# California Employees Have Burden to Initiate the Interactive Process Under FEHA

A California Court of Appeal case recently ruled that an employer could not be liable for failure to accommodate or engage in the interactive process where the employee failed to initiate the interactive process and accepted rehabilitation. In so holding, the Fourth District of the California Court of Appeal reversed the trial court and its award of nearly $230,000 for the plaintiff.

## Case Description

In *Milanv. City of Holtville*, No. D054139 (June 23, 2010), the plaintiff was an operator at a water treatment plant maintained by the City of Holtville ("the City"). She suffered from a serious neck injury on-the-job, resulting in several herniated discs in her back being removed and her spine being fused together. When she applied for workers' compensation benefits, a physician retained by the City determined that she could not return to work at the water treatment plant in light of her medical restrictions.

The City decided to take no immediate action after receiving the doctor's report because it wanted to see if the plaintiff's condition improved. A few months after her examination for workers' compensation benefits, however, the City offered the plaintiff rehabilitation benefits. The plaintiff accepted and took an online real estate course. She continued to receive a paycheck from the City during rehabilitation.

Eighteen months after her injury and ten months after beginning rehabilitation courses, the plaintiff received a termination letter. The plaintiff alleges that no one from the City contacted her with respect to the City's decision to termination her employment, no one inquired as to whether her condition improved, and that she was interested in returning to work. Shortly after her termination, her treating physician believed she could return to a job which did not require a great deal of physical activity, such as teaching. One year after her termination, her doctor believed she could return to work with some job modifications. After filing her lawsuit, the trial court held that the employer was under an obligation to engage in the interactive process when it received the workers' compensation doctor's report, and that the employer failed to meet this obligation.

The Court of Appeal disagreed, holding that the Fair Employment and Housing Act ("FEHA"), Gov't Code § 12940(n), specifically requires the ***employee***, not the employer, to initiate the interactive process. The Court held that "even if we generously interpret an employee's obligation under section 19240, subdivision (n), the record will not sustain a finding that [the plaintiff] met *her* obligations under the statute." The Court noted that at the time of her termination, the plaintiff "was aware that she had not been at work for more than 18 months." In addition, the plaintiff accepted rehabilitation benefits from the City to train for another line of work. The Court held that under the circumstances, she was required to at the very least "communicate to the city that she planned to continue working at the water treatment plant…. Only then would an obligation to engage with her with respect to possible accommodations arise."

## What's In It For You?

California employers should not underestimate the duty to engage in the interactive process and find reasonable accommodations. California courts are known for being tough

on employers, especially in failure to accommodate and failure to engage in the interactive process cases. California is one of the few jurisdictions that provides plaintiffs with two separate causes of action for dropping the ball in communications regarding accommodations, for example. However, this recent Court of Appeal case offers a silver lining. Where a California employer has not received any communication from an employee over a lengthy period of time, and if the employee has been given notice of the employer's determination that the employee is not fit to return to work, an employer is not required by § 12940(n) to initiate any discussion of accommodations.

If you have an employee out on medical leave and are not sure what your obligations are, its always best to check with an attorney before making any employment decision. If you have any questions, please contact Tara Presnell at 615-744-8447 or any other member of Miller & Martin's California Employment Team.



**ATLANTA**

1170 Peachtree Street, N.E., Suite 800
Atlanta, GA 30309-7706

**CHATTANOOGA**

832 Georgia Avenue,
Suite 1000,
Volunteer Building
Chattanooga, TN 37402-2289

**NASHVILLE**

150 Fourth Avenue North,
Suite 1200, One Nashville Place
Nashville, TN 37219