

# The Interactive Process Dance, Part Two: What Happens When the Music Stops?

March 18, 2015

Part one of this two-part series covered the details of the interactive process in California and discussed a scenario in which the employee fails to respond to the employer's attempts to communicate on an accommodation to his disability. Part two covers two additional scenarios and provides key take-aways to be drawn from recent California court rulings on the interactive process.

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## SCENARIO TWO

### **My Dance Card is Full—Employer Rejects Suggested Accommodation and Employee Rejects Offered Accommodation**

Employee Hillary, a data entry specialist, presents her employer, Management, LLC, with a doctor's note indicating that she has developed a medical condition restricting her ability to do more than three hours of work involving fine motor skills per day. Hillary and Management meet to discuss Hillary's restrictions, and Management begins to look into possible accommodations. After reviewing the essential functions of Hillary's job, Management determines that performing data entry for at least six hours per day is an essential function of Hillary's job, and that she cannot perform her data entry job with her restrictions. Management looks into other available positions and finds a receptionist position for which Hillary is qualified and which offers the same amount of pay. This position involves small amounts of data entry, in addition to answering phones and greeting customers as they enter the building.

Management meets with Hillary and presents this accommodation to her, expecting Hillary to be satisfied with its proposed solution. But Hillary balks. Hillary states that she will not accept the receptionist position because she does not want to work in customer service, and prefers her data entry job with little personal interaction. What does Management do next?

In its recently issued regulations, the FEHC clarified that an employer should consider the employee's preferred accommodation, but ultimately the employer has the right to implement an effective accommodation that allows the employee to perform the essential functions of the job, even if it is not the preferred one. Importantly, an employer should make every effort to keep the employee in her current position and should only view a transfer as an option when the restrictions cannot be accommodated (i.e., the restrictions do not allow the employee to perform essential functions with or without a reasonable accommodation). Although Management feels confident that it has interacted appropriately and has conducted a fair and thorough analysis of the accommodation request (including a comprehensive examination of whether Hillary can be accommodated in her current position), it should continue to keep the lines of communication open and not simply rely on Hillary's specific request.

Management has several options to ensure that it meets its obligations to continue the interactive process in good faith. First, Management should continue to seek Hillary's input—perhaps she has suggestions regarding a position that involves essential functions that she can perform given her restrictions. If Hillary is able to identify a position, Management should analyze whether it is feasible to transfer her to that position (and Management may need to give Hillary preference for a position if she is qualified for it). If Hillary does not have suggestions, Management should continue to utilize its resources to identify other potential solutions, including searching for open positions for which Hillary might qualify. Management is permitted to request additional information (such as educational qualifications and work experience) that may be helpful in finding a suitable alternative position for Hillary. While the law does not explicitly require it, the employer should consider whether the position it is offering is so qualitatively different that the employee may not be able to succeed at it. Although this process seems intensive, California courts reward diligent efforts by employers to cooperate and work with the employee.

### **SCENARIO THREE**

#### **The Party is Over—the Parties Cannot Identify a Reasonable and Effective Accommodation**

Jackson and his employer, EveryDay Solutions, Inc., have been engaged in the interactive process for several months. Jackson, a forklift driver, has informed EveryDay that he suffers from an anxiety disorder in which he experiences panic attacks. These panic attacks render him temporarily incapacitated and unable to drive. As such, it is unsafe for Jackson to drive the forklift.

EveryDay is not required to permit Jackson to continue to drive the forklift, as it would endanger both his health and safety and that of others. EveryDay has reviewed its available positions, and has found none for

which Jackson is qualified. Before giving up, EveryDay should engage in a cooperative dialogue with Jackson, including considering any positions that he may suggest. It is not enough to simply review Jackson's restrictions and then review available openings. EveryDay must actually engage in a back-and-forth with Jackson, including what positions he believes are available, and gain a better understanding of his restrictions, if possible. EveryDay should be exhaustive, including considering positions that are not in the warehouse, and positions that are located at nearby facilities, if applicable.

If, after this cooperative dialogue, the parties are still unable to come up with a solution, EveryDay might consider leave as a reasonable accommodation. A finite leave can be a reasonable accommodation under FEHA in appropriate circumstances. Leave may be particularly appropriate if Jackson's doctor indicates that Jackson's condition could improve over time. As is true with all accommodation requests, the analysis regarding a request for leave as an accommodation should focus on whether the leave of absence is likely to be effective (based on information provided by the employee's medical provider) to allow the employee to return to work either with or without further reasonable accommodation, and whether the leave of absence does not create an undue hardship for the employer.

If Jackson has been on leave for a long period of time and his physician has still not released him to work in a capacity that would render him able to perform any position at EveryDay, before terminating Jackson's employment, EveryDay must reevaluate. The obligation to engage in the interactive process is continuous, and EveryDay's previous search for positions does not relieve it of its obligations because there may be new information available and the company may have greater access to that information. EveryDay must search again to determine whether any positions have become available for which Jackson may be qualified.

### **Two Left Feet? Courts Grapple With These Issues, Too**

The above scenarios illustrate the practical challenges that employers and employees encounter with accommodation requests in the workplace. Courts similarly grapple with complex questions related to these issues, as civil lawsuits increasingly include an independent claim for failure to engage in the interactive process (as well as independent claims for failure to reasonably accommodate and for failure to take all reasonable steps to prevent wrongful behavior).

When assessing liability for failure to engage in the interactive process, courts will generally assign responsibility for the breakdown to the party who failed to participate in good faith. That question (assessing liability based on a failure to act in good faith) is settled. What is not settled is the issue of whether to assess liability (or damages) for the failure to engage if the evidence does not show that an accommodation could have been implemented.

Some California courts have held that to impose liability for failure to engage in the interactive process, an employee must demonstrate that a reasonable accommodation was available which the employer failed to provide. However, at least one California court found that an employee could prevail on an interactive

process claim without prevailing on a reasonable accommodation claim. In that case, the court cited the company's inadequate efforts to engage in the interactive process, noting that after it rejected the employee's requested accommodation, it never offered any alternative accommodations. Thus, absent a clear refusal to interact in good faith, it remains to be seen how a court will attribute liability and quantify damages (if appropriate) for a failure to engage in the interactive process.

## Conclusion

While courts continue to address this issue, the takeaway is that regardless of whether an accommodation is ultimately available, the employer and the employee must take steps to engage in a good faith, interactive dialogue. Courts and counsel are placing more scrutiny on the actual process, so parties should be careful not to have the music stop with them. By cooperating with the process, rather than avoiding it, each party will have fulfilled its reciprocal duties under the law. More importantly, the chances will increase that a reasonable, effective, and successful accommodation will be found.

This is the second part in a two-part series on employers' obligations during the interactive process in California. Part one, "[The Interactive Process Dance, Part One: What Happens When the Music Stops?](#)," provided an overview of the interactive process.

[Lara C. de Leon](#) is a shareholder in the Orange County office of Ogletree Deakins.

*A version of this article was originally published in the State Bar of California [Labor and Employment Law Section's](#) publication, [California Labor & Employment Law Review](#), Volume 29, No. 1.*

## TOPICS

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