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 REPLY BRIEF

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INTRODUCTION

In plaintiff's opening brief, he adduced more than sufficient evidence that there were triable issues of material fact on his accommodation and interactive process claims. As a result, summary judgment on these claims should not have been granted to the County of Los Angeles ("County").

Defendants respond with three arguments. First, they contend that plaintiff should not be able to cite *record evidence* to which no successful objection was made because plaintiff purportedly either failed to refer to this evidence or did not reference it properly in the trial court. (Respondent's Brief ["RB"], 31-35.) This argument is meritless because it was waived by defendants' failure (with one minor, irrelevant exception) to either object on these grounds in the trial court or to secure a ruling from the court on such objections. The argument also fails because this Court has the discretion to consider such evidence and should do so because plaintiff's papers substantially complied with summary judgment requirements and because plaintiff was opposing summary judgment.

Defendants then contend that plaintiff's interactive process claim fails as a matter of law because the County purportedly engaged in the interactive process (RB 35-40) and (alternatively) because plaintiff purportedly was required to show a triable issue of material fact regarding whether there was an alternative position available that he could have performed and failed to do so. (RB 40-45.) Both assertions are meritless.

The first contention fails because it incorrectly equates the County's

internal grievance procedure with the Fair Employment and Housing Act's ("FEHA") interactive process, then fails to counter plaintiff's showing that the County failed to engage in the interactive process during the grievance procedure and at other times. The second contention fails for several reasons: the cases upon which defendants rely should not be applied because they were decided after plaintiff filed his summary judgment opposition; defendants failed to raise this contention below, asserting instead that they had accommodated plaintiff; plaintiff demonstrated there was at least a triable issue of fact as to whether he could have performed his previous duties; and the cases upon which defendants rely were wrongly decided.

Defendants' final argument is that summary judgment was proper on plaintiff's accommodation claim. This argument fails because there were triable issues of material fact regarding whether plaintiff's new duties violated his work restrictions, whether plaintiff agreed that the new duties accommodated his restrictions and whether plaintiff could have returned to his previous duties. The argument also fails because defendants failed to meet their burden that plaintiff could not have been accommodated by transfer to a vacant position.

A fair reading of the record reveals that this case is replete with triable issues of material fact on plaintiff's interactive process and accommodation claims against the County of Los Angeles. Therefore, the judgment should be reversed and remanded for trial against the County on these issues.

ARGUMENT

I.

DEFENDANTS WAIVED THEIR CONTENTION THAT THIS COURT CANNOT CONSIDER CERTAIN EVIDENCE AND THE CONTENTION IS MERITLESS.

Defendants' first argument is that plaintiff should not be permitted to cite certain evidence on appeal because this evidence purportedly was *either* not referred to in plaintiff's memorandum of points and authorities ("opposition") or separate statement *or* had been improperly presented in the separate statement. (RB 31-35.) This argument tacitly concedes that the judgment must be reversed if this Court considers all of the record evidence to which objections were not sustained. The argument fails because it was waived and is at any rate meritless.

A. Defendants Waived This Argument.

Defendants accuse plaintiff of wanting a "'second bite of the apple'" (RB 32-33), but it is defendants who want to take that bite by attempting for the first time to exclude certain evidence submitted by plaintiff in connection with his opposition to defendants' summary judgment motion. "In determining whether there is a triable issue of material fact, we consider all the evidence set forth by the parties except that to which objections have been made and properly sustained." (*Lackner v. North* (2006) 135 Cal.App.4th 1188, 1196; *King v. United Parcel Service, Inc*. (2007) 152 Cal.App.4th 426, 437 [evidence not referenced in the separate statement is in the record].)

Defendants had the opportunity to object to this evidence on the grounds they now urge. However, with one minor exception that is irrelevant on appeal (the alleged failure to attach certain evidence cited in plaintiff's separate statement), defendants either failed to object to this evidence or failed to secure a ruling on their objections. These failures waive any objections on appeal. (*In re Marriage of Hewitson* (1983) 142 Cal.App.3d 874, 888 [evidentiary objections that are not made in the trial court are waived on appeal]; *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 670, fn. 1 [objections to evidence adduced in summary judgment proceedings are waived if not ruled on].)

Defendants' primary contention is that this Court cannot consider evidence that is not discussed in the plaintiff's opposition or his separate statement. (RB 32.) However, defendants waived this argument by failing to object to this evidence in the trial court.

Defendants' evidentiary objections were made in a document titled "Defendants' Objections to Evidence Submitted by Plaintiff in Opposition to Motion for Summary Judgment." (9 Clerk's Transcript ["CT"] 2076.) This document consisted of a "general objection" and "specific objections" to evidence plaintiff adduced. (9 CT 2077-2107.)

The "general objection" was a request to strike plaintiff's separate statement. (9 CT 2077.) Defendants complained that "plaintiff failed to cite specific page and line references to declarations and other evidence cited in his opposing separate statement." (9 CT 2077.) Defendants also complained about deposition pages that were not highlighted, the citation of "multiple pages," and evidence that was purportedly irrelevant and lacking

in foundation. (9 CT 2077.) The "specific objections" were either substantive in nature (9 CT 2077-2104) or pertained to plaintiff's alleged failures to highlight deposition testimony and to attach testimony cited in the separate statement. (9 CT 2104-2105.) Neither defendants' "general objection" nor their "specific objections" objected to evidence not discussed in plaintiff's opposition or separate statement. Therefore, defendants are precluded from contending that this Court cannot consider such evidence.

Defendants also contend that plaintiff's separate statement failed to cite page and line references to declarations. (RB 32, fn. 8.) This assertion has been waived because it was made in defendants' "general objection," on which the trial court never ruled. (9 CT 2122-2123.) Defendants further contend that plaintiff's evidentiary citations are found at the end of multiple facts disputing defendants' "undisputed" facts. (RB 34, fn. 9.) This assertion is waived because it was not made below. Finally, defendants contend that plaintiff's separate statement referred to evidence that was "not attached to the opposition papers." (RB 34, fn. 9.) Although this assertion has not been waived as to testimony from three depositions to which defendants objected on this ground (9 RT 2104-2105), it is irrelevant on appeal because such testimony is not physically part of the record, so plaintiff cannot and does not cite it.[1]

1/ Defendants contend that plaintiff cited inadmissible evidence. (RB 34, fn. 9) However, plaintiff cites no evidence on appeal that the trial court ruled inadmissible. Defendants assert that plaintiff failed to refute particular facts (RB 34, fn. 9), but this assertion is irrelevant to whether plaintiff's evidence can be considered by this Court.

Requiring defendants to have made objections in the trial court as a prerequisite to objecting to record evidence on appeal is no technicality. If defendants had made these objections and the trial court had deemed plaintiff's separate statement deficient because it failed to include certain evidence or reference it properly, the court could have ordered plaintiff to amend the separate statement, thereby obviating any problem and promoting the judicial economy defendants belatedly emphasize. (RB 32-33.) "[T]he proper response in most instances, if the trial court is not prepared to address the merits of the motion in light of the deficient separate statement, is to give the opposing party an opportunity to file a proper separate statement rather than entering judgment against that party based on its procedural error." (*Parkview Villas Assn., Inc. v. State Farm Fire and Cas. Co.* (2005) 133 Cal.App.4th 1197, 1211.) Defendants' failure to raise or secure a ruling on nearly all the objections they now make prevented the relevant corrections from occurring.

For the above-stated reasons, defendants should be deemed to have waived their objections (except for the irrelevant failure to attach certain testimony) made on the grounds that evidence was *either* not referred to in plaintiff's separate statement or memorandum of points and authorities *or* that it was improperly presented in the separate statement.

B. Defendants' Contention Lacks any Merit Because This Court Can and Should Consider All Evidence to Which Objections Have Not Been Sustained.

Even if defendants had not waived their contention that plaintiff is

precluded from citing the evidence in question, this contention fails at the threshold because the trial court did not impose such a limitation. (*Dunn v. County of Santa Barbara* (2006) 135 Cal.App.4th 1281, 1291 ["The trial court had the discretion to consider evidence not referenced in [movant's] separate statement."].) The court's order granting summary judgment nowhere states that the court considered only evidence referenced in the parties' separate statements and points and authorities.

Nor does the order confine itself to citing the separate statements of the parties; the order also cites plaintiff's and defendants' exhibits (9 CT 2124, 2126), including portions of *defense* declarations that were not referred to in defendants' opposition or separate statement. (Compare 9 CT 2126 [order citing paragraphs 2-6 of Timothy Cornell's Declaration and 9-24 of Victoria Campos' declaration] with 3 CT 650-701; 4 CT 756-776; 9 CT 2108-2119 [moving papers failing to cite paragraphs 3-4 of Cornell's declaration or 16-17 of Campos' declaration].)

Since the trial court did not limit its evidentiary scrutiny, neither should this Court. (*Oldcastle Precast, Inc. v. Lumbermens Mut. Cas. Co.* (2009) 170 Cal.App.4th 554, 572 [Court of Appeal would consider a declaration not referenced in the opposing party's separate statement, noting that "[n]othing in the record . . . shows the trial court did not consider [the] declaration . . ."].)

Moreover, even if the trial court did not consider all of the evidence, this Court has the discretion to do so. (*Dominguez v. Washington Mut. Bank* (2008) 168 Cal.App.4th 714, 726, fn. 10 ["Although some of the evidence we have relied on was not included in Dominguez's opposition

separate statement of disputed fact, it was in the record before the trial court and we exercise our discretion to consider it."]; *Fenn v. Sherriff* (2003) 109 Cal.App.4th 1466, 1481 ["we undoubtedly have the same discretion as the trial court to consider evidence not referenced in the moving party's separate statement in determining whether summary judgment was proper."].)[2]

It would be bizarre for this Court to scrutinize less of the record in a de novo appeal by a party who unsuccessfully opposed the drastic remedy of summary judgment than would be the case if the court were reviewing a substantial evidence appeal by a party that lost a trial on the merits. Defendants contend this Court is limited to such diminished scrutiny, but they are wrong. Tellingly, none of the cases they cite is on point.

Defendants rely in part on *American Continental Ins. Co. v. C & Z Timber Co.* (1987) 195 Cal.App.3d 1271, which states that "possible theories that were not fully developed or factually presented to the trial court cannot create a 'triable issue' on appeal." (*Id.* at p. 1281, cited at RB 31.) However, *American Continental Ins. Co.* involved the *complete* failure to raise particular defenses in the trial court. (*Id.* at p. 1281.) Defendants' contention here is that plaintiff's papers failed to refer (or to refer properly) to certain evidence. "'Language used in any opinion is of course to be understood in the light of the facts and the issue then before the court, and

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[2/] There is no indication that the parties opposing summary judgment in *Dominguez* and *Fenn* raised a waiver argument on appeal. If they had done so, the Courts deciding those cases presumably would have ruled on that argument. Because plaintiff in this case has raised a waiver argument, this Court should hold in plaintiff's favor on that ground.

an opinion is not authority for a proposition not therein considered. [Citation.]'" (*Elisa B. v. Superior Court* (2005) 37 Cal.4th 108, 118.) Therefore, *American Continental Ins. Co.* does not aid defendants.

Defendants also rely on *United Community Church v. Garcin* (1991) 231 Cal.App.3d 327 ("United Community Church"), superseded by statute on other grounds, as stated in *Certain Underwriters at Lloyd's of London v. Superior Court* (1997) 56 Cal.App.4th 952, 957, fn. 4. In *United Community Church*, this Court discussed former Justice Zebrowski's "golden rule" that "if it is not set forth in the separate statement, *it does not exist*." (*United Community Church*, *supra*, 231 Cal.App.3d at p. 337.) However, "the 'it' in Justice Zebrowski's 'golden rule,' as quoted . . . in *United Community Church* . . . , is the undisputed material fact, which must appear in the separate statement or be disregarded, *not the underlying evidence supporting the fact*." (*Parkview Villas Assn., Inc. v. State Farm Fire and Cas. Co.*, *supra*, 133 Cal.App.4th at p. 1214, emphasis added.)

In consequence, *United Community Church* is completely distinguishable from the present case. *United Community Church* involved whether a trial court properly granted summary adjudication when the alleged material facts presented in the moving party's separate statement were insufficient to show causation. (*United Community Church*, *supra*, 231 Cal.App.3d at pp. 337-338.) The issue in this case is whether a Court of Appeal is precluded from considering evidence included in the record, but allegedly not sufficiently brought to the trial court's attention.

Nor do the other cases defendants cite involve the issue presented here because all of them deal with trial court powers. (RB 31-33 and fn. 8

citing *Thrifty Oil Co. v. Superior Court* (2001) 91 Cal.App.4th 1070, 1075, fn. 4; *Collins v. Hertz Corp.* (2006)144 Cal.App.4th 64, 75; *San Diego Watercrafts, Inc. v. Wells Fargo Bank, N.A.* (2002) 102 Cal.App.4th 308, 310-311.)

This Court has the discretion to consider all of plaintiff's evidence in the present case and Court should exercise that discretion because plaintiff's papers substantially complied with summary judgment procedural requirements and the policies favoring trial on the merits by a jury substantially outweigh the concern for judicial economy that defendants raise.

1. Plaintiff's papers substantially complied with summary judgment procedural requirements.

This is not a case where an opposing party failed to file a memorandum of points and authorities or a separate statement, or to respond to specific arguments and dispute asserted material facts. (*Parkview Villas Assn., Inc. v. State Farm Fire and Cas. Co.*, *supra*, 133 Cal.App.4th at p. 1213 ["[M]ost cases citing the so-called golden rule . . . involve the failure of the *moving* party to file a proper separate statement or . . . the failure to identify the *disputed material fact* . . ."].) Contrary to defendants' assertions, plaintiff's opposition sufficiently discussed the relevant facts and law and plaintiff's separate statement disputed key material facts and cited to relevant evidence.

a. Plaintiff's opposition sufficiently discussed the relevant facts and law.

Defendants assert that plaintiff's opposition violated California Rules of Court, rule 3.1113(b), which requires "a concise statement of the law, *evidence and arguments relied on* . . . ." (RB 33, fn. 9.) Defendants contend that "[s]ummary judgment was proper on this basis . . . ." (RB 11.)

As a threshold matter, summary judgment would not have been proper on this basis because the pertinent statute provides only for granting summary judgment because of deficiencies in a separate statement, not in a memorandum of points and authorities. (Code Civ. Proc., § 437c, subd. (b)(3).) In fact, the statute does not even explicitly mention a memorandum of points and authorities.

In reality, plaintiff's opposition complied with California rules and discussed the issues raised on appeal in sufficient depth to preserve those issues. The opposition, which also discussed issues not raised on appeal, was limited to 20 pages. (California Rules of Court, rule 3.1113(d).) In fact, plaintiff and defendants devoted about the same amount of space to the facts and law pertaining to the reasonable accommodation and interactive process issues. (Compare 4 CT 763-764, 772-774 (defendants' memorandum) with 4 CT 822-824, 833-834 (plaintiff's opposition.)

Plaintiff's opposition disputed that defendants were entitled to summary judgment on plaintiff's interactive process and accommodation claims. Plaintiff asserted that Argott and Goldberg removed plaintiff from a job he could physically do and reassigned him to a job he could not physically do, the change in his job duties violated his permanent

restrictions, Goldberg refused to engage in the interactive process, Cornell refused to accommodate plaintiff's disabilities and defendants' failure to accommodate plaintiff was willful. (4 CT 823-824.) Citing *Diaz v. Federal Express Corp*. (C.D. Cal 2005) 373 F.Supp.2d 1034, plaintiff alleged this conduct violated the FEHA. (4 CT 833-834.) Defendants' assertion that plaintiff only contended that Goldberg was liable (RB 12, 29) is wrong.

Plaintiff did more than enough to comply with court rules regarding the content of summary judgment memoranda and preserve the relevant issues for appeal. (*Boyle v. CertainTeed Corp.* (2006) 137 Cal.App.4th 645, 650 [party opposing summary judgment sufficiently preserved their claim that a local rule was invalid "even without elaboration through argumentation and citation of authority"].)

b. Plaintiff's separate statement disputed key material facts and cited to relevant evidence.

Plaintiff's separate statement disputed (when appropriate) the alleged material facts defendants asserted pertaining to the issues raised on appeal. These disputes included such highly significant matters as whether Campos told Goldberg that plaintiff's new duties violated his work restrictions (9 CT 2034- 2037), whether the assignment violated plaintiff's work restriction (9 CT 2043-2045), whether plaintiff's duties changed (9 CT 2045-2046), whether plaintiff agreed that the new duties did not violate his work restrictions (9 CT 2051-2052), whether Goldberg refused to provide reasonable accommodation or engage in the interactive process. (9 CT 2060-2061) and whether all parties agreed during the grievance meeting

that plaintiff's new duties complied with his work restrictions. (9 CT 2063-2065.)

Despite these and other disputed material facts, defendants complain that the Appellant's Opening Brief "continually employs the practice of citing facts buried in his evidence which he never mentioned in his separate statement or in his opposition." (RB 32.)

As a threshold matter, there is no requirement that even all *material* facts be set forth in an opposing party's separate statement or its memorandum of law. It is the moving party who is required to set forth in a separate statement "all material facts which the moving party contends are undisputed." (Code Civ. Proc., § 437c, subd. (b)(1).) The opposing party has no equivalent requirement, but is only required to respond to the "material facts" by agreeing or disagreeing that they are undisputed, setting forth any other disputed material facts and referring to the supporting evidence. (Code Civ. Proc., § 437c, subd. (b)(3); *San Diego Watercrafts, Inc. v. Wells Fargo Bank, N.A.*, *supra*, 102 Cal.App.4th at p. 315 [suggesting legislative clarification regarding whether an opposing party must set forth undisputed facts in its separate statement].)

Thus, plaintiff was not required to set forth the facts in "excruciating detail" (see RB 31, characterizing appellant's opening brief) in order to comply with summary judgment requirements. Moreover, despite the sweeping language defendants use, they provide only *four* examples of plaintiff citing so-called "buried" facts (RB 31 and 32, fn. 8) and these examples do not withstand scrutiny.

Defendants' first example is that plaintiff did not state in his trial

court papers that he told Goldberg on the first day he returned to work that his new assignment violated his work restrictions. (RB 31 [citing 7 CT 1711].) However, plaintiff's response to defendants' "undisputed fact" 186 states that the change in assignment violated plaintiff's work restrictions and cites evidence that included plaintiff's deposition page 615, which is now 7 CT 1711. (9 CT 2045-2046.) That same deposition page is also cited in response to defendant's "undisputed facts" 182, 189 and 207. (9 CT 2043, 2048, 2059.) Such a fact is far from "buried."

Defendants' second example is that plaintiff did not state in his trial court papers that he told Goldberg that working on the 48 hour list violated his work restrictions. (RB 31-32 [citing 7 CT 1721].) This assertion is misleading because plaintiff's separate statement asserted that plaintiff had attempted to complain to Goldberg about this problem. Defendants' "undisputed fact" 181 alleged that "Goldberg never expected plaintiff to perform duties in his job that were more or less than he would have expected from any other Head Custody Records Clerk (HCRC)." (9 CT 2040.) Plaintiff's response read in relevant part as follows: "Disputed: After August 2005, [plaintiff] was working the 48 hour past due court list and also handling quality control. The 48 hour past due court list involves a lot of physical work that violated [plaintiff's] restrictions . . . . [Plaintiff] attempted to complain to his supervisor, Goldberg, but Goldberg refused to speak with him." (9 CT 2040-2041.) The response cited to evidence that included plaintiff's deposition page 638, which is now 7 CT 1721. (9 CT 2041.) That same deposition page is also cited in response to defendant's "undisputed facts" 193 and 206. (9 CT 2052, 2058.) Once again, no burial.

Defendants' last two "examples" involved plaintiff's testimony regarding the physical demands of his new assignment (RB 32, fn. 8.) It is far from clear whether the evidence in question amounts to "material facts," which "relate to some claim or defense in issue under the pleadings [citation] and . . . must also be *essential* to the judgment in some way [citation]." (*Kelly v. First Astri Corp.* (1999) 72 Cal.App.4th 462, 470, emphasis added.) Moreover, this testimony was referenced in plaintiff's separate statement, generally in multiple places.[3] Still no burial.

c. Defendants' other complaints are meritless.

Defendants also complain about the following:

- **Plaintiff did not insert page and line references to certain declarations.** (RB 32, fn. 8; RB 34, fn. 9.) However, the longest declaration, Dr. Capen's, was 11 pages. (6 CT 1492-1502.) The trial court's failure to rule on this objection (see Argument IA, p. 5 above) not only waived the objection, but indicates the court did not take it seriously. (Cf. *King v. United Parcel Service, Inc.*, *supra*, 152 Cal.App.4th at pp. 437-

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3/ Defendants' third example involves testimony found at 7 CT 1673. (RB 32, fn. 8, citing Appellant's Opening Brief ["AOB"] 9.) 7 CT 1673 is page 482 of plaintiff's deposition, which is cited in plaintiff's separate statement. (8 CT 1991.) Defendants' fourth example involves testimony found at 7 CT 1719-1721 and 1723. (RB 32, fn. 8, citing AOB 11.) 7 CT 1719-1720 are pages 635-636 of plaintiff's deposition, which were cited in response to three different purportedly "undisputed" facts. (9 CT 2041, 2046, 2052.) 7 CT 1921 is page 638 of plaintiff's deposition, which was also cited in response to three different purportedly "undisputed" facts. (9 CT 2041, 2052, 2058.) 7 CT 1723 is page 646 of plaintiff's deposition, which was cited in response to two purportedly "undisputed" facts. (9 CT 2041, 2052.)

438 [refusing to ignore an entire declaration although the separate statement cited only a single line].)

- **Plaintiff's evidentiary citations are found at the end of multiple facts disputing defendants' "undisputed" facts.** (RB 34, fn. 9.) This arrangement does not violate California Rules of Court, rule 3.1350(f), which requires citations to evidence supporting the facts controverting a moving party's "undisputed" fact, but does not preclude citations from being placed at the end of several facts. Moreover, defendants can also be criticized on this ground. (9 CT 2038-2039.) Additionally, defendants waived this objection by failing to make it in the trial court.

- **Plaintiff referred to testimony in three depositions that was not included in plaintiff's evidence.** (RB 34, fn. 9.) As noted on page 5 of argument IA above, this assertion is irrelevant on appeal, as plaintiff can (and does) cite only to evidence that was in the record.

For the above reasons, plaintiff's papers substantially complied with summary judgment procedural requirements and adequately presented his case.

2. Plaintiff *opposed* summary judgment, and the policies favoring trial on the merits by a jury outweigh the concern for judicial economy that defendants raise.

The second reason this Court should exercise its discretion to consider all the admissible evidence is that plaintiff *opposed* summary judgment, a "drastic measure that deprives the losing party of a trial on the

merits." (*G. E. Hetrick & Associates, Inc. v. Summit Construction & Maintenance Co.*, *Inc.* (1992) 11 Cal.App.4th 318, 326.) The primary purpose of summary judgment procedures is to render that process constitutional by imposing safeguards protecting the *opposing party* from being deprived of his right to jury trial. (*Bahl v. Bank of America* (2001) 89 Cal.App.4th 389, 395 ["technical compliance with the procedures of Code of Civil Procedure section 437c is required to ensure there is no infringement of a litigant's hallowed right to have a dispute settled by a jury of his or her peers."].)

The procedure defendants invoke is no exception. Even before former Justice Zebrowski formulated his "golden rule," the Court of Appeal reversed a summary judgment because the moving party failed to point out to the trial court where in the record a key fact was, stating "[i]t is academic that the burden is on the *party moving for summary judgment*; because of the drastic nature of the remedy sought, *he* is held to strict compliance with the procedural requisites." (*Department of General Services v. Superior Court* (1978) 85 Cal.App.3d 273, 284, emphasis added.)

In enunciating the "golden rule," former Justice Zebrowski stated that "'[b]oth the court and the *opposing party* are entitled to have all the facts upon which the moving party bases its motion plainly set forth *in the separate statement*.'" (*United Community Church*, *supra*, 231 Cal.App.3d at p. 337, citing Zebrowski, The Summary Adjudication Pyramid (Nov. 1989) 12 L.A.Law. 28, 29, emphasis added in part.) Not surprisingly, *United Community Church* involved a *moving party's* failure to present sufficient material facts in a separate statement. (*United Community*

Church, *supra*, 231 Cal.App.3d at pp. 337-338; see also *San Diego Watercrafts, Inc. v. Wells Fargo Bank N.A.*, *supra*, 102 Cal.App.4th at p. 316 ["'The due process aspect of the separate statement requirement is self evident-to inform the *opposing party* of the evidence to be disputed to defeat the motion.'"], emphasis added.)

Cases subsequent to *United Community Church* ignored former Justice Zebrowski's rationale for the golden rule and extended it to opposing parties. (See, e.g., *North Coast Business Park v. Nielsen Construction Co.* (1993) 17 Cal.App.4th 22, 30-32.) The rule's extension to opposing parties is questionable because the opposing party cannot deprive the moving party of its right to a jury trial by failing to present material facts in its separate statement.

Regardless, the rule should not be applied symmetrically to moving and opposing parties because the interests involved are of significantly different weight. (*Parkview Villas Assn., Inc. v. State Farm Fire and Cas. Co.*, *supra*, 133 Cal.App.4th at 1213 ["the trial court's exercise of the discretion authorized by section 437c to deny a motion for summary judgment, which simply means the case will proceed to trial, is more readily affirmed than a decision to grant the motion based on a curable procedural default, which deprives the opposing party of a decision on the merits."].) When opposing parties fail to comply with the "golden rule," judicial economy can be adversely affected. When moving parties fail to comply with the "golden rule," the right to a jury trial on the merits can be sacrificed. Judicial economy is important, but the right to jury trial is enshrined in the United States and California Constitutions.

Denial of that right would be particularly egregious in this case. As discussed in Argument IA above, the purported defects defendants now allege could have been cured in the trial court. Even if defendants' failure to raise or secure rulings on these supposed defects in the trial court was not a waiver, that failure precluded the trial court from permitting plaintiff to cure any such defects. Under these circumstances, it would be grossly unfair for this Court to refuse to consider evidence that could result in reversing summary judgment and trying this case on the merits.

Even more importantly, the evidence shows that defendants repeatedly refused to engage in the interactive process. Denying trial to a plaintiff with such strong evidence because of a failure to fully comply with a procedural requirement at the summary judgment stage would encourage well-funded defendants to file summary judgment motions that are groundless in whole or part in hopes that plaintiffs will file oppositions that do not comply with procedural requirements.

"The separate statement is not designed to pervert the truth, but merely to expedite and clarify the germane facts." (*King v. United Parcel Service, Inc.*, *supra*, 152 Cal.App.4th at p. 438.) Summary judgment was intended to weed out truly meritless cases, not deny jury trials on technicalities. However, denying plaintiff a jury trial is exactly what defendants hope to accomplish here by using procedural requirements originally formulated to be a shield against jury trial deprivation as a sword to accomplish such deprivation.

For the reasons discussed above, this Court should consider *all* of the evidence cited in the Appellant's Opening Brief and in this brief.

II.

DEFENDANTS FAILED TO COUNTER PLAINTIFF'S SHOWING THAT SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED ON HIS ACCOMMODATION CLAIM.

In plaintiff's opening brief, he demonstrated that the County failed to show that it was entitled to judgment as a matter of law on plaintiff's accommodation claim. (AOB 39-47.)[4] Defendants nevertheless argue that this claim fails as a matter of law because plaintiff's new duties purportedly accommodated his restrictions, plaintiff purportedly agreed with this assessment, plaintiff was neither entitled to return to his previous duties nor was the County required to create a new position, and plaintiff failed to produce evidence of another position for which he was qualified. (RB 45-53.) As discussed below, these contentions are meritless or (insofar as the creation of a new position is concerned) irrelevant.

A. There Are Triable Issues of Material Fact Regarding Whether Plaintiff's New Duties Violated His Work Restrictions.

Plaintiff demonstrated that the clerical position to which he had been reassigned was neither intended to be a reasonable accommodation, nor did it amount to one, because the duties violated plaintiff's work restrictions.

[4/] Plaintiff's opening brief discussed the accommodation issue after the interactive process issue. The order is reversed here because portions of plaintiff's accommodation argument are foundational to refuting assertions defendants make in connection with the interactive process issue.

(AOB 42-43, citing AOB 9-13 and 7 CT 1673, 1711-1712, 1714-1715, 1720-1721, 1725, 1746, 1849.) Dr. Kleiner concluded that "Mr. Goldberg reassigned [plaintiff] from a job he could do with his restrictions to a job which violated those restrictions" (AOB 43, citing 7 CT 1531, ¶ 11, lines 15-17.) Consequently, plaintiff's condition deteriorated, as Dr. Capen's disability status reports, plaintiff's e-mails, and plaintiff's testimony demonstrate. (See AOB 15-20.) Therefore, assigning plaintiff to the clerical duties did not reasonably accommodate him as a matter of law.

Despite this evidence, defendants maintain that "[p]laintiff failed to present any evidence that his duties violated his work restrictions." (RB 49.) This assertion is inexplicable unless predicated on defendants' argument that this Court cannot consider the evidence plaintiff cites on appeal because it was purportedly not properly presented below. That contention fails for reasons stated in Argument I above. Moreover, defendants themselves introduced sufficient evidence to create a triable issue of material fact regarding whether plaintiff required an accommodation. (*Villa v. McFerren* (1995) 35 Cal.App.4th 733, 749-751 [plaintiff's summary judgment opposition cured the evidentiary gaps in defendant's moving papers].)

Defendants' "Undisputed Fact 163" cites plaintiff's statement that "when I returned to work in August 2005, Jon Goldberg ordered me to perform clerical duties including heavy typing, filing, reaching above the shoulder, carrying heavy inmate transmittals, a lot of walking, heavy phone duty which aggravated my neck." (9 CT 2032.) Defendants' "Undisputed" facts 166 and 167 describe restrictions that include "light work," no

"repetitive work" using either arm at or above shoulder level and no "heavy lifting." (9 CT 2033-2034.) Defendants' "Undisputed Fact 211" describes many of the restrictions Dr. Capen placed on plaintiff. (9 CT 2062-2063.) The above-described discrepancies between plaintiff's new assignment and his restrictions would in and of themselves permit a jury to conclude that plaintiff needed accommodation.

Defendants also appear to contend that the County accommodated plaintiff because Goldberg reviewed plaintiff's restrictions and concluded plaintiff's new duties did not violate those restrictions, an assessment Campos accepted. (RB 46-47.) If such evidence permitted summary judgment, employers could prevail on accommodation claims by having the decision maker state a plaintiff's restrictions were consonant with his job duties, then having the appropriate human resources person agree. In reality, Goldberg's conclusion that plaintiff's reassignment did not violate his restrictions and Campos' accepting that conclusion is probative only of their beliefs.

For these reasons there are, at the very least, triable issues of material fact regarding whether plaintiff's new duties violated his work restrictions.

B. There Are Triable Issues of Material Fact Regarding Whether Plaintiff Agreed that the New Duties Accommodated His Restrictions; Moreover, any "Agreement" Did Not Last Long.

Defendants also contend that "[p]laintiff *agreed* that his duties did not violate his work restrictions when he signed the Request for Reasonable

Accommodation form on August 24, 2005 . . . ." (RB 47.) Defendants appear to be asserting that, as matter of law, plaintiff's accommodation request did not really request accommodation! Not only are defendants wrong, but even if defendants were right, any such "agreement" was transient.

Defendants' argument begins with a fact that no one disputes: plaintiff signed an accommodation request on August 24, 2005. (See RB 21; AOB 27.) What plaintiff did (and does) dispute is defendants' completely unsupported and incorrect assertion in their separate statement that plaintiff and Goldberg on that date discussed plaintiff's work restrictions and agreed "that his current job assignment did not violate his permanent work restrictions." (AOB 29, citing 3 CT 689.) Defendants utterly fail to even attempt to counter plaintiff's showing on this point, which is not surprising, because they cannot do so.[5]

Defendants next disagree with plaintiff's interpreting the accommodation request as stating he could perform his former work duties, but not his present ones, contending plaintiff's reading was unfair and "'self-serving." (RB 48.) Plaintiff's request read as follows: "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)."

[5/] Defendants note that plaintiff cited his superceded separate statement regarding the dispute over whether Goldberg and plaintiff purportedly discussed his work restrictions and agreed they were not violated by his current assignment. (RB 47, fn.11.) Both separate statements use virtually identical language in disputing this "fact." (Compare 4 CT 987 [original separate statement] with 9 CT 2051 [operative separate statement].)

(AOB 28, citing 4 CT 794.) Defendants quote the second sentence, which is written in the present tense, but not the first sentence, which is written in the past tense. (RB 48.)

This Court will decide who has given a fair reading to plaintiff's request: the party that quoted the entire request or the party that quoted only a part of the request, then asserted without any basis that "plaintiff clearly used the past and present tense to distinguish between his former and present job duties." (RB 48.) Given that the request's first sentence used the past tense to describe the duties plaintiff could do and the second sentence began with "[f]urthermore," a word of continuation, the most reasonable reading is that plaintiff was stating that it was his former duties–head clerk for day shift (floor manager)–that were consonant with his restrictions. This interpretation is especially likely given plaintiff's less than perfect English usage, which indicates that the shift in tenses was unintentional. At the very least, any ambiguity in language results in another disputed material fact.

Defendants conclude their argument by making up a "fact," claiming that plaintiff "had a change of heart and decided to grieve his new work assignment." (RB 48; see also RB 22.) There is no evidence in the record that plaintiff had a "change of heart;" defendants have drawn an inference they are not permitted to make as respondents in a summary judgment appeal. (*Miller v. Dept. of Corrections* (2005) 36 Cal.4th 446, 470 ["[A] reviewing court . . . *should draw reasonable inferences* in favor of the nonmoving party."].) Moreover, is it more likely that plaintiff agreed that his job duties were satisfactory, then changed his mind *on the same day* and

filed a grievance, or that plaintiff's accommodation request and grievance were perfectly consistent? And if plaintiff's new job duties were within his restrictions, why was he requesting accommodation? Because such questions are for a jury to decide, defendants have failed to counter plaintiff's showing that the there were, at the very least, triable issues of material fact regarding whether the County missed an opportunity to engage in the interactive process when plaintiff signed his accommodation request.

Finally, even if plaintiff's accommodation request can be read as agreeing that his new job duties were proper, any such "agreement" was very short lived. Defendants themselves contend that plaintiff had "a change of heart" and filed a grievance. (RB 48.) Moreover, plaintiff told Cornell during his grievance hearing and in a December 14, 2005 e-mail that his new work duties violated his restrictions. (7 CT 1524, ¶ 12, lines 3-9; 3 CT 753.) Therefore, defendants' argument that plaintiff somehow waived his FEHA protections by agreeing that his new duties accommodated his work restrictions fails.

C. There Are Triable Issues of Material fact as to Whether Plaintiff Could Have Returned to His Previous Duties.

Defendants next contend that even if the new duties violated plaintiff's work restrictions, plaintiff was not entitled to return to his previous duties and the County was not required to create a new position. (RB 49-52.) Plaintiff does not dispute the latter assertion, but it is irrelevant because plaintiff has never contended the County was required to create a new position for him. Plaintiff does contend there are triable issues of

material fact regarding the defendants' contention that plaintiff was not entitled to return to his previous duties. (AOB 46.)

Defendants assert that returning plaintiff to his previous duties would have as a matter of law resulted in "undue hardship" (RB 49-50) and required that another employee be "bumped" (RB 50-52.) As a threshold matter, defendant waived these arguments by failing to make them in the trial court. As plaintiff noted in his opening brief, defendants asserted only that plaintiff had been reasonably accommodated. (AOB 44-45; 4 CT 772-774.) Moreover, neither argument is correct.

1. Returning plaintiff to his previous duties would not have as a matter of law resulted in undue hardship.

Defendants' undue hardship argument founders because the evidence does not entitle it to judgment as a matter of law on this defense. "Undue hardship means an action requiring significant difficulty or expense when considered in light of the nature and cost of the accommodation, the employer's size, budget, number of employees, overall financial resources and the structure and composition of the workforce." (*Raine v. City of Burbank* (2006) 135 Cal.App.4th 1215, 1227, fn. 9, internal quotation marks omitted, citing [Gov. Code] § 12926, subd. (s); Cal. Code Regs., tit. 2, § 7293.9, subd. (b).)

The only evidence defendants introduced that might even pertain to this test was an e-mail stating that "we have been understaffed in the Records Section for quite some time." (3 CT 733.) The e-mail informs employees that the County is attempting to hire new personnel and requests

they work "harder, longer, and smarter." (3 CT 733.) This evidence might raise a question of whether accommodating plaintiff by letting him resume his previous duties would have required "significant difficulty and expense," but it does not answer it.

Even if defendants had merely contended that the proposed accommodation was unreasonable, the evidence did not justify summary judgment. (See generally *Raine v. City of Burbank*, *supra*, 135 Cal.App.4th at pp. 907-908 [distinguishing between whether an accommodation is reasonable and whether it constitutes an undue hardship].) Defendants adduced evidence that the IRC was short-staffed when plaintiff returned to work, that one of its functions was inmate release, that errors in this process could lead to dire consequences, that someone must serve as a head custody records clerk at all times and that plaintiff had missed approximately 10 months of work between February 26, 2004 and August 16, 2005. (RB 50; 4 CT 783.)[6] 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.)

[6/] Campos' declaration cites a number of overlapping time periods when plaintiff was absent from work between February 2004 and August 17, 2005. These periods reduce to February 26, 2004 - March 4, 2004, July 14, 2004 - January 14, 2005, March 1, 2005 - March 23, 2005 and May 12, 2005 - August 16, 2005. (4 CT 783.) Absences after August 17, 2005 are irrelevant to Goldberg's decision to transfer plaintiff when he returned on that date.

However, Goldberg also said to plaintiff on August 17, 2005 that "I'm tired of your medical and surgery leave and your disability." (7 CT 1711.) A jury could conclude that Goldberg's decision to transfer plaintiff was taken because Goldberg was tired of dealing with plaintiff, not for purposes of increasing the department's efficiency.

Moreover, 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.). This fact alone would be enough to preclude summary judgment, because Argott had been the IRC Captain from the end of 2003 until August 2005. (1 CT 126; 7 CT 1638, 1674.) Defendants attempt to explain away Argott's testimony by contending that it did not show that plaintiff could have performed "all of the duties assigned to Pam Broom . . . ." (RB 44-45.) This argument makes no sense because the only "duty" assigned to Broom was "Head Clerk[] for AM Shift" (3 CT 736), i.e., plaintiff's former duty, which plaintiff was able to perform.

Plaintiff also introduced evidence that 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.) Defendants respond that Dr. Kleiner's testimony was purportedly without foundation, but fail to make any argument as to why the trial court abused its discretion in admitting this testimony. Defendants also take exception to plaintiff's point that a jury might well be able to conclude that had the County supplied an ergonomic work station, plaintiff could have performed his prior duties. (RB 45.)

However, this is an inference a jury could reasonably draw and a summary judgment appellant is entitled to the benefit of such inferences.

For the above stated reasons, plaintiff has raised a triable issue of material fact regarding whether reassignment to his previous duties would have been a reasonable accommodation.

2. Returning plaintiff to his previous duties would not have resulted in another employee being bumped.

Defendants' "bumping" argument is easily disposed of. The "bumping" issue only comes into play when rights under a collective bargaining agreement or some other bonafide seniority system are involved. (See, e.g., *McCullah v. Southern California Gas Co.* (2000) 82 Cal.App.4th 495, 501 [rejecting the proposition that a disabled employee has "job placement rights superior to all other employees" and can therefore require the employer to "'bump' other employees to accommodate the disabled employee."].) Defendants failed to introduce any evidence that Ms. Broom's rights (if any) under a collective bargaining agreement or some other bonafide seniority system would be adversely affected by plaintiff's reassignment to his former duties. This is not surprising because Goldberg changed the job assignments of the head clerks (3 CT 731) and could simply have changed them back.

Defendants cite *Spitzer v. The Good Guys, Inc.* (2000) 80 Cal.App.4th 1376, 1389 for the proposition that reasonable accommodation does not require "violating another employee's rights" *or* "moving another employee." (RB 51.) However, *Spitzer* should no longer be considered

good law insofar as it is deemed to stand for the proposition that moving another employee is per se unreasonable. *Spitzer* took this language from *Cassidy v. Detroit Edison Co.* (6th Cir. 1998) 138 F.3d 629, 634, a case decided under the Americans with Disabilities Act ("ADA") and its Michigan equivalent. *Cassidy* predates *U.S. Airways, Inc. v. Barnett* (2002) 535 U.S. 391 [122 S.Ct. 1516], which holds that seniority system rights will usually, *but not always*, trump the right to reasonable accommodation under the ADA. (*Id*. at p. 394 [122 S.Ct. 1519].)

If seniority rights do not always preclude reasonable accommodation, then moving another employee (which can involve denigrating seniority rights) cannot be per se unreasonable under the ADA and it should not be deemed so under the FEHA. Thus, the reasonableness of "moving" Broom, who had not yet begun performing her new duties (plaintiff's former duties) when plaintiff first protested against his new duties on August 17, 2005, and who had been performing her new duties less than a week when plaintiff made his written accommodation request on August 24, 2005, is at most another question of fact for a jury to resolve.

D. It Was Defendants' Burden, Not Plaintiff's, to Demonstrate that Plaintiff Could Not Have Been Accommodated by Transfer to a Vacant Position.

Defendants contend that plaintiff was required to produce evidence of another vacant position for which he was qualified. (RB 52-53.) However, California has long placed this burden on the employer. (*King v. United Parcel Service, Inc.*, *supra*, 152 Cal.App.4th at pp. 442-443

[employer must establish through undisputed facts that "'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 . . . .'"].)

This principle was enunciated in *Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, where the Court stated "on summary judgment, the moving party employer has the burden of establishing that there were no vacant positions the employee could have performed." (*Id.* at p. 952.) The principle follows logically from the rules that "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 and to determine whether the employee is interested in, and qualified for, those positions . . . ." (*Id*. at pp. 950-951.)

Similarly, in *Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, the Court noted that "Wells Fargo never attempted to definitively establish that there were no positions within its organization which met Jensen's qualifications and restrictions" and concluded that "[h]aving failed to establish unequivocally that Jensen was unqualified for any vacant position within the organization, summary judgment was inappropriate on this ground." (*Id.* at pp. 264-265.)

Defendants cite *Nadaf-Rahrov v. Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 978 ("*Nadaf-Rahrov*"). (RB 52-53.) However, *Nadaf-Rahrov* did not address whether a plaintiff must show there were no vacant positions that he could have performed in order to prevail on an *accommodation* claim. *Nadaf-Rahrov* decided "whether a plaintiff must be

able to perform the essential functions of a job with or without accommodation (i.e., must be a qualified individual with a disability) to prevail under section 12940(m) and, if so, who bears the burden of proving this fact." (*Id.* at p. 973.)

Nadaf-Rahrov disagreed with *Bagatti v. Dept. of Rehabilitation* (2002) 97 Cal.App.4th 344, 358-363, which did not require an employee to prove he was a "qualified individual" to prevail on an accommodation claim. (*Nadaf-Rahrov*, *supra*, 166 Cal.App.4th at pp. 973-977.)[7] *Nadaf-Rahrov* also held that plaintiff must show he is a qualified individual by demonstrating that he is "qualified for a position *in light of the potential accommodation* . . . ." (*Id.* at p. 977, emphasis added.) Because that is all *Nadaf-Rahrov* held in regard to Government Code section 12940, subdivision (m) ["section 12940(m)"], it is inapposite.

For all of the above-stated reasons, the County was not entitled to summary judgment on plaintiff's accommodation claim.

[7/] As stated in his opening brief, plaintiff considers *Bagatti* correctly decided and respectfully suggests the court follow that decision. (AOB 40.)

III.

DEFENDANTS FAILED TO COUNTER PLAINTIFF'S SHOWING THAT SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED ON HIS INTERACTIVE PROCESS CLAIM.

In plaintiff's opening brief, he demonstrated that the County missed numerous opportunities to engage in the interactive process. (AOB 26-35.) These failures should have precluded the County from receiving summary judgment on plaintiff's interactive process claim. (AOB 36-39.)

Defendants nonetheless contend that plaintiff's interactive process claim fails as a matter of law because the County purportedly engaged in the interactive process (RB 35-40) and (alternatively) because plaintiff purportedly was required to show a triable issue of material fact regarding whether there was an alternative position available that he could have performed and failed to do so. (RB 40-45.) Both arguments are meritless.

A. Defendants Failed to Show that Their "Participation" in the Interactive Process Was Sufficient, as a Matter of Law, to Satisfy the FEHA.

Defendants contend the County "engaged in the interactive process" (RB 35) and was therefore entitled to summary judgment on this claim. (RB 40.) In making this argument, defendants rely heavily on the County's internal grievance procedure and attempt to contest some, but not all, of plaintiff's showing that the County missed other opportunities to engage in the interactive process. (RB 36-40.) For reasons discussed below,

defendants fail to show that, as a matter of law, they engaged in that process.

1. The County's internal grievance procedure was no substitute for the interactive process.

Defendants contend that the interactive process "was ongoing when plaintiff left work." (RB 35.) Not so. The County's internal grievance process had not yet been resolved when Dr. Capen refused to let plaintiff return to work, but the interactive process required by the FEHA had never really begun.

The contention that an employer can fulfill statutory interactive process obligations simply by engaging in a contractually mandated internal grievance procedure is ludicrous. (*E.E.O.C. v. Yellow Freight System, Inc.* (S.D.N.Y. 2002) 2002 WL 31011859, *24 ["Yellow Freight's position that its 'processing' of Walden's grievances constitutes evidence of good faith engagement in an 'interactive process' is simply absurd (Def. Post-Tr. Br. at 42); Yellow Freight was contractually obligated to respond to Plaintiff's grievance."].)[8] *Yellow Freight System, Inc*. was brought under federal and New York statutes prohibiting disability discrimination, but that court's reasoning is equally applicable here. Tellingly, defendants cite no case suggesting that an internal grievance procedure can substitute for the interactive process.

The interactive process and the grievance procedure are as different

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[8/] Pursuant to California Rules of Court, rule 8.1115(c), plaintiff has attached a copy of *E.E.O.C. v. Yellow Freight System, Inc.* as an appendix.

as the rights they protect. The former is "informal" (*Jensen v. Wells Fargo Bank*, supra, 85 Cal.App.4th at p. 263), "timely," "flexible" and a "back-and-forth process." (*Nadaf-Rahrov*, *supra*, 166 Cal.App.4th at pp. 964, 975, fn. 9, 980, 987.) It is "often an ongoing process rather than a single action . . . . this process may have many facets and take a number of different forms." (*Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 821-822.)

In contrast, the County's grievance procedure was a multi-stage process that involved plaintiff filing a formal grievance and meeting with a first, second and third level decision maker. (3 CT 747-748.) This process was neither flexible nor could it be considered "timely", since plaintiff filed his grievance on August 24, 2005 (3 CT 747), but did not meet with the second level decision maker until October 5, 2005 (3 CT 748) and was not able to meet with the third level decision maker before February 6, 2006, when Dr. Capen would not let him return to work. (6 CT 1502, ¶ 17, lines 1-4.) This slow, formal procedure could potentially result in an information exchange triggering the interactive process, but it cannot substitute for that process.

Moreover, the manner in which the grievance procedure was conducted precludes any claim that it served to even trigger the interactive process. When plaintiff, his union representative Helen Jones and Captain Cornell (the second level decision maker) met on October 5, 2005, plaintiff told Cornell that the work assignment change violated his restrictions (3 CT 749) and contended that he "should be returned to his job as floor manager of day shift." (7 CT 1524, ¶ 12, lines 3-9.) As defendants now all but

concede (RB 36), there is a disputed issue of fact regarding whether plaintiff and Ms. Jones eventually agreed during this meeting that the new assignment did not violate plaintiff's work restrictions. (Compare 3 CT 695 with 7 CT 1523, ¶ 12, line 26 – 7 CT 1524, ¶ 12, line 9.)

Cornell offered plaintiff a temporary transfer to an unsuitable position, which he declined. (AOB 30-31, citing 7 CT 1523, ¶ 9, lines 13-16, 1729, 1752.)[9] The offer was not intended to be a reasonable accommodation. (AOB 31, citing 9 CT 2214.) As plaintiff also stated in his opening brief, "the ball was back in Cornell's court," but instead of attempting to determine if plaintiff could be reasonably accommodated, Cornell simply denied plaintiff's grievance. (AOB 31, citing 3 CT 749.)

Defendants contend that "[p]laintiff makes the nonsensical argument that Captain Cornell's denial of his grievance represents 'yet another failure by a County employee to engage in the required interactive process.'" (RB 36-37.) Defendants have missed plaintiff's point, which is that it was Cornell's failure to attempt to determine if a reasonable accommodation could be made that constituted a failure of the interactive process. Plaintiff nowhere contends that Cornell was required to grant plaintiff's grievance. Defendants' confusion illustrates why the grievance procedure cannot be conflated with the FEHA's interactive process.

Despite the County's failure to use the grievance procedure to facilitate the interactive process, defendants have the chutzpah to criticize

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9/ Defendants state that the transfer "would have been for six months, not a matter of days . . . ." (RB 37.) However, this statement is contradicted by Helen Jones' declaration and plaintiff's testimony. (7 CT 1523, ¶ 9, lines 13-17, 7 CT 1752.)

(on thoroughly specious grounds) plaintiff's conduct during that procedure. Defendants assert that "*[n]otably, the grievance failed to specify how his job violated a single work restriction*" and accuse plaintiff of "postulating that the employer should be clairvoyant, and divine the employee's needs and whims." (RB 36.)

That defendants would make this sneering, flip assertion shows they still fail to understand what plaintiff is required to do in order to start the interactive process. Plaintiff's grievance stated that the "[c]hange in job assignments beginning 8/17/05" was "*against my work restrictions date 1/21/05* . . . ." (3 CT 747, emphasis added.) This information was exactly what the FEHA requires. (*Jensen v. Wells Fargo Bank*, *supra*, 85 Cal.App.4th at p. 266 ["It is an employee's responsibility . . . to present the employer at the earliest opportunity with a concise list of restrictions which must be met to accommodate the employee."].) Not surprisingly, defendants cite no case holding that the interactive process is not triggered until an employee specifies precisely how his job violates his restrictions.

Defendants also twice note that plaintiff waived the first level of the grievance procedure, which would have involved a meeting with Goldberg. (RB 36, 37.) Presumably, if defendants were ever arrested for a criminal offense, they would be happy to have the prosecuting attorney also sit as the judge. Goldberg had made the decision to reassign plaintiff because Goldberg was "tired of [plaintiff's] medical and surgery leave and [plaintiff's] disability." (7 CT 1711.) When plaintiff told Goldberg his new assignment violated his work restrictions, Goldberg replied "[t]his is what was agreed on with Captain Argott and I'm not changing." (7 CT

1711.) 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, emphasis added.)

"The law does not require a party to participate in futile acts." (*Doster v. County of San Diego* (1988) 203 Cal.App.3d 257, 262.) In *Doster*, the court held it would have been a "waste of time" for a peace officer to exhaust administrative remedies when the decision maker had already made up his mind. (*Id.* at p. 262.) In the present case, scheduling a hearing with Goldberg would have been just as much of a waste of time. Not surprisingly, plaintiff's union representative advised plaintiff not to participate in the grievance procedure's first level. (8 CT 1868.)

Although the County's grievance procedure was not designed to facilitate the interactive process, much less substitute for it, plaintiff provided the County with sufficient information in his application and the October 5, 2005 meeting to trigger this process. The County's failure to capitalize on this opportunity renders hollow defendants' assertion that, *as a matter of law*, the County fulfilled its interactive process obligation by using the grievance procedure.

2. Defendants failed to rebut plaintiff's showing that the County missed other opportunities to engage in the interactive process.

In plaintiff's opening brief, he demonstrated that there were, at the very least, triable issues of material fact as to whether the County also

missed the following opportunities to engage in the interactive process: (1) when plaintiff returned to work on August 17, 2005; (2) when plaintiff requested accommodation on August 24, 2005; (3) when Dr. Capen issued restrictions on multiple occasions and; (4) when plaintiff notified Goldberg and/or Cornell by e-mail that his new assignment was causing him physical problems and stress. (AOB 26-29, 32-35.)

a. Plaintiff's return to work.

Defendants do not even try to respond to plaintiff's showing that Goldberg failed to engage in the interactive process on August 17, 2005, the day plaintiff returned to work. (Compare AOB 26-27 with RB 35-40.)

b. Plaintiff's accommodation request.

Plaintiff contended that the County failed to engage in the interactive process when plaintiff requested accommodation on August 24, 2005. (AOB 27-29.) Defendants' interactive process argument does not discuss plaintiff's August 24, 2005 accommodation request. (See RB 35-40.) However, defendants address that request in their argument on plaintiff's reasonable accommodation cause of action, contending that plaintiff agreed that the duties to which he'd been assigned were consonant with his restrictions. (See RB 47-48.) As discussed in Argument II A above, there were triable issues of material fact on this issue. Therefore, it is a jury question whether the County missed an opportunity to engage in the interactive process when plaintiff submitted his accommodation request.

c. Dr. Capen's restrictions.

Plaintiff demonstrated that the County could have, but failed to, engage in the interactive process each time Dr. Capen issued a restriction. (AOB 32-34.) Defendants contend that they had no duty to respond to the disability status reports in which Dr. Capen issued restrictions, asserting that these reports "do not state that plaintiff is performing work which violates his work restrictions." (RB 37.)

Once again, defendants take an unduly strict view of what is required to trigger the interactive process. Plaintiff had a long history of work-related injuries and restrictions. (See AOB 5-8.) Goldberg was aware of these restrictions before plaintiff returned to work on August 17, 2005. (8 CT 1851.) Under these circumstances, the fact that Dr. Capen issued seven disability status reports describing plaintiff's physical problems and restrictions between August 31 through January 27, 2005 (AOB 32-33) should have put the County on notice that plaintiff's new job was causing him physical problems.

Additionally, the restrictions in these reports included "no repetitive typing and limited use of [plaintiff's] left hand," (4 CT 795; 6 CT 1498, ¶ 11, lines 13-14) and "[n]o reaching above bilateral shoulders.'" (4 CT 800; 6 CT 1501, ¶ 16, lines 22-26.) Plaintiff's testimony makes it clear that the work he was required to perform after his reassignment included considerable typing, as well as reaching above the shoulder. (7 CT 1720-1721, 1723.) A jury could infer that Goldberg, who was plaintiff's supervisor, was well aware of what plaintiff's duties entailed. Because Campos had Dr. Capen's reports (4 CT 779) and Goldberg knew the duties,

they collectively should have realized that plaintiff was performing activities his doctor had forbidden. Plaintiff is not responsible for the failure of County employees to communicate with one another.

At the very least, Dr. Capen's September 9, 2006 report should have put the County on notice that plaintiff needed accommodation. That report stated that "'[p]atient cannot be a clerk. Must be a floor head clerk or be TTD' (temporarily totally disabled)." (6 CT 1498, ¶ 12, lines 17-19; 4 CT 796.) The August 17, 2005 reassignment resulted in plaintiff's doing a clerk's job. (7 CT 1664, 1745.) Thus, the County was on notice that plaintiff's physician deemed plaintiff unable to do the job to which he had been reassigned. It is hard to imagine what else could possibly be required to trigger the interactive process.

Defendants assert that the "employee's physician cannot dictate what job the employee is given." (RB 37.) Once again, defendants miss plaintiff's point. Plaintiff does not maintain that the County was required to do what plaintiff's physician recommended; plaintiff simply asserts that his physician's statement that plaintiff could not be a clerk was sufficient to put the County on notice that plaintiff needed accommodation.

Because Dr. Capen's reports triggered the County's obligation to determine if plaintiff needed accommodation, the County's disregard of those reports constitutes yet another missed opportunity.

d. Plaintiff's e-mails to Goldberg and/or Cornell.

Plaintiff demonstrated that his e-mails to Goldberg and/or Cornell

were sufficient to put the County on notice that his new assignment was causing him physical problems and stress. (AOB 34-35.) Plaintiff noted specifically that plaintiff's December 14, 2005 e-mail to Cornell stated "[m]y difficulty arises from my physical inability to engage in extensive typing. My job restrictions preclude extensive typing." (AOB 35, citing 3 CT 753.)

Defendants respond by stating that "[p]laintiff did not specify what he meant by extensive typing, nor did he state what task required extensive typing." (RB 38.) This contention is utterly irrelevant because plaintiff did not have to provide such details to put the County on notice that he needed acommodation. Plaintiff told his employer that he was having problems stemming from engaging in extensive typing, which his restrictions forbade. As noted above, a statement by the employee stating that an assignment violated work restrictions is sufficient to trigger the interactive process.

Defendants further note that Dr. Capen only restricted 'repetitive typing.'" (RB 38.) This attempted semantic quibble puts defendants at odds with their own return-to-work coordinator, Campos, who testified that plaintiff's restrictions rendered him incapable of "doing a lot of typing . . . ." (8 CT 1849.)

Defendants also attempt to blame plaintiff for not responding to Lieutenant Ha's offer to meet with her and Cornell regarding work assignment changes. (RB 38.) However, plaintiff's possibly missing one alleged potential opportunity to begin the interactive process on January 12, 2006 (almost five months after plaintiff returned to work and less than a month before Dr. Capen ordered him off the job) does not excuse or

counterbalance the County's missing multiple opportunities to begin this process.

For these reasons, plaintiff's e-mails, particularly that of December 14, 2005, raise yet another triable issue as to whether the County failed in its duty to engage in the interactive process.

3. Defendants' attempt to distinguish plaintiff's case authority fails.

Defendants attempt to distinguish the case law plaintiffs cite, contending that *Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413 ("*Wysinger*") is distinguishable because it involved a period of two years, not six months and the plaintiff here was purportedly "*anything but ignored*." (RB 39.) Defendants are wrong on both counts. First, the FEHA requires that the interactive process be timely, and under the circumstances in this case, where plaintiff's health rapidly deteriorated and this fact was brought to defendants' attention by plaintiff and his physician, six months was as untimely as the two years in *Wysinger*.

Second, defendants' claim that plaintiff was "*anything but ignored*" is risible. Defendants accuse plaintiff of making "a bald-faced lie" in stating that "County employees either ignored or dismissed (sometimes contemptuously) plaintiff's and his physician's communications regarding plaintiff's deteriorating health . . . ." (RB 38.) Defendants' accusation is as inaccurate as it is intemperate.

The very day plaintiff returned to work and told Goldberg that plaintiff's new duties violated his restrictions, Goldberg replied that "the

doctors will write whatever [you] tell them to write." (1 CT 242.) The record shows no response from Goldberg to plaintiff's September 8, 2005 e-mail expressing health concerns or from Cornell to plaintiff's September 14, 2005 e-mail also expressing health concerns. (3 CT 737, 751.) Neither Campos nor anyone else reacted to Dr. Capen's communications regarding plaintiff's health, except for the underhanded attempt to deflect Dr. Capen's concerns by trying to mislead him into agreeing that plaintiff could be a clerk (1 CT 242) and Campos telling plaintiff that "his doctor could not dictate which position [plaintiff] could hold." (4 CT 781.) These actions fully merit the description plaintiff applied to them.

Not surprisingly, defendants still fail to understand why they should have responded, asking "[h]ow does 'deteriorating health' signal the need to engage in the interactive process under the FEHA . . . ?" (RB 39.) The obvious answer is that it shows an employee might need accommodation, particularly when he points to work as the source of his health problems.

Defendants also contend that other cases cited by plaintiff are distinguishable because "the interactive process had not broken down as in those cases. Rather, it was ongoing up until the time plaintiff left his employment with County." (RB 39.) Once again, defendants equate the interactive process with their own internal grievance procedure. Once again they are wrong, for reasons discussed above.

Finally, defendants dispute plaintiff's assertion that summary judgement was improper because plaintiff's expert concluded there was no adequate interactive process. (RB 40; see AOB 39.) Defendants assert that the case plaintiff cites for the proposition that expert testimony can preclude

summary judgment is factually distinguishable because it involved design changes to machinery (RB 40), but do not explain why this distinction makes a difference. Defendants' failure to do so could well stem from the fact that there is no logical reason why expert testimony in some, but not other, areas can preclude summary judgment.

Defendants also object, as they did in the trial court, that plaintiff's expert's conclusion regarding the interactive process' inadequacy was purportedly speculative, lacked foundation and was not the proper subject of expert testimony. (RB 40; 9 CT 2097-2098.) However, the trial court overruled this objection. (9 CT 2122, overruling objection 45.) "The court's evidentiary rulings made on summary judgment are reviewed for abuse of discretion." (*Walker v. Countrywide Home Loans, Inc.* (2002) 98 Cal.App.4th 1158, 1169.) Defendants have presented neither argument nor case law explaining why this ruling was an abuse of discretion.

For all the reasons discussed above, there is, at the very least, a triable issue of material fact regarding whether defendants failed to engage in the interactive process.

B. Defendants Err in Contending That Plaintiff Could Not Prevail On His Interactive Process Claim Even if He Failed To Demonstrate The Existence Of Another Position He Could Have Performed.

Defendants contend that plaintiff could not prevail on his interactive process claim because he purportedly did not demonstrate there was a position available that he could have performed with or without

accommodation. **(**RB 40-43.) This contention fails for several reasons.

First, it would be unfair under the circumstances of this case to apply the two cases on which defendants rely, *Nadaf-Rahrov* and *Scotch v. Art Institute of California-Orange County, Inc.* (2009) 173 Cal.App.4th 986 ("*Scotch*"). These cases held that plaintiffs' interactive process claims depended on their demonstrating the employer could have provided a reasonable accommodation. (*Nadaf-Rahrov*, *supra*, 166 Cal.App.4th at pp. 980-984; *Scotch*, *supra*, 173 Cal.App.4th at pp. 1018-1019.) The cases justified placing the burden on plaintiff because this information purportedly can be obtained in discovery during litigation. (*Nadaf-Rahrov*, *supra*, 166 Cal.App.4th at p. 984; *Scotch*, *supra*, 173 Cal.App.4th at p. 1019.) Both cases were decided after discovery in this case was conducted and plaintiff's summary judgment papers were filed in January 2008. (4 CT 919.) Prior to that time, the leading case was *Wysinger*, *supra*, 157 Cal.App.4th 413, which held that a plaintiff could prevail on a section 12940(n) claim without proving that the employer could have provided a reasonable accommodation. (*Id.* at pp. 424-425.) It would be unfair to punish plaintiff for not adducing evidence that he would not reasonably expect to be relevant.

Second, if it is fair to expect plaintiff to have anticipated the *Nadaf-Rahrov* and *Scotch* decisions, it is fair to expect defendants to have done the same. However, defendants failed to contend below that plaintiff did not adduce evidence that he could have performed another available position, claiming instead that plaintiff had been accommodated. (See 4 CT 772-774.) This failure obviated any necessity for plaintiff to demonstrate

that a such a position existed. (*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."].)

Third, plaintiff demonstrated there was at least a triable issue of fact as to whether he could have performed his previous duties as head floor clerk supervising others. (See Argument IIC above.) Moreover, Cornell told plaintiff he would be reassigned after Goldberg left. (7 CT 1747.) Either fact is sufficient to create a dispute of material fact regarding whether plaintiff could have performed another available position.

Fourth, insofar as *Nadaf-Rahrov* and *Scotch* held that a plaintiff could only prevail on an interactive process claim by demonstrating that an employer could have provided a reasonable accommodation, these cases are wrong for two reasons. First, success on a FEHA interactive process claim does not depend on whether the employer could have provided a reasonable accommodation. Second, even if such a showing was required, it would be defendants' burden, not plaintiff's, to identify and demonstrate that such accommodation was not possible.

1. Success on an interactive process claim does not depend on whether the employer could have provided a reasonable accommodation.

The correct rule was stated in *Wysinger*, *supra*, 157 Cal.App.4th 413, where the Court held that Government Code section 12940, subdivision (n)

["section 12940(n)"] gave rise to a cause of action with different elements than section 12940(m) and therefore did not require proving whether the employer could have provided a reasonable accommodation. (*Id.* at pp. 424-425.)

Nadaf-Rahrov explicitly disagreed with *Wysinger*. (*Nadaf-Rahrov*, *supra*, 166 Cal.App.4th at p. 983.) *Nadaf-Rahrov* began by citing federal case law purportedly holding that "[f]ederal courts applying the ADA have held that an employer may be held liable for failing to engage in the good faith interactive process only if a reasonable accommodation was available . . . ." (*Id.* at p. 980.) Actually, these cases held that an employer could not be liable for failing to *accommodate* an employee simply because the employer failed to engage in the good faith interactive process. None of the cases even involved the issue of whether an employer could be held liable purely for failing to engage in the interactive process. This is unsurprising because the ADA [Americans with Disabilities Act] has no provision equivalent to section 12940(n), as *Wysinger* noted in holding ADA cases inapplicable. (*Wysinger*, *supra*, 157 Cal.App.4th at p. 425.)

The difference in language is critical. Because the ADA prohibits the failure to accommodate, not the failure to engage in the interactive process, a failure in the interactive process does not in and of itself give rise to liability under that statute. (*Ibid*.) Only if such a failure prevented a reasonable accommodation from occurring would there be liability. Therefore, if no reasonable accommodation is possible, there would be no basis to conclude that the employer's failure to participate in the interactive process precluded the making of such an accommodation, so there would be

no liability.

In contrast, an employer's failure to engage in the interactive process is in and of itself an unlawful employment practice under the FEHA that supports a separate cause of action. (*Claudio v. Regents of University of California* (2005) 134 Cal.App.4th 224, 243 ("*Claudio*"); *Wysinger*, *supra*, 157 Cal.App.4th at p. 424.) Thus, while both the ADA and the FEHA have a "remedial" purpose (*Nadaf-Rahrov*, *supra*, 166 Cal.App.4th at p. 981), the California Legislature, unlike Congress, explicitly decided to remedy the failure of employers to engage in the interactive process. The FEHA is to be interpreted liberally in order to accomplish its purposes. (Gov. Code § 12993, subd. (a).) Reading a requirement into section 12940(n) that places an additional burden on an employee is not a "liberal" interpretation of that statute.

Additionally, if employer liability under section 12940(n) depended on the employer's being able to reasonably accommodate an employee, then it would be impossible for a plaintiff to succeed on a section 12940(n) claim without also prevailing under section 12940(m). This would render section 12940(n) "superfluous." (*Wysinger*, *supra*, 157 Cal.App.4th at p. 425.) "[E]very part of a statute serves a purpose and . . . nothing is superfluous." (*In re J.W.* (2002) 29 Cal.4th 200, 209.)

Nadaf-Rahrov attempts to evade the superfluity problem by stating that "[i]f a failure to provide accommodations is a consequence of a section 12940(n) violation, we see no reason why a plaintiff could not recover damages for that failure to accommodate, even if the plaintiff prevailed only on a section 12940(n) claim." (*Nadaf-Rahrov*, *supra*, 166 Cal.App.4th at p.

984.) However, *Nadaf-Rahrov* does not explain how a plaintiff could fail to recover damages under section 12940(m) if there were a failure to accommodate. *Nadaf-Rahrov* then states that section 12940(m) is the proper remedy when an accommodation is identifiable before suit is commenced and section 12940(n) is the proper remedy when an accommodation is identified during litigation. (*Ibid*.) *Nadaf-Rahrov* fails to explain why a plaintiff could not recover under section 12940(m) for failure to provide a reasonable accommodation regardless of when it was discovered that the accommodation was reasonable. Because recovery under section 12940(m) is always available when a reasonable accommodation is possible, section 12940(n) would be rendered superfluous if recovery is barred under that statute unless a reasonable accommodation is possible.

Nadaf-Rahrov then questions what would be an appropriate remedy for a section 12940(n) violation if no reasonable accommodation is found to exist. (*Nadaf-Rahrov*, *supra*, 166 Cal.App.4th at p. 982.) There are two answers to that question. First, section 12940(n) requires an employer to "engage in a timely, good faith, interactive process." A jury could find (for example) that the employer unduly delayed the process and the employee suffered emotional distress as a result, even if no accommodation was ultimately deemed reasonable.

Second, nominal damages could be available under Civil Code § 3360. A breach of duty violating constitutional rights can be actionable even in the absence of actual injury. (*Bullock v. City and County of San Francisco* (1990) 221 Cal.App.3d 1072, 1091.) The same should be true

of the important statutory rights guaranteed by the FEHA. "Where a party is entitled to nominal damages, he may also recover punitive damages in a proper case." (*Hotel & Restaurant Employees & Bartenders Union v. Francesco's B. Inc.* (1980) 104 Cal.App.3d 962, 973.) Attorney fees would also be available under the FEHA.

Finally, *Nadaf-Rahrov* states that because section 12940(n) requires employers to engage in the interactive process "'to determine effective reasonable accommodations, *if any*'" the statute can be construed to permit liability only if a reasonable accommodation existed. (*Nadaf-Rahrov*, *supra*, 166 Cal.App.4th at p. 981.) However, another court interpreted the same phrase as pertaining to whether an accommodation might be unnecessary for an employee only perceived as disabled, not whether it would be unreasonable for whether an employee who was actually disabled. (*Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 57-58 and fn. 18.) Thus, this language is too ambiguous to be useful in construing section 12940(n).

Scotch purports to "synthesize" *Wysinger* and *Nadaf-Rahrov*, as well as *Claudio*. (*Scotch*, *supra*, 173 Cal.App.4th at p. 1018.) In doing so, however, *Scotch* agreed with *Nadaf-Rahrov* that success on an interactive process claim depends on whether the employer could have reasonably accommodated the plaintiff. (*Scotch*, *supra*, 173 Cal.App.4th at p.1019.) *Scotch* is wrong for the same reasons as *Nadaf-Rahrov*.

2. Even if success on an interactive process claim depended on whether a reasonable accommodation was possible, defendant would have to show that such an accommodation was not possible.

Even if *Nadaf-Rahrov* and *Scotch* correctly held that the existence of a reasonable accommodation was a prerequisite to liability under section 12940(n), they erred in finding that plaintiff had the burden of proof on this issue.

A plaintiff can prevail on a section 12940(m) accommodation claim unless the employer establishes there were no positions the employee could have performed. (*Prilliman v. United Air Lines, Inc.*, *supra*, 53 Cal.App.4th at p. 952; *Jensen v. Wells Fargo Bank*, *supra*, 85 Cal.App.4th at pp. 264-265; *King v. United Parcel Service, Inc.*, *supra*, 152 Cal.App.4th at pp. 442-443.) There is no logical reason why the employer should have a lighter burden under section 12940(n) than under section 12940(m), especially since it is the defendant who is contending that the interactive process would have been futile because there were no available positions for the plaintiff. In essence, defendants are asserting an affirmative defense. As with any other affirmative defense, it is the defendant that should have the burden of proof.

Moreover, there are compelling policy reasons not to lighten the employer's burden. The FEHA is interpreted liberally to accomplish its purposes. Requiring the employee to show that an accommodation was possible throws an additional roadblock in the way of employees attempting to enforce the FEHA. *Nadaf-Rahrov* and *Scotch* justified this burden on the

ground that plaintiffs could purportedly acquire the relevant information in litigation-related discovery. (*Nadaf-Rahrov*, *supra*, 166 Cal.App.4th at p. 981; *Scotch*, *supra*, 173 Cal.App.4th at pp. 1018-1019.) However, the purpose of the interactive process is to facilitate employees retaining their jobs. Thus, employers should be given maximum incentives to identify potential accommodations as early in the process as possible. In contrast, *Nadaf-Rahrov* and *Scotch* provide a disincentive for employers to identify potential accommodations during the interactive process by permitting employers to escape liability if plaintiff fails to uncover potential accommodations during litigation-related discovery. *Nadaf-Rahrov* itself reveals the problem with this approach, as the defendant in that case put up significant resistance to demands for information regarding potential accommodations. (*Nadaf-Rahrov*, *supra*, 166 Cal.App.4th at pp. 971-974.)

Unlike the County, the employers in *Nadaf-Rahrov* and *Scotch* actually engaged in the interactive process at some point in time and the employer in *Scotch* even initially accommodated plaintiff. (*Nadaf-Rahrov*, *supra*, 166 Cal.App.4th at pp. 961, 986, 989; *Scotch*, *supra*, at p. 1018.) Had these employers been as uncooperative as the County in this case, those courts might well have perceived matters differently, as they should have done.

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: August 4, 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 13,326 words excluding the tables of contents and authorities, and this certificate.

DATED: August 4, 2009

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