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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

ELLIOT GALINDO, Plaintiff and Appellant, v. CITY OF LOS ANGELES, Defendant and Respondent.	B271274 (Los Angeles County Super. Ct. No. BC511277)

APPEAL from the judgment of the Superior Court of Los Angeles County. Samantha Jessner, Judge. Affirmed.

Law Offices of Stephen A. Ebner, Stephen A. Ebner and Stephen Love for Plaintiff and Appellant.

Michael N. Feuer, City Attorney, Vivienne A. Swanigan, Assistant City Attorney, and Jennifer Gregg Handzlik, Deputy City Attorney, for Defendant and Respondent.

* * * * * * * * * *

Plaintiff and appellant Elliot Galindo brought this action against his employer, defendant and respondent City of Los Angeles (City), for disability discrimination, failure to accommodate, failure to engage in the interactive process and retaliation under the California Fair Employment and Housing Act (Gov. Code, § 12900 et seq.; hereafter FEHA). The trial court granted the City's motion for summary judgment on plaintiff's operative second amended complaint. Plaintiff appeals, contending there were triable issues of material fact on all four of his claims under FEHA.

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff began working for the City in 1997 as a maintenance worker. In 1999, he was promoted to the position of cement finisher in the City's Department of Public Works, Bureau of Street Services.

A cement finisher for the City is considered a skilled worker position, requiring "strenuous" physical labor. A cement finisher "places and finishes concrete for any type of concrete work required in City service." A cement finisher may sometimes be called upon to act as the "leader of a small crew." Plaintiff was also sometimes called upon to operate heavy equipment, including a skip loader, backhoe and a mini grinder. Sometime after 2002, plaintiff acted as a "lead man" on a crew, overseeing the work of others, completing time sheets and the like. When acting as a "lead man," plaintiff was in more of a supervisory role and did not perform the normal labor functions of a cement finisher.

In 2004, plaintiff suffered a work-related back injury and did not return to full duty as a cement finisher until 2006. By

2008, plaintiff was routinely acting in the capacity of "lead man" but "did step in and set forms and pour concrete when [the crew was] missing a man."

On August 27, 2008, while plaintiff was setting forms for a curb and gutter, he reinjured his back. His supervisor asked him to go see a doctor, but it was near the end of the work day, so he went home instead because he did not think he hurt himself that badly. Plaintiff eventually saw a doctor because of worsening pain (primarily neck pain and pain in the lumbar area of his back). He filed a worker's compensation claim regarding the injury.

Plaintiff was off work for almost a year while his worker's compensation claim was pending. On August 6, 2009, Kisha Moreland, who was an analyst in the Workers' Compensation Division of the City's Personnel Department, advised plaintiff he could return to a light-duty assignment. In his light-duty assignment, plaintiff primarily handed out flyers to residents in areas where the City was performing construction or road work.

In December 2009, the Bureau of Street Services was notified by the Workers' Compensation Division that permanent work restrictions had been issued regarding plaintiff in connection with his worker's compensation claim. The notice specified the following work restrictions for plaintiff: "**Neck/Back**--Preclusion from very heavy work: 25% loss of pre-injury capacity to bend, stoop, lift, climb and perform activities of comparable physical effort. **Back--Preclusion** from heavy work: 50% loss of pre-injury capacity to bend, stoop, lift, push, pull, climb and perform activities of comparable physical effort. **Rt & Left Lower Extremity:** Due to the hip there is a loss of about ¼ of pre-injury capacity for lifting, weight-bearing, climbing,

walking over uneven ground, squatting, kneeling, crouching, crawling, and pivoting, or other activities of comparable physical effort. . . . **Back/Neck**--Limited to light duty only. He cannot perform any type of strenuous work. He should avoid lifting greater than 10 lbs, avoid repetitive bending, . . . avoid repetitive twisting, and avoid unusual body positioning for his spinal condition."

Plaintiff was called into a meeting with Thomas Pizzo and Abram Tejeda, the return-to-work coordinator and risk manager, respectively, for the Bureau of Street Services. Plaintiff was told his light duty assignment was ending, and he was not being released to return to full duty or another assignment at that time in light of the work restrictions.

Plaintiff was provided an interactive process questionnaire to complete. On December 20, 2009, plaintiff signed and submitted the questionnaire and confirmed that the medical work restrictions issued December 10 were accurately stated. Plaintiff stated he believed he could nonetheless perform his job as a cement finisher if he was given a "lead man" role, "less hands on." Plaintiff declined to be considered for another job classification, declined transfer to a lower-wage position, and said he was not aware of any equipment or devices that could assist him in completing his regular job duties.

At some point (the timing is not clear in the record), Mr. Pizzo spoke with Nick Lopez, the manager-supervisor of the division within the Bureau of Street Services where plaintiff was assigned. Mr. Pizzo asked Mr. Lopez to assess plaintiff's work restrictions and determine if there were any ways to accommodate him in his regular position or in the division.

The first interactive process meeting was held on March 31, 2010. Plaintiff, Mr. Pizzo and Mr. Tejada were present and they primarily discussed plaintiff's responses to the interactive process questionnaire. Although he had stated on the questionnaire that the work restrictions were accurately stated, plaintiff said at the meeting that he disagreed with them. He asked to be returned to his position as a cement finisher. Mr. Pizzo asked plaintiff to complete a City employment application identifying all of his work qualifications so that he could be considered for other modified duties or classifications.

Plaintiff testified that both Mr. Pizzo and Mr. Tejeda said it was to his benefit to complete an application listing all of his pertinent skills and qualifications. He recalled that Mr. Pizzo told him he could refuse any alternate position they might find if he did not want the reassignment. After the meeting, plaintiff said he spoke with Mr. Pizzo probably every two weeks or so and regularly pleaded with him to get back to work. Mr. Pizzo told him that everything was dependent on what the doctors said about his ability to perform his job and whether the medical work restrictions would be lifted or modified.

Mr. Pizzo testified in his deposition that during the interactive process, plaintiff said he did not want to be accommodated in other positions besides cement finisher. Plaintiff said he could perform a "lead man" role. Mr. Pizzo explained that plaintiff could not be accommodated as a "lead man" as it is not a separate job classification. Nor could plaintiff be accommodated as a formal supervisor, because that would be the functional equivalent of a promotion for which he would have to pass a civil service examination. The position of heavy equipment operator would have also constituted a promotion and

therefore did not constitute an accommodation the City could provide.

On May 28, 2010, Mr. Tejeda requested the various division heads within the Bureau of Street Services to assess whether there were any positions available in their respective divisions that could accommodate plaintiff's work restrictions. By July, all, including Mr. Lopez, had responded there were no positions available that could be performed with plaintiff's stated work restrictions, with or without accommodation.

On July 13, 2010, Mr. Tejeda requested the assistance of Marilyn Seltzer, the return-to-work coordinator for the Department of Public Works. The Department contained multiple bureaus, each with various divisions. Mr. Pizzo asked Ms. Seltzer to identify vacant, alternative positions throughout the Department which plaintiff was qualified to perform and which could accommodate his work restrictions.

In September 2010, Ms. Seltzer sent plaintiff a letter informing him that she had been assigned to perform a Department-wide search for an alternate position. A further interactive process meeting was set for October 5, 2010, and then rescheduled to October 14 at plaintiff's request because he had a doctor's appointment.

In preparation for the meeting, plaintiff completed and signed another interactive process questionnaire on September 22, 2010. He again acknowledged the accuracy of his stated work restrictions, and again declined to be transferred to a different job classification or a lower wage position. As he had before, he only requested accommodation in his position as cement finisher.

The October 14 meeting included plaintiff, Ms. Seltzer and Mr. Pizzo. Because plaintiff had reiterated in his questionnaire that he did not want to be considered for alternative positions, Ms. Seltzer explained what they were trying to do in order to accommodate his restrictions and get him back to work as he desired. After they discussed the issues, plaintiff eventually agreed he was willing to be reassigned to another position in order to get back to work, assuming a cement finisher position could not be found that could accommodate his restrictions. Ms. Seltzer asked plaintiff to fill out a City job application and list all of his pertinent skills and qualifications so they could perform a proper search and identify possible positions. Plaintiff said he would complete one and get it to her. Ms. Seltzer told plaintiff that the 10-pound lifting restriction was going to make it very difficult to accommodate him in any position in the Department.

Ms. Seltzer sent a letter to plaintiff on November 30, 2010, advising him that she had not yet received a completed application from him and asking him to submit one. Plaintiff testified he could not recall receiving the letter.

Ms. Seltzer proceeded with a Department-wide search without waiting further for an application from plaintiff. She looked at other job classifications, particularly those similar to plaintiff's position as cement finisher, to which plaintiff could be reassigned and accommodated. But, without information from plaintiff regarding other skills he might have, she was unable to tell the various bureaus in the Department that plaintiff was, for instance, proficient in computers or some other skill, so the search was necessarily more limited. The information she provided to the bureau heads was plaintiff's job classification and

duties, along with the list of medical work restrictions. Ms. Seltzer received responses indicating there were no positions available in which plaintiff's restrictions could be accommodated in any of the Department's bureaus.

In February 2011, Dr. Rick Pospisil, plaintiff's primary treating physician, reported that plaintiff's back injury remained symptomatic and he was awaiting a surgical consult. Dr. Pospisil reported that plaintiff "remain[ed] temporarily totally disabled for six weeks" and would be re-evaluated thereafter. Dr. Pospisil re-examined plaintiff several more times through November 2011, confirming each time that plaintiff remained temporarily totally disabled and was awaiting a surgical consult. In his November report, Dr. Pospisil stated, "I do not know why [the surgical consult] is taking so long."

During this same time period, Dr. Richard Rosenberg, the agreed medical examiner for plaintiff's worker's compensation claim, reported that plaintiff had a large disc protrusion that required surgery. Dr. Rosenberg noted that plaintiff had been told by a "spine specialist" that due to the complexity of the surgery required for his condition, it might be best not to proceed with surgery, apparently because of possible complications. Dr. Rosenberg opined that without surgical intervention, "nothing is likely to help his condition" and he would consider plaintiff's disability "permanent and stationary."

On June 1, 2011, Ms. Seltzer sent correspondence to Joe O'Toole, the placement officer for the City, and Ms. Moreland, plaintiff's workers' compensation analyst. Ms. Seltzer requested that a City-wide search be conducted for vacant positions in which plaintiff could be accommodated by way of a transfer as no positions had been found in the Department of Public Works.

The same day, Ms. Seltzer sent a letter to plaintiff advising him they were unable to place him in any positions with his work restrictions in the Department. "At this time, the positions that you qualify for would violate your restrictions." Ms. Seltzer advised she had forwarded his case to Mr. O'Toole for a City-wide search for possible openings.

On June 7, 2011, Mr. O'Toole responded to Ms. Seltzer that a City-wide search would not be conducted, at that time, based on the fact the Department of Public Works had "not been able to make an exhaustive search for a position" for plaintiff within different job classifications in the Department. Mr. O'Toole noted that plaintiff had not cooperated in completing an application listing his qualifications and experience to assist in a proper search for alternative positions. He indicated Ms. Seltzer should continue her "efforts to obtain [plaintiff's] cooperation" and search for a qualifying position within the Department.

In his deposition, Mr. O'Toole said he did not perform a City-wide search in part because he felt plaintiff had not been cooperative since he had failed to complete an application listing his qualifications. Mr. O'Toole said the Department, as a result, had not performed an exhaustive search to verify possible positions in the Department because they did not have sufficient information. Mr. O'Toole noted that the memo sent to him by Ms. Seltzer did not identify any specific positions that had been considered and rejected.

Ms. Seltzer could not recall notifying plaintiff that a City-wide search would not be performed, but agreed it was something he should have been told.

On September 26, 2011, Dr. Rosenberg issued another report opining that plaintiff appeared to have some reduction in pain, but his condition continued to preclude "heavy work."

A couple of days later, plaintiff called Ms. Seltzer. She advised him she had not received his application. Plaintiff told Ms. Seltzer he had sent an application to her but that he would complete another one and send it to her. Ms. Seltzer reiterated it was going to be difficult to place him given the 10-pound lifting restriction.

On October 2, 2011, plaintiff signed and forwarded an application stating his prior experience as a cement finisher, that he had "some lead man experience," was familiar with filling out time sheets, could read blueprints, and was capable of using Microsoft Word.

In late 2011, Estella Priebe, an analyst with the Los Angeles City Employees' Retirement System (LACERS), advised plaintiff he could apply for medical disability retirement. He told her that he did not believe he was disabled and wanted to return to work. Ms. Priebe said that applying for disability might be a path for ultimately getting him back to work. Plaintiff therefore agreed to submit an application for disability retirement and submitted one in late October. As part of the process for being considered for a medical disability retirement, plaintiff was evaluated by three approved doctors.

On March 9, 2012, plaintiff was seen by Dr. G.B. Ha'Eri. Dr. Ha'Eri opined that plaintiff was suffering from "multilevel degenerative disk disease" and was unable to perform his work as a cement finisher. However, Dr. Ha'Eri stated plaintiff could perform a job with a 25-pound lifting restriction and with no

duties that required the operation of heavy equipment or repetitive bending.

Plaintiff was examined by the other two approved doctors in March and April 2012. Dr. John Howard, an orthopedic surgeon, reported that plaintiff stated his desire to return to his position as a cement finisher and that he did not believe he needed any accommodation. Dr. Howard opined, based on his discussions with plaintiff, a physical exam and review of his medical records, that plaintiff should be allowed to return to work on "a trial basis for four months with a 25-pound weight lifting restriction" before proceeding to work without restriction. The third doctor, Dr. Richard Pollis, opined that plaintiff was not disabled and could perform the job of cement finisher without any restrictions.

Anna Ingram oversaw the City's disability retirement unit. In May 2012, Ms. Ingram advised the Department of Public Works that plaintiff was being considered for a disability retirement. However, she requested the Department to reassess whether there were any positions in which to accommodate plaintiff in light of the modified restrictions proposed by Drs. Ha'Eri and Howard.

On May 24, 2012, the Bureau of Street Services responded that it had no cement finisher positions in which it could accommodate plaintiff with the modified restrictions.

Sometime during this same time period, plaintiff spoke with Ms. Moreland. He told her again that he disputed his work restrictions and wanted to get back to work. He wanted to know if there was anything he could do to "speed up" the process. She advised him that they could have him reevaluated by the doctor who originally imposed the restrictions with respect to his

worker's compensation claim. Ms. Moreland testified in her deposition that basically every time she spoke with plaintiff, he told her he wanted to return to work and felt he was capable of doing so.

In July 2012, LACERS approved a medical disability retirement for plaintiff, retroactive to February 10, 2011. Plaintiff's disability retirement status was subject to re-evaluation in one year. Ms. Priebe called plaintiff to advise him of the approval. Plaintiff signed a disability retirement agreement on July 17, 2012. Plaintiff subsequently spoke with Ms. Priebe about the process for having his disability retirement status reviewed so that he could return to work. Under LACERS' rules, an employee on disability retirement may request a medical review if he or she believes they are no longer disabled.

That same month, Dr. Rosenberg, the agreed medical examiner for plaintiff's worker's compensation claim, modified plaintiff's work restrictions to substantially conform to the recommendations of Drs. Ha'Eri and Howard, specifically: no lifting, pushing or pulling with force any objects weighing more than 25 pounds, and no more than two and a quarter hours of work activities involving twisting, turning or bending. Ms. Moreland notified Mr. Pizzo of the modified restrictions on August 28, 2012.

The City requested plaintiff to complete another interactive process questionnaire in light of the modified restrictions. Plaintiff was "shocked" when he received the correspondence because he had just received approval of his medical disability retirement. He called Mr. Pizzo and asked why the questionnaire was sent. Mr. Pizzo told him that it was just paperwork that needed to be filled out as part of the process, but that there was

still nothing they could really do to get him back to work because of the medical restrictions imposed by Dr. Rosenberg.

In his signed interactive questionnaire dated September 19, 2012, plaintiff disputed the modified restrictions and said he believed he could work as a cement finisher using a back brace. He also stated he would consider reassignment or demotion to another job classification, underscoring "whatever I qualify for!!"

On September 18, 2012, Mr. Pizzo forwarded plaintiff's modified restrictions to the division heads within the Bureau of Street Services, asking for a reassessment of available positions for plaintiff based on the newly modified restrictions. After discussing the matter with each of the division heads, they all responded in writing that there were no positions available for which plaintiff met the minimum qualifications and that could be performed, with or without accommodation.

Mr. Lopez signed a reasonable accommodation form stating that plaintiff could not be reasonably accommodated in his former position as cement finisher given the modified restrictions. Mr. Lopez stated a cement finisher provided "skilled work in mixing, placing and finishing concrete, and may act as a lead for and work with a small crew, and also may construct, alter and repair curb and gutter, access ramps, bus pads, and sidewalk repair." The job "requires you to use lower and upper body strength to finish concrete to Greenbook specifications. In the process of finishing concrete you would be required to bend, stoop, push, pull." The job required frequent lifting, pushing and pulling of up to 10 pounds, and occasional work involving lifting and carrying between 25 and 75 pounds.

In "late 2012," Mr. Pizzo discontinued his search for a reasonable accommodation for plaintiff. Ms. Moreland had

advised that plaintiff's worker's compensation claim had been settled.

In March 2013, plaintiff filed a claim with the Department of Fair Employment and Housing and obtained a right to sue letter. Plaintiff timely filed this action thereafter.

In January 2014, LACERS notified plaintiff he was required to submit to three medical examinations in order to determine whether he would remain disabled or could be returned to duty. Plaintiff was examined by three LACERS-approved physicians: Dr. Howard (who had previously examined him in March 2012), Dr. Joon Koh and Dr. Aubrey Swartz. Dr. Howard's subsequent report was issued in June 2014, and the other two doctors' reports were issued in September 2014.

All three doctors opined that plaintiff could return to work as a cement finisher without restrictions. Dr. Howard, who had previously reported that plaintiff could return on a trial basis with a 25-pound weight lifting restriction, reported that plaintiff told him he had found work as a plumber and had been doing that work without incident since 2011. Plaintiff had "no current complaints" related to his spine. Dr. Howard stated "I again declare in this report this applicant is no longer disabled. I feel his prognosis is excellent." Dr. Aubrey Swartz reported that plaintiff was "not disabled from performing" the job of cement finisher. Dr. Koh concurred, stating that plaintiff was "fully recovered" and could perform any type of work, including cement finisher, without accommodation or restriction.

After receiving the three doctors' reports indicating plaintiff was no longer medically disabled and could be reinstated from disability retirement, Ms. Ingram contacted the Department of Public Works. She understood that an employee returning

from a disability retirement, like plaintiff, was entitled to return to his former position even if that position had been filled. Nevertheless, on December 30, 2014, Ms. Ingram advised the Department that plaintiff's medical disability retirement status was being reviewed and requested confirmation of an open position. She asked for a response by January 7, 2015. She did not receive a response until March 31, 2015, that an open position existed. She could not explain why confirming a position for plaintiff took over two months, except that she had other cases to work on.

Mr. Pizzo believed that because the permanent work restrictions issued by the Worker's Compensation Division were still in place, the Department did not have to reinstate plaintiff to his former position until that conflict was rectified. He requested guidance from Ms. Moreland as to whether the LACERS medical reports superseded the previous restrictions issued by the Workers' Compensation Division. Ms. Ingram also sought guidance on the issue. Ms. Moreland reported to Ms. Ingram that her superiors said it was an issue for the Department to resolve. Mr. Tejeda sought input and guidance from the City attorney's office. Mr. Tejeda was advised that plaintiff could return to work as a cement finisher in accordance with the LACERS' determination.

On May 12, 2015, the LACERS Board passed a resolution canceling plaintiff's disability retirement and restoring him to full duty in his former position of cement finisher. Plaintiff returned to work as a cement finisher for the City within a couple of days thereafter.

In September 2015, the City moved for summary judgment on plaintiff's operative second amended complaint. Plaintiff filed

opposition. After entertaining argument, the court granted the City's motion and entered judgment in its favor on January 25, 2016.

This appeal followed.

DISCUSSION

Plaintiff's operative pleading contained four causes of action, all of which were based on violations of FEHA: disability discrimination, failure to provide reasonable accommodation, failure to engage in the interactive process, and retaliation. Plaintiff contends the court erred in granting summary judgment to his employer, the City, on all four claims. We find no error.

Summary judgment is appropriately granted to a defendant where the evidence establishes that one or more elements of the plaintiff's cause of action cannot be established, or that there is a complete defense to the cause of action. (Code Civ. Proc., § 437c, subd. (p)(2).) Our Supreme Court has made clear that the purpose of the 1992 and 1993 amendments to the summary judgment statute was " 'to liberalize the granting of [summary judgment] motions.' " (*Perry v. Bakewell Hawthorne, LLC* (2017) 2 Cal.5th 536, 542; accord, *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 854.) It is no longer called a "disfavored" remedy. "Summary judgment is now seen as a 'particularly suitable means to test the sufficiency' of the plaintiff's or defendant's case." (*Perry,* at p. 542.)

We independently review a trial court's decision granting summary judgment. "[W]e take the facts from the record that was before the trial court . . . . [and] ' "review the trial court's decision de novo, considering all the evidence set forth in the moving and opposing papers except that to which objections were

made and sustained." ' " (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037, citations omitted (*Yanowitz*).)

A party challenging the grant of summary judgment on appeal must separately challenge any adverse evidentiary rulings below. " 'Where a plaintiff does not challenge the superior court's ruling sustaining a moving defendant's objections to evidence offered in opposition to the summary judgment motion, "any issues concerning the correctness of the trial court's evidentiary rulings have been waived. [Citations.] We therefore consider all such evidence to have been 'properly excluded.' [Citation.]" [Citations.] [¶] The reason for this rule is that '[t]rial courts have a duty to rule on evidentiary objections.' [Citation.] '[R]uling on such evidentiary objections can involve a number of considerations more suited to the trial court than the appellate courts, including an exercise of discretion in establishing the record to be reviewed de novo.' " (*Roe v. McDonald's Corp*. (2005) 129 Cal.App.4th 1107, 1113-1114 (*Roe*); accord, *Salas v. Department of Transportation* (2011) 198 Cal.App.4th 1058, 1074 ["Because plaintiffs failed to properly raise a challenge to the court's many evidentiary rulings and failed to support such challenge with reasoned argument and citations to authority, they have forfeited their challenge to the exclusion" of that evidence.].)

Here, the City filed objections to plaintiff's opposing declaration and to exhibits 2, 3 and 4 proffered by plaintiff. The court struck much of plaintiff's declaration stated on information and belief, and also excluded exhibits 2, 3 and 4. Plaintiff has not challenged these evidentiary rulings on appeal. It was plaintiff's burden to affirmatively demonstrate any error in the trial court's

evidentiary rulings, and plaintiff has failed to do so. (*Roe*, *supra*, 129 Cal.App.4th at p. 1114.)

Accordingly, plaintiff has forfeited any challenge to the exclusion of evidence by the trial court and we have not considered that evidence in reviewing the propriety of the court's ruling. (*Yanowitz*, *supra*, 36 Cal.4th at p. 1037.)

1. Disability Discrimination

In order to establish a prima facie claim of disability discrimination, an employee must show he or she "(1) suffered from a disability, (2) was otherwise qualified to do his or her job, and (3) was subjected to adverse employment action because of the disability." (*Nealy v. City of Santa Monica* (2015) 234 Cal.App.4th 359, 378 (*Nealy*).) If the employee makes this initial showing, the employer then bears the burden of demonstrating " 'a legitimate, nondiscriminatory reason for the adverse employment action.' " (*Ibid.*) "The employee may still defeat the employer's showing with evidence that the stated reason is pretextual, the employer acted with discriminatory animus, or other evidence permitting a reasonable trier of fact to conclude the employer intentionally discriminated." (*Ibid.*)

Plaintiff contends he was discriminated against and suffered an adverse employment action because the City forced him to take a disability retirement instead of timely re-evaluating his condition and reinstating him, delayed his reinstatement for years because of an inadequate interactive process, and unreasonably delayed his return to work for over six months after he was medically cleared by three separate doctors.

There is no dispute plaintiff suffered a workplace injury to his back in August 2008. There is also no dispute that in December 2009, the City's Worker's Compensation Division

issued permanent work restrictions for plaintiff based on the medical report from the agreed-upon medical examiner, Dr. Rosenberg. The restrictions were severe, limiting plaintiff to lifting less than 10 pounds and otherwise significantly curtailing his activities and limiting him to a "light-duty" assignment.

In February 2011, Dr. Rosenberg issued another report indicating that plaintiff required spinal surgery to repair a large disc protrusion, but that plaintiff had thus far declined to proceed with the surgery on the advice of a spine specialist who stated the surgery was extremely complex and could lead to complications. Dr. Rosenberg opined that without the surgery, plaintiff's back injury was permanent and stationary and he would not improve.

Plaintiff's treating physician, Dr. Pospisil, also reported that plaintiff was, in his opinion, temporarily totally disabled through at least November 2011.

Thereafter, plaintiff was evaluated for the purpose of taking a disability retirement. The City procedures required plaintiff to be examined by three physicians. One doctor concluded plaintiff had recovered and could return to work. The other two doctors (Drs. Ha'Eri and Howard) opined that plaintiff remained partially disabled but could be considered for work on a trial basis with restrictions limiting him to lifting no more than 25 pounds and limiting work activities that required twisting and bending.

On the basis of the reports by Drs. Ha'Eri and Howard, the City approved plaintiff for disability retirement in July 2012, retroactive to February 2011, and subject to plaintiff being re-examined in one year. At the same time, Dr. Rosenberg modified his original work restrictions for plaintiff to lifting no more than 25 pounds and limiting his duties to activities that did not

require more than two and a quarter hours of twisting or bending during the work day.

Plaintiff was not re-examined until mid-2014. All three LACERS doctors reported to the City by September 2014 that plaintiff had recuperated and was medically cleared to return to work as a cement finisher without restriction. It was not until May 12, 2015, that the LACERS Board passed a resolution canceling plaintiff's disability retirement and restoring him to full duty in his former position of cement finisher. Plaintiff returned to work as a cement finisher for the City within a couple of days thereafter.

The City presented undisputed evidence that it was at all times constrained by work restrictions issued by the Workers' Compensation Division. Those restrictions, identified as "permanent," were maintained until July 2012 when Dr. Rosenberg, the agreed medical examiner for plaintiff's workers' compensation claim, imposed modified restrictions. The modified restrictions were still in effect when the LACERS' doctors made separate disability findings, concluding plaintiff was no longer disabled and could return to work without any restrictions. Several different City employees, including Mr. Tejeda, Ms. Ingram and Ms. Moreland, sought guidance, including from legal counsel, as to whether the LACERS' findings superseded workers' compensation so that plaintiff could be allowed to return to active duty.

In order to prevail on a claim of disability discrimination, an employee must show that the employer took the adverse employment action with a discriminatory animus. " 'The [employee] cannot simply show that the employer's decision was wrong or mistaken, since *the factual dispute at issue is whether*

discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent. . . ." ' " (*Reeves v. MV Transportation, Inc.* (2010) 186 Cal.App.4th 666, 673-674, italics added.) The employee must demonstrate the weaknesses and incoherencies in the employer's proffered reasons for its actions such that " ' "a reasonable factfinder *could* rationally find them 'unworthy of credence,' [citation], and hence infer 'that the employer did not act for [the asserted] non-discriminatory reasons.' [Citations.]" ' " (*Id.* at p. 674.)

Plaintiff contends he has raised a triable issue that the City was acting with the intent to discriminate against him. We disagree. At most, plaintiff has shown some bureaucratic delay by some of the City employees but there is no evidence any delay was manufactured or motivated by discriminatory animus. The evidence does not raise a triable issue that the City was intentionally discriminating against him or that the City's concerns about bringing plaintiff back to work when the workers' compensation restrictions were still in place were a mere pretext.

2. Failure to Provide Reasonable Accommodation

"In addition to setting forth a general prohibition against unlawful employment discrimination based on disability, FEHA provides an independent cause of action for an employer's failure to provide a reasonable accommodation for an . . . employee's known disability." (*Moore v. Regents of University of California* (2016) 248 Cal.App.4th 216, 241 (*Moore*).) It is an unfair employment practice for an employer "to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee." (Gov. Code, § 12940, subd. (m)(1).) "The elements of a reasonable accommodation cause of action are (1) the employee suffered a disability, (2) the employee could

perform the essential functions of the job with reasonable accommodation, and (3) the employer failed to reasonably accommodate the employee's disability." (*Nealy*, *supra*, 234 Cal.App.4th at p. 373.)

"A reasonable accommodation is a modification or adjustment to the work environment that enables the employee to perform the essential functions of the job he or she holds or desires." (*Nealy*, *supra*, 234 Cal.App.4th at p. 373.) " 'Essential functions' means the fundamental job duties of the employment position the individual with a disability holds or desires. [It] does not include the marginal functions of the position." (Gov. Code, § 12926, subd. (f).) "FEHA does not obligate the employer to accommodate the employee by excusing him or her from the performance of essential functions." (*Nealy*, at p. 375.)

The City produced evidence that given the significant work restrictions issued by Dr. Rosenberg, it was not possible for plaintiff to be accommodated as a cement finisher. The essential functions of the job were too physically strenuous and simply could not be performed with plaintiff's work restrictions. The City also presented evidence that searches on the division level, the bureau level and then throughout the Department of Public Works did not result in any alternative positions for which plaintiff was qualified that could be performed given his restrictions.

Mr. Pizzo explained that plaintiff could not be accommodated as a "lead man" because it was not a separate job classification in the City. Plaintiff could not be given a purely supervisory position because that would have constituted a promotion for which he was not qualified. "FEHA does not require the employer to promote the employee or create a new

position for the employee to a greater extent than it would create a new position for any employee, regardless of disability." (*Nealy*, *supra*, 234 Cal.App.4th at p. 377.)

Moreover, plaintiff's contention that a "lead man" role would have been a reasonable accommodation that did not require physically demanding work was belied by his own testimony. Plaintiff conceded that when he worked as a lead man, supervising a small crew, he would nonetheless be required to perform the physical aspects of the job when a member of the crew was unavailable. Indeed, plaintiff was performing such work (setting forms for a curb and gutter) when he reinjured his back in August 2008.

Plaintiff argues he was not offered alternative positions, such as clerical work. "Reasonable accommodation may also include 'reassignment to a vacant position' if the employee cannot perform the essential functions of his or her position even with accommodation." (*Nealy*, *supra*, 234 Cal.App.4th at p. 377.) "FEHA requires the employer to offer the employee 'comparable' or 'lower graded' vacant positions for which he or she is qualified. (*Ibid.*) "FEHA does not require a reassignment, however, if there is no vacant position for which the employee is qualified." (*Ibid.*)

It was plaintiff's burden to demonstrate he was able to perform the essential functions of the job or alternative position with accommodation. (*Nadaf-Rahrov v. Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 978 (*Nadaf-Rahrov*).) Plaintiff testified to his belief that he could perform his job, but did not offer any medical testimony that he was in fact physically capable of performing the essential functions of a cement finisher until 2014 when Drs. Howard, Koh and Swartz opined that he had recuperated and could return to work without restriction.

Plaintiff did not offer any admissible evidence of his qualifications to work in other positions, or the availability of any such positions.

3. Failure to Engage in the Interactive Process

FEHA also makes it an unlawful employment practice "[f]or an employer. . . to fail to engage in a timely, good faith, interactive process with the employee . . . to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee . . . with a known physical or mental disability or known medical condition." (Gov. Code, § 12940, subd. (n).) The failure to engage in the interactive process is a separate cause of action. (*Moore*, *supra*, 248 Cal.App.4th at p. 242.)

"While a claim of failure to accommodate is independent of a cause of action for failure to engage in an interactive dialogue, each necessarily implicates the other." (*Moore*, *supra*, 248 Cal.App.4th at p. 242.) Indeed, in order to "prevail on a claim for failure to engage in the interactive process, the employee must identify a reasonable accommodation that would have been available at the time the interactive process occurred." (*Nealy*, *supra*, 234 Cal.App.4th at p. 379; accord, *Nadaf-Rahrov*, *supra,*166 Cal.App.4th at p. 984 [it is the employee's burden to prove reasonable accommodation was available].)

As we have already explained above, plaintiff did not offer any admissible evidence there were any alternative positions for which he was qualified at any time during the interactive process that spanned several years.[1] And, plaintiff failed to raise a

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[1] The trial court erred by sustaining the City's improvidently asserted objections to exhibits 2, 3 and 4, which are interrogatory responses by the City in other, unrelated litigation, identifying

triable issue that he could be reasonably accommodated in his position as cement finisher. As such, the court properly adjudicated his cause of action for failure to engage in the interactive process.

4. Retaliation

"To establish a prima facie case of retaliation under FEHA, 'a plaintiff must show "(1) he or she engaged in a 'protected activity,' (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer's action." ' " (*Nealy*, *supra*, 234 Cal.App.4th at p. 380.)

Plaintiff claims he engaged in the protected activity of repeatedly requesting accommodation and a return to work after his workplace injury in 2008. Requesting accommodation under FEHA is currently a protected activity that can support a cause of action for retaliation. However, it was first added to the statutory scheme as of January 1, 2016. (Stats. 2015, ch. 122, § 2.) In 2015, the Legislature amended Government Code section 12940 to provide protection from retaliation to an employee who makes a request for accommodation under FEHA. (*Moore*, *supra*, 248 Cal.App.4th at p. 245.) The general rule is that statutes operate prospectively. (*McClung v. Employment Development Dept*. (2004) 34 Cal.4th 467, 475.) *Moore* found there is nothing to support a finding of retroactivity for the

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available job positions with the City. The exhibits were admissible under Evidence Code section 1414. However, the error is of no consequence, since plaintiff offered no admissible evidence that he ever asked the City to consider his qualifications for any of the positions referenced in those exhibits.

amended language at section 12940, subdivision (m)(2). (*Moore*, at pp. 247-248.)

Plaintiff's claim is based on conduct that pre-dated the amendment of the statute. In any event, plaintiff produced no evidence from which it may be inferred that the City discriminated or retaliated against him.

DISPOSITION

The judgment entered in favor of defendant and respondent City of Los Angeles is affirmed. The City of Los Angeles shall recover its costs of appeal.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

RUBIN, J.