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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

SCOTT E. LOWERY, Plaintiff and Respondent, v. LOS ANGELES COMMUNITY COLLEGE DISTRICT, Defendant and Appellant.	B239179 (Los Angeles County Super. Ct. No. BC413753)

Appeal from a judgment of the Superior Court of Los Angeles County. John L. Segal, Judge. Reversed with directions.

Best Best & Krieger, John H. Holloway and Kira L. Klatchko for Defendant and Appellant.

The deRubertis Law Firm, David M. deRubertis; Law Offices of Donald S. Lucien, Darryl M. Lucien; Pine & Pine, Norman Pine and Beverly Tillett Pine for Plaintiff and Respondent.

A former technician in the heating and air conditioning department of a college facility suffered a debilitating back injury in the course of his work. After working for the next eighteen months with varying degrees of accommodation for his inability to lift heavy tools and equipment and to work in difficult positions and locations, the employer placed the technician on disability leave, to which he was entitled under his collective bargaining agreement. The employee sued the employer, alleging disability discrimination, failure to accommodate, and failure to engage in a good faith interactive process, under the California Fair Employment and Housing Act (FEHA), Government Code section 12900 et seq.[1]

The superior court found for the employee on all three FEHA claims, awarding substantial damages for back pay and non-economic damages, and ordering the employee's reinstatement to his former position—which by then had been filled by another employee. The employer appeals, arguing insufficiency of the evidence to support the judgment.

We find the trial court's decision as to the employer's failure to engage in a good faith interactive process supported in part, but the decision as to the employee's claims for wrongful discharge and failure to accommodate unsupported. We will reverse the judgment and remand the case to the trial court with directions to enter a new judgment ordering the employee's reinstatement to his position, and to redetermine the damages to the employee resulting from the employer's failure to engage in a good faith interactive process.

BACKGROUND

Plaintiff Scott Lowery was employed as a heating and air conditioning technician in the HVAC department of Pierce College in Woodland Hills from April 1995, when he was about 40 years old, until he was removed on October 8, 2007. When he was removed, his position was journeyman B-Shift HVAC Technician. His shift was from

[1] All further statutory references are to the Government Code unless otherwise indicated.

10:00 a.m. to 8:30 p.m.; he was the only HVAC Technician working that shift. He was well liked by his supervisor, Frank Vitone, who considered him a good and productive long-term employee.

An HVAC Technician at Pierce College performs skilled journey-level heating and air conditioning work involving installation, inspection, maintenance, alteration, and repair of heating, ventilating, refrigeration, and air conditioning systems, equipment, and controls. Lowery's work was very physical, sometimes requiring him to lift heavy loads and to get into difficult and awkward positions. Over the years he had suffered occasional muscle strains to his neck or back, requiring him to use ibuprofen and to take a few days off.

March 1, 2006 Injury

On March 1, 2006, Lowery experienced sharp pain in his lower back during a two-day project fitting sound-deadening panels on electrical generating equipment, a task that required lifting and prolonged and repetitive squatting. He reported the injury to his supervisor the next day. On March 9, 2006, Octagon Risk Services filed an employers' report of Lowery's injury on the District's behalf. On March 9, 2006 (and again on November 21, 2007), Lowery filed a worker's compensation claim form for his March 1, 2006 back injury.

Medical Examinations and Reports

March 9, 2006. Lowery was examined on March 9, 2006, eight days after his injury. He was given permission to return to modified work, with no climbing, bending, stooping, kneeling, or squatting; no prolonged standing, walking, or sitting; a five-minute stretch break every hour; lifting of no more than five pounds; no sports; and a

requirement that he must wear a brace at work and at home.[2] With these restrictions he was not able to perform his regular duties as an HVAC Technician.

March 30, 2006. Lowery testified that he answered phones in the plant facility office for the first two weeks after returning to work. For another week or two after that, Lowery went out in the field on "light duty" tasks such as inspecting thermostats—things he could do with one or two small screwdrivers and without lifting more than five pounds. His status report following his March 30, 2006 medical examination indicated he was unable to work that day and the next, but could return to work with the same limitations on Monday, April 3, 2006.

April 27, 2006. After an April 3 MRI, Lowery was reexamined on April 27, 2006. His activities were again restricted, prohibiting climbing, bending, stooping, kneeling, squatting, or overhead work, as well as prolonged standing, walking, or sitting; setting a maximum five-pound lifting limit; and requiring that he wear a back brace and take a five-minute stretching break each hour.

May 17 and May 26, 2006. A treating physician's Comprehensive Orthopedic Re-Evaluation dated May 17, 2006, reported Lowery's complaint of increased cramping and pulling in his left leg, "that now intensifies with lying down and prolonged sitting." The report continued the work restrictions, finding that if Lowery's employer cannot accommodate any of the restrictions, he "is deemed totally temporarily disabled." Lowery testified that these restrictions, contained also in a May 26, 2006 medical report, prevented him from performing all of his regular duties at work. During that time he was doing a lot of the HVAC department's inspection and inventory duties, and duties that required only a screwdriver or pair of pliers, such as helping teachers at night with problems such as stuck door keys.

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[2] In order to overcome Lowery's inability during the trial to recall specific dates and circumstances, the parties stipulated that Lowery had told his doctors whatever statements were attributed to him in their periodic reports. "If it's [in a doctor's report], you can assume he said it." The court nevertheless permitted Lowery to contradict his statements.

June 20, 2006. On June 20, 2006, Dr. Steven Grahek, a physician in the Occupational Medicine department at Kaiser Permanente Medical Group, became Lowery's primary treating physician. Dr. Grahek's First Report Of Occupational Injury on that date noted Lowery's modified-duty restrictions of no repetitive bending, climbing, kneeling, squatting, twisting, and no lifting over five pounds. Dr. Grahek modified these restrictions somewhat, to prohibit repeated climbing, bending, kneeling, squatting or twisting that causes pain.[3]

November 10, 2006. Dr. Grahek's November 10, 2006 report recounts Lowery's complaint of low back pain on a daily basis, radiating down his left leg, worse since his last visit in late September 2006. It states that Lowery is on modified duty at work, "and has been accommodated" by his employer. His work restriction summary authorizes Lowery's modified duty through December 24, 2006, providing for no bending, no climbing, no kneeling, no squatting, no twisting, and no lifting over 5 pounds.

December 26, 2006. On December 26, 2006, Dr. Grahek reported that Lowery's pain level had decreased since his previous visit, and that he "feels as though he is continuing to improve." He allowed Lowery to remain on modified duty through February 8, 2007, continuing the prohibition on repeated bending, kneeling, squatting, or twisting that causes pain, but loosening his lifting restriction from five pounds to eight pounds.

February 8, 2007. On February 8, 2007, Lowery reported to Dr. Grahek that since his previous visit his back pain was sometimes severe, with numbness, tingling and burning pain radiating down to his left foot, but on other days his pain was relatively mild. Dr. Grahek permitted Lowery to return to work on a modified basis, with some (unspecified) loosening of his restrictions.

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[3] Doctors are required to fill out and file with the employer's workers' compensation provider a Doctor's First Report Of Occupational Injury Or Illness upon their attendance in a new case of occupational injury. (Cal. Code Regs., tit. 8, §§ 14003(a).)

March 21, 2007. On March 21, 2007, Lowery reported to Dr. Grahek that he had experienced "no real improvement" in his low back pain, and he had had some recent exacerbation of his pain. Dr. Grahek ordered that he remain on modified duty.

May 7, 2007. Lowery reported to another Kaiser Permanente Group physician on May 7, 2007, that he had been "avoiding lifting more than 20 pounds and limiting repetitive bending and twisting." His treatment and plan as of May 23 required that he continue modified duty of lifting, pushing and pulling a maximum of 15 pounds, with no repetitive bending and twisting, and no squatting.

July 3, 2007. Lowery was again examined by Dr. Grahek on July 3, 2007. Lowery reported little or no back and leg pain since his last visit, but said he had increased pain if he kneels or squats, or has to constantly bend over. He was ordered to continue to work on a modified duty basis, "but with loosened restrictions": No bending, no kneeling, no squatting, and no lifting over 30 pounds. Dr. Grahek scheduled Lowery for a future "permanent and stationary" evaluation.[4]

Lowery's Work Restrictions

Lowery testified that although he had some significant limitations on the duties he could perform under the five-pound and eight-pound lifting restrictions, when he reached the 30-pound level he felt he was "doing basically all of my work." "There would be a few times when I would need to wait for someone to come in in the morning to help me lift something into place. But once that was done and I could continue to connect it and assemble it or put the belts on, wire it electrically, once I had the heavier part in place, then I could do everything else around it." Although Vitone had expressed some

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[4] A physician's Permanent and Stationary Report indicates that the patient has reached maximal medical improvement, meaning his condition is well stabilized and is unlikely to change substantially in the next year with or without medical treatment. (Cal. Code Regs., tit. 8, § 9785(a)(8); *Hanson v. Lucky Stores, Inc.* (1999) 74 Cal.App.4th 215, 220, fn. 2.)

"'A disability is considered permanent after the employee has reached maximum improvement or his condition has been stationary for a reasonable period of time.'" (*Chavira v. Workers' Comp. Appeals Bd.* (1991) 235 Cal.App.3d 463, 473 [286 Cal.Rptr. 600].)

frustration to Lowery about the things Lowery could not do when he was working under the 5-, 10-, and 15-pound restrictions, once he reached the 30-pound level he heard no further complaints that he was not pulling his weight.

Permanent and Stationary Report

Dr. Grahek examined Lowery on September 6, 2007. His Permanent and Stationary Report, issued that day, recited (under penalty of perjury) that Lowery continued to complain of low-grade discomfort in his left leg—though substantially less than immediately after his injury. Lowery told Dr. Grahek that "he no longer lifts anything over thirty pounds"; he "always seeks help when he has to have any heavy lifting done"; and he "does not do repeated bending, kneeling or squatting." Otherwise, he had little curtailment of his daily living activities.

Dr. Grahek reported that Lowery had reached "a maximum medical improvement. Restrictions listed are permanent." In the "Functional Capacity Evaluation" portion of his report, Dr. Grahek found that Lowery was capable of lifting or carrying a maximum of 30 pounds, he was capable of "frequently" lifting or carrying 10 pounds, and of "occasionally" lifting or carrying 20 pounds. He was capable of only occasionally climbing, balancing, stooping, kneeling, crouching, crawling, or twisting. Lowery testified that he did not recall telling Dr. Grahek that he did not lift over 30 pounds at that time (as Dr. Grahek reported he had); his recollection was that Dr. Grahek would increase his lifting or other work requirements whenever Lowery let him know what he was capable of doing without pain.[5]

Dr. Grahek's report noted that Lowery had returned to his usual occupation, "on new restrictions." Using applicable evaluation guidelines, he concluded that Lowery had an 11 percent impairment, "[b]ecause the patient has no severe alteration of his activities of daily living, but is restricted from heavy lifting . . . ." Dr. Grahek had not reviewed a written analysis of Lowery's job requirements in reaching these conclusions.

[5] Lowery did not recall telling Dr. Grahek some of the things reflected in Dr. Grahek's notes, notwithstanding the parties' stipulation that he had.

When Lowery received Dr. Grahek's permanent and stationary report, he did not try to correct what he testified were misstatements about his lifting capabilities at that time, because he "didn't really think it was that big of an issue." Frank Vitone, Lowery's immediate supervisor in the HVAC department, received a copy of each of Dr. Grahek's medical status reports, and the Permanent and Stationary Report.

The Interactive Meeting

Soon after the September 6, 2007 Permanent and Stationary Report, Southern California Risk Management Associates (SCRMA), a third-party administrator that handled the self-insured District's workers' compensation matters, notified Shauneice Milton, a workers' compensation claims specialist for the District, that Lowery had been found to have reached maximum medical improvement status. By letter of September 20, 2007, Milton advised Lowery of Dr. Grahek's permanent work restrictions of no bending, kneeling, or squatting that causes pain, and no lifting over 30 pounds. The letter also informed Lowery that because permanent work restrictions had been prescribed, the District had scheduled an interactive meeting for October 8, 2007 "to discuss and determine whether your permanent work restrictions can be accommodated" "based on the essential functions of your job," and if they cannot, to evaluate alternative positions.

Before the interactive meeting Vitone reported Lowery's permanent work restrictions to his supervisor, Pierce College Director of Facilities Paul Neiman, from Dr. Grahek's Permanent and Stationary Report. With the assistance of an outside consultant (but without input from Lowery) Vitone and Neiman prepared a "job function analysis" for the HVAC Technician position. The document listed the position's education, experience, and licensing requirements, (including licensing and competence certification for chloroflorocarbon handling in accordance with EPA rules). It identified many specific job functions and requirements, including seven "essential" functions and tasks, with attribution of a percentage of time an HVAC Technician would be expected to

devote to each.[6] It listed postures and movements that would be required during the essential tasks and functions (such as sitting, kneeling, crawling, stooping, squatting, and various sorts of twists and reaches), with identification of the typical frequency and duration for each. And it listed the job's essential lifting and carrying demands, for items ranging from hand tools, ladders, tool boxes, and wire rolls, to small and large compressors and air conditioning units, classified by weight, frequency, height of lift required, and whether the lift would be with or without assistance.

Neiman testified that before the meeting Milton had advised him of Lowery's work restrictions and asked him whether they could be accommodated, to which he had replied that they could not. As Milton explained, if Lowery's restrictions could be accommodated without further inquiry, no interactive meeting would be necessary.

The interactive meeting's participants, apart from Lowery, were Vitone, Neiman, Milton, Vice Chancellor Michael Shanahan, personnel analyst Denise McGee, and Lowery. According to the participants, at the meeting Milton provided Lowery with a copy of his work restrictions taken from Dr. Grahek's Permanent and Stationary Report, and reviewed the job function analysis, function-by-function. A number of participants reported that Lowery did not express any objections or disagreements with Dr. Grahek's restrictions. Milton's meeting summary states that Lowery "agrees with the permanent work restrictions prescribed by Dr. Grahek," and McGee's notes indicate that Lowery said that the "restrictions are not tight enough. Still pain lifting." Lowery testified at trial that he had told everyone at the meeting that the work restriction information was wrong—that he "was doing a lot more than this already. I didn't realize those restrictions were enforced at the time." Neiman recalled that Lowery might have said he was able to lift more than 30 pounds (although not necessarily without pain). Milton testified that if Lowery had said he was able to perform some task that his doctor had said he could not, she would have asked him to get another assessment of that function from his doctor.

[6] The seven tasks and functions that comprise 100 percent of the employee's working day were repairs, preventive maintenance, inspection, installation, driving, administrative work, and maintenance of tools and equipment.

Lowery was also given a copy of the eight-page job function analysis, and followed while the meeting participants went through it line-by-line. At trial he testified that although he agreed with some of the items in the job function analysis, there was too much information in it to review quickly, and at the meeting he felt he was being "ambushed." At trial, Lowery did not identify anything inaccurate in the District's job function analysis, except its statement of a need to occasionally lift between 50 and 75 pounds.

According to Vitone, in addition to asking whether Lowery understood and agreed with the work restrictions and the job function analysis, the meeting participants discussed whether the District could accommodate the stated work restrictions, and whether it would be feasible to hire a helper for Lowery. When asked, Neiman said (and Vitone agreed) that the department could not accommodate Lowery's work restrictions on a permanent basis, and that it would not be feasible to hire a helper for Lowery.

Vitone and Neiman felt at that time that although after his injury Lowery had fulfilled the assignments he was given within his medical restrictions, he was not performing the full duties of an HVAC Technician during the 18-month period until his condition became permanent and stationary. The HVAC department had accommodated Lowery's work restrictions for 18 months, but it was not reasonably feasible to continue doing so on a permanent basis for two reasons: the risk that Lowery would suffer further injury from engaging in the bending, twisting, and lifting tasks that his job required; and because permanent accommodation to his work restrictions would place the additional workload on his coworkers and on the department. Milton's meeting notes summarize the conclusion that accommodation would not be feasible: "While the college may be able to have someone occasionally assist with lifting, there needs to be a qualified person to perform repairs which consist of frequent bending, kneeling and squatting, therefore it

would not be safe or effective or feasible to accommodate as the person would need the same qualifications as the employee."[7]

Lowery's Removal

Lowery was removed from his modified duty position at the October 8, 2007 interactive process meeting, and was placed on paid industrial injury leave for 36 months, until October 2010. He was advised by letter on a number of occasions about other possible positions, and to respond with his resume and any additional medical information, but did not.

Lowery spoke with Vitone after the interactive meeting, telling Vitone that he wanted to keep his job as an HVAC Technician. According to Lowery (but not Vitone), Vitone agreed with his inability to understand how the meeting had resulted in Lowery losing his job.

Requests for Additional Information

On October 8, 2007, the District mailed Lowery a "follow-up" letter advising that he had been found to have permanent work restrictions, prescribing no repetitive bending, kneeling, or squatting; no lifting over 30 pounds, and no heaving lifting. These restrictions could not be accommodated in his HVAC Technician position. It asked Lowery to schedule a test for alternate positions for which he might be qualified, and to provide "any additional information" that he felt might be useful in determining his qualifications for other positions. Unless he did so within 30 days, the letter notified him, the District would close the interactive process. Lowery did not reply.

However, according to Dawn Bastin (the District's then Director of Business Services with responsibility for the District's risk management department, including worker's compensation), sometime after the interactive meeting Lowery sought to

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[7] Before, at, and after the interactive meeting, McGee informed Lowery of other positions with the District for which he might be qualified, and could apply. Among the listed positions were plumbing (a position that also may have had a 50-pound lifting requirement), general foreman (an opening that expired soon after the letter was sent), and HVAC supervisor and plumbing supervisor (positions that were being phased out). Lowery eventually interviewed for the general foreman position, but was not hired.

persuade her that he could do his job, and she acceded to his request for a meeting. She learned from Neiman before the meeting that Lowery had been accommodated on modified duty for 18 months, far longer than usual, that Lowery had been performing office functions, and that an untrained part-time employee had been performing many of the essential functions of his job. She was also told that Lowery's work restrictions had been decreasing during that time, "with the hope of being able to return to his usual and customary duties." Bastin testified that Lowery brought a union representative with him to meet with her, but he offered no new information.

According to Bastin, she reviewed the job function analysis with Lowery. Lowery did not say that he was doing, or could do, his job without restrictions; he said that the college was being unfair by refusing to continue to accommodate his work restrictions. He said the assistant he had been using for a while could continue to carry his tools; and although he could not climb onto the roof to reach the equipment he sometimes needed to work on, the assistant could follow his directions while working on equipment in remote or difficult locations. At the meeting's conclusion Bastin told Lowery that being able to do the work of a trained HVAC journeyman is a job requirement, that having someone else do that work for him is a job replacement, not an accommodation, and that he could not return to his position unless he could perform his job's essential functions without causing harm to himself or others.

At trial, Lowery denied having ever met with Bastin, but he described a similar meeting that he said he and his union representative had with Milton. He said that Milton told him that even though he had been working during the last 18 months, the decision that he could no longer be accommodated would not be changed.[8]

Subsequent Examination by Dr. Grahek

At his next examination on October 18, 2007, Lowery told Dr. Grahek that he had been dismissed from his employment, "although he had been working full duties with

[8] Lowery testified that although Milton had apparently thought he had been on disability leave since his injury, by the time of that meeting she understood that he had been working with restrictions during most of that period.

restrictions" since March 2006. Lowery also reported to Dr. Grahek that "his pain has worsened in being more constant with radiation down left lower extremity into foot accompanied by some tingling without numbness."

Dr. Grahek left Lowery's work restrictions unchanged: "No lifting over 30 pounds. No repeated bending/kneeling/squatting that causes pain." He recommended that Lowery "[r]eturn to work on modified duty with restrictions on permanent basis; would consider modification of restrictions if warranted on future exam."

SCRMA's Inquiry to Dr. Grahek, and Dr. Grahek's Re-Examination of Lowery

On November 1, 2007, SCRMA wrote to Dr. Grahek, asking for supplemental support for his position that Lowery's permanent disability should be apportioned entirely to his March 1, 2006 injury, and none to his degenerative disc disease (an issue relevant to Lowery's workers' compensation claim). The letter also provided Dr. Grahek with a copy of the job function analysis that had been discussed at the interactive meeting, and asked Dr. Grahek to "review and comment if there are any changes to your original permanent work restrictions."

Lowery Files Workers' Compensation Claim

On November 21, 2007, Lowery's attorney filed a workers' compensation claim with the Department of Industrial Relations, and advised the District not to contact Lowery directly.

November 27, 2007 Examination

Lowery was again examined by Dr. Grahek, at Dr. Grahek's request, on November 27, 2007. Lowery told Dr. Grahek that the work restrictions of the September 6, 2007 Permanent and Stationary Report had resulted in the loss of his job. Lowery also told Dr. Grahek that he had some recurring low back pain episodes, "which he feels may have been exacerbated by the stress of losing his job."

Dr. Grahek reported that after Lowery consulted with his newly acquired legal counsel, he "will try to contact me within one to two weeks regarding any changes to his permanent restrictions." The work restrictions "remain unchanged" from those given on September 6, 2007, "however, these are presently under review and may been [*sic*]

changed in near future." Lowery called Dr. Grahek back soon afterward, "and let him know that he could raise the restrictions."

Dr. Grahek's November 29, 2007 Letter

Dr. Grahek responded to SCRMA's November 1 letter on November 29, 2007. Noting that he had not seen Lowery's formal job function analysis before preparing his September 6, 2007 Permanent and Stationary Report, he provided a re-evaluation "with this new data at hand." He provided a "functional capacity assessment" that Lowery could lift a maximum of 60 pounds, he can "frequently" lift and carry 30 pounds, "occasionally" lift and carry 50 pounds, and he may lift greater than these weights with assistance. His allowed activities included climbing, stooping, kneeling, crouching, crawling, and twisting, "all frequently." He concluded that Lowery fully meets the requirements for his occupation as a HVAC Technician, and could safely return to his job. At trial, Dr. Grahek testified that he did not intend for Lowery to lose his job—which he understood Lowery had been substantially performing—due to his Permanent and Stationary Report. If he had had the job function analysis, Dr. Grahek said, he would have set a 60-pound restriction to begin with, rather than the 30-pound maximum set in his Permanent and Stationary Report.

Dr. Grahek's November 29 letter did not specifically mention Lowery's medical condition or changed work restrictions; but Dr. Grahek said he intended its changed "functional capacity assessment" to be understood as a change in Lowery's work restrictions.[9] He also did not say that Lowery should restrict his activities if they cause him pain (as his previous reports had); he believed that if the choice is losing a job

[9] Shanahan and Milton testified that a medical statement of work restrictions is not the same as an assessment of the patient's functional capacity to engage in various activities. The employer looks to a doctor's identification of work restrictions, rather than a functional capacity assessment, because the work restrictions focus on "what it is that the employee must avoid doing"—and therefore what the employer can become liable for permitting the employee to do—rather than on "the other 90 to 99 percent of what an employee can do."

because of pain or working with the pain and keeping their job, "most people choose to work with the pain."

Dr. Grahek's November 29, 2007 letter was mailed to the SCRMA workers' compensation claims manager who had earlier requested supplemental information. Although at trial Lowery did not recall having received Dr. Grahek's November 29, 2007 letter until a year or two later, he had testified at his deposition that he had received it earlier from Dr. Grahek, but he had not submitted the letter to the District because Dr. Grahek had said he was submitting it.

None of the participants at the interactive meeting, nor anyone at the District, received Dr. Grahek's November 29, 2007 letter, or learned of its existence or contents, until about 18 months later, when it was shown to Vitone at his deposition in Lowery's workers' compensation matter (not this FEHA lawsuit). Vitone apparently stated at that time that "based on the new report" (Dr. Grahek's November 29, 2007 letter) he saw no reason Lowery could not do his job. However, he did not then seek permission to rehire Lowery to his HVAC Technician position (which remained unfilled at that time).

Lowery remained on industrial leave in May 2009.[10] The District hired someone else to fill the HVAC Technician position in the summer of 2010, when Vitone was leaving Pierce College to become general foreman at another college in the district.

Refusal to Attend Agreed Medical Examinations

Lowery was aware that his workers' compensation attorneys had scheduled him for six Agreed Medical Examinations (AME's) between August 2010 and November 2011 (including an AME by a court-appointed workers' compensation doctor). However, he declined to attend any of them, because he did not believe they would help him recover his job, and because one of these examinations was scheduled during a time he was caring for his mother. He had been told by other workers that the AME's purpose was not to get his job back—which was his goal—but to obtain a job rating in order to prepare for a settlement and dismissal of his workers' compensation claim.

[10] Having suffered an industrial injury, Lowery was entitled to 36 months leave, during which he received sick pay.

Lowery Declines Offer to Return to Work Upon Showing of Fitness

By letter dated May 21, 2010, Shanahan advised Lowery that his leave was nearing an end, and offered him four options. The first option was to return to work "with or without request for accommodation." The other three options involved his resignation and/or retirement.

The letter advised Lowery that "[i]f you can provide medical documentation that you are fit to return to your position, you should provide it now. If you require accommodation of a physical limitation or restriction, provide medical documentation of your limitations with your request for accommodation." Lowery was asked to inform the college of his choice of options no later than June 21, 2010, in the absence of which an application for disability retirement would be submitted in his name.

Lowery did not respond to the request for choice of options, nor to the request for medical documentation showing his fitness for his HVAC Technician position. He testified that he did not respond because he believed that Shanahan (the letter's author) was aware that his lifting restrictions were then 60 pounds; Shanahan had been shown Dr. Grahek's November 29, 2007 letter at his May 2009 deposition in the workers' compensation case, as Lowery had seen from the deposition transcript.[11]

About four months later, on October 11, 2010, the District notified Lowery that his leave had expired and he was being placed on layoff status and a re-employment list for the next 39 months. "If, in the future, you are medically cleared to return to work, you will have reemployment rights to the class from which you were removed."

Lowery's Lawsuit and Trial

On October 8, 2008, Lowery filed a discrimination complaint with the Department of Fair Employment and Housing. On May 12, 2009, Lowery sued the District and SCRMA for damages under FEHA. His First Amended Complaint alleged claims for

[11] Shanahan testified that after seeing Dr. Grahek's November 29, 2007 letter at his deposition in the workers' compensation case, he did not reopen the interactive process with Lowery, although he did believe that some clarification should be sought from Dr. Grahek.

damages for disability discrimination (§ 12940, subd. (a)); failure to engage in a good faith interactive process (§ 12940, subd. (n)); failure to accommodate (§ 12940, subd. (m)); failure to prevent disability discrimination (§ 12940, subd. (k)); and retaliation in violation of FEHA (§ 12940, subd. (h)). Before trial Lowery dismissed SCRMA as a defendant, and dismissed his causes of action for failure to prevent discrimination and retaliation.

Trial began on December 5, 2011, and resumed on December 6, 7, 8, 9, 12, and 13. Jury was waived.

Lowery testified at trial that his back was "fine"; that he did exercises, "doing whatever I want to do, basically." He testified that after his March 1, 2006 injury he had not been able to do his regular duties as an HVAC Technician; however he later explained that he meant he could do all of the duties for the HVAC Technician position, but not "all of it," apparently meaning not the heavy lifting. After a few weeks of answering phones in the plant facilities office, he went on light duty—undertaking tasks within his work restrictions, such as inspections that he could do with one or two small screwdrivers. Lowery tried to adhere to his doctors' work restrictions. Although his HVAC work occasionally required him to get into difficult positions and cramped spaces, he could comfortably do that by lying on his side instead of on his back. He could lift 50 pounds, and could handle the refrigerant containers weighing up to 60 pounds and motors weighing up to 85 pounds—including bending as needed—as his job occasionally required.

Lowery testified that during his leave he had engaged in many strenuous tasks for himself and his family, involving plumbing, construction, and HVAC work. He had sought other employment, but had received no offers. In addition to his financial loss, he suffered serious emotional damage and depression. The court received in evidence Lowery's request for admission, and the District's responsive admission, that Lowery "had a physical condition of the low back that limited his ability to work from March 1, 2006 until October 8, 2007."

The Court Renders Judgment for Lowery

On December 13, 2011, the trial court heard argument and rendered its tentative decision in Lowery's favor on all three causes of action, awarding him back-pay and non-economic damages totaling $437,460, and ordering his reinstatement to his position as an HVAC Technician at Pierce College, as of January 1, 2012, in lieu of front-pay. On January 30, 2012, the court signed the statement of decision (prepared by plaintiff's counsel, with minor revisions), and entered judgment for Lowery.

On the first and third causes of action, for disability discrimination and failure to accommodate, the trial court found that Lowery was able to perform the essential functions of his HVAC Technician position "with or without reasonable accommodation"; that the District failed to provide reasonable accommodations; that Lowery's disability was a motivating factor in the District's failure to accommodate and failure to reinstate Lowery to his position; and that the District's failure to accommodate caused Lowery harm. The court explicitly credited Lowery's testimony. And it discredited the District's evidence that Lowery was not able to perform his essential job duties, as "not credible, not persuasive, and often contradicted by other evidence . . . ."

The court specifically held that SCRMA was the District's agent, and that the issues raised by this lawsuit were within the scope of that agency. Based on that finding, it was SCRMA's duty to advise the District of Dr. Grahek's November 29, 2007 letter responding to SCRMA's November 1 request for information, because Dr. Grahek's letter reflected a change in the information about Lowery's ability to perform the tasks required by his position with the District. "Therefore," the court found, SCRMA's knowledge of Dr. Grahek's November 29, 2007 letter is "fairly attributable to the District." And the court rejected the District's witnesses' explanations that unless and until a doctor expressly announced new work restrictions, the District was bound by the work restrictions in the Permanent and Stationary Report. The court found that the November 29, 2007 letter's revised evaluation of Lowery's physical capabilities should have been recognized by the District as a restatement of his work restrictions, although Dr. Grahek's letter had not used those words.

The court found that Vitone and Neiman, the decision-makers, were not qualified to determine whether Lowery's work restrictions could be reasonably accommodated; but it credited their testimony that they understood Dr. Grahek's November 29, 2007 letter to mean that Lowery could perform most or all of his job's essential functions—"at least 99.9 percent of the job"—without violating his work restrictions. "In short," the court found the November 29, 2007 letter showed that Lowery "was able to perform the essential functions of his B-Shift HVAC Technician position with or without reasonable accommodations."

The court also found that the District had failed at the interactive meeting to discuss any ways Lowery's lifting restrictions might have been accommodated with lifting devices, or that Lowery had recovered from each of his earlier back injuries. McGee's efforts to identify other positions for which Lowery might be qualified were made without regard to his work restrictions and the positions' availability, and therefore made "no sense."

With respect to Lowery's second cause of action, for failure to engage in a good faith interactive process (§ 12940, subd. (n)), the court found that Lowery had satisfied each element of his claim: he had requested reasonable accommodations; and the District had failed to engage in the interactive process in good faith, "or even at all," once it learned the additional information from Dr. Grahek's November 29, 2007 letter (constructively in late 2007, and actually in May 2009). And it was not necessary for Lowery to submit himself to further medical examinations, the court held, because seeking additional or revised medical information "does not qualify as engaging in an interactive process in this case."[12]

The District timely filed its appeal from the judgment on February 15, 2012.

[12] The trial court faulted the District for failing at the interactive meeting to discuss the work restrictions that caused Lowery pain, and for providing Lowery with an "eligibility list" of other job positions that did not take into account either his inability to do heavy lifting, or the positions' availability.

DISCUSSION

The District contends on appeal that there is insufficient evidence to support the trial court's determinations that its removal of Lowery from his HVAC Technician position resulted from disability discrimination in violation of section 12940, subdivision (a), that it failed to accommodate Lowery's disability in violation of section 12940, subdivision (m), and that it failed to engage in a good faith interactive process to accommodate Lowery's disability, in violation of section 12940, subdivision (n).

Standard of Review

"In general, in reviewing a judgment based upon a statement of decision following a bench trial, 'any conflict in the evidence or reasonable inferences to be drawn from the facts will be resolved in support of the determination of the trial court decision." (*Estate of Young* (2008) 160 Cal.App.4th 62, 75–76.) We consider the evidence in the light most favorable to the prevailing party, and draw all reasonable inferences from the record to support the judgment. (*Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 420.) We are bound by the trial court's credibility determinations, and we do not reweigh the evidence. (*Estate of Young, supra,* 160 Cal.App.4th at pp. 75–76; *Cuiellette v. City of Los Angeles* (2011) 194 Cal.App.4th 757, 765.)

1. Disability Discrimination

The evidence in the record does not support the determination that at the time he was placed on leave, Lowery was able to perform the essential functions of his job, with or without reasonable accommodation. Nor does it show that, even if he could then perform all the job's essential functions, the District had any way of knowing that when it removed him from his position.

As currently written, FEHA prohibits, as an unlawful employment practice, the discharge of an employee because of the employee's physical disability, unless it is based on a bona fide occupational qualification (§ 12940, subd. (a)), except when the employee's disability renders the employee "unable to perform his or her essential duties even with reasonable accommodations. . . ." (§ 12940, subd. (a)(1); *City of Moorpark v. Superior Court* (1998) 18 Cal.4th 1143, 1160.) It is also unlawful under FEHA for the

employer "to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee" unless the accommodation would cause "undue hardship" to the employer. (§ 12940, subd. (m); *Spitzer v. Good Guys, Inc*. (2000) 80 Cal.App.4th 1376, 1383.) However, FEHA does not prohibit an employer from discharging an employee "where the employee, because of his or her physical or mental disability, is unable to perform his or her essential duties even with reasonable accommodations," or cannot perform those duties "in a manner that would not endanger his or her health or safety or the health or safety of others even with reasonable accommodations." (§ 12940, subd. (a)(1); *Green v. State of California* (2007) 42 Cal.4th 254, 261-262; *Scotch v. Art Institute* (2009) 173 Cal.App.4th 986, 1002, 1005.)[13]

Under these provisions it is Lowery's burden to present evidence that he was able to perform the essential duties of his position, with or without reasonable accommodation. (*Green v. State of California*, *supra*, 42 Cal.4th at p. 263.) "[I]n disability discrimination actions, the plaintiff has not shown the defendant has done anything wrong until the plaintiff can show he or she was able to do the job with or without reasonable accommodation." (*Id.* at p. 265.)

The record contains no substantial evidence that on October 8, 2007, Lowery was able to perform the essential duties of his position, with or without reasonable accommodation. As of October 8, 2007, the District had identified the essential functions of Lowery's position as including lifting and carrying up to 25 pounds "frequently" (meaning 3 to 6 hours per day); and lifting and carrying 25 to 50 pounds "occasionally" (one-half to 3 hours per day). It identified as a frequent to occasional necessity of Lowery's job that he work at heights, on roofs, in attics, and on ladders. And it identified as from occasional to frequent the need for an HVAC Technician to kneel, bend, stoop, squat, climb, lie down, twist at the waist, and reach above the shoulder.

[13] The potential impact of Lowery's work restrictions on others is illustrated by the report of Lowery's medical examination on September 27, 2006. Lowery reported to his doctor that he had strained his back that day while assisting a coworker with a heavy compressor "so that [the coworker] would not injure himself falling off the ladder," and causing Lowery to miss a few days of work.

The record contains no evidence that these functions are not essential to the position of a B-Shift HVAC Technician at the District. Lowery testified that many of them were required only infrequently, and that he could usually get others to assist him when they were required. But he offered no evidence that tasks requiring repetitive heavy lifting, squatting, and twisting were not sometimes required (particularly on his evening shift, where he was the only HVAC Technician on duty), as the District's job function analysis indicates.

At his medical examination on September 6, 2007—the last examination and report before he was removed from his position—Lowery had told Dr. Grahek that "he no longer lifts anything over thirty pounds"; he "always seeks help when he has to have any heavy lifting done"; and he "does not do repeated bending, kneeling or squatting." Although at trial Lowery did not recall telling that to Dr. Grahek at that time, he did not deny that he had; and the parties expressly stipulated that Lowery had said everything attributed to him in Dr. Grahek's reports. Lowery admitted at trial that when he had to lift something heavy, sometimes he had to wait until the next day for someone to be there to assist him.

The only evidence was that the essential tasks of a B-Shift HVAC Technician include at least occasional heavy lifting, and at least some work in tight and uncomfortable spaces and positions, sometimes repetitively and for long periods. That is confirmed by the fact that Lowery's March 1, 2006 injury, as well as a number of his back injuries in earlier years, had occurred while he was performing such tasks in the course of his work. The trial court thus could conclude from the evidence that Lowery was frequently able to avoid some of the heavy lifting and difficult positions that his job required of him, primarily by having others perform those tasks in his place, or by having others assist him, when they were available to do so. But the record provides no basis for a conclusion that occasional lifting of more than 30 pounds, and working in tight and uncomfortable spaces and positions, was not sometimes a necessary part of the job.

The trial court concluded in its statement of decision that although some of the job's essential tasks "required a little extra muscle," Lowery had proved at trial that he

was able to perform his essential functions "practically without any accommodation at all," and that there were always others around to help on those occasional times when carrying or moving heavy objects was required. That means that *by the time of trial* Lowery could perform *most* of his job functions *most* of the time. It does not mean that he could perform *all* of the job's essential functions, even when others were not there to help with the physically challenging tasks; and it does not mean that he was able to do so as of October 8, 2007, when the District was held to have violated the FEHA by removing Lowery from his position.

As of October 2007, the District did not have Lowery's testimony that (contrary to his work restrictions) he had been doing heavy lifting at work. It had Vitone's and Neiman's reports to the interactive meeting that the HVAC department had for 18 months accommodated his physical limitations, with lighter duty and with postponement of some tasks until others could handle them or assist Lowery with them. Vitone and Neiman reported that Lowery had performed his modified duties well; but even Lowery testified that under the work restrictions as of September 26, 2007, he still could not always perform all the tasks he was called upon to do as an HVAC Technician.

Apart from the report from Lowery's supervisors that his duties had been modified to avoid subjecting him to activities restricted by his doctor, as of October 8, 2007 the District had only the Permanent and Stationary Report, in which Dr. Grahek said that Lowery had told him just a month earlier that he did no repeated bending, kneeling or squatting, and never lifted more than 30 pounds. Dr. Grahek's Functional Capacity Evaluation had reported that Lowery was capable of lifting or carrying up to 30 pounds; he was capable of "frequently" lifting or carrying up to 10 pounds; he could "occasionally" lift or carry up to 20 pounds; and he could only occasionally climb, stoop, kneel, crouch, crawl, or twist. And Dr. Grahek specifically directed Lowery—and the District—that Lowery "is restricted from heavy lifting . . . ."

Faced with Dr. Grahek's explicit work restrictions fixing a 30-pound maximum for lifting and carrying, with lower limits depending on frequency, and limiting his climbing, stooping, kneeling, crouching, crawling, and twisting activities, the District

could not conclude that Lowery was capable of more. (*Keulen v. Workers' Comp. Appeals Bd.* (1998) 66 Cal.App.4th 1089, 1096-1097 [Evidence from lay witness is not substantial evidence; medical proof is required on diagnosis, prognosis and treatment].) It could not place Lowery in a position that required functions and tasks that his doctor had expressly forbidden him to perform. (*Swonke v. Sprint Inc.* (ND Cal. 2004) 327 F.Supp.2d 1128 [Court could not hold that employee was able to return to work when employee's medical providers designated him unable to work].)

Without affirmative evidence that as of October 8, 2007, Lowery was capable of performing without his physician-imposed work restrictions, and that the District had that information, all the District could do was to compare those work restrictions with the job's essential functions identified by those in charge of the college facilities and the HVAC department (to which Lowery had voiced no dispute, and had presented no contrary evidence), and to hear from those in charge that the HVAC department could not permanently accommodate a technician who could perform only under those restrictions.

Faced with that information and the conclusions of Neiman and Vitone that the HVAC department could not permanently accommodate a Shift B technician who could not perform some of the job's essential functions, the District had little choice but to remove Lowery from his position. Its only information was that Lowery's disability rendered him "unable to perform his or her essential duties even with reasonable accommodations . . . ." (§ 12940, subd. (a)(1).)

2. Failure to Accommodate

The evidence did not identify any reasonable accommodation that would have enabled Lowery to perform all the essential functions of his position; nor does the trial court's statement of decision identify any particular accommodation that the District should reasonably have provided. Lowery testified that he had told those at the October 8, 2007 interactive meeting that he had for some time been lifting more than 30 pounds (despite his doctor's restrictions), and that getting a lighter ladder would help. But the ability to lift up to 30 pounds was well short of the job's essential lifting and carrying requirements. Thus while everyone agreed that Lowery had performed well in

the HVAC department when the heavier physical tasks were done by others, or were left undone, there was no evidence that he could perform all the essential functions of his position within his work restrictions. And there was no evidence that the department could continue permanently to have others perform some of Lowery's essential duties, while leaving other tasks undone during his shift because of his work restrictions.

Nor was the District required to do so. A reasonable accommodation under section 12940, subdivision (m), is "a modification or adjustment to the workplace that enables the employee to perform the essential functions of the job held or desired." (*Nadaf–Rahrov v. Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 975–976; *Scotch v. Art Institute of California-Orange County, Inc.*, *supra*, 173 Cal.App.4th at p. 994.) But an employer is not required to transform a disabled employee's temporary light-duty assignment into a permanent light-duty assignment, once the employee's temporary disability becomes permanent. Nor is an employer required to make accommodations that would place undue hardship on its operations, or on other employees. (§ 12940, subd. (m); *Raine v. City of Burbank* (2006) 135 Cal.App.4th 1215, 1217-1218, 1223.)

In *Raine v. City of Burbank*, *supra*, an injured police officer had been given a light-duty position during his recovery (just as in this case Lowery had been retained by the HVAC department with modified duties after his injury). The court held as a matter of law, however, that the employer had no obligation under the FEHA to make the temporary light-duty position available indefinitely, once it learned that the disability was permanent. (*Raine v. City of Burbank*, *supra*, at pp. 1217–1218; see also *Watson v. Lithonia Lighting* (7th Cir. 2002) 304 F.3d 749, 752 [same]; *Laurin v. Providence Hosp*. (1st Cir. 1998) 150 F.3d 52, 60 [hospital was not required to assign nurse to permanent day shift even though it had done so on temporary basis to assist her recuperation].)

So too, here, the District was not required to transform Lowery's job as B-Shift HVAC Technician into a new position, with all the attributes of his old position but without some of the functions that remained beyond his work restrictions and capabilities

when he was placed on leave.[14] "'The responsibility to reassign a disabled employee who cannot otherwise be accommodated does "not require creating a new job, moving another employee, promoting the disabled employee or violating another employee's rights . . . ."'" (*Raine v. City of Burbank*, *supra*, at p. 1223; *Spitzer v. The Good Guys, Inc.*, *supra*, at p. 1389.) "What is required is the 'duty to reassign a disabled employee if an already funded, vacant position at the same level exists.' [Citations.]" (*Hastings v. Department of Corrections* (2003) 110 Cal.App.4th 963, 972-973; *Spitzer v. The Good Guys, Inc.*, *supra*, at p. 1389.)[15]

The trial court thus erred by holding the District liable because Lowery could perform the essential functions of his position with the light-duty modifications the District had afforded him since his injury. Lacking evidence that Lowery was able to perform all the essential tasks of his position as HVAC Technician as of October 8, 2007, with or without reasonable accommodation, the District cannot be held liable under section 12940, subdivision (m), for failure to accommodate Lowery's disability.

3. Failure to Engage in Good Faith Interactive Process

The FEHA makes it unlawful for an employer "to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition." (§ 12940, subd. (n); *Scotch v. Art Institute of California-Orange County, Inc.*, *supra*, 173 Cal.App.4th at p. 1003; *Wilson v. County of Orange* (2009)

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[14] In *Cuiellette v. City of Los Angeles* (2011) 194 Cal.App.4th 757, the City was found to have violated FEHA by removing its disabled police officer from a desk position in which he had been accommodated during his recovery from an injury; but in that case, unlike here, the evidence showed that the employer had long maintained many such desk jobs as separate (and available) positions within the department.

[15] Federal decisions interpreting the Americans With Disabilities Act are instructive in applying FEHA, where, as here, the two acts contain similarly worded provisions. (*Richards v. CH2M Hill, Inc*. (2001) 26 Cal.4th 798, 812–813; *Reno v. Baird* (1998) 18 Cal.4th 640, 647–648; *Raine v. City of Burbank*, *supra*, 135 Cal.App.4th at p. 1226, fn. 7.)

169 Cal.App.4th 1185, 1193.) Unless the employer has engaged in a good faith interactive process, "'it cannot be known whether an alternative job would have been found.'" (*Wysinger v. Automobile Club of Southern California*, *supra*, 157 Cal.App.4th at pp. 424-425; *Claudio v. Regents of the University of California* (2005) 134 Cal.App.4th 224, 242 [same].) Whether the interactive process broke down, and which party or parties are responsible, ordinarily are issues of fact. (*Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245.)

However, in order to prove that the employer failed to engage in a good faith interactive process, at trial the plaintiff must identify reasonable accommodations that would have been available during the interactive process, if the process had been properly conducted. (*Scotch v. Art Institute of California-Orange County, Inc.*, *supra*, 173 Cal.App.4th at pp. 995, 1018; *Nadaf-Rahrov v. Neiman Marcus Group, Inc.*, *supra*, 166 Cal.App.4th at pp. 982-984.) Unless at trial—after having full discovery— the employee can identify reasonable accommodations that would have enabled him to perform the essential functions of the position he sought, even a good faith interactive process would have been to no avail. Any failure to engage in a good faith interactive process could not have resulted in any harm to Lowery unless some existing accommodation was missed. (*Scotch v. Art Institute of California-Orange County, Inc.*, *supra*, 173 Cal.App.4th at pp. 995, 1018 [plaintiff suffers no remedial injury from failure to engage in interactive process unless evidence shows that some qualifying position was available]; *Nadaf-Rahrov v. Neiman Marcus Group, Inc.*, *supra*, 166 Cal.App.4th at

p. 984 [employee bears burden of proving a reasonable accommodation was available before the employer can be held liable for failure to engage in good faith interactive process].)[16]

The trial court made no determination that *as of October 8, 2007*, or at any time before the District's constructive receipt of Dr. Grahek's November 29, 2007 letter, the District had breached its duty to engage in an interactive process, or had acted in bad faith in doing so, in any way that resulted in harm to Lowery.[17] Nor would the evidence have supported such a determination. Lowery's evidence did not show that Lowery was capable of performing the essential duties of his position as B-Shift HVAC Technician, or that he was qualified for any other position with the District, as of any time before November 29, 2007. He therefore failed to show that he was harmed by the District's failure to participate in the good faith interactive process before that date.

However, Dr. Grahek's November 29, 2007 letter constituted substantial evidence that Lowery was then qualified for the position from which he had earlier been removed. The letter identified no restrictions to Lowery's ability to perform his job's essential functions; and it identified no necessary accommodations.

The court held that when the District received Dr. Grahek's letter (constructively in late November 2007, and actually in 2009), it did not do what it should have done:

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[16] In *Hanson v. Lucky Stores, Inc.*, *supra*, 74 Cal.App.4th 215, as here, the employer had relied on the doctor's permanent and stationary report, consultations with vocational and rehabilitation specialists, and comparison of the doctor's work restrictions with the job's requirements; its failure to confer with the employee about accommodations did not require reversal. (*Id.* at p. 229 ["reversal for the sole purpose of requiring [the employer] to discuss the same issues with [the employee] himself would unreasonably laud form over substance"].)

[17] Although the trial court criticized the District for many deficiencies in its conduct of the interactive meeting, it found that "[t]here were plenty of mistakes, perhaps even some incompetence, but bad faith is a much closer question, particularly with respect to the October 8, 2007 interactive meeting."

engage in a new interactive process, as required by section 12940, subdivision (n).[18] The evidence supports this determination.

The trial court held that SCRMA's constructive receipt of the letter on November 29, 2007 constituted notice to the District that Lowery was *then* qualified for his position.[19] The letter identified no restrictions in Lowery's ability to perform his job's essential functions; according to it, Lowery needed no accommodation. Lowery's trial testimony about his physical activities since leaving his position amply supported the court's conclusion that he was then capable of performing the position's essential functions without accommodation. And when Vitone was asked at trial whether the HVAC department could accommodate Lowery as an HVAC Technician, based on the November 29, 2007 letter's re-evaluation of his medical condition, he responded: "I don't see why not."

Yet after receiving the letter, the District "failed to engage in good faith, or even at all," the trial court concluded.[20]

CONCLUSION

The record does not support the determination that Lowery was discharged as a result of unlawful discrimination. On October 8, 2007, when the District removed him from his position as a B-Shift HVAC Technician, the District had before it almost a dozen reports of Lowery's medical condition resulting from his on-the-job injury eighteen months earlier. Each of these reports concluded that his medical condition

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[18] A District witness agreed that a new interactive process is warranted when new medical information is received.

[19] The District's appeal does not challenge the trial court's agency finding, on which the constructive notice determination rests.

[20] Because the trial court found that the damages resulting from the failure to engage in the good faith interactive process after November 29, 2007 were no different from those resulting from the other grounds on which it imposed liability, its decision did not address, either expressly or by implication, the extent to which Lowery's conduct did not conform to his own obligations with respect to the interactive process.

precluded him from doing certain of the activities that the District considered essential for a B-Shift HVAC Technician at the college to be able to perform. (Indeed, it was Lowery's performance of these same activities [repetitive squatting, twisting, and lifting, for example] that had resulted in his injury on this and earlier occasions.) The most recent of these medical reports concluded that his inability to perform these essential activities was unlikely to change in the near future. The District had no indication to the contrary (except perhaps Lowery's trial testimony that he informed it at the October 8, 2007 interactive meeting that he had been exceeding his doctor's lifting restrictions for some time). This record provides no support for the trial court's determination that the District's removal of Lowery from his position on October 8, 2007 was unlawful.

Nor does the evidence support a determination that Lowery was harmed by any failure of the District to accommodate his medical restrictions at any time before November 29, 2007. Until Dr. Grahek's November 29, 2007 letter, the only accommodation that would have allowed Lowery to retain his position would be to continue having others perform some of his job's essential tasks—a result that the law does not require.[21]

Without evidence of a reasonable accommodation that would have permitted Lowery to retain his position before November 29, 2007, there is no support for the imposition of liability for any failure before that date to engage in the good faith interactive process, or failure to provide reasonable accommodation. No such failures could have resulted in harm to Lowery before that date.

After the November 29, 2007 letter, however, the information available to the District concerning Lowery's ability to perform his job's essential tasks had changed. The trial court found that Dr. Grahek's letter had removed all the restrictions that would have required accommodation. At that point the District undoubtedly would have been

[21] The only possible reasonable accommodation suggested in the evidence was Lowery's request for a lighter ladder. But even if such a ladder would have been within his then-30 pound lifting restriction (there is no evidence it would), there still was no evidence that he could perform the other repetitive or strenuous tasks that his job sometimes required—the same sorts of tasks that had resulted in his injuries.

entitled to inquire further about the accuracy and basis for that abrupt revision to Lowery's medical restrictions; but it would no longer have been justified in discharging him without further inquiry and investigation. The record therefore supports the trial court's determination that once the District learned the information in Dr. Grahek's November 29, 2007 letter (constructively or actually), it failed to engage in the good faith interactive process required by section 12940, subdivision (n). And the finding that the District failed to engage in the good faith interactive process after November 29, 2007 is not affected by any absence of evidence of reasonable accommodations for Lowery's inability to perform his job's essential tasks; according to Dr. Grahek's letter, accommodation no longer was necessary.

The trial court found that Lowery's damages resulted from the District's FEHA violations, without allocation among the various violations it found: the District's October 8, 2007 removal of Lowery from his position, its failure to provide reasonable accommodations for his medical restrictions, and its failure to engage in the good faith interactive process before November 29, 2007, each of which is unsupported by the record; and the District's failure to reopen the interactive process after November 29, 2007, a determination that the record supports. It is also likely that the passage of time since November 29, 2007 might make additional considerations relevant to the determination of the damages (or other appropriate remedies) that should be awarded as a result of the District's failure to engage in the good faith interactive process after that date.

For these reasons the judgment for reinstatement of Lowery to his former position must be affirmed, but the damages awarded by the trial court, both for back pay and for noneconomic damages, must be reversed for redetermination of the damages to which Lowery is entitled as a result of the District's breach of its obligation to engage in the good faith interactive process after November 29, 2007.

DISPOSITION

The judgment is reversed. The matter is remanded to the trial court with directions to order Lowery's reinstatement to his former position as a B-Shift HVAC Technician on the Pierce College campus, with the benefits he would have had if the District had reinstated him to his position following the November 29, 2007 letter, in performance of its obligations under the interactive process, or (if the District is unable or unwilling to do so) to order appropriate front pay in lieu of such reinstatement, and to determine and enter judgment for such other damages or remedies to which Lowery might be entitled as a result of the District's breach of its obligation to engage in the good faith interactive process after November 29, 2007. Respondent to recover costs.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

CHANEY, J.

I concur:

MALLANO, P. J.

Rothschild, J., concurring and dissenting:

I agree with the majority that the judgment in favor of Lowery on his claims for disability discrimination and failure to accommodate is not supported by substantial evidence. I disagree, however, with the majority's conclusion that substantial evidence supports the judgment in favor of Lowery on the interactive process claim, and I therefore respectfully dissent.

The majority concludes that the record contains no evidence that the District breached its duty to engage in a good faith interactive process before November 29, 2007, and I agree. But in my view, there is a similar lack of evidence that the District breached its duty thereafter. The uncontradicted evidence shows that the District repeatedly sought updated medical information from Lowery in August 2008, May 2010, and October 2010. Lowery did nothing to cooperate with the District's efforts to obtain additional information from him. He did not respond to the District's repeated solicitations for information that might show his ability to perform his position's essential tasks, did not suggest any accommodations, and refused to submit to further medical examinations. When the interactive process breaks down because the employee declines to provide relevant medical information or otherwise fails to cooperate, the employer is not liable. (See *Allen v. Pacific Bell* (9th Cir. 2003) 348 F.3d 1113, 1115-1116.)

For the foregoing reasons, I would reverse the judgment in its entirety and direct the superior court to enter judgment in favor of the District.

ROTHSCHILD, J.