

Filed 5/26/10 Larkin v. City of Los Angeles CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

WILLIAM LARKIN,

Plaintiff and Appellant,

v.

CITY OF LOS ANGELES,

Defendant and Respondent.

B212326

(Los Angeles County
Super. Ct. No. BC 365114)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Soussan G. Bruguera, Judge. Reversed.

John Derrick for Plaintiff and Appellant.

Carmen A. Trutanich, City Attorney, and Claudia McGee Henry, Senior
Assistant City Attorney, for Defendant and Respondent.

Plaintiff William Larkin, a retired police officer, timely appealed from the judgment entered in favor of defendant City of Los Angeles (City) following a bench trial in his action for disability discrimination, failure to make a reasonable accommodation and failure to engage in the interactive process under the Fair Employment and Housing Act (FEHA). (Gov. Code §¹ 12940, subds. (a), (m) & (n).) Plaintiff contends he satisfied all the elements for each cause of action. We reverse as we conclude there was substantial evidence the City failed to engage in the interactive process.

FACTUAL BACKGROUND

I. Background

Officer Larkin was first employed by the Los Angeles Police Department (LAPD or Department) in January 1988; he was 51 years old at the time of trial.

It was undisputed at trial that Larkin had retired in good standing and had received a positive performance evaluation in November 2004.

II. Prior Restrictions

In 2003, Larkin was assigned to the detective desk in the Northeast Division. That job entailed fielding questions from the public, both in person and over the phone, about a range of subjects, including ongoing investigations and general law enforcement matters and procedures. The job 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 the detectives in a variety of ways.

¹ All statutory references are to the Government Code.

In January 2004, Larkin was still assigned to the detective desk on “light duty” status. “Light duty” is where an officer has a condition that prevents him or her from engaging in a full range of police officer functions, but allows him or her to do some things around the station. Larkin was on light duty at that time because since 1997, he had been involved in four car crashes in the line of duty, none of which was his fault. Larkin had suffered a variety of orthopedic injuries as a result of the crashes.

In April 2004, Larkin was diagnosed with very high blood pressure on the order of “300 over 140” or higher. As a result, Dr. Greg Maddex, Larkin’s personal physician, put Larkin on medication and took him off work. Larkin returned to work in June 2004 and handed in a doctor’s note saying he could return without restrictions.

Larkin initially returned to the detective desk, but soon afterwards was reassigned to the front patrol desk; two other officers took his place at the detective desk. Larkin was glad to be back at work, but the hectic pace and long hours at the front patrol desk were not good for his blood pressure. The job involved being in the front line, i.e., dealing face-to-face with people coming to the police station for any reason, ranging from reporting crimes to having just been in an accident or fight. In addition, Larkin had to monitor the police radio and arrange for support if an officer was in trouble. Larkin found the position to be stressful.

In August 2004, Larkin’s blood pressure again began to spike. Dr. Maddex wrote a note specifying various work restrictions, including the need for a low stress environment with limited contact with the public. Dr. Maddex testified those restrictions were necessary because Larkin suffered from a condition known as “labile hypertension,” a form of hypertension that might involve unpredictable bursts due to external stimuli. Other restrictions covered by the note regarding prolonged standing and bending were for orthopedic reasons. The restrictions in that note were temporary. Larkin handed in the note at work, but his assignment was not changed.

In September 2004, Larkin began feeling a worsening of his blood pressure, including “semi-blackouts” and “profuse sweating.” When Larkin reported his condition

to a senior officer, he was told to take a five-minute break and get back on the job. Dr. Maddex found Larkin's blood pressure was "skyrocketing" and took him off work that month. It took a while for Larkin's blood pressure to be brought under control with the help of medication, but eventually his condition stabilized temporarily.

III. 2005 Restrictions

On January 18, 2005, Larkin attempted to return to work after telling Dr. Maddex he wished to do so. Dr. Maddex wrote a note stating Larkin should be restricted to "a low-stress position with little or no public contact."

Dr. Maddex testified that by January 2005, Larkin's condition had become presumptively permanent, which in the case of a police officer was equivalent to saying he had a permanent disability. The note referred to "temporary work restrictions/accommodations." Dr. Maddex testified the reason for making the restrictions temporary at that time was that while he considered the high blood pressure² itself to be a permanent condition, he felt that the lability (the propensity to sudden change) was not necessarily so. Dr. Maddex did not know at that point whether the restrictions would ultimately need to be permanent or whether they could be lifted at some point.

When Larkin arrived for work on January 18, he gave his doctor's note to Joanne Walsh, who was the "sick and IOD [injured on duty] coordinator" at the Northeast division at all relevant times. Walsh's duties involved processing the paperwork for all injured, sick and disabled officers at the division.

Walsh testified that when Larkin came to see her that morning, she told him that Captain Carol Aborn wanted to see him later that morning. Captain Aborn had been

² High blood pressure is a disability under FEHA. (Cf. *American National Ins. Co. v. Fair Employment & Housing Com.* (1982) 32 Cal.3d 603, 609.) The Department viewed hypertension as a disabling condition.

Larkin's commanding officer since May 2003. Aborn had never disciplined Larkin in any way or given him a less than satisfactory performance evaluation. Aborn believed Larkin had been competent in his work on the detective desk.

Larkin went to see Aborn as requested, meeting privately in her office behind closed doors. Aborn asked him to sit down and then read the doctor's note.

Larkin described the meeting as follows:

[S]he said that 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.

On cross-examination, Larkin agreed that Aborn had stated that she might reconsider if the requested restrictions were clarified or there was a change in his medical condition. During that meeting, Larkin did not offer any specific assignments he could fill given the necessary work restrictions. Larkin did not say anything about his desire to seek an accommodation or a permanent medical condition or disability.

Aborn did not offer Larkin any position or indicate she had considered a position for him. Larkin did not subsequently take up the issue with the medical liaison section because he thought that might be considered going outside the chain of command, which could lead to disciplinary consequences.

Aborn testified she only vaguely recalled the meeting with Larkin and could not recall any specifics. Aborn did recall reviewing the doctor's note. When asked whether Larkin had been accommodated when he returned to work, Aborn testified: "My

independent recollection is these 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.” In Aborn’s view, every job within the LAPD had the potential to cause stress.

IV. Pension Application

Larkin tried to resolve the situation, but after meeting with negative reactions, he filed for a medical disability retirement a month later on February 21, 2005, because he was “running into a brick wall” and being forced to retire.

When Larkin applied for retirement, he indicated on the form that for medical reasons he was unable to perform the duties of a police officer. At trial, Larkin testified he felt he could perform some, but not all, duties.

Captain Aborn heard about Larkin’s application soon after it was made and concluded he would not be coming back to work. Aborn said she had no intention to “rid” the Department of him.

When Larkin was asked why he did not ask Aborn to reconsider, he 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.”

At the hearing before the Board of Fire and Police Pension Commissioners (Pension Board) at which Larkin’s retirement application was considered, his attorney told the Pension 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 has some reference to this.”

Captain Lance Smith, the officer in charge of LAPD's medical liaison section from November 2005 through November 2007, told the Pension Board the Department did not have a job for Larkin because of the medical recommendation Larkin perform administrative duties and because he could not return to the field.

At trial, Smith explained his view the decision not "to create a position" was a matter of supporting Larkin's decision to retire rather than forcing him to retire. Smith said that position represented a change from previous LAPD policy when the Department would oppose pension applications in circumstances even when it felt the employee could not do the job. The previous position was "no matter what the circumstances, we will always have a position for you." In the past the Department had created positions by placing officers in positions that were not classified as police officer positions. However, the Department had become oversaturated with employees who could no longer perform the essential functions of a police officer, "which is actually work the streets." A provision of the new policy is that it only applies to officers injured after August 2006.

Larkin could have withdrawn his pension application while it was pending, but he never did. The Department did not try to find a job for Larkin during that time or during the six months between the Board hearing and its approval of Larkin's application.

Larkin testified he would have gone back to work in a "heartbeat" if given the chance.

Smith testified that although he tried to contact Larkin, he never talked to Larkin. If Larkin had told Smith he wanted to return to work, Smith would have looked into it and engaged in the "interactive process." Smith acknowledged that early in 2006, he saw the letter Larkin sent to a member of the city council complaining about being forced to retire and about not being accommodated on account of his injuries. When asked how it was he did not know Larkin wanted to work, Smith replied that in his experience, what people wrote in letters was not always what they actually thought when one sat down and talked to them.

Larkin's disability pension was approved in November 2006. The Board made findings of fact, including: (1) Larkin's "claim of disability is based upon injuries to his

spine, hips, shoulders, bilateral carpal tunnel, and hypertension/heart”; (2) Larkin had been examined by three licensed practicing physicians in the medical specialties of cardiology, orthopedics and neurology; (3) LAPD did not have a position available to accommodate Larkin’s medical restrictions; and (4) Larkin was disabled “due to his service related injuries.” Larkin was given 45 percent of his final salary. At the time of trial, Larkin was unemployed and still being treated for high blood pressure and hypertension.

DISCUSSION

Appellant contends he satisfied all the elements of each of his three causes of action -- disability discrimination, failure to make a reasonable accommodation and failure to engage in the interactive process. In order to prevail on each of those causes of action, a plaintiff has the burden of proving he or she can perform the essential duties of the position with or without reasonable accommodation. (*Green v. State* (2007) 42 Cal.4th 254, 257-258, 260-266, 267; CACI Nos. 2540, 2542, 2546.) In the case at bar, as to all three causes of action, the court found appellant had “failed to carry his burden or even to provide the Court with evidence of his ability to perform the essential functions of the job of a Los Angeles police officer.”

To assert a failure to accommodate claim, a plaintiff must establish “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.” (*Jensen v. Well Fargo Bank* (2000) 85 Cal.App.4th 245, 256.) In order to determine if a plaintiff can do so, the parties must engage in the interactive process.

“The FEHA imposes an additional duty on the employer ‘to engage in a timely, good faith, interactive process with the employee . . . to determine effective reasonable accommodations’ (§ 12940, subd. (n).) An employer’s failure to engage in this process is a separate FEHA violation.” (*Wilson v. County of Orange* (2009) 169 Cal.App.4th 1185, 1193.) “The ‘interactive process’ required by the FEHA is an

informal process with the employee or the employee's representative, to attempt to identify a reasonable accommodation that will enable the employee to perform the job effectively. Ritualized discussions are not necessarily required." (Citation omitted.) (*Id.*, at p. 1195.)

Generally, "[t]he employee bears the burden of giving the employer notice of the disability. This notice then triggers the employer's burden to take "positive steps" to accommodate the employee's limitations. . . . [¶] . . . The employee, of course, retains a duty to cooperate with the employer's efforts by explaining [his or] her disability and qualifications. Reasonable accommodation thus envisions an exchange between employer and employee where each seeks and shares information to achieve the best match between the employee's capabilities and available positions.'" (*Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 950.)

"An employer may claim there was no available reasonable accommodation. But if it did not engage in a good faith interactive process, 'it cannot be known whether an alternative job would have been found.' The interactive process determines which accommodation is required. Indeed, the interactive process could reveal solutions that neither party envisioned." (Citations omitted.) (*Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 424-425.)

"[A]n employer who knows of the disability of an employee has an affirmative duty to make known to the employee other suitable job opportunities with the employer and to determine whether the employee is interested in, and qualified for, those positions, if the employer can do so without undue hardship or if the employer offers similar assistance or benefit to other disabled or nondisabled employees or has a policy of offering such assistance or benefit to any other employees." (*Prilliman v. United Air Lines, Inc.*, *supra*, 53 Cal.App.4th at pp. 950 -951.)

Appellant asserts this case is distinct from *Raine v. City of Burbank* (2006) 135 Cal.App.4th 1215, in which the issue was whether the city, which had reassigned a police officer to a temporary light duty position on the front desk, was obligated under FEHA to

make that assignment available indefinitely once the officer's disability became permanent. (*Id.*, at pp. 1217-1218.) This court held the city was not required to do so. (*Id.*, at pp. 1223-1224.) The city had engaged in the interactive process. (*Id.*, at pp. 1218-1219.)

The court concluded: “[A]n employer has no duty (absent perhaps workplace precedent suggesting its reasonableness) to accommodate a disabled employee by making a temporary accommodation permanent if doing so would require the employer to create a new position just for the employee. Raine was certainly entitled to a reasonable accommodation, which would have included job reassignment if a vacant position existed; the City, however, was not required to create a new position of front-desk officer -- a position indisputably reserved for civilians on a permanent basis or as a temporary light-duty assignment for police officers.” (Fn. omitted.) (*Raine v. City of Burbank*, *supra*, 135 Cal.App.4th at p. 1227.)

However, *Raine* also noted that: “FEHA does not require the employer to create a new position to accommodate an employee, at least when the employer does not regularly offer such assistance to disabled employees.” (*Raine v. City of Burbank*, *supra*, 135 Cal.App.4th at p. 1226; see also *School Bd. of Nassau County v. Arline* (1987) 480 U.S. 273, 289, fn. 19 [“Employers have an affirmative obligation to make a reasonable accommodation for a handicapped employee. Although they are not required to find another job for an employee who is not qualified for the job he or she was doing, they cannot deny an employee alternative employment opportunities reasonably available under the employer’s existing policies.”].)

In the case at bar, the court found respondent “did not fail to participate in a timely and good faith interactive process with [appellant].” The record shows the Department did not engage in any interactive process with appellant. Rather, it appears the Department was enforcing Chief Bratton’s new policy that the Department would no longer “always have a position” for a disabled officer.

Lieutenant Leslie Lutz, who had served in the LAPD for almost 38 years before retiring, testified about conversations he had with Chief Bratton in 2005 and 2006 in which the chief expressed a desire to rid the Department of light duty officers. During argument, counsel for the City stated that testimony showed the chief's "goal and expectation" was that "all police officers in LAPD be capable of doing all those functions," including patrolling the community and, if necessary, pursuing, arresting and searching people" as that was the "whole point of having police officers." Captain Aborn confirmed the chief had communicated his concern to herself and other command officers about the large number of restricted-duty personnel with the Department. Whether the Department can enforce a policy of not providing accommodation to permanently disabled officers is not before this court.

In the present case, there was a precedent of accommodation. At the time appellant returned to work, the LAPD had a policy that "no matter when the circumstances, we will always have a position for you" and even fought a disabled officer's application for a disability retirement when it felt the officer could not do the job. It was not until August 2006 that Chief Bratton changed the policy to one of supporting a disabled officer's application for a disability retirement rather than providing a position for the officer. The change was apparently made because the Department had a large number of light duty officers who could not do field work.

Appellant returned to work on January 18, 2005, with a note from Dr. Maddex stating appellant should be restricted to "a low-stress position with little or no public contact."³ According to appellant, Captain Aborn informed him "she couldn't think of any place in Northeast that would . . . accept this return-to-work note" and "she couldn't

³ Dr. Maddex's note stated appellant "may return to work beginning January 17, 2005 with the following temporary work restrictions/accommodations." A doctor's note satisfies the employee's burden of giving notice and triggers the employer's burden to take steps to engage in the interactive process. (See *Rowe v. City & County of San Francisco* (N.D.Cal. 2002) 186 F. Supp.2d 1047, 1051.) Respondent does not deny appellant's assertion that whether his condition was temporary or permanent did not drive the decision about whether he could be accommodated.

think of any place in the entire City of Los Angeles that would accept this return-to-work note.”

Appellant accepted Captain Aborn’s statement, but there were no discussions, formal or otherwise, about whether or not appellant could be reasonably accommodated with a position. Aborn simply ordered appellant to leave. On the one hand, appellant filed for a disability retirement a month after his meeting with Captain Aborn. On the other hand, the Department did not fulfill its obligation to engage in the interactive process to determine if there was a possible accommodation for appellant’s restrictions. Aborn admitted she had not considered whether a possible position existed for appellant; she did not ask Walsh to find out if there were any jobs available or interview incumbents to find out whether their job duties matched what appellant could do.

Trial exhibits 1 and 2 were the Department’s “Disability/Medical Accommodation Request Procedures, Revised” and “Reasonable Accommodation Assessment Form.” Those procedures and forms were never used in relation to appellant’s request.

Lieutenant Lutz had authored the LAPD policy (exhibit 1) for handling medical accommodations in effect in January 2005. Lutz testified the interactive process required a supervisor handling a reasonable accommodation request to interview people in certain positions, and their supervisors, to determine the suitability of such positions for the person seeking an accommodation. In appellant’s case, LAPD did not follow its own policies. In order to request a reasonable accommodation, all appellant had to do was report to his workplace, present a doctor’s note to his supervisor outlining his restrictions, and state whether he was available to come back to work. Lutz believed appellant had satisfied all the requirements to trigger the interactive process in January 2005.

In *Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1015-1018, the court noted there was a split of authority as to whether an employee had to prove a reasonable accommodation was possible to assert a claim for failing to engage in the interactive process. The court concluded: “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. An employee cannot necessarily be expected to identify and request all possible accommodations during the interactive process itself because “[e]mployees do not have at their disposal the extensive information concerning possible alternative positions or possible accommodations which employers have. . . .” However . . . once the parties have engaged in the litigation process, to prevail, the employee must be able to identify an available accommodation the interactive process should have produced.” (Citations omitted.) (*Id.*, at p. 1018.)

Even under the *Scotch* test, there was testimony a specific position was available. Appellant and Dr. Maddex testified about tasks appellant had performed or could perform. In addition, Detective Neel, who was a supervising detective between 2003 and 2005 and familiar with appellant’s work on the detective desk, testified he considered appellant to be a “godsend” in terms of appellant’s job performance. Neel, who testified there was “a large shortage of detectives,” asked Aborn the day after he had been told appellant had been sent home if appellant could return to the detective desk where there were vacancies, but she said no. Lutz confirmed there was a need for the type of work “light duty” personnel could do.

Thus, substantial evidence showed the City failed to engage in the interactive process with appellant. (See *Shaw v. County of Santa Clara* (2008) 170 Cal.App.4th 229, 279.)

“[E]mployers, who fail to engage in the interactive process in good faith, face liability for the remedies imposed by the statute if a reasonable accommodation would have been possible.” (*Rowe v. City & County of San Francisco, supra*, 186 F.Supp.2d at p. 1051; see also *Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 54 [“[I]f the [interactive] process fails, responsibility for the failure rests with the party who failed to participate in good faith.”].)

Had the Department engaged in the interactive process, it might have found that no reasonable accommodation could be made for appellant's restrictions or that creating a permanent light duty position for appellant was a hardship on the Department. However, because the Department did not engage in the interactive process and failed to offer any accommodation to appellant, it failed to make a reasonable accommodation in violation of section 12940, subdivision (m). (See *Scotch v. Art Institute of California, supra*, 173 Cal.App.4th at p. 1010.) Moreover, without engaging in the interactive process, the Department also violated section 12940, subdivision (a) as it discriminated against appellant because of his medical condition as it did not determine appellant was unable to perform essential duties even with reasonable accommodation. (*Id.*, at p. 1002.)

The court found appellant judicially estopped from asserting he was able to perform the essential functions of a police officer. As the facts are undisputed, whether estoppel applies is a question of law subject to de novo review. (*Jordan v. City of Sacramento* (2007) 148 Cal.App.4th 1487, 1496.) Citing *Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 183, respondent contends appellant was judicially estopped from asserting he was able to perform the essential functions of a police officer because he stated on his disability application that he could not do so. One of the elements necessary for the application of judicial estoppel is that "the first position was not taken as a result of ignorance, fraud, or mistake." (*Ibid.*) Given appellant's explanation to the Pension Board that he felt he was being forced to retire and respondent's failure to engage in the interactive process, we conclude judicial estoppel does not apply as the pension application was equivalent to being the result of ignorance or mistake. (See *Prilliman v. United Air Lines, Inc., supra*, 53 Cal.App.4th at p. 960.)

Appellant requests he be awarded attorney's fees pursuant to section 12965, subdivision (b). We agree appellant should be awarded reasonable attorney's fees. (*Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 393-394.)

DISPOSITION

The judgment is reversed and the case is remanded for further proceedings and to award appellant court costs and reasonable attorney's fees, both in the proceedings below and on appeal, in amounts to be determined by the trial court.

WOODS, J.

We concur:

PERLUSS, P. J.

ZELON, J.