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MEMO

TO:

FROM: JRB

DATE: 12/03/07

RE: Wysinger

Employers have to be knowledgeable of the requirements in dealing with an employee alleging a disability. As a starting point, it is an unlawful employment practice to discharge a person from employment or discriminate against the person in the terms, conditions or privileges of employment, because of a physical or mental disability. This does not prohibit an employer from discharging an employee with a disability where the employee, because of the disability, “is unable to perform [the] essential duties even with reasonable accommodations.” The term “reasonable accommodation” includes “job restructuring,...reassignment to a vacant position,...and other similar accommodations for individuals with disabilities.”

This requires the employer to perform two separate and distinct tasks: (1) engage in a good faith interactive process with a disabled employee to explore the alternates to accommodate the disability; and, (2) provide a reasonable accommodation where applicable. Even where there is no reasonable accommodation available, the employer must still engage in the good faith interactive process. The recent case *Wysinger v. Automobile Club of Southern California*, 2007 DJDAR 17669 (December 3, 2007), makes clear that the failure to so engage will

create liability for the employer even under circumstances where the jury finds no disability discrimination and no failure to provide a reasonable accommodation.

More specifically, in *Wysinger*, the California Court of Appeal upheld a jury verdict finding the employer liable for its failure to engage in an interactive process to determine reasonable accommodations for a disabled employee while also finding the employer not liable for the claim that it failed to provide a reasonable accommodation for the employee's disability. Although these findings would appear to be inconsistent, the Court of Appeal concluded that the jury findings required different proofs and were, therefore, not inconsistent.

The evidence showed that the plaintiff was a district manager for the Automobile Club of Southern California (ACSC). He had received favorable performance evaluations over the course of his 25 years of employment. The plaintiff suffered from lupis, a heart condition, and rheumatoid arthritis. He claimed that his daily commute aggravated his arthritis and he sought a promotion to an office closer to his home in order to lessen his commute. ACSC denied such request and hired another employee to file the role.

Concurrently, ACSC decided to implement a new compensation plan. There was evidence that the older office managers, of which plaintiff was a part, opposed the plan because they would receive a reduction in their compensation. ACSC stated a desire to "crush those" opposing the plan and stated that they would tolerate no opposition. Plaintiff filed a complaint with the EEOC in regards to such plan and ACSC ceased its new compensation plan. Plaintiff claimed he was subject to retaliation thereafter as a result of his EEOC complaint.

Plaintiff filed a complaint alleging retaliation, failure to engage in an interactive process to determine reasonable accommodations for his disability and disability discrimination. The jury found that ACSC did not fail to provide a reasonable accommodation to plaintiff; that ACSC did not discriminate against him because of his physical disabilities; that ACSC retaliated against plaintiff; and that ACSC failed to engage in an interactive process regarding his disability. The

jury awarded damages of \$284,000 for economic and non-economic damages and \$1,000,000 in punitive damages. The Court found Plaintiff to be the prevailing party and awarded an additional \$978,791 in attorneys' fees and costs.

Focusing on the issue of the alleged inconsistent verdicts regarding disability liability, ACSC argued that because the jury found that it did not fail to provide a required reasonable accommodation to plaintiff for his physical disability, the jury could not also find that ACSC failed to engage in the interactive process regarding the plaintiff's disability. The Court of Appeal rejected such argument noting that the issues of reasonable accommodation and the interactive process are separate causes of action and require proof of different facts. Under FEHA, an employer must engage in a good faith interactive process with a disabled employee to explore the alternates to accommodate the disability. Government Code section 12940(n). The failure to engage in this process is a separate FEHA violation independent from an employer's failure to provide a reasonable disability accommodation, which is also a FEHA violation. Government Code section 12940(m). It is not enough that an employer claims that there are no available reasonable accommodations. Because if the employer did not engage in the good faith interactive process, "it cannot be known whether an alternative job would have been found." In the *Wysinger* case, the jury found that there was no failure to provide a required accommodation because the parties never reached the stage of deciding which accommodations were required. ACSC prevented that from happening by its refusal to engage in the interactive process.

The lesson to take from this case is clear: an employer must engage in the interactive process regardless of whether a reasonable accommodation exists. Even if there are absolutely no known alternatives, the good faith interactive process must take place to explore accommodations and discuss how the employee can be accommodated, if at all. The good faith process must take into account the employee's disability and all reasonable accommodations available. This process should be documented and witnessed by more than simply one

representative from the employer and the employee. Ultimately, whatever was discussed and whatever was considered should be reduced to written form and placed in the employee's file.