2 Civil No. B210751

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION 1

GEORGE AZER,

Plaintiff and Appellant

vs.

LOS ANGELES COUNTY SHERIFF'S OFFICE, et al.,

Defendants and Respondents

On Appeal From The Superior Court of Los Angeles County
Honorable Ralph Dau, Judge,
Los Angeles Superior Court Case No. BC343459

APPELLANT'S OPENING BRIEF

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Cal. Rules of Court, Rule 8.208)

There are no interested entities or persons to list in this certificate.

(Cal. Rules of Court, Rule 8.208(e)(3).)

DATED: April 13, 2009

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INTRODUCTION

This case is a textbook example of how *not* to treat a disabled employee. Plaintiff George Azer worked for the Los Angeles County Sheriff's Department ["Sheriff's Department" or "County"] for more than 20 years. In 1997, he was promoted to Head Custody Records Clerk, a supervisory position. Over time, plaintiff began to suffer from ailments that eventually restricted him to light work. When plaintiff returned to work after knee surgery in 2005, the County assigned him to heavy clerical duties that violated his restrictions.

Plaintiff immediately protested this re-assignment, telling his first level supervisor that these duties conflicted with his restrictions. The supervisor refused to alter plaintiff's assignment and told him that the new duties did not violate his restrictions. A week later, plaintiff requested in writing that he be accommodated by a return to his prior duties and filed a grievance requesting a return to these duties. Plaintiff's accommodation request was rejected two weeks later because his new duties purportedly did not conflict with his restrictions. Plaintiff's grievance was denied after he declined the only other offered position, which was temporary and clerical.

Plaintiff's health began to deteriorate almost immediately. His treating physician issued a series of disability status reports that documented plaintiff's deteriorating condition and (on several occasions) stated that plaintiff should be restored to his former duties. The County paid no heed to these reports; in fact, the "Return to Work" coordinator told plaintiff that his doctor could not dictate plaintiff's job assignment. Plaintiff also sent e-mails to his superiors describing his difficulties; one of these e-mails

specifically requested he be restored to his former duties. The County did nothing. Approximately five months after plaintiff returned to work, he was carried out on a stretcher and has not returned to work since.

Plaintiff subsequently sued the County and certain individuals pursuant to the Fair Employment and Housing Act ["FEHA"] for harassment, retaliation, failure to engage in the interactive process and failure to accommodate. Defendants obtained summary judgment.

This judgment must be reversed in part because plaintiff's claims against the County based on failure to engage in the interactive process and failure to accommodate should have gone to a jury. The County made little (if any) effort to engage in the required interactive process and fell far short of exhausting its duty to determine if plaintiff could be accommodated. Instead, the County insisted that plaintiff had been accommodated, a point on which the evidence conflicts, to put it mildly.

The trial court noted that "[i]t's pretty rare" for summary judgments in employment cases to be upheld on appeal. (1 Reporter's Transcript ["RT"] 50; see generally *Nadaf-Rahrov v. Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 963 ["[a]ll doubts as to the propriety of granting summary judgment are resolved in favor of the opposing party."].) Questions as to whether an employer adequately engaged in the interactive process or provided a reasonable accommodation "are generally ones of fact." (*Wilson v. County of Orange* (2009) 169 Cal.App.4th 1185, 1193.) The present case is no exception and this Court should reverse the judgment insofar as the County was granted summary judgment on plaintiff's interactive process and accommodation claims.

STATEMENT OF THE CASE

A. Standard of Review and Substantive Fact Presentation.

This Court reviews summary judgment appeals de novo. (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 404.) The Court "must view the evidence in a light favorable to plaintiff as the losing party [citation], liberally construing her evidentiary submission while strictly scrutinizing defendants' own showing, and resolving any evidentiary doubts or ambiguities in plaintiff's favor." (*Saelzer v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.) "[A] reviewing court . . . *should draw reasonable inferences* in favor of the nonmoving party." (*Miller v. Dept. of Corrections* (2005) 36 Cal.4th 446, 470.) Therefore, substantive facts will be presented by resolving all evidentiary ambiguities or conflicts in plaintiff's favor and granting him the benefit of all reasonable inferences.

B. Substantive Fact Summary.

1. Plaintiff serves the Sheriff's Department well for more than two decades in positions of increasing responsibility.

Plaintiff became employed with the Sheriff's Department in 1982 as an Intermediate Typist Clerk. (1 Clerk's Transcript ["CT"] 23; 3 CT 599.)[1] After serving as a Senior Clerk and Custody Records Clerk II, plaintiff was promoted to Head Custody Records Clerk in 1997. (1 CT 23-24; 3 CT

1/ Plaintiff's operative complaint is cited for certain facts in this paragraph because defendants deemed those facts undisputed. (3 CT 599.)

599.) The Head Custody Records Clerks supervise the Supervising Records Clerks, who supervise the Custody Records Clerks I and II. (3 CT 723.)

Plaintiff worked in the Inmate Reception Center ["IRC"]. (7 CT 1511, ¶ 2, lines 26-28; 7 CT 1617.)[2] Defendant Jon Goldberg managed the IRC's records section from May 2000 until November 17, 2005 when he left the Sheriff's Department. (3 CT 722; 7 CT 1726.) Goldberg directly supervised plaintiff until September 2005. (3 CT 722.) Defendant Anthony Argott was the IRC Captain from the end of 2003 until August 2005, when Timothy Cornell became the IRC Captain. (1 CT 126; 7 CT 1638, 1674.)

Plaintiff's duties as Head Custody Records Clerk included supervising the "day shift, civilian personnel" and liaising with all outside agencies, including the courts. (7 CT 1709.) This sometimes required him to use the telephone to receive phone calls and to run an inmate's name through a computer, but it did not require entering other information, which is done by "the clerks." (7 CT 1709-1710.) Argott deemed plaintiff's position to be a "line supervisory head clerk position," stating that "[l]ine supervisors are present at the IRC 24 hours a day, 7 days per week on each shift supervising the records clerks." (3 CT 707.) Plaintiff "was responsible for the overall efficiency and effectiveness of the civilian

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[2/] Defendants successfully objected to portions of certain declarations. (9 CT 2076-2107, 2122-2123.) Plaintiff's citations to these declarations will include paragraph and line numbers to make it clear that plaintiff is citing material admitted into evidence. Because the line numbers often do not align with the text precisely, the initial line number will generally be above the first line of cited text and the final line number will generally be below the last line of cited text.

personnel assigned to his shift, including such tasks as scheduling, training, productivity and discipline." (8 CT 1768.) Plaintiff's evaluations through 2002 rated him as "outstanding" or "very good" (1 CT 249; 7 CT 1642-1643, 1649); the record does not refer to plaintiff's post-2002 evaluations.

2. Plaintiff's injuries mount over his years of service, resulting in disabilities necessitating work restrictions.

On February 18, 1999, plaintiff began to suffer from carpal tunnel syndrome. (1 CT 222, 249-250.) On February 19, 1999, plaintiff's blood pressure rose at work as a result of interactions at a staff meeting and he felt dizzy and lightheaded. (1 CT 249.) Plaintiff has work-related hypertension and an inability to handle stress that causes elevated blood pressure. (1 CT 163, 249.) Restrictions in plaintiff's medical file include "no severe stress." (7 CT 1712.) Plaintiff was on his way to see the jail nurse, accompanied by a subordinate who was helping him walk, when he lost his balance and fell down the stairs. (1 CT 163, 249.) As a result, plaintiff suffered injuries to his neck, back, shoulder and left knee (1 CT 249.) At some point "in about 1999," plaintiff's doctor "ordered that [plaintiff] work at an ergonomic workstation," but plaintiff was not provided with such a workstation. (1 CT 176.)

Plaintiff also suffered a work-related injury on October 1, 2002. (4 CT 779.) This injury was "diagnosed as right cubital tunnel syndrome." (4 CT 779.) The injury resulted in a "continuing work restriction" which included the following: "Right upper extremity: No heavy lifting – the individual has lost approximately one-half of his pre-injury capacity for

lifting. No repetitive forceful gripping, grasping, pushing, pulling, squeezing, twisting & torquing." (4 CT 779.) Tristar Risk Management communicated this restriction to Return to Work coordinator Victoria Campos in a May 5, 2005 letter. (4 CT 778-779, 785.)

On August 6, 2003, Dr. Sperling ordered that plaintiff be provided with an ergonomic workstation. (1 CT 251; 8 CT 1866.) Sperling informed Tristar Risk Management of this order and plaintiff informed Goldberg. (7 CT 1704.) On May 4, 2004, Barbara Blanton of "Risk Management" requested Diane Guzman of "Health and Safety" to provide plaintiff with an ergonomic workstation. (1 CT 251.) The County never provided an ergonomic workstation to plaintiff. (1 CT 251.)

In January 2005, plaintiff was examined by Andrew Rah, M.D. (4 CT 787.) Since last being seen by Dr. Rah's office, plaintiff had undergone "a CT scan of the lumbar spine" that showed "evidence of a small disc protrusion at the L4-5 and L5-S1 levels, 2-3mm." (4 CT 787.) Plaintiff reported "experiencing pain in multiple areas including his neck, lower back, [and] weakness in both upper and lower extremities." (4 CT 787.) Plaintiff experienced "[c]onstant moderate pain [in his cervical spine] upon heavy work, repetitive movements of the head and neck, and the use of either arm at or above shoulder level." (4 CT 789.) Plaintiff experienced "[c]onstant moderate pain [in his lumbar spine], becoming intermittently severe upon activities such as heavy lifting, repetitive bending, stooping, and prolonged sitting, standing, and walking." (4 CT 789.)

Plaintiff was diagnosed with "[l]umbar spondylosis," "[c]ervical discogenic pain" and "[b]ilateral upper extremity, overuse syndrome." (4

CT 788.) Plaintiff was deemed to be "permanent and stationary," (4 CT 789), which meant that plaintiff's "condition was not improving and not expected to improve." (*People v. Blick* (2007) 153 Cal.App.4th 759, 763.) Dr. Rah gave plaintiff the following work restrictions:

> Restrictions for the patient's cervical and lumbar spine limit this patient to light work. The patient is also precluded from the use of either arm, for repetitive work, at or above shoulder level. [¶] The patient continues to experience chronic pain in multiple areas including his upper extremities and lower extremities, which limits his ability to perform any substantial heavy lifting, repetitive gripping and grasping and pushing and pulling. [¶] For his lower extremities, the patient is precluded from heavy lifting and repetitive kneeling, squatting, running, jumping, climbing, or walking on uneven surfaces. [¶] The patient should be allowed to sit and stand as necessary based upon his pain level.

(4 CT 789-790.)

On or about May 6, 2005, "SAT/Human Resources, the department that consults for ergonomic workstations, received a referral for an Ergonomic Evaluation of [plaintiff]. . . ." (4 CT 780.) On May 11, 2005, plaintiff had knee surgery. (4 CT 780; 7 CT 1699.) On May 12, 2005, SAT/Human Resources sent Tristar Risk Management and Campos a letter stating that because plaintiff had been scheduled for surgery, his ergonomic evaluation would be put on hold until Tristar requested that SAT/Human Resources proceed with the evaluation. (4 CT 780, 793.)

On May 19, 2005, Dr. Daniel Capen evaluated plaintiff in regards to his claim for work-related repetitive motion injuries to his right and left upper extremities. (6 CT 1496, ¶8, lines 9-12.) Dr. Capen is a board certified orthopedic surgeon who for 25 years has primarily treated workers

injured at their work place. (6 CT 1492, ¶ 2, lines 17-19; 6 CT 1493, ¶ 3, lines 1-3.) Dr. Capen first examined plaintiff on June 24, 2004, as a result of a work-related injury to both of his knees. (6 CT 1493, ¶4, lines 16-18.) In April 2005, plaintiff designated Dr. Capen as his "'primary treating physician.'" (6 CT 1493, ¶4, lines 18-20.) Dr. Capen subsequently treated plaintiff's "numerous orthopedic problems." (6 CT 1493, ¶4, lines 19-21.)

When Dr. Capen examined plaintiff on May 19, 2005, plaintiff complained of aching to sharp pain in his elbows with pain radiating to his hands. The pain was more intense on the right. Plaintiff had aching pain in the right wrist and hand with pain radiating through his forearm to the elbow. He had swelling, numbness and tingling in his wrist, hand and fingers. Plaintiff noted weakness and cramping in his hand. He also complained of pain in the left wrist and hand secondary to compensating for his right hand. (6 CT 1496, ¶8, lines 9-24.)

Dr. Capen again examined plaintiff on August 4, 2005. (6 CT 1496, ¶9, lines 26-27.) Plaintiff had pain and tenderness in his right elbow and limited range of motion. (6 CT 1497, lines 6-8.) Dr. Capen noted that plaintiff's "'right elbow has given him a lot of trouble.'" (6 CT 1497, lines 7-9.) Plaintiff was suffering financial hardship and wanted to go back to work. (6 CT 1497, lines 8-10.) Dr. Capen provided a prescription for an ergonomic workstation and released plaintiff "to work on August 17, 2005 on a trial basis at his regular job of Head Custody Records Clerk, supervising the floor." (6 CT 1497, ¶9, lines 10-15.) Plaintiff was given new restrictions for his knees and for "carpal tunnel." (7 CT 1713.)

3. Plaintiff returns to work and, despite his protests, is reassigned to duties that violated his work restrictions.

Plaintiff was off work from May 11, 2005 until August 17, 2005 because of knee surgery. (7 CT 1699.) When plaintiff returned to work, Cornell had replaced Argott as the IRC captain. (7 CT 1664, 1674.) However, before plaintiff returned to work from his knee surgery, Goldberg told one of plaintiff's coworkers that he was going to make plaintiff's life "miserable" (8 CT 1821), and Argott and Goldberg agreed to change plaintiff's assignment from "head clerk to a clerk." (7 CT 1664.)

The assignment change required plaintiff "to do a lot of typing, a lot of reaching above the shoulder, ascending, descending the stair," which actions were either prohibited or restricted by plaintiff's doctors. (7 CT 1673.) Goldberg was aware of all of plaintiff's work restrictions before plaintiff returned to work on August 17, 2005 (8 CT 1851) and was not allowed to place plaintiff in a position that violated those restrictions. (8 CT 1847.) Goldberg did not discuss plaintiff's new duties with Return to Work coordinator Victoria Campos before plaintiff's return (4 CT 778; 8 CT 1851), but told Campos he could accommodate plaintiff. (8 CT 1849.)

Plaintiff returned to work on August 17, 2005 and was doing his usual job. (7 CT 1745.) At approximately 11:30 a.m., plaintiff went to Goldberg's office and said "good morning," whereupon Goldberg "called [plaintiff] in in a nasty way"and said "[y]our assignment changed starting today" and that plaintiff would be doing a "clerical job." (7 CT 1745.) When plaintiff asked Goldberg why, he said: "I'm tired of your medical and surgery leave and your disability." (7 CT 1711.) (Argott subsequently

testified that Goldberg had not complained about plaintiff's absences due to work-related disabilities and that such absences had not caused "any problem" in the IRC. (7 CT 1757.).)

Plaintiff replied that "[t]his is in violation of my restriction," whereupon Goldberg said "[t]his is what was agreed on with Captain Argott and I'm not changing." (7 CT 1711.) Plaintiff responded: "I'm urging you to look at all my restrictions because I will not be able to do this job." (7 CT 1746.) Plaintiff also told Goldberg "you know this is [*sic*] violation of policy. You better look in my medical file." (7 CT 1712.) Goldberg replied "nobody's going to change my decision and I don't want you to talk to me for [*sic*] now on." (7 CT 1713.) Goldberg also told plaintiff that "the doctors will write whatever [you] tell them to write." (1 CT 242.)

Goldberg informed plaintiff that Pam Broom was to be the floor head clerk (7 CT 1694) and moved plaintiff away from his normal desk, which was used by the floor head clerk for each shift. (7 CT 1699-1701.) Goldberg's rationale for the move was that "the Head Clerk running the shift needed to be in that office." (3 CT 725.) At noon on August 17th, Goldberg sent plaintiff an e-mail stating that "Vicki Campos and I reviewed your current medical restrictions. Nothing in these restrictions should prohibit you from fulfilling your new duties." (3 CT 732.) Nineteen minutes later, Goldberg sent an e-mail to a number of people, including plaintiff; the subject line read "Change of Assignment." (3 CT 731.) The e-mail read in relevant part: "*For your information, some of the Head Clerks will be changing job assignments*. . . . [¶] 4. HCRC George Azer will assume responsibility for processing various AJIS reports. On

Saturdays, he will serve as Head Clerk for AM Shift." (3 RT 731.)

Although plaintiff kept his job title and pay, his duties changed to a "heavy clerical job." (7 CT 1714-1715.) Plaintiff was initially assigned the 48 hour "[p]ast court date list," which was comprised of people who had missed their court date. (7 CT 1715, 1719.) This list had not been worked on "for a while" and was 20 pages long. (7 CT 1715.) Each page had "over 20 to 25 inmates." (7 CT 1720.) Plaintiff had to determine where the inmates were located and then look for the "jacket." (7 CT 1720.) Plaintiff had to "look for jackets all over the building" and "pull over 200 jackets a day." (7 CT 1723.) This work involved "[a] lot of walking up and down and a lot of updating." (7 CT 1720.) Plaintiff had to push a cart, which violated his restrictions. (7 CT 1719.) Plaintiff also had to do "[a] lot more typing" than had previously been the case. (7 CT 1720-1721.) As Campos subsequently acknowledged, plaintiff's restrictions rendered him incapable of "doing a lot of typing . . . ." (8 CT 1849.) Plaintiff told Goldberg that working on this list violated his restrictions. (7 CT 1721.)

On September 7, Goldberg e-mailed plaintiff additional duties:

> On those days when your only assignment is the processing of the Past Due Court List, I would like you to also perform quality control. Please submit the number of jackets or papers you quality controlled, along with the number of hours you spent performing quality control, to SCRC Alfonso Hernandez so that he can include it on the QC productivity sheet he submits to me daily.

(3 CT 738.)

Quality control involved checking updates of a "jacket" or sentence. (7 CT 1720.) Hernandez, to whom plaintiff was directed to report, was

plaintiff's subordinate. (7 CT 1719-1720.) Plaintiff's job was now strictly clerical and involved no supervision, except on Saturday when there were only 5 or 6 clerks. (7 CT 1716-1718.) When some of these clerks did not come in, plaintiff had to perform their clerical duties as well as the 48 hour list. (7 CT 1718.) Plaintiff was physically unable to perform the clerical duties assigned to him because of his carpal tunnel syndrome and other limitations. (1 CT 240-242.)

Helen Jones, plaintiff's Union representative (7 CT 1520, ¶2, lines 7-17), recommended he file a grievance because she "felt that he suffered a 'pseudo demotion' and was being relegated to performing duties at a lower level than his classification." (7 CT 1522, ¶6, lines 1-5.) Dr. Capen stated:

> based upon my background, training, and experience, my review of the County of Los Angeles Class Specifications for the jobs of Head Custody Records Clerk, Supervising Custody Records Clerk, Custody Records Clerk 2 and Custody Records Clerk 1 and my own understanding of [plaintiff's] job before returning to work on August 17, 2005, these duties were physically more demanding and were more in line with the tasks handled by Custody Records Clerks 2. It is my opinion, based on my review of the deposition transcripts and conversations with [plaintiff], that this job involved more stress than the job of Head Floor Clerk since a simple error may result in disciplinary action.

(6 CT 1497, ¶10, lines 22-28 – 6 CT 1498, ¶10, lines 1-9.)[3]

Plaintiff's expert Dr. Brian Kleiner, a professor of human resources management (7 CT 1528, ¶¶2-3, lines 6-25), stated that "[a]fter reviewing

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[3/] Defendants objected to paragraph 10 of Dr. Capen's declaration, which included the above-cited language. (9 CT 2080-2081.) The court overruled the objection except as to the first sentence of the paragraph (9 CT 2123), which plaintiff does not cite.

the Class Specifications for Custody Records Clerk 2 and head Custody Records Clerk, it is clear that the duties to which [plaintiff] was reassigned were more closely those of a Custody Records Clerk 2 rather than the managerial functions of a Head Custody Records Clerk." (7 CT 1531, ¶9, lines 4-8.) Dr. Kleiner also stated that "Mr. Goldberg reassigned [plaintiff] *from a job he could do with his restrictions to a job which violated those restrictions*" and that because "[plaintiff] was more qualified than Ms. Broom for the position of Head Floor Clerk, the County should have allowed him to return to that position after his leave for surgery to his knee." (7 CT 1531, ¶11, lines 15-17 and 21-24, emphasis added.)

4. Plaintiff seeks to regain his former duties by filing a request for reasonable accommodation, which is summarily denied, and a grievance.

On August 24, 2005, plaintiff filled out a "Request for Reasonable Accommodation." (4 CT 794.) The request form listed plaintiff's job title as "Head Custody Records Clerk" and restated the restriction Tristar Risk Management communicated on May 5, 2005: "'Right upper extremity: No heavy lifting – the individual has lost approximately one-half of his pre-injury capacity for lifting. No repetitive forceful gripping, grasping, pushing, pulling, squeezing, twisting & torquing." (4 CT 779, 785, 794.)

Plaintiff replied "yes" to the question: "Are you able to ***permanently*** perform the essential duties of the above identified position [Head Custody Records Clerk]." (4 CT 794.) Plaintiff requested "**permanent** accommodation," stating: "I *was* able to perform the essential functions of

my regular job as head clerk for day shift (floor manager) after the industrial injury. Furthermore, the job duties do not exceed the work restrictions impose [*sic*] by Dr. Brourman (AME)." (4 CT 794, emphasis added in part.) The accommodation request form includes a section to be completed by "appropriate department management." (4 CT 794.) On September 8, 2005, Goldberg wrote the following: "[Plaintiff] has been assigned to duties which do not violate his permanent work restrictions." (4 CT 794.)

Campos subsequently testified that "Mr. Goldberg was told what [plaintiff's] restrictions were. *Mr. Goldberg placed [plaintiff] in the position that he needed him the most*." (8 CT 1850, emphasis added.) Campos added that "so far as the department is concerned, he was placed in a position that didn't violate his restrictions . . . ." (8 CT 1850.) According to Campos, Goldberg was the only person at the IRC responsible for "making sure that [plaintiff's] assignments did not violate his physician-imposed work restrictions." (8 CT 1855.) Campos relied on Goldberg in concluding that the duties to which Goldberg assigned plaintiff did not violate his restrictions (8 CT 1857) and told plaintiff that "his doctor could not dictate which position [plaintiff] could hold." (4 CT 781.)

The same day plaintiff requested accommodation, he filed a grievance regarding Goldberg's removing him from his head clerk duties. (3 CT 734.) The grievance stated that plaintiff's job assignment beginning August 17, 2005 was improper and violated his work restrictions, and that plaintiff should be returned to his previous assignment, which met his restrictions. (3 CT 734.) On the advice of his union representative, plaintiff waived the first level grievance hearing in front of Goldberg. (3 CT 727, 734; 8 CT 1868.)

5. Plaintiff's new duties significantly aggravate his symptoms, but the Sheriff's Department ignores plaintiff's complaints and his physician's reports documenting the symptoms and reiterating plaintiff's work restrictions.

On August 31, 2005, Dr. Capen, cognizant that "the Sheriff's Department had changed [plaintiff's] job duties," "prepared a Disability Status report for [plaintiff] limiting his work activities to 'no repetitive typing and limited use of his left hand.'" (6 CT 1498, ¶ 11, lines 9-15.) This report, like other "documents received by [Campos] and the Health and Safety unit from the employee and/or his healthcare providers," became part of the file Campos maintained on plaintiff because he had "requested a reasonable accommodation based on a disability." (4 CT 779, 781, 795.)

On September 8, a day after being assigned the quality control duties, plaintiff sent Goldberg the following e-mail and copied Cornell:

> Jon, [¶] You apparently misinformed of how long to process and investigate the past court date list, plus you adding quality control jackets, and running the floor when Ms. Broom out for surgery. I will be glad to discuss the matter with you if you allow me. Thank you. [¶] George Azer.

(3 CT 738.)

Goldberg's reply stated, among other things, that "[t]here is nothing to discuss" and "I don't understand why you felt the need to send a copy of your e-mail to the Captain [Cornell], and I don't appreciate it." (3 CT 737.) Plaintiff then sent Goldberg a message stating, among other things, that Goldberg was "every day adding more responsibilities that I can not meet" and that he had copied Cornell on the first e-mail because "all form [*sic*] of

retaliation, harassment and humiliations need to seize [*sic*] and stop, and is not doing anything, but getting me sick and creating hostile work environment . . . ." (3 CT 737.) Plaintiff also copied Cornell on this e-mail. (3 CT 737.) Cornell sent plaintiff and Goldberg an e-mail stating "we need to get together and resolve some issues of communication between you both." (3 CT 737.) The record does not reveal whether that meeting was ever held. At some point in time, Cornell told plaintiff he would be reassigned after Goldberg left. (7 CT 1747.) No reassignment occurred.

On September 9, 2005, because "[n]othing changed," Dr. Capen "issued a Disability Status slip for [plaintiff] indicating that '[p]atient cannot be a clerk. Must be a head floor clerk or be TTD' (temporarily totally disabled)." (6 CT 1498, ¶ 12, lines 15-19; 4 CT 796.)[4] Dr. Capen issued "this . . . slip" because plaintiff was suffering "significant aggravation of his symptoms in his upper extremities and other parts of his body . . . ." (6 CT 1498, ¶ 12, lines 18-20, 22-23.)[5]

On September 14, 2005, plaintiff sent Cornell an e-mail stating that Goldberg's actions were affecting his health and requesting a transfer to another unit, possibly the renditions unit in the criminal courts building. (3 CT 751.) When plaintiff made this request, he did not know what that job

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[4/] The slip is dated September 9, 2005, though Dr. Capen's declaration states it was issued September 15, 2005.

[5/] Defendants objected to paragraph 12 of Dr. Capen's declaration, which included the above-cited language. (9 CT 2081-2082.) The court overruled the objection except insofar as Dr. Capen discussed the "work required of plaintiff." (9 CT 2123.) Plaintiff does not cite that material. (See 6 CT 1498, ¶ 12, line 20– 6 CT 1499, ¶ 12, line 9.)

entailed, but just wanted to "get away" from Goldberg. (7 CT 1729.)

On September 29, 2005, plaintiff sent Goldberg an e-mail stating that "[d]ue to severe neck and shoulder pain, I'm requesting to leave work early to go see my doctor. Thank you." (8 CT 1875.) Goldberg's response was "Please ensure that you fax or bring some documentation from your doctor." (8 CT 1875.) That same day, Dr. Capen submitted a disability status form stating that plaintiff was temporarily totally disabled until October 2, 2005, but was released to return to work on October 3, 2005 under the "same work restriction as before." (4 CT 797.)

6. Plaintiff's grievance is heard and denied, his requests for reassignment before and after the denial are ignored and he leaves work for the last time on a stretcher.

On October 5, 2005, plaintiff's grievance was heard by Cornell, with plaintiff and his union representative Helen Jones present. (3 CT 749.) Plaintiff and his representative contended that Goldberg had assigned plaintiff to jobs that violated his permanent work restrictions and that plaintiff "should be returned to his job as floor manager of day shift." (7 CT 1524, ¶12, lines 3-9.)[6] Neither plaintiff nor his representative agreed that the jobs to which plaintiff was assigned were appropriate and accommodated his permanent restrictions. (7 CT 1523, ¶ 12, lines 26 – 7 CT 1524, ¶ 12,

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[6/] Defendants objected to paragraph 12 of Jones' declaration (9 CT 2094), which plaintiff cites in part. The court sustained the objection "on the ground of hearsay as to what the declarant was told." (9 CT 2123.) Plaintiff does not cite information told to declarant. (See 7 CT 1524, ¶ 12, lines 10-17.)

line 2.) "[T]his was a major point of contention at the grievance meeting." (7 CT 1524, ¶ 12, lines 1-4.) Cornell offered plaintiff a transfer to the "renditions unit," but only for a short time. (7 CT 1523, ¶ 9, lines 13-16.)[7] Plaintiff did not want to go for a "few days" and get sent back. (7 CT 1752.) The renditions unit position was "clerical." (7 CT 1729.)

On November 3, 2005, Dr. Capen issued a disability status slip releasing plaintiff to return to work with the following restrictions: "No heavy lifting Clerk Position." (4 CT 798.) Dr. Capen issued this restriction because his secretary received a call from a man identifying himself as 'Mike,' who purported to be plaintiff's supervisor. (1 CT 242.) Mike stated that the only position available to plaintiff was that of "clerk," and that plaintiff was "performing the duties of a clerk and . . . was trying to promote himself to a supervisory position." (1 CT 242.) Mike's call misled Dr. Capen into issuing the "Disability Status sheet" approving plaintiff's ability to perform a clerk's job. (1 CT 242.) After reviewing the chart, Dr. Capen realized he was misled by Mike and issued a report dated November 4, 2005 stating that plaintiff could "perform his customary duties as Head Custody Records Clerk but could not perform the duties of a "'clerk.'" (1 CT 242.)[8]

7/ Defendants successfully objected to certain language in paragraph 9 of Jones' declaration. (9 CT 2093, 2123.) However, defendants did not object to the language cited here.

8/ Defendants submitted the cited evidence regarding "Mike's" call to Dr. Capen's secretary and Dr. Capen's resulting actions. (1 CT 107-109, 228, 242.) Defendants successfully objected when plaintiff offered similar evidence (9 CT 2082-2083, 2123), but "[i]t is axiomatic that a party who himself offers inadmissible evidence is estopped to assert error in regard thereto." (*People v. Williams* (1988) 44 Cal.3d 883, 912.)

On November 11, 2005, Dr. Capen saw plaintiff, who "had continuing complaints regarding his upper extremities and tested positive for carpal tunnel syndrome and cubital tunnel syndrome. He also had low back pain with restricted range of motion and right knee pain (post surgical)." (6 CT 1500, ¶ 14, lines 6-11.) Dr. Capen prescribed bilateral wrist splints and "prepared a report . . . ." (6 CT 1500, ¶ 14, lines 3-5, 14-16.)

On December 7, 2005, Cornell denied plaintiff's grievance, asserting that plaintiff's work restrictions were being accommodated and that he had refused "another assignment accommodation." (3 CT 749.)

On December 14, 2005, plaintiff e-mailed Cornell stating "[m]y difficulty arises from my physical inability to engage in extensive typing. My job restrictions preclude extensive typing." (3 CT 753.) Plaintiff also wrote that he would be "more than happy to transfer to the rendition unit or some other location consistent with my class specification and work restrictions." (3 CT 753.) Cornell replied that plaintiff's current job duties accommodated his restrictions and that plaintiff had previously declined a transfer to the renditions unit. (3 CT 753.)

On December 15, 2005, Dr. Capen saw plaintiff, who "[a]gain . . . presented with neck pain, low back pain, right knee pain, some left knee symptoms as well as bilateral hand and wrist complaints." (6 CT 1500, ¶ 15, lines 16-20.)[9]

[9/] Defendants objected to paragraph 15 of Capen's declaration (9 CT 2083), which plaintiff cites in part. The court overruled the objection "except as to the contents of the report which is sustained on the ground of the secondary evidence rule." (9 CT 2123.) Plaintiff does not cite the report. (6 CT 1500, ¶ 15, lines 20-28 – 6 CT 1501, ¶ 15, lines 1-9.)

On January 27, 2006 plaintiff "presented to [Dr. Capen's] office with complaints of 'aching pain in the arms and legs, accompanied by numbness and a pins and needles sensation.' He also complained of 'stabbing pain in the head, neck and low back.' He related missing work the prior week 'because of a severe flare up of neck and arm pain, as well as back and leg pain.'" (6 CT 1501, ¶ 16, lines 13-21.)[10] Dr. Capen signed a Disability Status report releasing plaintiff to work on January 28, 2006, but "limiting his work activities to 'Head Records Clerk only, light typing & No reaching above bilateral shoulders." (4 CT 800; 6 CT 1501, ¶ 16, lines 22-26.) The Sheriff's Department received this report on January 27, 2006. (4 CT 782.)

A "meeting" regarding plaintiff's ergonomic work station request was scheduled for February 2, 2006, but "plaintiff went out on stress leave . . . ." (4 CT 782.) Plaintiff was to meet with the next level decisionmaker regarding his grievance, but was "carried out in a stretcher to the hospital" before this could occur. (7 CT 1748.) By February 6, 2006, plaintiff's "symptoms had increased to the point that [Dr. Capen] temporarily totally disabled him and would not permit him to return to work." (6 CT 1502, ¶ 17, lines 1-4.) Plaintiff never returned to work. (6 CT 1502, ¶ 18, lines 5-6.)

Dr. Kleiner concluded that "[t]he County did not adequately reasonably accommodate Mr. Azer's disabilities. There was no adequate interactive process." (7 CT 1530, ¶5, lines 11-12.)

10/ Defendants objected to lines 9-22 of paragraph 15 of Capen's declaration (9 CT 2083), which plaintiff cites in part. The court sustained the objection "on the ground of personal knowledge except as to the reported symptoms." (9 CT 2123.) Plaintiff cites only the material pertaining to the reported symptoms.

C. Procedural Fact Summary.

This case was brought under the Fair Employment and Housing Act. (4 CT 891-910.)[11] Plaintiff requested compensatory and punitive damages and attorney fees. (4 CT 910.)

Plaintiff's Second Amended Complaint, the operative pleading, was brought against the County, Argott, Goldberg, Curtiss Burnett and Danny Sneed. (4 CT 891.) Plaintiff's first cause of action alleged that all the defendants had harassed him in violation of Government Code section 12940, subdivision (j)(1). (4 CT 904.) Plaintiff brought a second cause of action against the County for retaliation that violated Government Code section 12940(h). (4 CT 904-905.)

Plaintiff alleged a third cause of action against the County, Goldberg and Argott for harassment and disability discrimination violating Government Code section 12940, subdivisions (j)(1), (m) and (n.) (4 CT 905-909.) Plaintiff asserted that defendants had "refused to reasonably accommodate plaintiff's disability or enter into good faith interaction to determine effective reasonable accommodation of said disability." (4 CT 909.) Plaintiff brought a fourth cause of action against the County for violating Government Code section 12940, subdivision (j)(1) by failing to prevent harassment. (4 CT 909.)

Plaintiff subsequently dismissed Sneed without prejudice. (1 CT 50.) Plaintiff also dismissed without prejudice the third cause of action

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11/ This citation is to plaintiff's Second Amended Complaint. The trial court judicially noticed this pleading's filing. (4 CT 836-837; 9 CT 2123.)

against Argott. (1 CT 48.) The remaining defendants filed a demurrer, which was sustained on the fourth cause of action. (1 CT 57.)

Defendants answered the complaint, then moved for summary judgment, or, in the alternative, summary adjudication, and requested the court to judicially notice certain documents. (1 CT 58, 78; 4 CT 810.) Plaintiff opposed the summary judgment motion and filed a judicial notice request. (4 CT 815, 836.) Defendants replied to the opposition and objected to some of plaintiffs' evidence. (9 CT 2076, 2108.)

Before the court ruled on the motion for summary judgment, plaintiff dismissed Burnett with prejudice. (4 CT 813.) On May 27, 2008, the court sustained some of defendants' objections, granted both plaintiff's and defendants' requests for judicial notice and granted defendants' motion for summary judgment. (9 CT 2120-2126.) The trial court then entered a final judgment in favor of the remaining defendants: the County, Argott and Goldberg. (9 CT 2127; Code Civ. Proc., §577.)

On June 20, 2008, defendants served the Notice of Entry of Judgment. (1 Supplemental Clerk's Transcript ["SCT"] 3.) On June 30, 2008, plaintiff timely filed and served a "Notice of Intention to Move for New Trial." (9 CT 2129-2131; Code Civ. Proc., § 659.) On July 10th 2008, plaintiff timely filed and served a supporting affidavit, along with a memorandum of law. (9 CT 2132, 2150; Code Civ. Proc., § 659a.)

The court heard the new trial motion on August 8, 2008 and denied it on August 13, 2008. (1 RT 37; 1 SCT 4.) On September 11, 2008, plaintiff timely filed a notice of appeal. (9 RT 2256; Code Civ. Proc., §660; Cal. Rules of Court, Rule 8.108(b)(1)(A).)

ARGUMENT

I.

THIS COURT SHOULD REVERSE THE SUMMARY JUDGMENT GRANTED TO THE COUNTY ON PLAINTIFF'S INTERACTIVE PROCESS CLAIM.

The court granted summary judgment to the remaining defendants (the County and Goldberg) on plaintiff's allegation that they failed to engage in a timely, good faith, interactive process. (9 CT 2125-2126.) The court erred in granting summary judgment to the County because the evidence shows, at the very least, that there were triable issues of material fact regarding the County's liability.

A. When A Disabled Employee Requests Accommodation, The FEHA Requires An Employer To Participate In A Timely, Good Faith, Interactive Process To Determine Whether Reasonable Accommodation Is Possible.

The FEHA makes it unlawful:

> For 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.

(Gov. Code, § 12940, subd. (n).)

This provision "imposes an additional duty on the employer 'to engage in a timely, good faith, interactive process with the employee . . . to determine effective reasonable accommodations . . . .'" (*Wilson v. County of Orange*, *supra*, 169 Cal.App.4th at p. 1193.) "An employee may file a civil action based on the employer's failure to engage in the interactive process." (*Claudio v. Regents of University of California* (2005) 134 Cal.App.4th 224, 243.) This violation gives rise to a different cause of action than that which arises from a failure to accommodate. (*Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 424.)

An employer's obligation to engage in the interactive process typically begins after "a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition." (Gov. Code, §12940, subd. (n); *Hanson v. Lucky Stores, Inc.* (1999) 74 Cal.App.4th 215, 229 ["employer obligation to participate in interactive process is triggered by employee's request for accommodation"]; but see *Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 950-951 ["an 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 . . . ."].)

Defendants sensibly refrained from contending below either that they did not know plaintiff was disabled or that they were unaware plaintiff had requested accommodation after he returned to work. Instead, defendants asserted that Goldberg was not individually liable and that the County engaged in the interactive process. (4 CT 772-774; 9 CT 2116-2117, 2204-2206, 2210-2214; 1 RT 22-33, 54-59, 63-68.) Plaintiff does not contend on

appeal that Goldberg is individually liable. However, summary judgment should not have been granted for the County because its responses to plaintiff's accommodation requests did not by any stretch of the imagination comply, *as a matter of law*, with the FEHA's interactive process requirement.

"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." (*Wilson v. County of Orange*, *supra*, 169 Cal.App.4th at p. 1195.) This process "'is at the heart of the [FEHA's] process and essential to accomplishing its goals. It is the primary vehicle for identifying and achieving effective adjustments which allow disabled employees to continue working without placing an 'undue burden' on employers.'" (*Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 61, citing *Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 261-262.)

"The interactive process requires communication and good-faith exploration of possible accommodations between employers and individual employees with the goal of identifying an accommodation that allows the employee to perform the job effectively." (*Nadaf-Rahrov v. Neiman Marcus Group, Inc.*, *supra*, 166 Cal.App.4th at p. 985, internal quotation marks and brackets omitted.) "For the process to work both sides must communicate directly, exchange essential information and neither side can delay or obstruct the process." (*Ibid.*, internal quotation marks and brackets omitted.) The facts show that the County did almost nothing to facilitate the interactive process and much to obstruct it.

B. The County Failed To Adequately Participate In The Interactive Process On Multiple Occasions.

The record reveals multiple occasions on which the County was required, but failed, to engage in the interactive process sufficiently or at all: (1) when plaintiff returned to work on August 17, 2005; (2) when he requested accommodation on August 24, 2005; (3) when his grievance was heard on October 5, 2005; (4) when Dr. Capen issued restrictions on multiple occasions; (5) when plaintiff notified Goldberg or Cornell by e-mail that his new assignment was causing him physical problems and stress. Neither on these occasions, nor at any other time, did the County satisfy the FEHA's interactive process requirement.

1. Plaintiff tells Goldberg that his new duties violated his work restrictions, that he would not be able to perform these duties and that Goldberg should review plaintiff's file; Goldberg rebuffs plaintiff.

When plaintiff returned to work on August 17, 2005, Goldberg told plaintiff that his "assignment changed starting today" and he would be doing a "clerical job." (7 CT 1745.) Plaintiff informed Goldberg that this change in duties violated his restrictions, that he would "not be able to do this job" and that Goldberg should review plaintiff's medical file. (7 CT 1711-1712, 1746.) Goldberg's responses were "[t]his is what was agreed on with Captain Argott and I'm not changing" (7 CT 1711), "the doctors will write whatever [you] tell them to write" (1 CT 242) and "nobody's going to change my decision and I don't want you to talk to me for [*sic*] now on." (7

CT 1713.) Goldberg then e-mailed plaintiff that "Vicki Campos and I reviewed your current medical restrictions. Nothing in these restrictions should prohibit you from fulfilling your new duties." (8 CT 1890.)

"It is an employee's responsibility to understand his or her own physical or mental condition well enough to present the employer at the earliest opportunity with a concise list of restrictions which must be met to accommodate the employee." (*Jensen v. Wells Fargo Bank*, *supra*, 85 Cal.App.4th at p. 266.) Because plaintiff brought his restrictions to Goldberg's attention, referenced his medical file and told Goldberg that he would not be able to perform the new duties, plaintiff did more than enough to begin the interactive process. By flatly rebuffing plaintiff, Goldberg failed to fulfill the County's obligation to engage in that process.

2. Plaintiff requests a return to his previous duties as a reasonable accommodation and Goldberg responds that plaintiff's new assignment does not violate his work restrictions.

On August 24, 2005, plaintiff filled out a "Request for Reasonable Accommodation." (4 CT 794.) The request form listed plaintiff's job title as "Head Custody Records Clerk" and restated the restriction Tristar Risk Management communicated on May 5, 2005: "'Right upper extremity: No heavy lifting – the individual has lost approximately one-half of his pre-injury capacity for lifting. No repetitive forceful gripping, grasping, pushing, pulling, squeezing, twisting & torquing." (4 CT 779, 785, 794.) Plaintiff replied "yes" in response to the question: "Are you able to ***permanently***

perform the essential duties of the above identified position [Head Custody Records Clerk]." (4 CT 794.) Plaintiff requested "**permanent** accommodation," stating: "I *was* able to perform the essential functions of my regular job as head clerk for day shift (floor manager) after the industrial injury. Furthermore, the job duties do not exceed the work restrictions impose [*sic*] by Dr. Brourman (AME)." (4 CT 794, emphasis added in part.)

Defendants' Memorandum of Points and Authorities filed in support of their summary judgment motion asserted that "[o]n August 24, 2005, plaintiff agreed that his work duties did not violate his work restrictions." (4 CT 774.) However, defendants failed to specify which "work duties" plaintiff referred to. A fair reading of the accommodation request is that plaintiff asserted he *was* able to perform his former work duties as "head clerk for day shift (floor manager)" and was requesting a return to those duties as a permanent accommodation. (*Bell v. Wells Fargo Bank* (1998) 62 Cal.App.4th 1382, 1387-1388 [plaintiff's statements regarding whether he could perform "'regular and customary work'" should be interpreted as assertions that he was able to do his job before the bank ended an existing accommodation].) This interpretation is reinforced by plaintiff's filing (that same day) a grievance requesting a return to his previous assignment. (3 CT 747.) Moreover, even if plaintiff's request could be deemed ambiguous, "[e]videntiary doubts or ambiguities are ordinarily resolved in favor of the party opposing summary judgment." (*Santillan v. Roman Catholic Bishop of Fresno* (2008) 163 Cal.App.4th 4, 12.)

Defendants' Separate Statement of Undisputed Material Facts asserted more explicitly that "[o]n August 24, 2005, plaintiff signed a Health

and Safety Unit Request for Reasonable Accommodation form along with Jon Goldberg because they discussed his work restrictions and his job assignment and they were both in agreement that his *current* job assignment did not violate his permanent work restrictions." (3 CT 689, emphasis added.) This contention, which plaintiff disputed (4 CT 987), is incorrect.

Neither the pages defendants cited (4 CT 781, 794), nor any other evidence shows that plaintiff and Goldberg even discussed his work restrictions on August 24, 2005, much less agreed that plaintiff's then current job assignment did not violate his permanent work restrictions. In fact, the record shows that the only "discussion" between plaintiff and Goldberg regarding his work restrictions occurred on August 17, 2005; any other communication between the two on this topic was via e-mail.

In reality, the County's only response to plaintiff's accommodation request was Goldberg's September 8, 2005 statement in another section of the accommodation request form that "[plaintiff] has been assigned to duties which do not violate his permanent work restrictions." (4 CT 794.) By simply brushing off plaintiff's accommodation request, Goldberg once again failed to engage in the required interactive process.

3. Plaintiff files a grievance that Cornell hears and denies.

On the same day plaintiff requested accommodation, he filed a grievance regarding Goldberg's removing him from his previous duties. (3 CT 734.) The grievance stated that plaintiff's job assignment beginning August 17, 2005 was improper and violated his work restrictions, and that

plaintiff should be returned to his previous assignment, which met those restrictions. (3 CT 734.) On the advice of his union representative, plaintiff waived the first level grievance hearing that Goldberg would have conducted. (3 CT 727, 734; 8 CT 1868.)

On October 5, 2005, plaintiff's grievance was heard by Cornell, with plaintiff and his union representative Helen Jones present. (3 CT 749.) Plaintiff and his representative contended that Goldberg had assigned plaintiff to jobs that violated his permanent work restrictions and that plaintiff "should be returned to his job as floor manager of day shift." (7 CT 1524, ¶12, lines 3-9.) Defendants subsequently asserted in their Separate Statement of Undisputed Material Facts that plaintiff and his union representative agreed that the job assignments did not violate plaintiff's work restrictions. (3 CT 695; 4 CT 774.) Plaintiff disputed this inaccurate assertion (4 CT 999) because neither he nor his representative agreed that the jobs to which plaintiff was assigned were appropriate and accommodated his permanent restrictions. (7 CT 1523, ¶ 12, line 26 – 7 CT 1524, ¶ 12, line 2.) "[T]his was a major point of contention at the grievance meeting." (7 CT 1524, ¶ 12, lines 1-4.)

Cornell responded to plaintiff's request for reassignment to his former duties by offering him a transfer to the "renditions unit," but only for a short time. (7 CT 1523, ¶ 9, lines 13-16.) "A temporary position is not, however, a reasonable accommodation." (*Jensen v. Wells Fargo Bank*, *supra*, 85 Cal.App.4th at p. 264.) Plaintiff declined because he did not want to go for a "few days" and get sent back (7 CT 1752.) Moreover, the renditions unit job was also "clerical" (7 CT 1729), so it would not have

been a reasonable accommodation. The County has acknowledged that the "offer of a temporary transfer was not done as a reasonable accommodation for plaintiff's medical restrictions . . . ." (9 CT 2214.)

Once plaintiff declined the temporary transfer, the ball was back in Cornell's court. (*Nadaf-Rahrov v. Neiman Marcus Group, Inc.*, *supra*, 166 Cal.App.4th at p. 987 ["The EEOC Interpretive Guidance describes a back-and-forth process of *sharing* information about available jobs (on the employer's part) and physical limitations (on the employee's part)."][12]; *Humphrey v. Memorial Hospitals Ass'n* (9th Cir. 2001) 239 F.3d 1128, 1138 ["[T]he duty to accommodate is a continuing duty that is not exhausted by one effort."], internal quotation marks omitted; *Wysinger v. Automobile Club of Southern California*, *supra*, 157 Cal.App.4th at p. 426 ["'An employer . . . who rejects the other's proposed accommodations and offers no effective alternative fails to engage in good faith in the mandatory interactive process.'"].)

Instead of attempting to determine if a reasonable accommodation could be made, however, Cornell simply denied plaintiff's grievance on the grounds that plaintiff's work restrictions were being accommodated and that he had refused "another assignment accommodation." (3 CT 749.) Thus, the grievance hearing and its outcome represent yet another failure by a County employee to engage in the required interactive process.

12/ The EEOC ("Equal Employment Opportunity Commission") is a federal agency, but the California Legislature accords weight to its guidance regarding the interactive process. (Gov. Code, § 12926.1, subd. (e).)

4. Dr. Capen issues restrictions on multiple occasions and the County ignores them.

Dr. Capen was plaintiff's "'primary treating physician'" from April 2005 onward. (6 CT 1493, ¶4, lines 18-21.) During this time, he examined plaintiff on multiple occasions and described plaintiff's work restrictions in disability status reports that included the following:

- **August 4, 2005**: Dr. Capen examined plaintiff, provided a prescription for an ergonomic workstation and released plaintiff "to work on August 17, 2005 on a trial basis at his regular job of Head Custody Records Clerk, supervising the floor." (6 CT 1496, ¶9, lines 26-27, 6 CT 1497, ¶9, lines 10-15.) Plaintiff was given new restrictions for his knees and for "carpal tunnel." (7 CT 1713.)

- **August 31, 2005**: Dr. Capen, cognizant that "the Sheriff's Department had changed [plaintiff's] job duties," "prepared a Disability Status report for [plaintiff] limiting his work activities to 'no repetitive typing and limited use of his left hand.'" (6 CT 1498, ¶ 11, lines 9-15.)

- **September 9, 2005**: Because "[n]othing changed," Dr. Capen "issued a Disability Status slip for [plaintiff] indicating that '[p]atient cannot be a clerk. Must be a head floor clerk or be TTD' (temporarily totally disabled)." (6 CT 1498, ¶ 12, lines 15-19; 4 CT 796.)

- **September 29, 2005**: Dr. Capen submitted a disability status form stating that plaintiff was temporarily totally disabled until October 2, 2005 and was released to return to work on October 3, 2005 under the "same work restriction as before." (4 CT 797.)

- **November 3, 2005:** Dr. Capen issued a disability status slip releasing plaintiff to return to work with the following restrictions: "No heavy lifting Clerk Position." (4 CT 798.) Dr. Capen issued this restriction because his secretary received a call from a man identifying himself as 'Mike,' who purported to be plaintiff's supervisor. (1 CT 242.) Mike stated that the only position available to plaintiff was that of "clerk," and that plaintiff was "performing the duties of a clerk and . . . was trying to promote himself to a supervisory position." (1 CT 242.)

- **November 4, 2005**: After reviewing the chart, Dr. Capen realized he was misled by Mike and issued a report dated November 4, 2005 stating that plaintiff could "perform his customary duties as Head Custody Records Clerk but could not perform the duties of a 'clerk.'" (1 CT 242.)

- **November 11, 2005**: Dr. Capen saw plaintiff, who "had continuing complaints regarding his upper extremities and tested positive for carpal tunnel syndrome and cubital tunnel syndrome. He also had low back pain with restricted range of motion and right knee pain (post surgical)." (6 CT 1500, ¶ 14, lines 6-11.) Dr. Capen prescribed bilateral wrist splints and "prepared a report . . . ." (6 CT 1500, ¶ 14, lines 3-5, 14-16.)

- **January 27, 2005**: Dr. Capen signed a Disability Status report releasing plaintiff to work on January 28, 2006, but "limiting his work activities to 'Head Records Clerk only, light typing & No reaching above bilateral shoulders.'" (4 CT 800; 6 CT 1501, ¶ 16, lines 22-26.) The Sheriff's Department received this report on January 27, 2006. (4 CT 782.)

The record is virtually devoid of evidence showing that the County

responded to these reports. Although Campos maintained a file on plaintiff containing "documents received by [Campos] and the Health and Safety unit from the employee and/or his healthcare providers" because plaintiff had "requested a reasonable accommodation based on a disability" (4 CT 779) and although Campos was aware of plaintiff's restrictions even before he returned to work (8 CT 1890), the only evidence of Campos speaking with plaintiff about these reports was that at some point, she told plaintiff that "his doctor could not dictate which position [plaintiff] could hold." (4 CT 781.) The record does not reveal whether Campos spoke with Goldberg or Cornell about Dr. Capen's reports issued after August 17, 2005.

5. Plaintiff notifies Goldberg or Cornell by e-mail that his new assignment was causing him health problems; their responses are unhelpful.

Plaintiff sent three e-mails to Goldberg or Cornell between September 8, 2005 and December 14, 2005 informing them that he was experiencing work-related health problems.

- **September 8, 2005**: During an exchange of e-mails, plaintiff sent Goldberg a message stating, among other things, that Goldberg was "every day adding more responsibilities that I can not meet" and that "all form [*sic*] of retaliation, harassment and humiliations need to seize [*sic*] and stop, and is not doing anything, but getting me sick and creating hostile work environment . . . ." (3 CT 737.)

- **September 14, 2005**: Plaintiff sent Cornell an e-mail stating that Goldberg's actions were affecting his health and requesting a transfer to

another unit, possibly the renditions unit in the criminal courts building. (3 CT 751.) When plaintiff made this request, he did not know what that job entailed, but just wanted to "get away" from Goldberg. (7 CT 1729.)

- **December 14, 2005**: Plaintiff sent an e-mail to Cornell stating "[m]y difficulty arises from my physical inability to engage in extensive typing. My job restrictions preclude extensive typing." (3 CT 753.) The e-mail also stated that plaintiff would be "more than happy to transfer to the rendition unit or some other location consistent with my class specification and work restrictions." (3 CT 753.) Cornell replied that plaintiff's current job duties accommodated his restrictions and that plaintiff had previously declined a transfer to the renditions unit. (3 CT 753; see *Humphrey v. Memorial Hospitals Ass'n*, *supra*, 239 F.3d at p. 1139 ["an employer fails to engage in the interactive process as a matter of law where it rejects the employee's proposed accommodations by letter and offers no practical alternatives."].)

All of these e-mails informed Goldberg or Cornell that plaintiff was suffering work-related health problems. Goldberg knew about all of plaintiff's work restrictions before he returned to work on August 17, 2005. (8 CT 1851.) Cornell had been told at the October 5, 2005 grievance hearing that Goldberg had assigned plaintiff to jobs that violated his permanent work restrictions. (3 CT 749; 7 CT 1524, ¶12, lines 3-6.) Moreover, at some point in time before Goldberg left on November 17, 2005 (7 CT 1726), plaintiff told Cornell that Goldberg was overloading him with work. (1 CT 245.) Given this background, these e-mails, particularly that of December 14, 2005, should have triggered the interactive process.

C. The County's Multiple Failures to Adequately Engage In The Interactive Process Should Have Precluded Summary Judgment In Its Favor.

The trial court should not have granted summary judgment for the County, whose employees repeatedly ignored plaintiff and his physician when they warned that plaintiff was physically unable to perform his new duties and required accommodation. An employer is not permitted to simply disregard such warnings. (See, e.g., *Diaz v. Federal Express Corp.* (C.D. Cal. 2005) 373 F.Supp.2d 1034, 1041-1042, 1061-1062 [employer was obligated to engage in the interactive process after receiving psychiatrist's report recommending that plaintiff be transferred for psychiatric reasons].) By disregarding these warnings, the County violated the FEHA.

The case most on point is *Wysinger*, where the court upheld a jury verdict on the plaintiff's interactive process claim because the employer "ignored [plaintiff's] repeated requests to discuss his health . . . problems." (*Wysinger v. Automobile Club of Southern California*, *supra*, 157 Cal.App.4th at p. 422.) The *Wysinger* Court cited the employer's failure to respond to: (1) the plaintiff's letters concerning his health in 2000; (2) the plaintiff's 6-12 requests to his immediate supervisor for health-related accommodations in 2001, when plaintiff's health was deteriorating; and (3) the written communications from plaintiff's doctor about plaintiff's health conditions in 2002. (*Ibid.*) In the present case, County employees either ignored or dismissed (sometimes contemptuously) plaintiff's and his physician's communications regarding plaintiff's deteriorating health, even when those communications specifically requested that plaintiff be restored

to his former duties or be granted some other accommodation. As in *Wysinger*, these failures should have precluded the County from obtaining summary judgment on plaintiff's interactive process claim.

Courts have found triable issues of fact regarding the adequacy of employers' participation in the interactive process even in cases where the employers were *more* engaged in the interactive process than was the County and/or where plaintiffs did *less* to facilitate that process than did the plaintiff here. In *Jensen*, the court concluded that there was a triable issue regarding whether the employer had caused the interactive process to break down even though the employer provided the employee some "informal assistance" in finding a new position within the organization and the employee failed to "fully cooperat[e] with efforts to place her." (*Jensen v. Wells Fargo Bank*, *supra*, 85 Cal.App.4th at pp. 265-266; see also *Velente-Hook v. Eastern Plumas Health Care* (E.D. Cal. 2005) 368 F.Supp.2d 1084, 1099-1100 [a jury could find that plaintiff's emotional behavior during meetings regarding her job was due to her disability and/or the employer's conduct, so that the employer and not the plaintiff could be held responsible for the breakdown of the interactive process].)

In *Nadaf-Rahrov*, the court reversed summary judgment on the plaintiff's interactive process claim despite the fact that: (1) the employer initially engaged adequately in the interactive process; (2) the plaintiff, who held monthly telephone conversations with the employer's human resources department, never informed anyone that she was able to return to work; (3) the plaintiff told the human resources manager that she was unable to work; and (4) the plaintiff's doctor never released her to return to work.

(*Nadaf-Rahrov v. Neiman Marcus Group, Inc.*, *supra*, 166 Cal.App.4th at pp. 961, 986, 989.) The court held that a reasonable jury could have found that the employer caused the interactive process to break down by refusing to provide information about available positions and by demanding a medical release before it would re-engage in the interactive process. (*Id.* at p. 987.) The court also stressed that the plaintiff at one point had submitted a note stating that she might be able to return to work in a new position, but the employer unilaterally decided that plaintiff would not be able to perform any available position in the company with or without accommodation and terminated her without warning. (*Id.* at pp. 988-989.)

Unlike the *Nadaf-Rahrov* employer, which initially engaged in the interactive process, the County never adequately engaged in this process despite having numerous opportunities to do so as plaintiff's condition worsened. Goldberg, who was hostile toward plaintiff and reassigned him, was inflexible from start to finish. Although Campos received Dr. Capen's post-August 17, 2005 medical reports, her only apparent reaction to them was to tell plaintiff that his "doctor could not dictate which position [plaintiff] could hold." (4 CT 781.) Cornell denied plaintiff's grievance, asserting that the County had accommodated plaintiff's work restrictions and he had refused "another assignment accommodation." (3 CT 749.) In sum, the County's representatives either ignored or rejected without discussion multiple accommodation requests by plaintiff and his physician.

Plaintiff could not even obtain an ergonomic workstation, despite doctor's prescriptions dating back to 1999. (1 CT 176, 251; 6 CT 1497, ¶9, lines 10-12; 8 CT 1866.) In a sad little coda epitomizing the County's

failure to conduct a timely, good faith, interactive process, plaintiff went out on disability leave prior to a scheduled "meeting" regarding an ergonomic work station. (4 CT 782.) The meeting was to be held more than *five months* after plaintiff returned to work on August 17, 2005 with yet another prescription for that work station. (4 CT 782; 6 CT 1497, ¶9, lines 10-12.)

It is wholly unsurprising that plaintiff's expert Dr. Kleiner concluded "[t]here was no adequate interactive process." (7 CT 1530, ¶5, line 12.) Dr. Kleiner's testimony in and of itself should have precluded summary judgment. (*DeLeon v. Commercial Manufacturing & Supply Co.* (1983) 148 Cal.App.3d 336, 342, 348 [expert testimony that defendant fell below the "standard of practice" "also protected plaintiff from a summary judgment"].)

The County's virtually complete failure to engage in the interactive process puts its performance roughly on a par with that of the *Wysinger* employer, and well below that of the employers in *Jensen*, *Velente-Hook*, and *Nadaf-Rahrov*. As in all these cases, there is sufficient evidence for a jury to conclude that the employer failed to satisfy the FEHA's interactive process requirement. Therefore, the judgment below must be reversed in part so plaintiff can pursue his interactive process claim against the County.

II.

THIS COURT SHOULD REVERSE THE SUMMARY JUDGMENT GRANTED TO THE COUNTY ON PLAINTIFF'S FAILURE TO ACCOMMODATE CLAIM.

The court granted summary judgment to the remaining defendants

(the County and Goldberg) on plaintiff's allegation that they failed to reasonably accommodate his disability. (9 CT 2125-2126.) The court erred in granting summary judgment to the County because the evidence shows, at a minimum, triable issues of material fact regarding the County's liability.

The FEHA makes it unlawful "[f]or an employer or other entity covered by this part to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee." (Gov. Code, § 12940, subd. (m).) Courts disagree as to whether an employee must show himself to be a "qualified individual" to prevail on a claim brought under this section. (Compare *Bagatti v. Department of Rehabilitation* (2002) 97 Cal.App.4th 344, 358-363 [employee need not show he is a "qualified individual" to prevail on a failure to accommodate claim] with *Nadaf-Rahrov v. Neiman Marcus Group, Inc.*, *supra*, 166 Cal.App.4th at p. 977 [disagreeing with *Bagatti*]; see also *Green v. State* (2007) 42 Cal.4th 254, 265 [*Bagatti* "provided little guidance on the qualification issue [under section 12940, subdivision (a)] because it involved a cause of action for the failure to accommodate under section 12940, subdivision (m)"].)

Plaintiff should prevail regardless of whether this Court follows *Bagatti* or *Nadaf-Rahrov* because there are at the very least triable issues of material fact as to whether defendant is entitled to summary judgment even if plaintiff is required to be a qualified individual. Plaintiff will therefore discuss his accommodation claim using standards imposing this requirement. However, if this Court finds that plaintiff was not a qualified individual as a matter of law, plaintiff respectfully suggests the Court follow *Bagatti* and modify those standards to eliminate the "qualified individual" requirement.

Assuming arguendo plaintiff is required to be a qualified individual, "[t]he essential elements of a failure to accommodate claim are: (1) the plaintiff has a disability covered by the FEHA; (2) the plaintiff is a qualified individual (i.e., he or she can perform the essential functions of the position); and (3) the employer failed to reasonably accommodate the plaintiff's disability." (*Wilson v. County of Orange*, *supra*, 169 Cal.App.4th at p. 1192, citing *Jensen v. Wells Fargo Bank*, *supra*, 85 Cal.App.4th at p. 256.)

If the employee is disabled, which the County has not contested here, an employer seeking summary judgment on a failure to accommodate claim must establish through undisputed facts that:

> (1) reasonable accommodation was offered and refused; (2) there simply was no vacant position within the employer's organization for which the disabled employee was qualified and which the disabled employee was capable of performing with or without accommodation; or (3) the employer did everything in its power to find a reasonable accommodation, but the informal interactive process broke down because the employee failed to engage in discussions in good faith.

(*King v. United Parcel Service, Inc.* (2007) 152 Cal.App.4th 426, 442-443, citing *Jensen v. Wells Fargo Bank*, *supra*, 85 Cal.App.4th at p. 263.)[13]

[13/] The second part of the test enunciated in *Jensen* and applied in *King* fails to recognize that an employee can be accommodated in ways other than transfer to a vacant position. (Gov. Code, § 12926, subd. (n)(2).) This failure is likely an artifact of the *Jensen* employee's need for a transfer. (*Jensen v. Wells Fargo Bank*, *supra*, 85 Cal.App.4th at p. 251.) *King* used the *Jensen* test even though the potential accommodation was decreasing plaintiff's work hours, not transferring him. (*King v. United Parcel Service, Inc.*, *supra*, 152 Cal.App.4th at pp. 442-444.) As discussed below, the County failed to show as a matter of law either that plaintiff could not have been returned to his previous duties or transferred to a vacant position.

For reasons discussed below, the County failed to adduce undisputed facts that would establish any of these rationales.

1. The County failed to establish through undisputed facts that a reasonable accommodation was offered and refused.

During the period after plaintiff returned to work on August 17, 2005, the County offered him only two positions. The first was the clerical position to which he'd been reassigned; the second was a temporary transfer to the renditions unit. A jury could have easily found that neither of these positions reasonably accommodated plaintiff; in fact, a court could have made this finding as a matter of law.

The clerical duties to which plaintiff was assigned were neither intended to be a reasonable accommodation, nor did they amount to one. Plaintiff did not request these duties; Goldberg assigned them because he was "tired of [plaintiff's] medical and surgery leave and [his] disability." (7 CT 1711.) These duties amounted to a "pseudo demotion" that relegated plaintiff "to performing duties at a lower level than his classification" (7 CT 1522, ¶6, lines 1-5), they were "more closely those of a Custody Records Clerk 2 rather than the managerial functions of a Head Custody Records Clerk" (7 CT 1531, ¶9, lines 4-8) and they "were physically more demanding." (6 CT 1498, ¶10, lines 1-2.)

Far from being an accommodation, these duties, unlike plaintiff's previous assignment, actually violated plaintiff's restrictions. (See Statement of the Case, *supra*, section (B)(3), pp. 9-13 and 7 CT 1673, 1711-

1712, 1714-1715, 1720-1721, 1725, 1746, 1849.) Dr. Kleiner summed matters up by stating that "Mr. Goldberg reassigned [plaintiff] from a job he could do with his restrictions to a job which violated those restrictions" (7 CT 1531, ¶11, lines 15-17; *Smith v. International Brotherhood of Electrical Workers* (2003) 109 Cal.App.4th 1637, 1657 [triable issues of fact existed on plaintiff's failure to accommodate claim; plaintiff had asserted that his employer "affirmatively disaccommodated him by assigning him to a more strenuous job with longer hours and greater stress"]; *Bell v. Wells Fargo Bank* (1998) 62 Cal.App.4th 1382, 1389, fn. 6 ["A jury could conclude that Wells Fargo's move to abolish plaintiff's telecommute day disturbed a reasonable accommodation."].)

Consequently, plaintiff's condition deteriorated, as Dr. Capen's disability status reports, plaintiff's e-mails, and plaintiff's testimony demonstrate. (See Statement of the Case, *supra*, sections (B)(5) and (B)(6), pp. 15-20.) Because the clerical duties violated plaintiff's restrictions and because plaintiff's condition deteriorated, the County failed to show that plaintiff's assignment to clerical duties on August 17, 2005 was a reasonable accommodation as a matter of law.

The second position offered was the temporary transfer to the renditions unit, which plaintiff declined because he did not want to go for a "few days" and get sent back. (7 CT 1523, ¶ 9, lines 13-16; 7 CT 1752.) The County has acknowledged that the "offer of a temporary transfer was not done as a reasonable accommodation for plaintiff's medical restrictions . . . ." (9 CT 2214.) Moreover, there are two independently adequate reasons why this accommodation would have not have been reasonable.

First, "[a] temporary position is not . . . a reasonable accommodation." (*Jensen v. Wells Fargo Bank*, *supra*, 85 Cal.App.4th at p. 264.) Second, the renditions unit job was "clerical" (7 CT 1729), so it would not have been a reasonable accommodation because plaintiff's restrictions precluded him from performing such assignments. (*Alexander v. Northland Inn* (8th Cir. 2003) 321 F.3d 723, 727-728 [employee unable to vacuum could not be reasonably accommodated by transfer to another position requiring her to vacuum].) Therefore, the County failed to show that the renditions unit assignment would have been a reasonable accommodation as a matter of law.

Because the County failed to show that either position it offered would have reasonably accommodated plaintiff as a matter of law, the County was not entitled to summary judgment under the first rationale enunciated in *Jensen*.

2. The County failed to establish through undisputed facts either that there was no vacant position within the Sheriff's Department or even the IRC for which plaintiff was qualified and which he was capable of performing with or without accommodation, or that no other accommodation was possible.

The County failed to even contend *either* that there were no vacant positions within the IRC or the rest of the Sheriff's Department for which plaintiff was qualified and could perform with or without accommodation, *or* that no other accommodation was possible. Instead, the County asserted

that plaintiff's "job duties did not violate his work restrictions." (4 CT 774.) Therefore, the County waived any argument that plaintiff could not have been accommodated by a transfer to a vacant position or by any other form of accommodation. (*Webster v. Southern Cal. First Nat. Bank* (1977) 68 Cal.App.3d 407, 416-417 [rejecting attempt to uphold summary judgment on grounds not raised below because "[a] party opposing a motion for summary judgment cannot be required to marshal facts in opposition to the motion which refute claims wholly unrelated to the issues raised by the moving papers. A party may not present his case at the trial court on one theory and then urge a completely different theory on appeal."].)

Even if the County had not waived the issue of whether any accommodation was possible, it was not entitled to summary judgment on this basis for two independently adequate reasons. First, the County failed to offer any evidence *either* that there were no vacant positions within the IRC or the rest of the Sheriff's Department for which plaintiff was qualified and could perform with or without accommodation, *or* that no other accommodation was possible. That failure precludes the County from prevailing on this issue. (*Prilliman v. United Air Lines, Inc.*, *supra*, 53 Cal.App.4th at p. 952 ["on summary judgment, the moving party employer has the burden of establishing that there were no vacant positions the employee could have performed."]; *Jensen v. Wells Fargo Bank*, *supra*, 85 Cal.App.4th at pp. 264-265 [employer could not show as a matter of law that reassignment was possible because it "never attempted to definitively establish that there were no positions within its organization which met [the plaintiff's] qualifications and restrictions."].)

Second, there was sufficient evidence to create a triable issue of fact that accommodating plaintiff by returning him to his former duties was reasonable. Goldberg testified that he wanted Pam Broom "to take [plaintiff's] spot on the day shift" "[b]ecause there was an inconsistent attendance record of [plaintiff] and it was causing a void in leadership and was causing problems that weren't being resolved and it was too important a job to leave to somebody who was not going to be there at all times." (8 RT 1827.) However, Argott testified that Goldberg had not complained about plaintiff's absences due to work-related disabilities and that such absences had not caused "any problem" at the IRC. (7 CT 1757.).

Argott's testimony in and of itself creates a triable issue of fact regarding whether returning plaintiff to his former duties would have been a reasonable accommodation. Additionally, Dr. Kleiner stated that plaintiff should have been returned to the "the position of Head Floor Clerk" because he was more qualified than his replacement, Pam Broom. (7 CT 1531, ¶11, lines 21-24.) Moreover, a jury might well be able to conclude that had the County supplied the ergonomic work station Dr. Capen prescribed (6 CT 1497, ¶9, lines 10-12), plaintiff could have performed his head floor clerk duties without aggravating his ailments, thus increasing the chance that returning plaintiff to those duties was a reasonable accommodation.

Because the County waived any argument that plaintiff could not have been accommodated by either a transfer to a vacant position or any other form of accommodation, because the County failed to introduce evidence that neither transfer nor any other accommodation would have been reasonable and/or because there was a triable issue of fact regarding whether

the County could have reasonably accommodated plaintiff by returning him to his former duties, the County was not entitled to summary judgment under the second rationale enunciated in *Jensen*.

3. The County failed to establish through undisputed facts that it did everything in its power to find a reasonable accommodation, but the informal interactive process broke down because plaintiff failed to engage in discussions in good faith.

For reasons stated in Argument I, pp. 23-39, there are at the very least triable issues of material fact regarding whether the *County* engaged in the required good faith interactive process. Consequently the County cannot establish as a matter of law that it did everything in its power to find a reasonable accommodation, but the informal interactive process broke down because plaintiff failed to engage in discussions in good faith. Therefore, the County is not entitled to summary judgment under the third rationale enunciated in *Jensen*.

CONCLUSION

This Court should reverse the judgment insofar as it grants the County summary judgment on plaintiff's claims that the County failed to engage in the interactive process and failed to accommodate plaintiff.

Dated: April 13, 2009

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204(c) of the California Rules of Court, I certify that the attached Appellant's Opening Brief contains 12,496 words excluding the tables of contents and authorities, and this certificate.

DATED: April 13, 2009

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