

To the Victor Go the Toils

By Leonid M. Zilberman and Mary P. Snyder

The process by which an employer and disabled employee attempt to achieve an accommodation that enables a disabled employee to perform the essential functions of a job in the workplace is called the "interactive process." The interactive process requires a unique mandate that is different from other employment discrimination laws. In the traditional discrimination analysis, membership in the protected class is usually either physically evident (such as sex or race) or easily invoked by the employee (such as religion or sexual orientation). While courts have often held that there are no "magic words" necessary to trigger the interactive process, in most instances the employee must inform the employer of the employee's disability and limitations and request an accommodation of those limitations. Thus, the interactive process requires the employer to engage in a sort-of individualized bargaining with an employee to determine if some reasonable accommodation is feasible to allow the employee to perform the essential functions of his or her job. That is easier said than done.

The legal standard is deceptively simple. California's Fair Employment and Housing Act requires that

employers engage in a "timely, good faith, interactive process" with the employee in order to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee with a known disability. That may sound simple, but many employers have discovered the practice is not simple and is one of the aspects of employment law that keeps many HR managers up at night. Indeed, the notion of discussing how to provide a reasonable accommodation for a disabled employee has been the subject of numerous recent California cases.

Just two weeks ago, in *Wilson v. County of Orange*, 2009 DJDAR 249 (Jan. 6, 2009), the California Court of Appeals for the 4th District held that just as employees are not obligated to invoke any particular magic words to trigger an employer's obligation to engage in the interactive process, neither are employers required to formally announce the beginning of the interactive process in order to meet their obligations.

As described in *Jensen v. Wells Fargo Bank*, 85 Cal.App.4th 245 (2000), the interactive process required by the Fair Employment and Housing Act is an "informal" discussion whereby the employer meets with the employee to attempt

to identify a reasonable accommodation that will enable the employee to perform the job effectively. The informal nature of the discussion is designed to benefit both employers and employees by creating a collaborative atmosphere where the parties can engage in a give-and-take discussion in order to achieve the result both parties want - getting the employee back to work. While the goal is certainly worthy, the amorphous nature of the "informal" forum can sometimes lead to confusion as to each party's respective responsibilities in the process.

The stakes were made all the higher for employers in 2007 when the decision in *Wysinger v. Automobile Club of Southern California*, 157 Cal. App. 4th 413 (2007), made it clear that an employer's failure to engage in the interactive process was a separate and independent cause of action, leading to additional liability. Nor was the employer's night made any more restful when only five months ago in *Nadaf-Rahrov v. The Neiman Marcus Group*, 166 Cal. App. 4th 952 (2008), the court held that an employer's accommodation analysis should not be limited solely to the employee's particular position. For example, an employer cannot avoid looking at alternate positions simply because a doctor's note states that

the employee is "unable to work." This language can be interpreted to mean that the employee is only unable to perform his or her *current* position, but may be able to work in a substitute job. Thus, the court held, the employer must consider all vacant positions that the worker could perform. For example, clerical jobs must be considered for employees who formerly performed only physical duties.

The *Neiman Marcus* case was a wake-up call to California employers stating that simply extending an employee's leave is not enough to fully engage in the "interactive process." Rather, an employer must be proactive and must consider vacant positions at other facilities or locations. If the employee signals a willingness to relocate, this may conceivably require a nationwide search for vacant positions that the employee could perform, including not-yet vacant positions that might open soon, throughout the company, including in other geographical areas.

Coming on the heels of *Neiman Marcus*, the *Wilson* case provides some measure of relief to weary employers. *Wilson* was a dispatcher at the Orange County Sheriff's Department.

Dispatchers were required to rotate their dispatch stations and shifts. As part of a disability accommodation, Wilson requested that the department excuse her from working the pursuit desk, generally acknowledged as the most stressful dispatch desk, because she was on a new medication that affected her memory and made it difficult for her to concentrate. She told the department that the accommodation would be temporary. The accommodation was first granted on a temporary basis in September 2004. Shortly thereafter, Wilson went out on an unpaid medical leave for several months. During that time the department attempted to find her another position, but she rejected all of the positions offered either because they increased her commute time or paid less than her original position.

In April 2005, Wilson returned to work with further restrictions and the department extended her temporary leave accommodations. The department's HR representative had several discussions with Wilson about her accommodation requirements, and in June 2005 sent her supervisor an e-mail noting that she was commencing the "interactive process." In August 2005, the parties negotiated an agreement that gave Wilson every accommodation she asked for on a permanent basis. Shortly thereafter, Wilson sued the department for disability discrimination.

Interestingly, Wilson did not claim that the department failed to engage in the interactive process, but rather that it simply took too long to do so because of the June 2005

e-mail advising that it was formally commencing the "interactive process." The court rejected Wilson's argument that the interactive process did not begin until June 2005 when the HR representative sent the e-mail. The court noted that the department, through providing a temporary accommodation, working with Wilson to find her another position, and generally discussing Wilson's needs with her, had been engaging in the interactive process all along. The court observed that the interactive process is informal and that no official announcement is necessary for the process to begin.

The *Wilson* case is instructive because it helps clarify that the interactive process is informal on both sides of the discussion. An employer is not required to announce that it is formally engaging its interactive process procedures. The employer meets its obligations not when it announces the formalized initialization of the process, but rather when it actually begins to work with the employee to arrive at mutually beneficial solutions that get the employee back to work if possible.

The *Wilson* decision is also a welcome focus on the common sense practicalities of the interactive process. Namely, the goal of disability discrimination laws is not to bog down the parties in a meaningless ritualized dance that accomplishes no practical goal other than giving each side the ammunition to point fingers in subsequent litigation. Just as the parties are expected to focus on results and practicality, it is helpful

when courts provide opinions that favor and encourage practical solutions to problems, rather than applying ritualized and rigid analysis to a process that inherently requires flexibility on the part of the participants. When courts demand form over function, it gets that much more difficult for the parties to find practical solutions.

The *Wilson* decision supports the ideal of the interactive process as a two-way street. Just as the employee is not required to speak magic words to initiate the process, nor is the employer. An employer that promptly begins working with an employee to achieve the shared goal of trying to accommodate the employee's restrictions and get the employee back to work, meets its obligation to engage in the interactive process. While there are still plenty of aspects of the interactive process that go "bump" in the night, Wilson should help employers get to sleep at last.

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