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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

DAVID GULLEY, Plaintiff and Appellant, v. CITY OF GLENDALE, Defendant and Respondent.	B282705 (Los Angeles County Super. Ct. No. BC613294)

APPEAL from a judgment of the Superior Court of Los Angeles County, Daniel S. Murphy, Judge. Affirmed.

Irving Meyer for Plaintiff and Appellant.

Michael J. Garcia, City Attorney, and Ann M. Maurer, Assistant City Attorney, for Defendant and Respondent.

* * * * * *

In this employment case, plaintiff David Gulley[1] appeals the grant of summary judgment to his former employer and defendant City of Glendale (the City) on his claims of disability discrimination, failure to accommodate, failure to engage in the interactive process, and wrongful termination. We conclude no triable issues of fact exist as to whether the City could have reasonably accommodated Gulley's restrictions in his then-current position of Water System Equipment Operator, and we find he has forfeited his claims based upon the failure to reasonably accommodate his restrictions through reassignment to one of six open positions within the City. We therefore affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Gulley began working for the City in 2001 as a seasonal laborer in the Parks Department. From there, he moved to the Public Works Department as an hourly helper, then full-time Street Maintenance Worker, and then Light Equipment Operator. In 2007 or 2008, he was promoted to the Glendale Water and Power Department as a Light Equipment Operator. In 2009, he was promoted to Water System Equipment Operator. Following the injury at issue in this case, he filed for disability retirement from that position effective October 2015.

All positions in the City except City Manager and City Attorney are civil service positions with written job descriptions setting forth minimum qualifications. They are approved by the Glendale Civil Service Commission at public meetings. In addition to the written description, each position has an "Essential Job Functions Form." As the name suggests, it defines

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[1] Gulley explains his name was incorrectly spelled as "Gully" in the caption to this case. We therefore use the correct spelling in this opinion.

the essential functions of a position, including the frequency and the necessity of each function.

Gulley's position when he retired—Water System Equipment Operator—was part of the City's maintenance and construction crews responsible for the maintenance and operation of all City water piping, service lines, meters, and hydrants. The crews perform construction work to repair, maintain, upgrade, and install water systems for existing and new customers. The majority of the work is strenuous manual labor.

The job description for Water System Equipment Operator was approved in 2000 and last revised in 2003. Essential functions of the position include driving and operating heavy equipment, such as backhoes and cranes; performing "journey-level water system construction, repair and maintenance work of water system facilities as part of the construction crew"; and "other related duties as assigned or as the situation requires."

The position's "Essential Job Functions Form" set forth a "Frequency Scale" and a "Necessity Scale" that assigned frequency and necessity values to each function of the position. "Bending" was listed under the "other activities" category. It was rated "F" on the Frequency Scale and "3" on the Necessity Scale, meaning it was frequent and could not be modified. "Bending at the waist" was listed under the "Repetitive Motion" category, and it was rated "F" and "2," meaning it was frequent but it could be modified without altering the position. Under the "Lifting" category, lifting from one to 50 pounds was rated "F" and "3," or frequent and could not be modified. Lifting 51 to 100 pounds was rated "I" and "3," or infrequent and could not be modified. Lifting over 100 pounds was rated "R" for rarely and "0" for not essential.

Gulley's supervisor further explained that the journey-level construction work performed by a Water System Equipment Operator required "physically demanding construction work," such as installing and repairing water mains, piping, service lines, and hydrants; heavy lifting and operating tools like jackhammers and tamps; and strenuous manual labor like hand-digging trenches where excavation with a backhoe was not feasible. All equipment operators are required to perform these tasks as part of their regular duties.

Two full-time Water System Equipment Operators testified that they regularly assisted crews in performing physically demanding tasks like hand-digging, jackhammering, tamping asphalt, heavy lifting, and sweeping. Gulley also testified that he assisted crew members with similar functions when he was not operating heavy equipment, such as bringing tools to coworkers, sweeping, working in the trench, shoveling and setting up traffic delineations. He also assisted in repairing water mains and fire hydrants and hosing down reservoirs.

Gulley suffered several injuries while working for the City. In 2008, he suffered back spasms while digging and shoveling on a job. He filed a workers' compensation claim and remained off work for one month.

In 2010, he filed a second workers' compensation claim for back pain. He underwent surgery and was off work for one year. He returned to work in June 2011 with a heavy lifting restriction, so the City allowed him to operate heavy equipment while foregoing construction crew duties requiring heavy lifting. He did no jackhammering, shoveling or getting into ditches.

In March 2013, Gulley was again injured when he fell off a pressurized water main. He was off work for one week.

In September 2015, while still on modified duty due to his back issues, Gulley drove his backhoe over a rough patch of road and reinjured his back. He went off work again due to the injury, which eventually led to his disability retirement.

As part of his workers' compensation case, Gulley was examined by Dr. Phillip Kanter, an Agreed Medical Examiner. The parties agreed Dr. Kanter could make the final determination about Gulley's condition, restrictions, and percentage of disability. The City received a report from Dr. Kanter in September 2015 indicating that Gulley had reached his "maximum medical improvement" and that he was precluded from "heavy lifting and repetitive bending and stooping." In the report, Dr. Kanter wrote that Gulley was "currently working with restrictions of no lifting more than 20 pounds and no repetitive bending or shoveling as directed by [his doctor]. [¶] The patient does not feel he can work anymore. Even with the self-modifications, his lumbosacral spine is hurting him too much. It radiates into both buttocks and posterior thighs." Further, Gulley "complains of constant pain" and "[h]eavy lifting or bending exacerbates this condition." He "has constant slight pain, increasing to moderate with heavy lifting, and repetitive bending and stooping." As far as limitations of physical activities, Dr. Kanter stated, "[O]n a scale of 0 to 10, where 0 means he can do it entirely and with 10 meaning he cannot do it at all," his ability to lift a 10-pound bag was a "4"; his ability to walk one block was a "4"; his ability to sit or stand for half an hour was a "5"; his ability to do activities of daily living was a "7"; and his ability to do jobs around the house was a "7."

The report was forwarded to the City's Employee Health Coordinator, Christine Baute, to schedule an "interactive

meeting" to discuss Gulley's work restrictions and whether he could perform the essential functions of his job with those restrictions. On September 28, 2015, Baute sent a letter to Gulley setting a meeting on October 15, 2015, to discuss his restrictions from Dr. Kanter. The letter told Gulley to "think of what you could do to your current job to make it so you can work with physical limitations and the restrictions" identified by Dr. Kanter. It also said the goal of the meeting was to "determine whether your job can be reasonably modified to accommodate these restrictions on a permanent basis, or if there is a match between your capabilities and any available vacant positions."

The City convened the meeting on October 15, 2015. Gulley attended along with members of the City's workers' compensation section, Human Resources Department, and Glendale Water and Power. According to Baute, the parties discussed Gulley's restrictions and whether he could return to full duty. Gulley suggested he could continue operating heavy equipment as he had been doing in the past. He was told that was a temporary accommodation that could not be made permanent; his position required many other tasks that he was precluded from doing. Gulley was asked to provide a résumé to determine whether he could perform some other open position.

Gulley sent his résumé to Senior Human Resources Analyst Steve Nersesyan, who had attended the first meeting. It consisted of a list of Gulley's licenses and certificates, a list of positions he held at the City, a brief description of his job duties, and the contact information for three references. Nersesyan was aware of all open positions in the City in November 2015 and attended weekly meetings during which all openings were

discussed. He also had access to a report listing all open positions at any given time. Based on his familiarity with Gulley's résumé and skill set, Nersesyan did not locate any open positions for which Gulley met the minimum qualifications.

Baute sent Gulley a letter on November 15, 2015, setting another meeting. The letter advised him that he could bring a representative to the meeting, and he brought a representative from his bargaining group. At this meeting, Nersesyan informed Gulley he looked for available positions but did not find any matching Gulley's skill set. Gulley was told that he could ask any questions or offer suggestions about his skill set for other positions, but he did not respond. Gulley was told that he could apply for disability retirement, which he did effective October 2015.

Gulley then filed this lawsuit, alleging seven claims against the City. He dismissed three of those claims, leaving causes of action for (1) disability discrimination in violation of the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.); (2) failure to accommodate in violation of the FEHA; (3) failure to engage in the interactive process as required by the FEHA; and (4) "wrongful termination" in violation of the FEHA.

The City moved for summary judgment, submitting declarations and evidence generally setting forth the facts we have recited up to this point. In opposition, Gulley did not dispute the functions of the Water System Equipment Operator position and explained that prior to his latest injury, he had been performing those functions "with the minor accommodation of choosing to use a machine to pick up material that weigh[ed] over 50 pounds." He contended the City misinterpreted his restriction

from Dr. Kanter as limiting him to lifting no more than 20 pounds. He relied on a workers' compensation "Schedule for Rating Permanent Disabilities" from 1997 and "Guidelines for Work Capacity," apparently in effect from 1997 to 2004, both of which defined a restriction precluding "Heavy Lifting, Repeated Bending and Stooping" to mean the employee has lost approximately half his pre-injury ability. He claims that he could have lifted 200 pounds before his injury and bent and stooped an unlimited number of times a day, so under these guidelines he was only precluded from lifting over 100 pounds and precluded from bending and stooping for just a small part of the day. He claimed that he was never required to lift more than 50 pounds as a Water System Equipment Operator, and that he "only occasionally bent or stooped, as I was for the most part sitting in the operator's seat, operating/driving heavy equipment."

He further explained: "During the time, after my last injury, for about 1 1/2 years, I was doing my entire job without any accommodation, except for when I had to remove the jackhammer from a ditch, the few times I was required to do that, and I used the backhoe to do it. The tamper I used by myself, but the few times I needed assistance to remove it from the hole or to put it in the hole to use, I used the backhoe. I had no problems sweeping or shoveling. Small hand tools weigh just a few pounds, with none heavier than 20 pounds. The few times it was required for me to load the tamper, I put it in the front bucket."

He also disputed the City's characterizations of the two meetings to discuss Dr. Kanter's restrictions. He declared: "In the two meetings I had with the City, supposedly as an interactive process, there were about six people from the City talking at me, and all they wanted to do was tell me that I

couldn't do my job, and they didn't have any other jobs for me in the City, because my restrictions were, 'Pre[c]luding Heavy Lifting and Repeated Bending and Stooping.' Some of the people at the meetings were from the human resources department, and one, Ms. Baute, was from the City's workers' compensation department, yet, they kept telling me my restrictions precluded me from lifting more than 25 pounds, and that is why I couldn't do my job. As I showed above, I was allowed to lift up to 100 pounds. [¶] I had told those that were present, including Ms. [Baute], and Mr. Ner[s]esyan that I could still do my regular job, and I asked if I could be sent back to Frank William's crew, where I had worked for the past four months, doing all the work the other workers were doing, or be sent to the office, where I had worked before, but after I sent Mr. Ner[s]esyan my 'resume' [*sic*] I never heard from any of them again."

With regard to providing his résumé, he stated: "I was never asked to detail my work history, or what I actually did in my jobs with Steve Ner[s]esyan, who was assigned to find an accommodation for me in the job I was doing, or to find another job for me with the City. All he did was ask me to provide him with my resume [*sic*], which I did. However, as can be seen by looking at my resume [*sic*], . . . it is very, very scant, as I was not familiar with what was needed, and Mr. Ner[s]esyan never talked to me to ask me what items/duties/responsibilities of work I had actually performed with the City for the last sixteen years."

The trial court granted the City's motion and entered judgment for the City. Gulley timely appealed.

DISCUSSION

1. Legal Standard

We review de novo the grant of summary judgment, considering all the evidence presented by the parties except evidence for which objections were made and sustained. (*Guz v. Bechtel National Inc.* (2000) 24 Cal.4th 317, 334.) A court shall grant a motion for summary judgment if all the papers show there is no triable issue as to any material fact and the moving party is entitled to a judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) The moving party may do this by showing either (1) one or more elements of a cause of action cannot be established or (2) a complete affirmative defense to the cause of action exists. (Code Civ. Proc., § 437c, subds. (*o*), (p)(2).)

2. Failure to Accommodate

"A reasonable accommodation is a modification or adjustment to the work environment that enables the employee to perform the essential functions of the job he or she holds or desires. [Citation.] FEHA requires employers to make reasonable accommodation for the known disability of an employee unless doing so would produce undue hardship to the employer's operation. (Gov. Code, § 12940, subd. (m).) The elements of a reasonable accommodation cause of action are (1) the employee suffered a disability, (2) the employee could perform the essential functions of the job with reasonable accommodation, and (3) the employer failed to reasonably accommodate the employee's disability." (*Nealy v. City of Santa Monica* (2015) 234 Cal.App.4th 359, 373 (*Nealy*).)

The City argues that Gulley's restrictions prevented him from performing the essential functions of Water System Equipment Operator and he was not qualified to perform any

other available positions in the City. Gulley responds that a triable issue of fact exists over whether the City improperly interpreted Dr. Kanter's restrictions of no "heavy lifting and repetitive bending and stooping" to mean he could not lift more than 20 pounds. He contends the proper interpretation would have enabled him to perform the essential functions of the job. He also contends there was a triable issue over whether he was qualified for and could perform the essential functions of six other available positions in the City.

a. Water System Equipment Operator Position

" ' "Essential functions" means the fundamental job duties of the employment position the individual with a disability holds or desires.' " (*Nealy, supra,* 234 Cal.App.4th at p. 373; see Gov. Code, § 12926, subd. (f).) " 'A job function may be considered essential for any of several reasons, including, but not limited to, any one or more of the following: [¶] (A) . . . [T]he reason the position exists is to perform that function. [¶] (B) . . . [T]he limited number of employees available among whom the performance of that job function can be distributed. [¶] [And] (C) . . . the incumbent in the position is hired for his or her expertise or ability to perform the particular [highly specialized] function.' (Gov. Code, § 12926, subd. (f)(1); see Cal. Code Regs., tit. 2, § 11065, subd. (e)(1).)" (*Nealy, supra*, at p. 373.) Evidence of essential functions may come from "the employer's judgment, written job descriptions, the amount of time spent on the job performing the function, the consequences of not requiring employees to perform the function, the terms of a collective bargaining agreement, the work experiences of past incumbents in the job, and the current work experience of incumbents in

similar jobs." (*Atkins v. City of Los Angeles* (2017) 8 Cal.App.5th 696, 717-718.)

Gulley does not dispute the essential functions of a Water System Equipment Operator set forth in the job description or the Essential Job Functions Form or as described by his supervisor and coworkers.[2] Instead, Gulley contends that he could have performed the essential functions but the City misinterpreted Dr. Kanter's restrictions of no "heavy lifting and repetitive bending and stooping" as limiting him to lifting only 20 pounds. He relies on the workers' compensation "Schedule for Rating Permanent Disabilities" from 1997 and "Guidelines for Work Capacity" from 1997 to 2004, which defined a restriction precluding "Heavy Lifting, Repeated Bending and Stooping" to mean the employee has lost approximately half his pre-injury ability. Because Gulley could have lifted 200 pounds before his injury and bent and stooped an unlimited number of times a day, he was only precluded from lifting over 100 pounds and precluded from bending and stooping for just a small part of the day. Since he was never required to lift more than 50 pounds as a Water System Equipment Operator, he argues he was able to perform the essential functions of the position.

The main problem with this argument is that these guidelines long predated Gulley's injuries and Dr. Kanter's permanent restrictions, and Gulley has offered no evidence that the current guidelines contained a similar definition. To the

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[2] Gulley suggests that heavy lifting, bending, and stooping are not essential functions, but the "means by which the essential functions are to be performed." He has offered no evidence to rebut the City's evidence that these functions were in fact essential to the Water System Maintenance Operator position.

contrary, the City's Worker's Compensation Analyst testified there is *no* corresponding definition of "heavy lifting" under the 2017 law. Gulley also did not offer any evidence that he ever shared this specific interpretation of his restrictions with anyone at the City, even when given two opportunities to do so. (See *Nadaf-Rahrov v. Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 986 (*Nadaf-Rahrov*) [" '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 . . . ."].)

Even if we accepted Gulley's reliance on outdated worker's compensation guidelines, he failed to offer any evidence that he could lift over 20 or 25 pounds or repeatedly bend and stoop. At best, he testified based on the workers' compensation guidelines that he was "only limited me from lifting more than 100 pounds, and not to bend and stoop for just a small part of the day." He also testified his "job never required me to lift over 50 pounds by myself, and I only occasionally bent or stooped," which suggested he was still required to lift up to 50 pounds and to bend and stoop. When discussing the meetings he had with the City, he stated only that he was "allowed" to lift up to 100 pounds, not that he *could*. In response to an interrogatory from the City, Gulley admitted, "I also need an accommodation for the Water System Equipment Operator, to avoid heavy lifting."[3]

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[3] For the first time at oral argument, Gulley's counsel pointed to statements buried in a separate part of Gulley's lengthy declaration describing his qualifications for other positions with the City. He claimed that he could perform the requirements of these different positions because he was "able,

He further testified he told City officials he "could still do my regular job," and requested he be placed where he had been working for the past four months "doing all the work the other workers were doing." But the undisputed evidence showed he was being temporarily accommodated in that position due to his prior injury. When his restrictions became permanent, the City was not required to eliminate the essential functions of lifting up to 50 pounds and frequent bending and stooping to accommodate his restrictions. (*Nealy, supra,* 234 Cal.App.4th at p. 375 ["[E]limination of an essential function is not a reasonable accommodation."].)

Additionally, the undisputed evidence demonstrated City officials reasonably interpreted his "heavy lifting" restriction as precluding him from lifting more than 25 pounds. Though Dr. Kanter did not define "heavy lifting," he noted Gulley was already restricted from "lifting more than 20 pounds and no repetitive bending or shoveling as directed by [his doctor]," and he concluded Gulley had reached his "maximum medical improvement." Dr. Kanter further reported that Gulley did "not feel he can work anymore. Even with the self-modifications, his

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even with my restrictions, to lift 'up to 100 pounds' "; that he could "safely lift and carry street maintenance equipment up to 60 pounds"; and that "[l]ifting 10-25 pounds, is not a problem for me, as I am able to lift up to 100 pounds." Aside from not citing or discussing these statements in his appellate briefs, these statements clearly refer to the inapplicable workers' compensation guidelines. He also has not explained how these statements relate to the Water System Equipment Operator position specifically, or how they square with Dr. Kanter's report, Gulley's medical history, or his admitted need for accommodation in that position.

lumbosacral spine is hurting him too much." Also, Gulley "complains of constant pain" and "[h]eavy lifting or bending exacerbates this condition." He "has constant slight pain, increasing to moderate with heavy lifting, and repetitive bending and stooping." And he was limited in his physical activities—on the scale of 0 to 10 with 0 meaning full ability to perform and 10 meaning no ability to perform, his ability to lift a 10-pound bag was a "4"; his ability to walk one block was a "4"; his ability to sit or stand for half an hour was a "5"; his ability to do activities of daily living was a "7"; and his ability to do jobs around the house was a "7." Based on this report, the City reasonably concluded that Gulley was precluded from lifting more than 20 or 25 pounds and could not repetitively bend and stoop, all of which were essential functions of the Water System Equipment Operator position.[4]

On this record, the undisputed evidence showed that Gulley could not perform the essential functions of Water System Equipment Operator, so summary judgment was proper.

b. Reassignment to Vacant Positions

Reasonable accommodation may include " 'reassignment to a vacant position' if the employee cannot perform the essential functions of his or her position even with accommodation." (*Nealy, supra,* 234 Cal.App.4th at p. 377; see *Nadaf-Rahrov,*

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[4] Baute and Human Resources Director Matthew Doyle stated in their declarations that Dr. Kanter's restrictions meant Gulley was "totally precluded" from "heavy lifting and repetitive bending and stooping." Though Dr. Kanter's report does not use the word "totally," Baute's and Doyle's interpretation was reasonable and did not change the nature of Gulley's restrictions in any way.

supra, 166 Cal.App.4th at p. 963; Gov. Code, § 12926, subd. (p)(2); Cal. Code Regs., tit. 2, §§ 11065, subd. (p)(2)(N), 11068, subd. (d)(1)(A).) But an employer need not reassign an employee as an accommodation if " 'there simply was no vacant position within the employer's organization for which the disabled employee was qualified and which the disabled employee was capable of performing with or without accommodation . . . .' " (*Nealy, supra,* at p. 378.)

Gulley contends that he was qualified for six open positions as reasonable accommodations. However, he has inadequately briefed this issue on appeal. In his opening brief, he merely references the six positions for which he claims he was qualified and could perform the essential functions. He offers no analysis of any of those positions or his qualifications or restrictions relative to them; he simply points us to 25 pages of the trial court record containing the City's descriptions for each job, and 17 pages of his declaration submitted in opposition to summary judgment purporting to explain why he was qualified for them. His reply brief also contains no analysis, but additionally refers us to his *49-page* opposition to the City's summary judgment motion, "where Gulley listed each of those six jobs, with each of their qualifications and with the essential functions, and Gulley fully and completely detailed why he was qualified, and why he could do the essential functions of each of those six jobs."

" 'Appellate briefs must provide argument and legal authority for the positions taken. "When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived." ' [Citation.] 'We are not bound to develop appellants' argument for them. [Citation.] The absence of cogent legal

argument or citation to authority allows this court to treat the contention as waived.' " (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956.) " 'The appellant may not simply incorporate by reference arguments made in papers filed in the trial court, rather than briefing them on appeal.' " (*Salehi v. Surfside III Condominium Owners Assn.* (2011) 200 Cal.App.4th 1146, 1162.)

On appeal from summary judgment in particular, we need not " 'cull the record for the benefit of the appellant in order to attempt to uncover the requisite triable issues. As with an appeal from any judgment, it is the appellant's responsibility to affirmatively demonstrate error . . . .' [Citation.] 'While [the moving party] had the burden of proving its right to summary judgment below, on appeal, [the opposing party], as the appellant, bears the burden of showing error. [Citation.] In the absence of such a showing, we presume the judgment is correct.' " (*Claudio v. Regents of University of California* (2005) 134 Cal.App.4th 224, 252.)

These rules are particularly vital here because the issue of whether any of the six positions was a reasonable accommodation is intensely fact-based. Gulley had to show he was qualified for the six jobs and his restrictions would have enabled him to perform the essential functions of the positions. (See *Atkins, supra,* 8 Cal.App.5th at p. 722.) Other considerations include whether placing him in any of these positions would have amounted to a promotion or creation of a new position for him, which the City was not required to do. (See *Nealy, supra,* 234 Cal.App.4th at p. 377 [reassignment not reasonable if employee is not qualified for open position, cannot perform essential functions even with accommodation, or would require a promotion or

creation of new position].) Gulley was required to support his arguments with reasoned analysis of the facts and the law. We decline to hunt through the record to craft his arguments for him.

3. Disability Discrimination

To establish disability discrimination under the FEHA, an employee must show that he or she "(1) suffered from a disability, (2) was otherwise qualified to do his or her job, and (3) was subjected to adverse employment action because of the disability." (*Nealy, supra,* 234 Cal.App.4th at p. 378.) An employee is qualified to do a job if he or she is "able to perform the essential functions of his or her job, with or without reasonable accommodation." (*Ibid.*; see *Green v. State of California* (2007) 42 Cal.4th 254, 267.) That requires the same showing as a claim for failure to reasonably accommodate a disability. (*Nealy, supra,* at p. 378.)

For reasons we have explained, Gulley failed to raise a triable issue of fact over whether he could perform the essential functions of the Water Systems Equipment Operator position with or without accommodation. As a result, he has not raised a triable issue of fact with regard to his disability discrimination claim. Summary judgment on this claim was proper.

4. Interactive Process

The FEHA requires an employer to engage in an " 'good faith interactive process with the disabled employee to explore the alternatives to accommodate the disability.' " (*Nealy, supra,* 234 Cal.App.4th at p. 379; see Gov. Code, § 12940, subd. (n).)[5]

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[5] The City contends this is not a stand-alone claim under the FEHA. That is plainly incorrect. (*Wilson v. County of Orange* (2009) 169 Cal.App.4th 1185, 1193 ["An employer's failure to

" ' "[T]he interactive process requires communication and good-faith exploration of possible accommodations between employers and individual employees" with the goal of "identify[ing] an accommodation that allows the employee to perform the job effectively." [Citation.] . . . [F]or the process to work "[b]oth sides must communicate directly, exchange essential information and neither side can delay or obstruct the process." [Citation.] When a claim is brought for failure to reasonably accommodate the claimant's disability, the trial court's ultimate obligation is to " 'isolate the cause of the breakdown . . . and then assign responsibility' so that '[l]iability for failure to provide reasonable accommodations ensues only where the employer bears responsibility for the breakdown.' " ' " (*Nadaf-Rahrov, supra,* 166 Cal.App.4th at pp. 984-985.)

To prevail on a claim that the employer failed to engage in this process, an employee "must identify a reasonable accommodation that would have been available at the time the interactive process occurred. [Citations.] 'An employee cannot necessarily be expected to identify and request all possible accommodations during the interactive process itself because " ' "[e]mployees do not have at their disposal the extensive information concerning possible alternative positions or possible accommodations which employers have. . . ." ' " ' [Citation.] But the employee should be able to identify specific, available reasonable accommodations through the litigation process, and particularly by the time the parties have conducted discovery and reached the summary judgment stage." (*Nealy, supra,* 234

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engage in [the interactive] process is a separate FEHA violation."].)

Cal.App.4th at p. 379; see *Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1019; *Nadaf-Rahrov, supra,* 166 Cal.App.4th at p. 980.)

This claim fails because Gulley did not demonstrate a reasonable accommodation was available to him. With regard to the Water System Equipment Operator position, Gulley offered no evidence his restrictions could have been reasonably accommodated without eliminating essential functions of the position. As for the City's failure to assign Gulley to a vacant position, Gulley forfeited his claim that the City failed to reasonably accommodate his disability through reassignment to one of six open positions. As a result, summary judgment on his interactive process claim was proper.

5. "Wrongful Termination" Under the FEHA

Gulley alleged a separate claim captioned "Wrongful Termination/Adverse Employment Action in Violation of FEHA (GC §12940 et seq.)." The City moved for summary judgment on this claim on the ground that Gulley was actually alleging a common law tort claim for wrongful termination in violation of public policy, which is not cognizable against a public employer. (See *Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876, 899.) The trial court construed the claim as one for retaliation under the FEHA and granted summary judgment because Gulley failed to offer any evidence he engaged in protected activity. (See *Nealy, supra,* 234 Cal.App.4th at p. 380 [FEHA retaliation claim requires showing employee engaged in protected activity].)

On appeal, Gulley continues to characterize this claim as arising directly under the FEHA, not under the common law, but does not contend it is based on retaliation. Instead, he briefly

argues this claim is cognizable because his termination was pretextual for disability discrimination. That merely duplicates his other claims for disability discrimination and failure to accommodate. Because we have found summary judgment proper on these claims, summary judgment was proper on his "wrongful termination" claim as well.

DISPOSITION

The judgment is affirmed. Respondent is awarded costs on appeal.

HALL, J.*

WE CONCUR:

BIGELOW, P. J.

GRIMES, J.

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