se* violations of the ADA. (*Ibid.*) That makes perfect sense — requiring complete fitness is inherently inconsistent with making reasonable accommodations. And the policy applied in Larkin's case did, in effect, amount to a "100% healed" requirement.

The present case can be distinguished from another, quite recent, one that involved an injured police officer. In *Raine v. City of Burbank* (2006) 135 Cal.App.4th 1215, a police officer with a permanently injured knee appealed the fact that the City of Burbank refused to convert a temporary,

light-duty position at the front desk into a permanent one that could accommodate his injury. (*Id.* at 1217-1219.) Permanent appointments in that position had hitherto been reserved for civilian employees and the officer had not been willing to move into a civilian position. (*Id.* at 1226-1227.) Rather, he wanted the position to be reclassified to accommodate him. (*Id.* at 1223.) The holding of *Raine* was that the City was not required to do so. (*Id.* at 1223-1224.)

Here, however, Officer Larkin was not asking for any reclassification. Nothing in the record suggests that he was wanting to occupy a role that was reserved for civilians. He wanted to go back to a job he had done before — the one at the detective desk, or something equivalent — with no change in the job description.

The other major difference between *Raine* and the present case is that in *Raine*, the police department *did* engage in the “interactive process” to try to identify positions that would suit the injured officer. (*Raine v. City of Burbank, supra*, 135 Cal.App.4th at 1218-1219.) That is how these types of matters *should* be handled. In the present case, *no* such effort was made by the LAPD — that’s an issue to which this argument will return shortly when discussing Larkin’s third cause of action.

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**(iii) Officer Larkin requested an accommodation, even though this was not a required element of his claim**

Government Code section 12940, subdivision (m), does not specifically require that the employee request reasonable accommodation; it requires only that the employer know of the disability. (See *Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 950-951; but see *Avila v. Continental Airlines, Inc.* (2008) 165 Cal.App.4th 1237, 1252 [employee must request an accommodation].)

Here, any reasonable reading of the record shows that Larkin *did* request an accommodation — so any legal uncertainty as to whether he had to make that request is moot. The doctor’s letter he presented in January 2005 said that he was able to return to work with accommodations, which were identified as including “a low-stress position with little or no public contact.” (App. 63 [trial exhibit 8, p.23].) That, surely, constitutes a request to be accommodated along those lines. Captain Aborn’s testimony leaves no doubt that she took the letter in that way, even though she felt unable to grant the request. (See, e.g., RT 1208:8-21.)

**(iv) The trial court’s findings on the second cause of action are not supported by the record or the law**

The trial court made two findings with respect to the second cause of action. The first was that “Plaintiff failed to establish, or even to present

evidence, that he was capable of performing the essential functions of the job of a Los Angeles Police officer at any time during the relevant time period.” (App. 103:3-5.)

That was an identical finding to one relating to the first cause of action that has already been discussed. Larkin will not restate his analysis of the factual and legal flaws, save to say that the finding could only be true if one defined the essential duties of a police officer as being *all* the duties that may be carried out by *any* police officer — which would, in effect, be to preclude *any* form of accommodation for any disability, thereby violating the mandate of section 12940, subdivision (m).

The other finding was that “Defendant City of Los Angeles did not fail to accommodate any disability suffered by plaintiff.” (App. 103:7-8.) That, too, was the same as one of the findings relating to the first cause of action. It is undeniable — and it was undisputed — that the City did *not* accommodate Larkin. So the only meaning that could possibly be given to the contention that it did not “fail” to accommodate him was that it was not obligated to do so, and that not doing that which one doesn’t have to do is not “failing” to do it.

But it *was* obligated — that is what FEHA requires. “Under the FEHA (and the ADA) an employer is relieved of the duty to reassign a disabled employee whose limitations cannot be reasonably accommodated in his or

her current job *only* if reassignment would impose an “undue hardship” on its operations or if there is no vacant position for which the employee is qualified.” (*Spitzer v. The Good Guys, Inc., supra*, 80 Cal.App.4th at 1389, emphasis added.) Here, the City never argued “undue hardship.” And there *was* a suitable vacancy, as Detective Neel’s uncontradicted testimony established. So there was no excuse.

Moreover, had the City wished to rely on hardship, it needed to bear the burden of proof. Although FEHA does not require an employer to provide an accommodation that would produce undue hardship to its operation, a plaintiff need not initially plead or produce evidence showing that the accommodation would not impose an undue hardship on the employer; rather, the burden is on the employer to make a showing of undue hardship. (*Bagatti v. Department of Rehabilitation* (2004) 97 Cal.App.4th 344, 356.)

Furthermore, any argument that the City could not have made an accommodation because none was possible is belied by its own admissions that, in the past, its practice *would have been to make an accommodation in these circumstances* — see the earlier argument in the discussion of the first cause of action.

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**D. LARKIN SATISFIED ALL THE ELEMENTS FOR HIS  
THIRD CAUSE OF ACTION FOR FAILURE TO ENGAGE IN  
THE INTERACTIVE PROCESS**

- (i) It is unlawful for an employer to fail to engage in the  
“interactive process” in response to a request for reasonable  
accommodation**

Officer Larkin’s third cause of action was for failure to engage in the interactive process. This was based on Government Code section 12940, subdivision (n), which makes it unlawful “[f]or an employer or other entity covered by this part to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition.”

“The “interactive process” required by subdivision (n) is an informal process with the employee to attempt to identify a reasonable accommodation that will enable the employee to perform the job effectively.” (*Wilson v. County of Orange* (2009) 169 Cal.App.4th 1185, 1195.)

Generally, a disabled employee bears the burden of giving the employer notice of the disability, which notice then triggers the employer's

burden to take positive steps. (*Raine v. City of Burbank, supra*, 135 Cal.App. 4th at 122.) A letter from a doctor informing an employer that the employee has a disability is sufficient notice to trigger the obligation to initiate the interactive process. (*Rowe v. City & County of San Francisco* (N.D.Cal. 2002) 186 F.Supp.2d 1047, 1051.)

**(ii) A claim for failing to engage in the interactive process is distinct from one for failing to provide reasonable accommodation**

The unlawful employment practices relating to disabilities covered by FEHA are not limited to discrimination. (*Bagatti v. Department of Rehabilitation, supra*, 97 Cal.App.4th at 357.) An employee may also file a civil action based on the employer's failure to engage in the interactive process. (*Claudio v. Regents of the University of California* (2005) 134 Cal.App.4th 224, 243.) The failure to engage in the interactive process is an independently actionable unlawful business practice under FEHA. (*Smith v. International Brotherhood of Electrical Workers* (2003) 109 Cal.App.4th 1637, 1656.)

But there has been an apparent split of authority as to whether the employee must *also* prove that reasonable accommodation was possible before there is a violation for failure to engage in the interactive process. (Cf.: *Wysinger v. Automobile Club of Southern California* (2007) 157

Cal.App.4th 413, 424-425 [jury's finding that no reasonable accommodation was possible not inconsistent with its finding of liability for refusing to engage in interactive process]; *Nadaf-Rahrov v. The Nieman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 980-985 [employee who brings a section 12940(n) claim bears the burden of proving a reasonable accommodation was available before the employer can be held liable under the statute].)

A more recent case, *Scotch v. Art Institute of California-Orange County, Inc.*, *supra*, 173 Cal.App.4th 986, has attempted to synthesize the conflicting authority. According to *Scotch*, the state of the law is as follows: To prevail on a claim under section 12940, subdivision (n), for failure to engage in the interactive process, an employee must identify a reasonable accommodation that would have been available at the time the interactive process should have occurred. (*Id.* at 1018.) But an employee cannot necessarily be expected to identify and request all possible accommodations at the time of the litigated events, because employees do not have at their disposal the extensive information concerning possible alternative positions or possible accommodations which employers have. (*Ibid.*)

However, once the parties have engaged in the *litigation* process, the employee — in order to prevail — must *then* be able to identify an available accommodation that the interactive process should have produced. (*Scotch v. Art Institute of California-Orange County, Inc.*, *supra*, 173 Cal.App.4th at

1018.) The *Scotch* Court reasoned that this is because once litigation has begun, the employee has discovery tools available to learn what accommodations might have been discussed during the interactive process. (*Id.* at 1019.)

If one adopts the rule articulated in *Scotch*, Larkin should have prevailed. At trial, there was evidence of reasonable accommodations that could have been made — for example, the position at the detective desk that Detective Neel wanted Larkin to be offered. (RT 77:9-18, 81:4-82:18.)

But even if one adopted a tougher rule, which would require that the Department had some knowledge of possible accommodations *at the time of the litigated events* in order for the City to be liable for not having engaged in the interactive process, then Larkin should *still* prevail. This is because there was undisputed evidence that Detective Neel suggested to Captain Aborn that Larkin be assigned to the detective desk at that time, only to be turned down. (RT 77:9-18, 81:4-82:18.)

**(iii) The trial court’s findings on the third cause of action are not supported by the record or the law**

The statement of decision made two findings with respect to the third cause of action. The first was the same one that featured in the other two — the one to the effect that Larkin had failed to establish or provide evidence of his ability to perform the job of a police officer. (App. 103:10-12.) To

avoid repetition, Larkin will not restate the flaws about that finding, which are as applicable here as there.

The second was that “Defendant City of Los Angeles did not fail to participate in a timely and good faith interactive process with plaintiff.” (App. 103:14-15.) There is not a shred of evidence in the record that it did engage in such a process — and a heap of evidence that it did not. So, as with the finding about making reasonable accommodations, there has to be error in one of two ways:

- ▶ Either there is error under the substantial evidence rule, if the court reached a factual conclusion that the City *did* engage in the interactive process. Nothing in the record could support that.
- ▶ Or there is an error of law, if the court found that the City did not “fail” to engage in that process, because it was not obligated to do so. Nothing in the law could support that. The process is not optional. *So, either way, reversal is required.*

**E. EVEN IF THE EVENTS IN AND AFTER JANUARY 2005 DID NOT IN THEMSELVES CONSTITUTE UNLAWFUL CONDUCT UNDER FEHA, THEY SHOULD BE CONSIDERED IN TANDEM WITH WHAT WENT BEFORE**

Larkin’s position on appeal is that the events in and after January 2005 entitled him to relief under FEHA. But if, for some reason, this Court were

to find that they, alone, fall short of establishing unlawful conduct by the City, then Larkin would urge the Court to consider what had taken place before.

On substantial evidence review of a claim of adverse action under FEHA, this Court considers collectively the alleged discriminatory acts; there is no requirement that an employer's discriminatory acts constitute "one swift blow, rather than a series of subtle, yet damaging injuries." (*Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 374.)

Here, what took place in January 2005 was not the first time that Officer Larkin had requested an accommodation and been rebuffed. As noted in the Statement of Facts, *supra*, in August, 2004 — when his blood pressure had begun to spike — he handed in a doctor's note requesting temporary work restrictions, including the need for a low-stress environment with limited contact with the public. (RT 337:12-23, 338:5-10, 620:1-10; App. 61 [trial exhibit 8, p.16].) At this time, he was working at the front patrol desk, a high-stress, front-line position. (RT 619:1-26.) However, his assignment was not changed as a result. (RT 620:15-22.)

Soon after, Officer Larkin began feeling worsening symptoms of his blood pressure, including "semi-blackouts" and "profuse sweating." (RT 621:3-9.) But when he reported his condition to a senior officer, he was told

to take a five-minute break and to get back on the job. (RT 621:11-16.)

Those facts were undisputed at trial.

Here, again, no effort was made to accommodate Officer Larkin. There was no effort to engage him in the interactive process. *He was treated as though FEHA simply did not exist.* It was soon after that that he had to go off work until he attempted to return the following January. (RT 338:11-339:3, 621:17-21; App. 62 [trial exhibit 8, p.22].)

Even if any one act of ignoring Larkin's request were not sufficient, the *repeated* failure to do what the law requires surely suffices.

**F. LARKIN'S APPLICATION FOR A DISABILITY PENSION DID NOT BAR ANY OF HIS CAUSES OF ACTION**

The City's response to the arguments about its obligation to Larkin are likely to be based on what was written in the last paragraph of the statement of decision. There, the court wrote: "By virtue of his application for a City of Los Angeles disability pension, in which plaintiff asserted that he could no longer perform his duties as a Los Angeles Police officer as a result of certain specified medical conditions, plaintiff is factually and judicially estopped from claiming in this case that he could perform the essential functions of the job of Los Angeles Police officer. Plaintiff never withdrew his application for a pension, and in fact plaintiff fully prosecuted his

application, and the City of Los Angeles awarded plaintiff a disability pension pursuant to plaintiff's request." (App. 104:1-5.)

The estoppel issue calls for independent review. The essential facts relating to it are undisputed. The interpretation of the facts may be the subject of argument, but the basic sequence of events is what it is — no one is presenting alternative versions. Where, as here, the material facts are undisputed, estoppel presents only a question of law that is subject to de novo review. (*Jordan v. City of Sacramento* (2007) 148 Cal.App.4th 1487, 1496.)

The trial court's finding on this issue — quoted above — made no sense, either as a statement of fact or law. Larkin only conceded that he could not perform the duties of a Los Angeles police officer after being told, in effect, that the duties of such an officer necessarily included the ability to do *anything* done by *any* serving officer. But he made it abundantly clear — including at the hearing on his pension application — that this was not his choice and that his preference was to work if he could be accommodated. (See, e.g., RT 1073:20-1074:6; App.72-73 [trial exhibit 110, pp.56-57].)

Once he was ordered home, Larkin had no alternative other than to apply for a pension unless he wanted to be without any income.

For the City's estoppel argument to work, the law would need to be that once there is a refusal to accommodate, an employee cannot take a

medical disability pension or will forfeit the right to sue for not being accommodated. But there is no authority for such a proposition.

The case of *Prilliman v. United Air Lines, Inc.*, *supra*, 53 Cal.App.4th 935 shows that the City's estoppel argument — adopted by the court in its City-authored statement of decision — was erroneous. In *Prilliman*, the trial court granted summary judgment in favor of an airline in an action based on FEHA brought against it by a former pilot who had been diagnosed with AIDS (there were actually two pilots with AIDS who sued, but this summary will focus on the facts relating to the one who was successful on appeal). (*Id.* at 943-946.) Pilots who have been diagnosed with AIDS are prohibited by the Federal Aviation Authority from piloting an aircraft. (*Id.* at 941.) However, in this case, the pilot's overall ability to function was good at the time that he was grounded and for more than a year afterwards. (*Id.* at 944.) The pilot did not request an alternative job position with the airline, and took monthly disability benefits from both it and the government. (*Ibid.*)

The trial court granted summary judgment in favor of the airline. The Court of Appeal reversed. The Court summarized one portion of the issue as follows: "Respondents' [i.e., the airline's] position is that because appellants sought and received state and federal disability benefits on the representation that they were totally disabled, they are estopped from taking a contrary position in this lawsuit, i.e., that they were physically able to work in some

other position with United.” (*Prilliman v. United Air Lines, Inc.*, *supra*, 53 Cal.App.4th at 946.) That is mighty similar to the estoppel defense raised by the City of Los Angeles in the present case.

Ruling on that issue, the Court of Appeal found that although the pilot was receiving a disability benefit from the airline as well as government Social Security, those benefits were based on his being permanently grounded from his flight-qualified position, and thus did not dispose of the question whether the airline had *earlier* violated FEHA by failing to make known *other* suitable job opportunities. (*Prilliman v. United Air Lines, Inc.*, *supra*, 53 Cal.App.4th at 956-963.) Hence, principles of judicial estoppel were not applicable, since the pilot’s position in this FEHA lawsuit was not clearly inconsistent with the position he took in applying for disability benefits. (*Id.* at 962-963)

That same reasoning applies here. The questions at issue are whether the City took adverse action against Larkin on account of his disability, whether it failed to provide a reasonable accommodation, and whether it failed to engage in the interactive process. None of those issues are impacted by the fact that — after the disputed events and in order to secure an income — Larkin applied for a disability pension.

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**G. THE TRIAL COURT’S FAILURE TO MAKE REQUESTED FINDINGS WAS ITSELF REVERSIBLE ERROR**

At various points in this argument, Larkin has pointed out that the trial court’s statement of decision failed to make requested findings on material issues of fact. (See App. 94:17-23 [objections to proposed statement of decision].) That failure is in itself a separate ground for reversal. (*Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1134 [judgment may be reversed where trial court furnished statement of decision omitting critical findings and, despite objection, court refused to adequately explain factual and legal basis for its decision]; *Bardeen v. Commander Oil Co.* (1941) 48 Cal.App.2d 355, 357 [prejudicial error to fail to make finding on material issue presented by the pleadings, where record shows that there was substantial evidence upon such issue].)

**H. IF THIS COURT REVERSES, SUCH THAT LARKIN PREVAILS, HE SHOULD BE AWARDED ATTORNEY FEES FOR THIS APPEAL AND THE TRIAL COURT PROCEEDINGS**

In the event that the Court reverses, in whole or in part, such that Larkin prevails in any of his claims, he should be awarded statutory attorney fees. A court in its discretion may award fees and costs to the “prevailing party” in FEHA actions. (Govt. Code, § 12965(b).) Although the statute

provides that the court “may” award such fees, cases hold a prevailing plaintiff is entitled to fees “absent circumstances that would render the award unjust.” (*Stephens v. Coldwell Banker Comm’l Group, Inc.* (1988) 199 Cal.App.3d 1394, 1406 [disapproved on other grounds in *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563]; *Horsford v. Board of Trustees of Calif. State Univ., supra*, 132 Cal.App.4th at 394.)

Thus, in the event of a reversal, the Court is urged to order that Larkin be entitled to recover his attorney fees for this appeal and the trial court proceedings in an amount to be determined on remand. (*Los Angeles Times v. Alameda Corridor Transp. Authority* (2001) 88 Cal.App.4th 1381, 1393.)

## CONCLUSION

Larkin’s three causes of action overlap, but are nonetheless distinct — each reflecting a different obligation that FEHA imposed on the City and each actionable in its own right. Larkin urges the Court to find that there was reversible error with regard to all three: He was subject to adverse discrimination; there was no accommodation or proper reason justifying the failure to accommodate; and the City failed in its obligation to engage in the interactive process. But even if there was error with respect to just one or two of them, the judgment would still need to be reversed.

This was a case where a serving police officer was treated as though FEHA did not exist. One can debate whether this was part of a systematic

effort to purge the Department of light-duty officers or whether it was an aberration. But that question need not be resolved. This case can be decided narrowly, by applying settled law to undisputed facts and determining that Officer Larkin did not get what the law entitled him to.

The Court is asked to reverse and to award statutory attorney fees and costs in amounts to be determined on remand.

August 6, 2009

Respectfully submitted,

THE LAW OFFICE OF JOHN DERRICK,  
a professional corporation

by \_\_\_\_\_  
John Derrick  
Attorney for Appellant

## **CERTIFICATE OF WORD COUNT**

I certify that the text of this brief, as counted by Microsoft Word, consists of 13,989 words (including footnotes but excluding the tables of contents and authorities, this certificate, and the attached proof of service).

August 6, 2009

THE LAW OFFICE OF JOHN DERRICK,  
a professional corporation

by \_\_\_\_\_  
John Derrick  
Attorney for Appellant

## **PROOF OF SERVICE**

I am over 18 years of age and not a party to this action. I am a resident of the county where the mailing described herein took place. My business address is 21 E. Pedregosa Street, Santa Barbara, CA 93101.

On August 6, 2009, I sent from Santa Barbara, California, the following documents:

APPELLANT'S OPENING BRIEF

APPELLANT'S APPENDIX

I served the document by enclosing copies in envelopes and depositing the sealed envelopes with the United States Postal Service, postage fully prepaid (except that the copy for the California Supreme Court was served electronically pursuant to Rule of Court 8.212(c)(2)(A)). The envelopes were addressed and sent as follows:

SEE SERVICE LIST ATTACHED

I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct.

August 6, 2009

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