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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

IMELDA GODOY, Plaintiff and Appellant, v. UNIVERSAL SWITCHING CORPORATION, Defendant and Respondent.	B279158 (Los Angeles County Super. Ct. No. BC583896)

APPEAL from judgment of the Superior Court of Los Angeles County, Deirdre H. Hill, Judge. Affirmed.

Law Offices of Robert S. Scuderi and Robert S. Scuderi, for Plaintiff and Appellant.

Wolf, Rifkin, Shapiro, Schulman & Rabkin, Matthew Oster, Jason M. Flom, for Defendant and Respondent.

Plaintiff and appellant Imelda Godoy appeals from a judgment in favor of defendant and respondent Universal Switching Corporation following a bench trial in this action for failure to accommodate a disability and failure to engage in the interactive process under the Fair Employment and Housing Act (FEHA) (Government Code section 12900 et seq.).[1] Godoy contends on appeal that her request for accommodation was reasonable because she could have been reassigned to a vacant position for a mechanical assembler in January 2015. We conclude substantial evidence supports the trial court's finding that there was no vacant position in January 2015 to which Godoy could have been reassigned, and therefore affirm the judgment.

FACTS

Universal hired Godoy in 1998. As a solder technician, Godoy used a soldering iron and a microscope to solder surface mount components onto printed circuit boards. She helped with other positions on the production floor when there was a slowdown in soldering work.

Lilliana Cruz worked for Universal as a mechanical assembler. Mechanical assemblers take completed assemblies from solder technicians and install them into larger assemblies. They also install covers on the assemblies, cut and crimp wires, and perform similar tasks.

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[1] All further statutory references are to the Government Code unless otherwise stated.

The position of mechanical assembler requires a high school diploma, is less skilled than a solder technician, and is paid at a lower rate.

In July 2013, Universal's production department had seven employees, which included four solder technicians, two mechanical assemblers and a quality inspector. Godoy suffered a work-related injury and became unable to work on September 5, 2013. Universal did not hire a replacement for Godoy. As a result of Godoy's workers' compensation claim, Universal's workers' compensation policy premium doubled.

Cruz became unable to work in March 2014 due to a non-work related disability. Universal did not hire a replacement for Cruz, so it had five employees in the production department after March 2014, which included three solder technicians.

The workers' compensation section of Universal's employee handbook provides in relevant part: "Under most circumstances, upon submission of a medical certification that an employee is able to return to work from a workers' compensation leave, the employee will be offered the same position held at the time the leave began, if available. If the same position is not available, an employee's return to work will depend on job openings existing at the time of his/her scheduled return. An employee's return will depend on his/her qualifications for any existing openings."

The handbook also provides that a medical leave of absence may be granted for non-work-related temporary medical disabilities. It states, "If returning from a non-

work-related medical leave you will be offered the same position held at the time of leaving, if available. If this position is not available, a comparable position will be offered. If neither the same nor a comparable position is available, your return to work will depend on job openings existing at the time of your scheduled return. There are no guarantees of reinstatement and your return will depend on your qualifications for any existing openings."

The handbook further provides, "A personal leave of absence without pay may be granted at the discretion of the Company. Requests for personal leave should be limited to unusual circumstances requiring an absence of longer than two weeks." Under the provisions of the handbook, Godoy and Cruz were both considered to be on "inactive status" when their leaves of absence exceeded four months. They earned no benefits and seniority did not continue to accrue during their absences.

Universal hired temporary employees in August 2014 for 90 days to work on a specific order. The temporary employees performed simple mechanical assembly work, cut and stripped wires, and taped coils.

On September 5, 2014, Godoy informed Universal that she was able to return to work without restrictions. Universal responded by e-mail that there was no work available, and the company was under contract with a temporary agency through September 18, 2014. Universal would reevaluate its workload and make a determination with respect to returning her to work at that point.

Universal had suffered a severe decline in sales. For the fiscal year that ended on September 30, 2012, Universal had sales of more than $10 million. But for the fiscal year ending in September 2013, the company had sales of $7,348,324, and for the fiscal year ending in September 2014, Universal had sales of $5,165,980. Sales were at their lowest in September 2014.

Godoy sent e-mails asking about returning to work on September 18 and October 20, 2014. After reviewing work orders and evaluating Universal's staffing needs, the operations manager determined that there was no work available for Godoy. Universal did not have any positions open that fit her skill level. The operations manager considered solder technician, mechanical assembly, and quality inspector positions when he looked for work for her. Universal advertised a position for a radio frequency engineer at all times, but Godoy was not qualified for that position.

On December 11, 2014, Godoy asked to meet with the operations manager at the company to discuss returning to her job. The operations manager responded that he was confident she had the ability to return to work, but there was no work available. If work had been available, Universal would have offered it to her. There was a slight increase in sales in October 2014 that continued through the end of 2014, but it was not sufficient to justify a change in employment practices. No one from Universal ever met with

Godoy in response to her request or to discuss other positions that she was qualified to do.

Cruz notified Universal that she was able to return to work in January 2015. The operations manager determined that there had been a small increase in purchase orders and Universal had some mechanical assembly work which needed to be filled. Universal returned Cruz to her job in January 2015.

The operations manager did not consider Godoy to have been terminated or laid off. There were no layoffs at the company in 2013 or 2014. He continued to evaluate the company's workload and hoped to bring Godoy back to work. Universal's sales for the fiscal year ending in September 2015 were $5,350,920. Cruz resigned in January 2016. Universal did not fill her position and operated with five employees in the production department, three of whom are solder technicians. Universal has not hired anyone in the entire company from July 2013 to the present.

PROCEDURAL BACKGROUND

Godoy filed a complaint against Universal on June 3, 2015, for disability discrimination and retaliation under the FEHA. A bench trial was held beginning on July 27, 2016, on Godoy's causes of action for failure to accommodate and failure to engage in the interactive process. On August 18, 2016, the trial court found Universal had no equivalent position for Godoy at any time after her recovery.

Universal filed a proposed statement of decision. Godoy submitted objections to the proposed statement of decision. On September 29, 2016, the trial court entered the statement of decision and judgment. The court found that there was no vacant position at the same level available for Godoy to be reassigned or placed into at Universal. Universal was not required to select Godoy for the mechanical assembler position over Cruz. Universal was not required to create a position for Godoy, especially when it would cause undue financial hardship to the company. Therefore, Universal did not fail to provide a reasonable accommodation to Godoy. The court also found Universal did not have a duty to further engage in the interactive process when no accommodation was possible, because Universal had no open equivalent funded position to which to reassign Godoy. The court entered judgment in favor of Universal the same day. Godoy filed a timely notice of appeal from the judgment.

DISCUSSION

Standard of Review

A party may request that the trial court issue a statement of decision under Code of Civil Procedure section 632, explaining the basis for its decision on specified issues. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) "[I]f the trial court issues a statement of decision, a party

claiming omissions or ambiguities in the factual findings must bring the omissions or ambiguities to the trial court's attention." (*Fladeboe v. American Isuzu Motors Inc.* (2007) 150 Cal.App.4th 42, 59.) If a party brings omissions or ambiguities to the attention of the trial court under Code of Civil Procedure section 634, an appellate court will not imply findings favorable to the judgment. (*In re Marriage of Arceneaux, supra,* 51 Cal.3d at p. 1133.)

"In reviewing a judgment based upon a statement of decision following a bench trial, we review questions of law de novo. [Citation.] We apply a substantial evidence standard of review to the trial court's findings of fact." (*Thompson v. Asimos* (2016) 6 Cal.App.5th 970, 981 (*Thompson*).) "Under the substantial evidence standard of review, our review begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the trial court's factual determinations. [Citations.] Substantial evidence is evidence of ponderable legal significance, reasonable in nature, credible, and of solid value. [Citation.] The substantial evidence standard of review applies to both express and implied findings of fact made by the court in its statement of decision." (*Ermoian v. Desert Hospital* (2007) 152 Cal.App.4th 475, 501.)

"A single witness's testimony may constitute substantial evidence to support a finding. [Citation.] It is not our role as a reviewing court to reweigh the evidence or

to assess witness credibility." (*Thompson*, *supra*, 6 Cal.App.5th at p. 981.)

Reasonable Accommodation after Leave

Godoy contends her request for accommodation was reasonable, because Universal had an open equivalent funded position in January 2015 to which she could have been reassigned. It is undisputed that there was no work for a solder technician, but Godoy asserts that there was a vacant position in mechanical assembly in January 2015. We conclude substantial evidence supports the trial court's finding that there was no vacant position in mechanical assembly in January 2015.

"The FEHA imposes on employers the duty reasonably to accommodate their employees' physical disabilities. (*Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1003.) Section 12940, subdivision (m) provides that it is an unlawful employment practice for an employer to 'fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee.'" (*Cuiellette v. City of Los Angeles* (2011) 194 Cal.App.4th 757, 766 (*Cuiellette*).) "The elements of a failure to accommodate claim are '(1) the plaintiff has a disability under the FEHA, (2) the plaintiff is qualified to perform the essential functions of the position, and (3) the employer failed to reasonably accommodate the plaintiff's disability.' [Citation.]"

(*Swanson v. Morongo Unified School Dist.* (2014) 232 Cal.App.4th 954, 969 (*Swanson*).)

"Under the FEHA, 'reasonable accommodation' means 'a modification or adjustment to the workplace that enables the employee to perform the essential functions of the job held or desired.' (*Nadaf–Rahrov v. Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 974.) 'If the employee cannot be accommodated in his or her existing position and the requested accommodation is reassignment, an employer must make affirmative efforts to determine whether a position is available. (*Spitzer* [*v. Good Guys, Inc.* (2000)] 80 Cal.App.4th [1376,] 1389 [(*Spitzer*)].) A reassignment, however, is not required if "there is no vacant position for which the employee is qualified." (*Ibid.;* see *School Bd. of Nassau County v. Arline* (1987) 480 U.S. 273, 289, fn. 19 ["Employers have an affirmative obligation to make a reasonable accommodation for a handicapped employee. Although they are not required to find another job for an employee who is not qualified for the job he or she was doing, they cannot deny an employee alternative employment opportunities reasonably available under the employer's existing policies. [Citations.]"].)'" (*Cuiellette, supra,* 194 Cal.App.4th pp. 766–767.)

"'"The responsibility to reassign a disabled employee who cannot otherwise be accommodated does 'not require creating a new job, moving another employee, promoting the disabled employee or violating another employee's rights . . . .' " (*Spitzer,* [*supra*, 80 Cal.App.4th] at p. 1389; see also

McCullah v. Southern Cal. Gas Co. (2000) 82 Cal.App.4th 495, 501 (*McCullah*) ["The employer is not required to create new positions or 'bump' other employees to accommodate the disabled employee"].) "What is required is the '*duty* to reassign a disabled employee if an already funded, vacant position *at the same level* exists.' [Citations.]" [Citations.]' (*Raine v. City of Burbank* (2006) 135 Cal.App.4th 1215, 1223 (*Raine*); § 12926, subd. (n); *Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 950–951 ['an employer who knows of the disability of an employee has an affirmative duty to make known to the employee other suitable job opportunities with the employer and to determine whether the employee is interested in, and qualified for, those positions, if the employer can do so without undue hardship or if the employer offers similar assistance or benefit to other disabled or nondisabled employees or has a policy of offering such assistance or benefit to any other employees'].)" (*Cuiellette, supra,* 194 Cal.App.4th p. 767.) California law provides "[t]he employee with a disability is entitled to preferential consideration of reassignment to a vacant position over other applicants and existing employees," although an employer is not generally required to disregard a bona fide seniority system. (Cal. Code Regs., tit. 2, § 11068, subd. (d)(5).)

"'Under the FEHA . . . an employer is relieved of the duty to reassign a disabled employee whose limitations cannot be reasonably accommodated in his or her current job only if reassignment would impose an "undue hardship" on

its operations or if there is no vacant position for which the employee is qualified.' ([*Spitzer,*] *supra,* 80 Cal.App.4th at p. 1389.)" (*Cuiellette, supra,* 194 Cal.App.4th p. 767.)

When a FEHA provision is modelled on parallel federal requirements of the Americans with Disabilities Act (ADA), as the reasonable accommodation requirements of section 12940(m) are, federal case law is an appropriate guide for construction of the FEHA provision. (*Nadaf-Rahrov v. Neiman Marcus Group, Inc.*, *supra*, 166 Cal.App.4th at pp. 973–974; *Swanson, supra,* 232 Cal.App.4th at p. 969.) Under federal case law, whether an employee on leave has a legal right to his or her job does not determine whether that employee's position is considered "vacant." (*McFadden v. Ballard Spahr Andrews & Ingersoll, LLP* (D.C. Cir. 2010) 611 F.3d 1, 5 (*McFadden*).) "The word 'vacant' has no 'specialized meaning' in the ADA. [(*US Airways, Inc. v. Barnett* (2002) 535 U.S. 391, 399.)] Its meaning 'in ordinary English,' [citation], is 'not held, filled, or occupied, as a position or office.' Webster's New Twentieth Century Dictionary 2014 (2d ed.1983)." (*McFadden*, *supra*, 611 F.3d at p. 5.)

Substantial evidence supports the trial court's finding in this case that there was no vacant mechanical assembler position in January 2015. Godoy contends that she should have been reassigned as a mechanical assembler in January 2015, but it is undisputed that Cruz was on leave from her position as a mechanical assembler and informed Universal in January 2015 that she could return to work. Cruz never

separated from employment. She had not been terminated. The fact that Universal hired temporary employees to perform mechanical assembly work while Cruz was on leave did not mean Cruz's job was vacant. (See *McFadden*, *supra*, 611 F.3d at p. 5 [hiring temporary employee to fill in for receptionist on leave did not mean position was vacant].) Universal did not seek a permanent replacement for Cruz while she was on leave, did not post a job listing for a mechanical assembler, and did not otherwise act as though it had a vacant mechanical assembler position. Under these circumstances, the evidence supports the trial court's finding that Cruz "held, filled, or occupied" the mechanical assembler position funded in January 2015. Whether Cruz had a legal right to her position as a mechanical assembler does not determine whether the position was considered vacant for purposes of reassignment under the FEHA. There was no solder technician position available, and the mechanical assembler to which Godoy sought reassignment was not vacant, and therefore, the evidence supports the trial court's finding that Universal did not fail to provide a reasonable accommodation.

Interactive Process

Godoy contends Universal failed to engage in the interactive process. We conclude the trial court's finding that Universal is not liable for failure to engage in the interactive process is supported by substantial evidence.

"The FEHA makes it 'an unlawful employment practice . . . [¶] . . . [¶] . . . [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.' (§ 12940, subd. (n).) Although the interactive process is an informal process designed to identify a reasonable accommodation that will enable the employee to perform his or her job effectively [citation], an employer's failure to properly engage in the process is separate from the failure to reasonably accommodate an employee's disability and gives rise to an independent cause of action [citation]." (*Swanson*, *supra*, 232 Cal.App.4th at p. 971.)

"The employee must initiate the process unless his or her disability and the resulting limitations are obvious. Once initiated, the employer has a continuous obligation to engage in the interactive process in good faith. [Citation.] 'Both employer and employee have the obligation "to keep communications open" and neither has "a right to obstruct the process." [Citation.] "Each party must participate in good faith, undertake reasonable efforts to communicate its concerns, and make available to the other information which is available, or more accessible, to one party. Liability hinges on the objective circumstances surrounding the parties' breakdown in communication, and responsibility for the breakdown lies with the party who fails to participate in

good faith.'" [Citation.]" (*Swanson*, *supra*, 232 Cal.App.4th at pp. 971–972.) "[S]ection 12940(n) imposes liability only if a reasonable accommodation was possible." (*Nadaf-Rahrov v. Neiman Marcus Group, Inc.*, *supra*, 166 Cal.App.4th at p. 981.)

As discussed above, no reasonable accommodation was possible in this case. There was no work at Universal for a solder technician, and the trial court's finding that there was no vacant position in January 2015 for a mechanical assembler is supported by substantial evidence. Since there was no work available in any position that could reasonably accommodate Godoy's return to work, Universal cannot be held liable for failure to engage in the interactive process. The trial court's findings are supported by substantial evidence.

DISPOSITION

The judgment is affirmed. Respondent Universal Switching Corporation is awarded its costs on appeal.

KRIEGLER, Acting P.J.

We concur:

BAKER J.

DUNNING, J.*

* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.