

Los Angeles

444 South Flower Street
Suite 2400
Los Angeles, California
90071
Telephone (213) 236-0600
Facsimile (213) 236-2700

Inland Empire

3403 Tenth Street
Suite 300
Riverside, California 92501
Telephone (951) 788-0100
Facsimile (951) 788-5785

Orange County

5 Park Plaza
Suite 1280
Irvine, California 92614
Telephone (949) 863-3363
Facsimile (949) 863-3350

San Diego

701 "B" Street
Suite 1790
San Diego, California 92101
Telephone (619) 615-6672
Facsimile (619) 615-6673

San Jose

96 North Third Street
Suite 620
San Jose, California 95112
Telephone (408) 299-0422
Facsimile (408) 299-0429

Ventura County

2310 East Ponderosa Drive
Suite 25
Camarillo, California 93010
Telephone (805) 987-3468
Facsimile (805) 482-9834

Employment Law Update

FURTHER DEFINING "REASONABLE ACCOMMODATION" UNDER THE FAIR EMPLOYMENT AND HOUSING ACT

By Ellen J. Shadur, Esq. and Kelly A. Trainer, Esq.

Raine v. City of Burbank

January 25, 2006 (06 Cal. Daily Op. Serv. 704)

In *Raine v. City of Burbank*, the Second District Court of Appeal held that, under the Fair Employment and Housing Act ("FEHA"), "the duty to provide reasonable accommodation for a disabled employee does not obligate the employer to convert a temporary light-duty position into a permanent one when doing so would, in effect, create a new position." In so holding, the Court of Appeal adopted the standard uniformly adhered to by the federal circuit courts of appeal in resolving the same issue under the Americans with Disabilities Act ("ADA"). The Court also made clear that such an accommodation is unreasonable, and did not require the employer to proceed to the next analytical step of establishing that it presented an undue hardship.

Mark Raine was employed as a police officer by the Burbank Police Department ("BPD") for 21 years. He worked as a uniform patrol officer for approximately 14 years, and then worked as a school resource officer for the Burbank Unified School District until he was injured on the job in 1995. Raine suffered an injury to his knee, which prevented him from running, jumping, kneeling, and lifting. In 1995, BPD reassigned Raine to a temporary light duty position as a reasonable accommodation while

his injury healed. The desk job was ordinarily filled by police technicians – civilians who are paid substantially less and provided fewer benefits. The position is also reserved as a temporary light-duty position for officers recovering from injuries. A non-injured police officer only works the desk when no civilian or injured police officer is available or qualified to complete a particular report. In addition to this accommodation, BPD also provided Raine with two years of leave while he recovered from his injury.

Six years later, BPD was advised by Raine's personal physician that his disability was permanent and he would never be able to perform the essential functions of a patrol officer. BPD thereafter engaged in the interactive process with Raine, which included a job analysis with input from Raine and his immediate supervisor. BPD then advised Raine that there was no available position for a sworn police officer with his limitations. BPD offered to place him in the civilian police technician position, but Raine made clear that he was not interested in a civilian position because he would forfeit his police retirement benefits. Raine then took disability retirement.

After receiving a right to sue letter from the Fair Employment and Housing Commission, Raine sued BPD, the City of Burbank and three senior officials alleging disability discrimination, failure to

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accommodate, age discrimination, retaliation and harassment, in connection with his removal from the temporary desk position and his involuntary retirement.

The City filed for summary judgment, which the trial court granted. The court concluded that (1) Raine was unable to perform the essential functions of the sworn officer position, with or without reasonable accommodation; (2) it was unreasonable to require the City to permanently place Raine at the front desk because the position was reserved for civilian personnel; and (3) there was no evidence of disability discrimination, age discrimination, or retaliation.

The Court of Appeal affirmed, and noted that, like the ADA, the FEHA does not require employers to create a new position to accommodate an employee, unless the employer regularly offers such assistance to disabled employees. The Court went on to hold that Raine's request that his long-term temporary assignment be made permanent was essentially a request to create a new position because BPD did not have a permanent front desk position for police officers – only for civilian police technicians.

The Court went on to reject Raine's argument that BPD was required to show that converting his temporary assignment to a permanent one constituted an undue hardship, holding that the question is not whether the accommodation is an undue hardship, but rather whether the accommodation is reasonable and thus required in the first place.

The Court also rejected Raine's argument that he was merely requesting that the position be restructured, which is a reasonable accommodation under *Government Code* section 12926(n)(2). The Court held that Raine was not requesting a job restructuring, but a reclassification of the front desk position from a civilian post to a sworn-officer post. A reclassification was not required under the FEHA.

What makes this case particularly interesting is the Court's adoption of the same rule utilized by the federal courts under the ADA. It is helpful when the California courts further define the similarities and differences between the ADA and FEHA.

Ellen J. Shadur is a Partner in the Labor and Employment Law Practice Group.

Kelly A. Trainer is an Associate in the Labor and Employment Law Practice Group.