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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Sacramento)

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STEVE JACKSON,

Plaintiff and Appellant,

v.

RALEY'S,

Defendant and Respondent.

C067248

(Super. Ct.

No. 34200900040802CUWTGDS)

Steve Jackson sued Raley's alleging the company violated four provisions of the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12940 et seq.) and discharged him in violation of public policy.<sup>1</sup> Jackson appeals from a summary judgment entered in favor of Raley's, claiming there are triable issues of material fact with regard to whether Raley's violated section 12940, subdivision (n), by failing to engage in a timely, good faith, interactive process to determine effective reasonable accommodations for Jackson's physical disability. We conclude that summary judgment was properly granted and affirm the judgment. As we explain, Jackson was responsible for the

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<sup>1</sup> Undesignated statutory references are to the Government Code.

breakdown in the interactive process. And contrary to his argument on appeal, Jackson's conversation nearly a year later with his supervisor did not remedy his prior rejection of the interactive process and make Raley's responsible for the breakdown in that process.

## BACKGROUND

In 2001, Raley's hired Jackson to work in the warehouse at the company's distribution center. In 2006, Jackson worked as a "Warehouse Worker - Selector." Among other things, this job required Jackson to select cases or individual items of product from various locations at the distribution center and load the product onto pallets to fill retail store orders. The job is physically demanding, requiring a significant amount of lifting, carrying, pushing, pulling, climbing, bending, stooping, twisting, squatting, reaching, stretching, and grasping. At all relevant times, Jackson was a member of the Chauffeurs, Teamsters and Helpers Local Union No. 150 (Local 150).

### *Jackson's Injury and Leave of Absence*

In May 2006, Jackson injured his lower back while selecting product at the distribution center. He immediately notified Raley's of the injury and filed a workers' compensation claim. Jackson continued to work on modified duty until July 2006, when the injury was aggravated while he was on the job. Because the aggravated injury prevented Jackson from performing the duties of his position, he requested a workers' compensation leave of absence. Raley's granted the request.

Pursuant to Raley's workers' compensation leave of absence policies, the amount of leave time permitted for a work-related injury is "assessed on a case-by-case basis, based upon medical necessity and medical verification," and the maximum amount of leave time "var[ies] by Union Contract and employee group." For members of Local 150, the maximum amount of leave time permitted during Jackson's employment was 12 months. These policies also require employees who have taken such a leave of absence, and who desire to return to work, to present Raley's with verification that they are medically able to do so. Employees who have not been medically cleared to return to

work at the end of the applicable leave time are “administratively terminated,” but “may apply for rehire subsequently, if medically able, and will receive preference for vacancies for which they are equally qualified, over non-employee applicants. If rehired, and if permitted by contract, their former seniority, performance appraisal, and benefit dates will be reinstated.”

Initially, Raley’s approved Jackson’s leave of absence through October 14, 2006. However, as his condition did not improve, Raley’s extended the leave several times beyond the 12-month maximum. At the time Jackson was terminated, he had been on leave for 19 months. He never provided Raley’s with verification that he was medically able to return to work.

#### ***Raley’s Attempt to Engage in the Interactive Process***

In December 2006, Beth Rogers, M.D., examined Jackson and filed a “permanent and stationary report” concluding he was “not capable of performing his usual and customary job duties.” The report provided the following work restrictions: “No lifting more than 20 lbs. on an occasional basis. No frequent bending or stooping. For sitting and standing, he should be able to change positions as necessary.” The following month, Jackson was examined by Michael A. Kasman, M.D., the agreed medical examiner obtained through the workers’ compensation process. Dr. Kasman confirmed that Jackson would “not be able to return to his usual and customary duties.”

Also in December 2006, before Jackson was rated permanent and stationary by Dr. Rogers, he participated in a bidding process for positions in the following calendar year. Pursuant to its agreement with the union, at the end of each year, Raley’s posts warehouse and transportation positions at the distribution center. Each employee is given a bid number based upon seniority, and a specific date and time during which to bid. Supervisors at the distribution center then call the employees during the specified times to receive the bids. Eric Archie, Raley’s Manager of Administration at the distribution center, called Jackson during his designated time period and took his bid for three 10-

hour shifts as a “Warehouse Worker - Selector” and one 10-hour shift as a “Janitor.” Due to Jackson’s seniority, his bids were successful. However, his medical restrictions prevented him from working these shifts.

In March 2007, Raley’s workers’ compensation insurance carrier, Claims Management, Inc. (CMI), informed Mike Gabbert, Raley’s human resources manager, that Jackson’s disability qualified him for vocational rehabilitation. The letter also explained that Raley’s would be required to advise Jackson as to whether there was “a modified or alternative job available.” Upon receiving this letter, Gabbert called Jackson “to engage in the interactive process and discuss reasonable accommodations.” Gabbert’s declaration provides the following description of the conversation: “Jackson confirmed that his doctor concluded his condition was permanent and stationary. [Jackson] and I talked about the essential job functions of his job and agreed that he could not perform those job functions with his medical restrictions. When I attempted to discuss reasonable accommodations, such as modified or alternative jobs that [Jackson] might be able to perform with his medical restrictions, [Jackson] refused to continue the conversation. Instead, he said I would need to talk to his workers’ compensation attorney or his healthcare provider. At that point, our telephone conversation ended.”

During the conversation, Gabbert filled out a document titled, “Interview form to assist in engaging in the Interactive Process.” We provide the relevant portions of this interview form, placing in italics Gabbert’s handwritten responses: “4. Identify potential accommodations and assess the effectiveness of each. [¶] a. Employer suggestions: *Unable to determine as [Jackson] would not have a conversation about other possible positions or his other skills if any.* [¶] b. Employee suggestions: *[Jackson] had no suggestions[.] [H]e said his doctor said he was permanently disabled [and] it was up to his attorney [and] doctor[.] [H]e could not answer any other questions.* [¶] 5. What is your preference? *It is up to his doctor [and] attorney.* [¶] 6. Do you possess any skills that may qualify you for another position within the company? *Did not want to discuss.”*

The same day, Gabbert sent Jackson a letter summarizing his understanding of their conversation: “As we discussed in reviewing the job analysis of a Warehouse Worker Selector[,] the position does require frequent to continuous lifting of 11 to 50 pounds or more in the range of floor to overhead level. Your current position also requires frequent bending/stooping and firm grasping[.] You stated that your healthcare provider said that you were permanently disabled. We both agreed that you would not be able to return to your position as a Warehouse Worker based on your healthcare provider[']s permanent restrictions. We were unable to discuss other qualifications you have or review any other possible positions as you felt that was up to your attorney and healthcare provider.” After explaining that he would inform CMI that Raley’s did not have modified or alternative work available for Jackson, and that CMI would notify Jackson regarding eligibility for vocational rehabilitation benefits, Gabbert stated: “If this summary does not accurately reflect our conversations or you would like to discuss other qualifications you have, to review any other possible positions or have any questions, please feel free to contact me.”

Jackson received Gabbert’s letter, but did not respond. Jackson explained in his deposition that he did not discuss reasonable accommodations with Gabbert during the phone call and did not respond to the letter because his workers’ compensation attorney instructed him “not to talk to Raley’s.” However, even after Jackson’s workers’ compensation claim settled in August 2007, he still did not contact Gabbert to discuss reasonable accommodations that would enable him to return to work. Nor did Jackson contact Joey Tobias, who took over Gabbert’s position as human resources manager in September 2007. At no time did Jackson provide Gabbert, Tobias, or anyone else at Raley’s, with a release indicating that he was medically able to return to work.

#### ***Jackson’s Conversation with Eric Archie***

In December 2007, Jackson was still on leave and was on the list of employees scheduled to participate in the previously-described bidding process for positions during

the 2008 calendar year. However, believing that Jackson was no longer employed by Raley's, Archie did not call Jackson during his bid time. As Archie explained in his declaration: "Although [Jackson] was listed on the December 2007 bid list, that did not mean he was still employed. The list is generated from an employee database that is frequently out of date and is not always updated when employees stop working for Raley's." According to Jackson, when his bid time passed without a phone call, he tried to call two supervisors, Cliff Murray and Don Feickert. Each time, he received their voicemail and did not leave a message. In the following days, Jackson again tried to call Feickert and Murray, and again chose not to leave a message. Jackson also tried to call Archie, but his voicemail was full and would not allow him to leave a message.

In January 2008, Jackson went to the distribution center and spoke to Archie in person. According to Jackson, he told Archie that he wanted to return to work and handed him a doctor's certificate, dated January 8, 2007, that was filed as part of Jackson's claim for disability insurance benefits (SDI doctor's certificate). This certificate required Jackson's doctor to list a date he anticipated Jackson would be able to return to his "regular/customary work." Jackson's doctor listed January 1, 2008. However, this estimate was provided for purposes of obtaining disability insurance benefits during 2007. On the certificate, Jackson's doctor was specifically instructed that a date was required, and that responses such as "unknown" and "indefinite" would not be accepted. Accordingly, Jackson's doctor listed the first date in the next benefit year, January 1, 2008.

Jackson acknowledges that this SDI doctor's certificate did not constitute a medical release that would have enabled him to return to work at Raley's. He claims that Archie should have engaged in the interactive process with him at that time. But instead, Archie told him: "Workman's comp. told me you was [sic] done." Archie then said that he would get back to Jackson the following day. Archie never contacted Jackson. Two weeks after Jackson's conversation with Archie, his doctor filled out another SDI

doctor's certificate so that Jackson could obtain disability benefits for the 2008 year. As with the previous certificate, Jackson's doctor listed January 1, 2009, as the date he anticipated Jackson would be able to return to his "regular or customary work."

### ***Jackson's Termination***

In February 2008, Raley's terminated Jackson's employment. Tobias sent Jackson the termination letter. As Tobias explained in his declaration: "Jackson had been on a leave of absence for 19 months with no expectation that he would return to work. His physician listed him as permanent and stationary approximately a year earlier and I was aware that my predecessor, Mike Gabbert, attempted to engage in the interactive process with [Jackson] in March 2007 after he became permanent and stationary. I was also aware that [Jackson] settled his workers' compensation claim against Raley's and that he had provided no further information from his physicians suggesting that his medical condition had improved or that he had been released to return to work." After explaining the reason for Jackson's termination, the letter stated: "If at a future date your medical condition improves to a point where you can perform the essential functions of a Raley's job description, you are more than welcome and are encouraged to reapply with Raley's and will be considered for any open positions for which you are qualified."

After receiving the termination letter, Jackson did not contact Tobias or anyone else at Raley's to dispute the fact that he had not been medically cleared to return to work. Nor did Jackson contact anyone at Raley's asking for an alternative position. During Jackson's deposition, when asked why he did not reapply for any positions he felt he was medically able to perform, Jackson responded: "It seemed like a trap to me."

### ***Jackson's Complaint***

In April 2009, Jackson sued Raley's for several alleged FEHA violations and for termination in violation of public policy. Specifically, the first cause of action alleged two FEHA violations: employment discrimination in violation of section 12940, subdivision (a), and failure to prevent employment discrimination in violation of

section 12940, subdivision (k). The second cause of action similarly alleged two FEHA violations: failure to make reasonable accommodation for Jackson's physical disability in violation of section 12940, subdivision (m), and failure to engage in a timely, good faith, interactive process to determine effective reasonable accommodations in violation of section 12940, subdivision (n). The third cause of action alleged that Jackson was terminated in violation of public policy.

With respect to the claimed violation of section 12940, subdivision (n), Jackson alleged that "[Raley's] refused to discuss [Jackson's] request to bid for available positions with [Raley's] and that as a result [Raley's] did not properly engage in the interactive process to find a reasonable accommodation. In addition, [Raley's] failed and refused to meet with [Jackson] after he had been medically cleared to return to work on or about January 2, 2008 to investigate the circumstances under which [Jackson] could return to his prior position with [Raley's]." The remaining causes of action are not relevant to the contentions raised on appeal and will not be discussed.

### ***The Summary Judgment Motion***

In July 2010, Raley's moved for summary judgment or, in the alternative, summary adjudication. With respect to Jackson's claim that Raley's violated section 12940, subdivision (n), Raley's asserted: "No triable issue of material fact exists as to [Jackson's] second cause of action for failure to engage in the interactive process in violation of FEHA because [Jackson] failed to engage in good faith discussions and therefore caused the breakdown of the interactive process." In support of this assertion, Raley's cited the undisputed evidence, recounted in greater detail above, that Gabbert called Jackson to engage in the interactive process and Jackson refused to discuss reasonable accommodations, instead referring Gabbert to his workers' compensation attorney and physician. Raley's also pointed out that Gabbert immediately sent Jackson a letter summarizing the phone call and encouraging Jackson to contact him to discuss possible accommodations, but Jackson neither responded to the letter nor contacted

anyone at Raley's to discuss such accommodations. Thus, argued Raley's, it was Jackson who was responsible for the breakdown in the interactive process.

In September 2010, Jackson filed an opposition to the summary judgment/summary adjudication motion arguing that there was a triable issue of material fact with respect to whether Jackson or Raley's was responsible for the breakdown in the interactive process. Acknowledging that Raley's "was not required to communicate through [Jackson's] attorney," Jackson pointed out that Raley's workers' compensation leave of absence policies allowed the company to "request clarification of any medical information received from the employee directly from the employee's health care provider. Neither [Archie], [Gabbert] nor [Tobias] ever contacted [Jackson's] physician to request clarification of [Jackson's] medical information at any time between March 26, 2007 and February 21, 2008. In addition, [Raley's] never contacted [Jackson] directly during this period to clarify exactly what was required before he could be reassigned to a new position."

Jackson also argued that his January 2008 meeting with Archie qualified as an attempt to engage in the interactive process: "[O]n January 2, 2008, [Jackson] met in person with [Archie] at [Raleys'] Sacramento Distribution Center and presented him with the January 8, 2007 SDI doctor's certificate. [Jackson] asked [Archie] about returning to work, and the conditions of his return to work. [Archie] stated to [Jackson] that 'Workman's comp. told me you was [sic] done,' and 'I'll get back to you tomorrow,' and did not respond to [Jackson's] questions about returning to work. [Archie] did not tell [Jackson] that the SDI release was insufficient to allow [him] to return to work, nor did [Archie] contact [Jackson's] physician for clarification." Thus, argued Jackson, "Raley's unilaterally decided that [he] was unable to perform any available vacant position with Raley's with or without accommodation and that his condition was not going to improve in the near future. Raley's never contacted [Jackson's] physician after March 26, 2007 to

discuss [his] medical restrictions and refused to discuss available vacant positions with [Jackson] directly from January 2, 2008 until February 21, 2008.”

### ***The Trial Court’s Ruling***

In October 2010, the trial court entered summary judgment in favor of Raley’s. With respect to Jackson’s claim that Raley’s failed to engage in the interactive process, the trial court explained: “Raley’s called [Jackson] on March 26, 2007, to discuss reasonable accommodations after [Jackson’s] physician determined that [his] condition was permanent and stationary and he would not be able to do his usual work. [Jackson] agreed that he could not perform the functions of his job, but referred Raley’s to his worker’s compensation counsel or medical care provider, and refused to discuss reasonable accommodations. Gabbert sent [Jackson] a letter confirming their call and requesting [Jackson] contact him to discuss accommodations. [Jackson] never responded to the letter, nor did he contact anyone at Raley’s regarding reasonable accommodations. [¶] It is the responsibility of both sides to keep communications open and neither side has a right to obstruct the process. [(*Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 266.)] For the process to work both sides must communicate directly, exchange essential information and neither side can delay or obstruct the process. An employee has no right to withdraw himself from the process and force the employer to engage in the interactive process through the employee’s attorney. [(*Claudio v. Regents of University of California* (2005) 134 Cal.App.4th 224, 247.)] [¶] Here, the evidence reflects that [Jackson] failed to communicate with anyone at Raley’s regarding possible accommodation after the March 2007 phone call, resulting in his withdrawal from the interactive process. Moreover, [Jackson] never obtained a release indicating that he could return to work, and made no effort to pursue Raley’s offer that when he was able to work he could apply for rehire with retained seniority. Accordingly, the undisputed material facts indicate that summary adjudication is warranted here.”

## DISCUSSION

### I

#### *Summary Judgment Principles*

We begin by summarizing several principles that govern the grant and review of summary judgment motions under section 437c of the Code of Civil Procedure.

“A defendant’s motion for summary judgment should be granted if no triable issue exists as to any material fact and the defendant is entitled to a judgment as a matter of law. [Citation.] The burden of persuasion remains with the party moving for summary judgment. [Citation.]” (*Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1002-1003 (*Kahn*); Code Civ. Proc., § 437c, subd. (c).) Thus, a defendant moving for summary judgment “bears the burden of persuasion that ‘one or more elements of’ the ‘cause of action’ in question ‘cannot be established,’ or that ‘there is a complete defense’ thereto. [Citation.]” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850; Code Civ. Proc., § 437c, subd. (o)(2).) Such a defendant also “bears the initial burden of production to make a prima facie showing that no triable issue of material fact exists. Once the initial burden of production is met, the burden shifts to [plaintiff] to demonstrate the existence of a triable issue of material fact.” (*Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1250, citing *Aguilar, supra*, 25 Cal.4th at pp. 850-851.)

On appeal from the entry of summary judgment, “[w]e review the record and the determination of the trial court de novo.” (*Kahn, supra*, 31 Cal.4th at p. 1003.) “While we must liberally construe plaintiff’s showing and resolve any doubts about the propriety of a summary judgment in plaintiff’s favor, plaintiff’s evidence remains subject to careful scrutiny. [Citation.] We can find a triable issue of material fact ‘if, any only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.’ [Citation.]” (*King v. United Parcel Service, Inc.* (2007) 152 Cal.App.4th 426, 433; see also *Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 163 [“responsive evidence that

gives rise to no more than mere speculation cannot be regarded as substantial, and is insufficient to establish a triable issue of material fact”].)

## II

### *Failure to Engage in the Interactive Process*

Jackson contends that summary judgment was improperly granted because his January 2008 conversation with Archie was a request for reasonable accommodation and Raley’s refused to engage in the interactive process prior to terminating his employment the following month. We disagree.

Section 12940, subdivision (n), makes it unlawful “[f]or an employer or other entity covered by this part to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition.” An employer’s duty to enter into the interactive process envisioned by this provision “‘is triggered by an employee’s disability and the desire for accommodation.’ [Citation.]” (*Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 261 (*Jensen*).

“Reasonable accommodation” is defined to include: “(1) Making existing facilities used by employees readily accessible to, and usable by, individuals with disabilities. [¶] (2) Job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.” (§ 12926, subd. (o).) Placing a disabled employee on leave and holding open his or her position while the employee recuperates is also a form of reasonable accommodation. (See *Jensen, supra*, 85 Cal.App.4th at p. 263; see also *Hanson v. Lucky Stores, Inc.* (1999) 74 Cal.App.4th 215, 226.)

“Interactive process” is not defined by statute. However, section 12926.1, subdivision (e), provides: “The Legislature affirms the importance of the interactive process between the applicant or employee and the employer in determining a reasonable accommodation, as this requirement has been articulated by the Equal Employment Opportunity Commission in its interpretive guidance of the federal Americans with Disabilities Act of 1990.”

The Equal Employment Opportunity Commission’s (EEOC) interpretive guidance of the Americans with Disabilities Act (ADA) describes the interactive process as follows: “Once a qualified individual with a disability has requested provision of a reasonable accommodation, the employer must make a reasonable effort to determine the appropriate accommodation. The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the qualified individual with a disability. Although this process is described below in terms of accommodations that enable the individual with a disability to perform the essential functions of the position held or desired, it is equally applicable to accommodations involving the job application process, and to accommodations that enable the individual with a disability to enjoy equal benefits and privileges of employment.” (29 C.F.R., § 1630.9, App.)

The EEOC’s interpretive guidance continues: “When a qualified individual with a disability has requested a reasonable accommodation to assist in the performance of a job, the employer, using a problem solving approach, should: [¶] (1) Analyze the particular job involved and determine its purpose and essential functions; [¶] (2) Consult with the individual with a disability to ascertain the precise job-related limitations imposed by the individual’s disability and how those limitations could be overcome with a reasonable accommodation; [¶] (3) In consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position;

and ¶ (4) Consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer.” (29 C.F.R., § 1630.9, App.)

The EEOC’s interpretive guidance further explains that the interactive process “requires the individual assessment of both the particular job at issue, and the specific physical or mental limitations of the particular individual in need of reasonable accommodation. With regard to assessment of the job, ‘individual assessment’ means analyzing the actual job duties and determining the true purpose or object of the job. Such an assessment is necessary to ascertain which job functions are the essential functions that an accommodation must enable an individual with a disability to perform. ¶ After assessing the relevant job, the employer, in consultation with the individual requesting the accommodation, should make an assessment of the specific limitations imposed by the disability on the individual’s performance of the job’s essential functions. This assessment will make it possible to ascertain the precise barrier to the employment opportunity which, in turn, will make it possible to determine the accommodation(s) that could alleviate or remove that barrier. . . . ¶ Once potential accommodations have been identified, the employer should assess the effectiveness of each potential accommodation in assisting the individual in need of the accommodation in the performance of the essential functions of the position.” (29 C.F.R., § 1630.9, App.)

Thus, the interactive process envisioned in both the federal ADA and California’s FEHA “requires communication and good-faith exploration of possible accommodations between employers and individual employees, and neither side can delay or obstruct the process. [Citation.]” (*Humphrey v. Mem’l. Hosps. Ass’n.* (2001) 239 F.3d 1128, 1137; *Jensen, supra*, 85 Cal.App.4th at p. 261.) “A party that obstructs or delays the interactive process is not acting in good faith. A party that fails to communicate, by way of initiation or response, may also be acting in bad faith. In essence, courts should attempt to isolate the cause of the breakdown and then assign responsibility.” (*Beck v. University*

*of Wis. Bd. of Regents* (7th Cir. 1996) 75 F.3d 1130, 1135.) Where the employer is responsible for the breakdown in the interactive process, liability attaches “if a reasonable accommodation would have been possible.” (*Humphrey v. Mem’l. Hosps. Ass’n., supra*, 239 F.3d at pp. 1137-1138; see also *Nadaf-Rahrov v. Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 981 (*Nadaf-Rahrov*) [section 12940, subdivision (n), “imposes liability only if a reasonable accommodation was possible”].)

*Nadaf-Rahrov, supra*, 166 Cal.App.4th 952, a case heavily relied upon by Jackson, illustrates these principles. There, Nadaf-Rahrov worked for Neiman Marcus as a fitter and suffered from recurrent back and joint pain. Between 1997 and 2003, her doctor informed Neiman Marcus that she needed various accommodations, including time off work and a shortened work week, which Neiman Marcus provided. (*Id.* at p. 957.) In November 2003, Nadaf-Rahrov requested a leave of absence, providing Neiman Marcus with a doctor’s certificate stating that she was unable to perform work of any kind. Neiman Marcus granted the leave request. During the leave, in January 2004, she informed Neiman Marcus that she “could not return to her fitter job due to her disability” and “asked to be assigned to another position.” (*Id.* at p. 958.) Her doctor also wrote to Neiman Marcus “recommending she be reassigned to a position ‘that would not involve bending, standing, or kneeling.’” (*Ibid.*) At this point, Neiman Marcus’s human resources manager, Kelly Butler, had multiple phone conversations with Nadaf-Rahrov “‘regarding her restrictions and the fact that, according to her doctor’s notes, she was completely prohibited from performing work of *any kind*,’” and told Nadaf-Rahrov that she “‘would be happy to assist her in exploring other opportunities within [Neiman Marcus] as soon as her restrictions were modified to allow her to perform some work in some capacity, as without a release there was no point in discussing available positions because she was not qualified for anything.’” (*Ibid.*) Nadaf-Rahrov agreed that she was unable to return to work and further agreed to call Butler when she was released to return to work. (*Id.* at p. 959.) The next month, she informed Butler that she could not return to

work ““for a little while longer”” and would let her know when she was released to do so. (*Ibid.*) Her doctor then extended her leave four times, stating in the last of these extensions that he believed she ““may be able to return to work [in August 2004] but not in her previous position.”” (*Ibid.*) Nadaf-Rahrov was terminated about a month before the anticipated release date. (*Id.* at pp. 959-960.)

Nadaf-Rahrov sued Neiman Marcus for, among other things, failure to engage in the interactive process. Summary judgment was granted in Neiman Marcus’s favor. (*Nadaf-Rahrov, supra*, 166 Cal.App.4th at pp. 960-961.) The Court of Appeal reversed, explaining that Nadaf-Rahrov “raised a triable issue of fact about whether Neiman Marcus bears responsibility for breakdowns in the interactive process.” (*Id.* at p. 985.) The court explained: “The evidence shows that Neiman Marcus’s initial response to Nadaf–Rahrov’s request for reassignment was appropriate. Upon receiving the January 2004 letters asking that Nadaf–Rahrov be reassigned to a new position, Butler spoke to Nadaf–Rahrov about her professional qualifications, her medical restrictions, and the available positions at Neiman Marcus. Nadaf–Rahrov said she was unable to work at all at that time. Butler told Nadaf–Rahrov that once her medical restrictions were modified to the point she could perform some work, she should contact Butler, who would then explore alternate positions for her. Nadaf–Rahrov verbally agreed to do so. Butler and Nadaf–Rahrov confirmed this understanding in writing in late February.” (*Id.* at p. 985.)

However, as the court explained, “the fact that an employer took some steps to work with an employee to identify reasonable accommodations does not absolve the employer of liability under section 12940(n). If the employer is responsible for a later breakdown in the process, it may be held liable. [Citations.]” (*Nadaf-Rahrov, supra*, 166 Cal.App.4th at p. 985.) The court continued: “After February 2004, Nadaf–Rahrov spoke to someone in the human resources department about once a month to report on the status of her medical leave. Butler avers: ‘At no time after [Nadaf–Rahrov]’s February 24, 2004 letter did she ever inform me or, to my knowledge, anyone else at [Neiman

Marcus], that she had been released to return to work in any capacity.’ Butler testified that Nadaf–Rahrov personally ‘confirmed to me over the phone that she was unable to come back to work.’ Nadaf–Rahrov acknowledged that she never told Neiman Marcus at any time before her termination that she was ready to return to work or that she was released to return to work. However, she characterizes her conversations with human resources as frustrating her attempts to provide such a release: ‘I keep asking if they can give me another job, and they said, no, you have to be released from your doctor until we talk about another job, and I don’t know when my doctor is going to release me, because I do not want to lose my job.’ ‘I asked [Butler] if I can get some -- another department job, and she said, when you -- your doctor has to release you -- to come and then we talk about it. She doesn’t want to talk about it and give me any job until I get released from my doctor. [¶] . . . [¶] [Butler] asked me, ask your doctor what kind of job you can do. [¶] And I told [Butler], my doctor doesn’t know what kind of job we have in Neiman Marcus. You are a manager. You tell me what kind of job you have, then I can tell you I can do the job or not. But she said after you are released from the doctor. [¶] . . . [¶] . . . [A]nd one time the doctor wrote a letter to Neiman Marcus and released me for -- said she can come back to job but not the same job, but they wanted date. . . . [¶] I said, okay. I will call him and ask him a date. So I went back to him, and I said, they want -- they want to know what -- which day I can go back to work. [¶] Then he wrote another letter.’ Butler does not dispute that these conversations took place.” (*Id.* at pp. 985-986, fn. omitted.)

The court concluded: “A reasonable jury could find, drawing all inferences from the evidence in favor of Nadaf–Rahrov, that Neiman Marcus caused a breakdown in the interactive process by refusing to provide information about available positions that might have assisted Nadaf–Rahrov in preparing a list of her work-related medical restrictions. Moreover, a jury could find that Neiman Marcus’s demand for a medical release before it would reengage in the interactive process was unreasonable. A medical

doctor might not want to release a severely disabled patient for unspecified work without knowing the exact demands of the job the patient would be expected to do.” (*Nadaf-Rahrov*, *supra*, 166 Cal.App.4th at p. 986.)

In this case, like *Nadaf-Rahrov*, *supra*, 166 Cal.App.4th 952, Jackson was injured, requested a leave of absence, and Raley’s responded appropriately by granting that request and opening up a line of communication regarding his qualifications and medical restrictions, and potential alternative positions at Raley’s. But this is where the similarities end. Unlike *Nadaf-Rahrov*, Jackson withdrew from the interactive process by refusing to answer Gabbert’s questions and requiring Gabbert to discuss his medical condition and potential alternative positions with his doctor and workers’ compensation attorney. We have held that, absent “unusual circumstances” not present here, “an employee has no right to withdraw himself from the process and force the employer to engage in the interactive process through the employee’s attorney. The kind of information designed to be elicited by the interactive process (job skills and interests, etc.) is personal to the individual employee. Requiring the employer to use the employee’s attorney as a conduit for this personal information would slow the process unnecessarily.” (*Claudio v. Regents of University of California* (2005) 134 Cal.App.4th 224, 247.) Requiring an employer to engage in the interactive process through the employee’s doctor similarly slows the process.

While, as Jackson points out, “[Raley’s] Workers’ Compensation Leave of Absence policies state [Raley’s] may request clarification of any medical information received from the employee directly from the employee’s health care provider,” this cannot be a substitute for Jackson’s obligation to participate in the interactive process. “It is an employee’s responsibility to understand his or her own physical or mental condition well enough to present the employer at the earliest opportunity with a concise list of restrictions which must be met to accommodate the employee.” (*Jensen*, *supra*, 85 Cal.App.4th at p. 266.) “An employer cannot be expected to propose reasonable

accommodation absent critical information on the employee's medical condition and the limitations it imposes." (*Templeton v. Neodata Serv.* (10th Cir. 1998) 162 F.3d 617, 619.) Here, in his opposition to the summary judgment motion, Jackson claimed that his medical restrictions would not have prevented him from performing the job of "Warehouse Worker - Receiver/Loader," also known as "bale dock." Jackson had done this job in the past and presumably understood both the requirements of the position and whether his back injury would have allowed him to perform the essential functions of the job with or without accommodation. He could have suggested this alternative position to Gabbert and then talked to his doctor about whether that was a viable option. And if Gabbert needed confirmation of Jackson's ability to perform the essential functions of that position, he could have contacted Jackson's doctor in accordance with Raley's leave of absence policies. Instead, Jackson refused to discuss alternative positions.

Returning to *Nadaf-Rahrov, supra*, 166 Cal.App.4th 952, the employee's doctor was an active part of the interactive process. Nadaf-Rahrov engaged in discussions with Neiman Marcus and her doctor submitted notes confirming her representations. (*Id.* at pp. 958-959.) There, summary judgment was reversed because a reasonable jury could have found that the breakdown in the interactive process occurred because Neiman Marcus refused to discuss possible alternative positions with Nadaf-Rahrov to enable her to bring that information to her doctor to obtain a release to perform one of those positions. (*Id.* at pp. 985-986.) Here, Jackson wanted no part of the interactive process, and referred Raley's to his doctor and attorney. We conclude, as the trial court correctly found, that the breakdown in the interactive process was caused by Jackson's refusal to participate.

Nevertheless, Jackson argues that his January 2008 meeting with Archie, about 10 months after withdrawing from the interactive process, without any communication in the meantime concerning his medical condition or potential return to work, was a request for reasonable accommodation and that Raley's caused the breakdown in the interactive

process by refusing to discuss reasonable accommodations prior to terminating his employment the following month. We are not persuaded.

Jackson's declaration describes the conversation with Archie as follows: "On January 2, 2008, I went in person to the Sacramento Distribution Center and met with [Archie]. I stated to [Archie] that I wanted to return to work, and handed [Archie] a copy of the January 8, 2007 SDI certificate. [Archie] looked at the SDI certificate, and stated, 'Workman's comp. told me you was [sic] done.' [Archie] also stated, 'I'll get back to you tomorrow.' I had no further communications with [Archie] between January 2, 2008 and February 21, 2008. ¶ During this meeting, [Archie] refused to discuss my request to return to work, the conditions under which I could return to work or alternative positions with [Raley's]. [Archie] also did not refer me to [Raley's] Human Resources department during this meeting. At no time between January 2, 2008 and my termination did any representative of [Raley's] inform me that the January 8, 2007 SDI certificate was not sufficient medical documentation to allow me to return to work."

Archie confirmed in his deposition that such a meeting took place, although he believed it occurred in October or November 2007, and that "the conversation generally was about [Jackson's] returning to work." He stated that he did not discuss alternative positions with Jackson because the "conversation didn't go in that direction." Indeed, a careful reading of Jackson's declaration reveals that he does not specifically claim to have asked Archie about alternative positions. And in Jackson's deposition, he stated that while he wanted to bid on the bale dock position, he did not discuss this position with anyone at Raley's prior to being terminated. Archie also confirmed during his deposition that he did not discuss Jackson's medical condition or refer Jackson to Raley's human resources department. Archie denied receiving "any type of doctor's note or medical release form" during his meeting with Jackson.

After the meeting, Archie called Tobias and informed him that Jackson had stopped by and was asking about returning to work. Tobias then called Gabbert and

discussed his prior attempt at engaging in the interactive process with Jackson. Tobias and Gabbert also discussed the fact that Jackson had not produced a medical release that would allow him to return to work or offered any indication that his medical restrictions had changed. Based on this conversation and a review of the notes Gabbert took during his previous attempt to engage in the interactive process with Jackson, Tobias concluded that Jackson would not be able to perform the functions of any position at Raley's and authorized his termination.

We acknowledge that “[i]n expressing a desire for reassignment, an employee need not use magic words” (*Smith v. Midland Brake, Inc.* (10th Cir. 1999) 180 F.3d 1154, 1172) and that “[a] request as straightforward as asking for continued employment is a sufficient request for accommodation.” (*Hendricks-Robinson v. Excel Corp.* (7th Cir. 1998) 154 F.3d 685, 694.) However, about 10 months prior to Jackson's conversation with Archie, he rejected Raley's attempt to engage him in the interactive process. Despite Gabbert's letter informing Jackson to contact him if he changed his mind and wanted to discuss qualifications or alternate positions at Raley's, Jackson refused to engage. Jackson never contacted Gabbert, or his successor in the human resources department. Jackson avoided the process. Instead, after not receiving a call during his bid time, Jackson showed up at the distribution center to participate in the annual bidding process for positions the following calendar year. Thus, the question is not whether Jackson's conversation with Archie would have been sufficient to trigger Raley's initial duty to engage him in the interactive process, but whether a reasonable jury could find that this conversation remedied Jackson's previous rejection of the interactive process and made Raley's responsible for the breakdown in that process. We conclude that no reasonable jury could so find.

### III

#### *Obligation to Produce a Medical Release*

Jackson also asserts that, under *Nadaf-Rahrov, supra*, 166 Cal.App.4th 952, he was not required to produce a medical release in order for Raley's to have to engage him in the interactive process. While we agree, this does not change the fact that Raley's did engage him in the interactive process. It was Jackson, not Raley's, who caused the breakdown in that process.

As we explained, in *Nadaf-Rahrov, supra*, 166 Cal.App.4th 952, the employee remained in constant contact with Neiman Marcus concerning her disability and a reasonable jury could have found that the breakdown in the interactive process occurred, not because the employee refused to produce a medical release, but because Neiman Marcus refused to discuss possible alternative positions with her to enable her to bring that information to her doctor to obtain such a release. (*Id.* at pp. 985-986.) The court also rejected Neiman Marcus's reliance on the tentativeness of the doctor's note she did provide, which stated that Nadaf-Rahrov might be able to return to work in a new position in August 2004. As the court explained: "In light of Neiman Marcus's apparent refusal to provide information about open positions that might have allowed Nadaf-Rahrov to provide a more specific medical release, a reasonable jury could find that the tentativeness of the note did not alone justify her termination." (*Id.* at p. 988.) The court further rejected Neiman Marcus's reliance on the November 2003 doctor's certificate stating that Nadaf-Rahrov could not perform work of any kind, explaining: "In light of Nadaf-Rahrov's and [the doctor's] representations in the meantime that she wanted to be reassigned to another position at Neiman Marcus, and Nadaf-Rahrov's requests for work-related information so she could obtain a specific medical release from her doctor, a jury could find that Neiman Marcus's reliance on the earlier passive representation on the [leave of absence] form was unreasonable and caused a breakdown in the interactive process." (*Ibid.*)

Here, Jackson caused the breakdown in the interactive process by refusing to discuss alternative positions with Gabbert. Gabbert also left open a line of communication for Jackson to use if he reconsidered. But instead of contacting Gabbert, or his successor in the human resources department, Jackson waited about 10 months and then went to Archie to participate in the distribution center's annual bidding process for positions in the following calendar year. Jackson had an SDI certificate that he acknowledges was not sufficient to allow him to return to work. After rejecting the interactive process outright, an employee such as Jackson must do more than simply show up nearly a year later without a medical release and ask to return to work in order to be found to have participated in the interactive process in good faith. (See *Smith v. Midland Brake, Inc.*, *supra*, 180 F.3d at p. 1173 ["There are no doubt cases in which the employee's failure to provide a medical release is unreasonable, breaks down the interactive process, and thereby insulates the employer from ADA [or FEHA] liability"].)

Finally, contrary to Jackson's argument on appeal, there is a substantive difference between the SDI doctor's certificate he gave Archie and the tentative doctor's note involved in *Nadaf-Rahrov*, *supra*, 166 Cal.App.4th 952. The tentative doctor's note was provided to Neiman Marcus as part of an ongoing interaction in which Nadaf-Rahrov was attempting to do everything in her power to satisfy Neiman Marcus's insistence on a medical release despite refusing to discuss possible alternative positions with her so that she could better inform her doctor concerning the demands of those potential positions. Here, Jackson could have discussed alternative positions with Gabbert or Tobias at any time, informed his doctor about those positions, and then provided either a release or list of accommodations necessary to enable him to perform the essential functions of one of those positions. Again, Jackson chose not to participate in the interactive process Raley's offered him. He cannot hold Raley's liable for his failure to interact.

DISPOSITION

The judgment is affirmed. Raley's shall recover its costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

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HOCH, J.

We concur:

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BLEASE, Acting P. J.

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ROBIE, J.