Filed 5/18/12 Robinson v. The City of Los Angeles CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

STEVEN L. ROBINSON, Plaintiff and Appellant, v. CITY OF LOS ANGELES et al., Defendants and Respondents.	B230078 (Los Angeles County Super. Ct. No. BC427150)

APPEAL from an order of the Superior Court of Los Angeles County. Mark V. Mooney, Judge. Affirmed.

Law Offices of Joseph Y. Avrahamy and Joseph Y. Avrahamy for Plaintiff and Appellant.

Carmen A. Trutanich, City Attorney, Claudia McGee Henry, Assistant City Attorney, and Gregory P. Orland, Deputy City Attorney, for Defendants and Respondents.

When plaintiff Steven L. Robinson, a firefighter and fire department helicopter pilot employed by defendant City of Los Angeles (the City), became disabled, the City employed him in an unofficial and unbudgeted light-duty position for more than six years, paying him out of the fire department's discretionary funds. When the fire department was ordered to dissolve all unbudgeted positions, the City moved Robinson to the job of dispatcher, at 25 percent less pay. He sued the City under the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.)[1] for disability discrimination, failure to reasonably accommodate his disability (§ 12940, subd. (m)), and failure to engage in a good faith interactive process (§ 12940, subd. (n)). The trial court granted summary judgment in favor of the City, and Robinson appeals. We conclude that summary judgment was proper, and affirm.

FACTS

Robinson was employed by the City as a firefighter and fire department helicopter pilot. His civil service classification was Firefighter III, and he received the base salary due the classification plus a 25 percent hazard bonus given to pilots. On March 23, 1998, Robinson was involved in an on-duty helicopter crash that left him permanently disabled and unable to obtain the Federal Aviation Administration (FAA) medical clearance necessary to be a pilot.

From approximately 2001 to 2007, former Fire Chief William Bamattre approved placement of Robinson in a light duty position developing the fire department's Incident Mapping Unit, commonly referred to as the GIS System, receiving the same base salary and pilot hazard pay bonus. The GIS System is a sophisticated system that uses advanced technology such as digital mapping, high definition cameras, thermal video imagery and software integration to predict the course of brush fires and plan emergency responses. There is no dispute that the GIS System was valuable to the fire department, but annual

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

attempts by Chief Bamattre to obtain approval and budgeting from the City for the program failed.

In 2007 the City Administrative Officer ordered now Fire Chief Douglas Barry to place all light duty personnel currently in unbudgeted positions into budgeted positions. Accordingly, Robinson participated in the fire department's reasonable accommodation interactive process and was placed as a dispatcher, retaining his Firefighter III civil service classification and salary but no longer receiving the pilot hazard pay bonus.

Robinson then filed this FEHA lawsuit, alleging causes of action for disability discrimination, failure to offer reasonable accommodations, and failure to engage in an interactive process to identify a reasonable accommodation. (§ 12940, subds. (a), (m), (n).) Although he admittedly could no longer fly, he alleged the City refused to transfer him to the position of fire helicopter pilot or place him as a captain in any of several other positions. Robinson alleged the City's explanation—that he was not qualified for these positions—was pretextual, as evidenced by the cases of John Gibbs and Glen Smith, both pilots who could not fly for medical reasons but were nevertheless classified as fire helicopter pilots.

The City moved for summary judgment, arguing, as pertinent here, that Robinson was not qualified for the only position he sought that actually existed—fire helicopter pilot. It argued that the other position Robinson sought—GIS mapping at Air Operations—did not exist. It supported the motion with a 2008 City Civil Service Commission memorandum indicating that a fire helicopter pilot was required to have an FAA medical certificate permitting him or her to pilot helicopters, and with the declaration of Chief Bamattre, who stated that Robinson's former light duty position in Air Operations was not budgeted and no longer existed.

Rebutting Robinson's allegation that permanently disabled pilots such as John Gibbs and Glenn Smith could be classified as fire helicopter pilots, the City presented the declarations of Gibbs, Smith and Cynthia White, a senior personnel analyst, for the City. This evidence indicated Gibbs and Smith were permitted to remain classified as fire helicopter pilots only so long as their medical conditions were deemed to be temporary.

When the medical conditions were deemed permanent they were told to begin the process of looking for another position, and Smith was ultimately offered a different assignment and the rank of captain. Neither individual was actually transferred, however, as Gibbs went on sick leave until his retirement and Smith took indefinite injured-on-duty leave.

Robinson opposed the motion. He argued triable issues existed as to whether he was qualified to be classified as a fire helicopter pilot because (1) the position was specifically intended to accommodate injured pilots who could no longer fly and (2) Gibbs and Smith were fire helicopter pilots even though they could not fly. He also argued triable issues existed as to whether the GIS position had in fact been created. He supported the opposition with a 2007 memorandum authored by Assistant Chief Patrick Butler recommending that a limited duty officer position be created to accommodate pilots who became disabled and could no longer fly. Robinson also provided excerpts from the deposition testimony of Gibbs and Smith, both of whom testified that for a time they were classified as fire helicopter pilots even though they could no longer fly. (Robinson did not dispute that Gibbs's and Smith's classification was terminated once their medical disabilities were deemed permanent.) Finally, Robinson himself declared he had learned that the GIS mapping system remained in use after he left his GIS position, headed by Thomas Gikas, a captain.

The trial court granted the City's motion for summary judgment, finding there were no triable issues as to whether a light duty assignment for helicopter pilots existed or whether Robinson was qualified to be classified as a fire helicopter pilot.

Judgment was entered in the City's favor on November 29, 2010. Robinson filed a timely appeal from the judgment on January 7, 2011.

DISCUSSION

1. Standard of Review

In ruling on a defense motion for summary judgment, the trial court must determine whether the motion presents material facts sufficient to establish that one or more of the elements of the claim cannot be proved, or that there is a complete defense to the cause of action. (Code Civ. Proc., § 437c, subds. (c), (o)(1) & (o)(2).) If the

defendant's motion makes such a prima facie showing, the plaintiff's opposition must demonstrate the existence of one or more disputed issues of material fact as to the cause of action or defense. (Code Civ. Proc., § 437c, subd. (p)(2).) Unless issues of material fact exist, no trial is required and the defendant is entitled to judgment on that claim as a matter of law.

On appeal, we apply an independent standard of review to determine whether a trial is required—whether the evidence favoring and opposing the summary judgment motion would support a reasonable trier-of-fact's determination in the plaintiff's favor on the cause of action or defense. (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 850, 859.) In doing so we view the evidence in the light most favorable to the party opposing summary judgment. (*Id*. at p. 843; *Alexander v. Codemasters Group Limited* (2002) 104 Cal.App.4th 129, 139.) We accept as true the facts shown by the evidence offered in opposition to summary judgment, and the reasonable inferences that can be drawn from them. (*Spitzer v. Good Guys, Inc*. (2000) 80 Cal.App.4th 1376, 1385.)

2. FEHA

FEHA "prohibits employment discrimination based on a physical disability. [Citations.]" (*Colmenares v. Braemar Country Club, Inc*. (2003) 29 Cal.4th 1019, 1022.) Thus an employer may not, because of an employee's physical disability, discriminate against the employee "in terms, conditions, or privileges of employment." (§ 12940, subd. (a).) The employer may, however, discharge an employee with a physical disability "where the employee, because of his or her physical . . . disability, is unable to perform his or her essential duties even with reasonable accommodations . . . ." (*Id*., subd. (a)(1).)

FEHA also makes it unlawful for an employer "to fail to make reasonable accommodation for the known physical . . . disability of an applicant or employee," except where the employer demonstrates an accommodation would "produce undue hardship to its operation." (§ 12940, subd. (m).) Additionally, it is unlawful for an employer "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 . . . disability . . . ." (*Id*., subd. (n).) Each of these unlawful employment practices gives rise to a separate cause of action. (*Gelfo v. Lockheed Martin Corp*. (2006) 140 Cal.App.4th 34, 54.)

To establish a prima facie case of physical disability discrimination under FEHA, the employee must demonstrate that although he is disabled, he is otherwise qualified to do the job and was subjected to an adverse employment action because of the disability. (*Faust v. California Portland Cement Co*. (2007) 150 Cal.App.4th 864, 886.) To establish that he is qualified, the employee must show he can perform the essential functions of the job with or without reasonable accommodation. (*Green v. State of California* (2007) 42 Cal.4th 254, 260-261.) If this burden is met, the employer must show it possessed a legitimate, nondiscriminatory reason for its employment decision. (*Deschene v. Pinole Point Steel Co.* (1999) 76 Cal.App.4th 33, 44.) If it does so, the burden shifts back to the employee to produce substantial evidence that employer's justification for its decision was either untrue or pretextual or that the employer acted with discriminatory animus. (*Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1004-1005.)

The elements of a failure to accommodate claim are similar. The plaintiff must establish that he suffers from a disability covered by FEHA and that he is a qualified individual, i.e., that he can perform the essential functions of the position to which reassignment is sought. But the employee need not establish that an adverse employment action was caused by the employee's disability. Under FEHA, "the employer's failure to reasonably accommodate a disabled individual is a violation of the statute in and of itself. [Citation.]" (*Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 256.) "'Ordinarily, the reasonableness of an accommodation is an issue for the jury.' [Citation.]" (*Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 954.) "While a claim of failure to accommodate [under subdivision (m)] is independent of a cause of action for failure to engage in an interactive dialogue [under subdivision (n)], each necessarily implicates the other." (*Gelfo, supra*, 140 Cal.App.4th at p. 54; see also § 12940, subds. (m) & (n).)

"Section 12940, subdivision (m) provides that it is an unlawful employment practice '[f]or an employer or other entity covered by this part to fail to make reasonable accommodation for the known physical . . . disability of an applicant or employee.' 'Two principles underlie a cause of action for failure to provide a reasonable accommodation. First, the employee must request an accommodation. [Citation.] Second, the parties must engage in an interactive process regarding the requested accommodation and, if the process fails, responsibility for the failure rests with the party who failed to participate in good faith. [Citation.]' [Citations.]" (*Avila v. Continental Airlines, Inc.* (2008) 165 Cal.App.4th 1237, 1252.)

"Generally, '"[t]he employee bears the burden of giving the employer notice of the disability. [Citation.] This notice then triggers the employer's burden to take 'positive steps' to accommodate the employee's limitations. . . . [¶] . . . The employee, of course, retains a duty to cooperate with the employer's efforts by explaining [his or] her disability and qualifications. [Citation.] Reasonable accommodation thus envisions an exchange between employer and employee where each seeks and shares information to achieve the best match between the [employee's] capabilities and available positions." [Citation.]' [Citation.]" (*Raine v. City of Burbank* (2006) 135 Cal.App.4th 1215, 1222 (*Raine*).)

"FEHA does not obligate an employer to choose the best accommodation or the specific accommodation a disabled employee or applicant seeks. [Citation.] It requires only that the accommodation chosen be 'reasonable.' (§ 12940, subds. (a) & (m).) Although FEHA does not define what constitutes 'reasonable accommodation' in every instance, examples provided in the statute itself and the regulations governing its implementation include job restructuring, part-time or modified work schedules or 'reassignment to a vacant position.' [Citations.]" (*Raine, supra,* 135 Cal.App.4th at pp. 1222-1223.)

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. [Citation.] A reassignment, however, is not

required if 'there is no vacant position for which the employee is qualified.' [Citations.]" (*Raine*, *supra*, 135 Cal.App.4th at p. 1223.) Moreover, "[t]he responsibility to reassign a disabled employee who cannot be otherwise accommodated does 'not require creating a new job, moving another employee, promoting the disabled employee, or violating another employee's rights . . . .'" (*Spitzer v. Good Guys, Inc*., *supra*, 80 Cal.App.4th at p. 1389; see also *McCullah v. Southern Cal. Gas Co*. (2000) 82 Cal.App.4th 495, 501 [employer not "required to create new positions or 'bump' other employees to accommodate the disabled employee"].)

3. On this record, reasonableness of the accommodation can be determined as a matter of law.

Robinson sought to impose liability on the City for its refusal to place him in a fire helicopter pilot position due to his disability, and for its failure to offer reasonable accommodations or engage in an interactive process to identify those accommodations. (§ 12940, subds. (a), (m), (n).)

FEHA provides that an employer's refusal to hire a candidate due to a physical handicap or medical condition (among other things) constitutes unlawful discrimination. The candidate, however, must be qualified for the position he or she seeks. The employer cannot be liable for refusing to hire a candidate based upon a bona fide occupational qualification, where the candidate "is unable to perform his or her essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger his or her health or safety or the health or safety of others even with reasonable accommodations." (§ 12940, subd. (a)(1).)

According to the City, Robinson's admitted inability to pilot helicopters demonstrated he was not qualified to be a fire helicopter pilot, which precluded him from establishing unlawful discrimination. (*Quinn v. City of Los Angeles* (2000) 84 Cal.App.4th 472, 480 [to establish prima facie case for discrimination under the FEHA, plaintiff must prove he was qualified for position sought]; see *Guz v. Bechtel National, Inc*. (2000) 24 Cal.4th 317, 354.) The trial court agreed, finding no triable issue existed

as to whether Robinson was qualified for the only existing position he sought—fire helicopter pilot.

Determining the essential qualifications for the firefighter job and the appropriate objective criteria for meeting those qualifications are unquestionably within the City's discretion. (*Quinn v. City of Los Angeles, supra,* 84 Cal.App.4th at p. 482 [it is within discretion of city police department to set physical criteria for its hiring process]; *Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 76 [employee's subjective opinion of competence for position does not raise genuine issue of material fact as to essential qualifications for job].) The City offered substantial evidence that the Civil Service Commission and Los Angeles City Council created the fire helicopter pilot classification in 2008, five years after Robinson's disability was deemed to be permanent. One requirement of the classification was that a pilot be able to fly helicopters. Robinson offered no evidence that the City's exercise of its discretion in fixing its hiring criteria was defective or improper in any way, and it was undisputed he could no longer fly helicopters. Thus, Robinson could not establish a prima facie case for FEHA discrimination.

Robinson contends a triable issue exists as to whether the ability to pilot a helicopter truly is a requirement for classification as a fire helicopter pilot. He argues that by creating the fire helicopter pilot classification the City intended also to create a civil service position, which he denominates limited duty officer, to help in the reasonable accommodation of injured pilots by transferring them to nonflight positions as fire captains. No evidence supports the argument.

No limited duty officer position was ever created within the fire helicopter pilot classification by the commission or city council. A limited duty officer position was *proposed* by a fire department workgroup in 1998 and by Assistant Chief Butler in 2007, but the concept was rejected by Chief Barry. He declared: "During the development of the Civil Service Classification of 'Fire Helicopter Pilot', there was a proposal that any disabled members of the class be accommodated . . . as Fire Captains. As Fire Chief, I never authorized that this proposal be adopted as LAFD policy. I would have considered

the accommodation of Fire Helicopter Pilots to Fire Captain on a case by case basis, based upon a review of the employee's background and whether he possessed sufficient additional experience to make up for his lack of formal training. Candidates for Fire Captain are normally required to undergo a competitive civil service examination process, including oral and written examinations. I would not have authorized the accommodation of an employee as a Fire Captain based solely on the experience of being a pilot, as I do not believe they would be qualified. This includes plaintiff."

Robinson cites no evidence—other than temporal proximity between the 2007 Butler memorandum and the 2008 institution of a fire helicopter pilot classification—that when the city council adopted the fire helicopter pilot classification in 2008, it did so to accommodate disabled pilots. On the contrary, if the City had intended the new classification to be a conduit for transfer of disabled pilots to nonflight positions it would not have required that those in the classification hold FAA medical certificates. In fact, the scheme Robinson proposes would be wholly unnecessary, because if the City wanted to accommodate disabled pilots by transferring them to nonflight positions as captains—without requiring that they go through the written and oral examination process to actually qualify for that rank—it could do so without the artifice of first transferring them to the fire helicopter pilot classification.

Robinson observes that shortly before the fire helicopter pilot classification was approved, his name appeared on a list of 16 pilots who would be transferred into the new classification. But it is undisputed that his name was removed when Chief Barry pointed out to the City's personnel department that Robinson was no longer a pilot. The temporary, mistaken belief by the City that Robinson would be reclassified is not evidence either that he was actually qualified for the new classification or that the City's refusal to reclassify him constituted discrimination. (*Quinn v. City of Los Angeles, supra*, 84 Cal.App.4th at p. 484 [the City's rectification of a mistaken belief that a candidate is qualified for a position does not constitute discrimination].)

Robinson argues the City's offer to transfer Glenn Smith, who was permanently disabled but nevertheless a fire helicopter pilot, to a nonflight position with the rank of

captain constitutes evidence that a disabled pilot can be reassigned to a nonflight position with the rank of captain. But according to both Smith and White, when Smith was first classified as a fire helicopter pilot he was not disabled, but rather, as he declared, "perform[ed] all of the duties [and] responsibilities and held all certifications necessary to fulfill the minimum qualifications for the position." He became disabled after entering the classification. He was then enrolled in the City's interactive accommodation process and was ultimately offered a nonflight position in a different classification.

Smith's example does not mean that City must place an already permanently disabled former pilot into a pilot position for the sole purpose of then reassigning him to a nonflight position, with a higher rank. (See *Hastings v. Department of Corrections* (2003) 110 Cal.App.4th 963, 976-977 [where an employee works for a public entity that has its own competitive examination process, the employee "is not entitled as an accommodation to reassignment to a position in a different . . . classification, without complying with [that process]"].)

No triable issue exists as to whether Robinson was qualified to be a fire helicopter pilot or fire captain, or whether a limited duty officer position existed within that classification.

Robinson also contends a triable issue exists as to whether the light duty, GIS mapping position he held for six years after the crash developed into a created position into which he should have been placed permanently. We disagree.

Robinson concedes that an officially created and budgeted GIS never existed. As stated, FEHA does not require that a disabled employee be reassigned to a particular position if "'there is no vacant position for which the employee is qualified.' [Citations.]" (*Raine*, *supra*, 135 Cal.App.4th at p. 1223.) "The responsibility to reassign a disabled employee who cannot be otherwise accommodated does 'not require creating a new job, moving another employee, promoting the disabled employee, or violating another employee's rights . . . .'" (*Spitzer v. Good Guys, Inc.*, *supra,* 80 Cal.App.4th at p. 1389.)

Robinson contends sufficient evidence existed that the GIS task "developed into a created position," as he argues occurred in *Wellington v. Lyon County School Dist.* (9th Cir. 1999) 187 F.3d 1150 (*Wellington*).) We presume Robinson means that under some circumstances a temporary position may be deemed to have become a de facto permanent position.

In *Wellington*, a school district maintenance employee developed carpal tunnel syndrome resulting from performance of his work duties. (*Wellington*, *supra*, 187 F.3d at pp. 1151-1152.) Unable to continue in his maintenance position, he was placed in a temporary safety officer position, where he worked until that position was dissolved several months later. He was given no other accommodation and his employment was terminated. (*Id*. at p. 1153.) Before and after dissolution of the temporary safety position, the school board met to discuss whether a permanent safety position should be created, reaching no resolution.

In reversing summary judgment for the school district, the Ninth Circuit held substantial evidence existed that the school district had in fact created a permanent safety position prior to the employee's termination. A job description for the position had been drafted and the district superintendent had been authorized by the district's board of trustees to hire someone for that position. When asked in his deposition whether a light duty safety aide job had been created, the superintendant responded: "'Position was created.'" Comments the superintendant made during school board meetings also suggested that such a position may have been created. When asked by a board member whether he was creating a safety position, the superintendant responded, "'One way or another we are creating a job.'" In a subsequent meeting a board member asked: "'[A]re we going to go ahead and look for someone for that position or are we going to handle this? We literally made a position there, didn't we?'" The superintendent "acknowledged the importance of the proposed safety position by affirmatively responding: [¶] 'Oh, I think we are eventually going to find a person for that position because it is an important position. It is not a program that's going to go away. We have to have a safety program . . . ." The Ninth Circuit found that the transcripts of the board

meetings and the superintendent's deposition raised an issue of fact as to whether the safety position was created prior to the employee's termination. (*Wellington*, *supra*, 187 F.3d at p. 1156.)

Robinson observes that the City's GIS mapping position was analogous to the safety position in *Wellington* because both were deemed to be important, and according to *Wellington*, the high importance of a position is "evidence that the job was in fact created." We disagree. Although in *Wellington* the Ninth Circuit noted that the superintendant had "acknowledged the importance of the proposed safety position," nowhere did it hold that importance itself constituted evidence that the position actually existed. The evidence, the court stated, was found in "[c]omments made" during school board meetings that suggested the position may have been created. (*Wellington*, *supra*, 187 F.3d at p. 1156.) Although one of those comments was that the position was important, the Ninth Circuit did not identify the comment as particularly probative, much less explain why it would be. Nor need it have, as the superintendant had also stated the position was "created," and he "was going to find a person" for it, comments that needed no elaboration and were sufficient on the creation issue. (*Ibid*.) No principle or precedent suggests that a temporary position could be deemed permanent simply because it added value to the employer.

Robinson argues that Chief Barry ultimately decided not to formalize the GIS position because to do so would set a bad precedent, which itself is evidence "that the GIS position developed into a created position." The argument is without merit.

Chief Barry testified in deposition that when he was instructed to dissolve all nonbudgeted positions, he asked his staff what options were available regarding Robinson. Staff reported back that the salary for a GIS mapper would be significantly less than what Robinson was earning, given that hazard pilot pay would not be available. Barry testified the "deciding factor" for him in no longer seeking official funding for the position was that he could not offer specially created positions for all employees who became injured, and to do so for Robinson would be inconsistent and unfair, and would set a bad precedent.

In the last paragraph of its analysis in *Wellington*, the Ninth Circuit stated, without explanation or citation to authority, that the employee "might establish at trial that although the safety position was not actually created, the reason that the School District did not follow through on its initial decision to do so was Wellington's disabled status and the feared adverse reaction of his fellow employees. This too, if proven, could provide a basis for a reasonable jury's concluding that the School District failed to make a reasonable accommodation." (187 F.3d at p. 1156.)

Keying in on this paragraph, Robinson argues that refusal to create a position for fear of setting a bad precedent is evidence that the position "developed into a created position." We disagree. First, refusal to create a position, for whatever reason, is not evidence that the position was created. Second, we do not read *Wellington* as holding that an employer must create a new position if its only reason not to do so is the "feared adverse reaction of" other employees. Such a holding would contravene the well established rule that an employer has no duty to create a new position to accommodate a disabled employee. (*Raine*, 135 Cal.App.4th at p. 1227.)

In *Raine*, the defendant municipal employer reassigned a police officer to a temporary light-duty position to accommodate his injury while it healed. (135 Cal.App.4th at p. 1218.) The employee remained in that position for six years, until his physician advised the employer the disability was permanent. (*Ibid*.) The employer had no available permanent position for a sworn police officer with the employee's qualifications, and offered him a desk position as a civilian police technician. (*Id*. at p. 1219.) The employee declined the offer, took disability retirement, and sued the employer under FEHA, contending the employer failed to reasonably accommodate his limitations by making his temporary position permanent. (*Raine*, *supra*, 135 Cal.App.4th at p. 1219.) The court, affirming summary judgment in the employer's favor, held the employer had no obligation under FEHA to make the temporary light-duty position available indefinitely once the employer learned the disability was permanent. (*Raine*, *supra*, 135 Cal.App.4th at pp. 1217-1218.) The employee was entitled to a reasonable accommodation only, which might include reassignment if a vacant position were open;

but the employer was not required to create a new sworn officer position of front desk officer by making a temporary position permanent. (*Id*. at p. 1227.)

If the Ninth Circuit had intended to reverse this well established rule, it would have done so explicitly and explained its reasoning. The better reading of *Wellington* is that once the school district decided to create a new position to accommodate a disabled employee, it could not reverse that decision if its only reason for doing so was fear of setting a bad precedent. Although we would perhaps be uncomfortable even with this rule, the matter is of no moment here because Robinson does not dispute that neither the city council nor the civil service commission ever decided even preliminarily to create the GIS position he sought.

Robinson also argues that the City's continued funding of the GIS position after he left it, and the employment of a nondisabled employee—a captain—in it, is evidence the position was actually created. The argument is without merit, as no evidence suggested the GIS "position" continued to be funded by the City. (All the evidence is to the contrary.) Robinson relies on his own declaration that he learned during a meeting held to discuss development of a vehicle that could be used for GIS mapping, that a captain was in charge of "the project." A "project" is not a "position," and no evidence indicates the City ever knowingly funded any GIS related work.

Robinson did not and cannot establish a prima facie case of FEHA discrimination because he cannot show that he was qualified for any existing position he sought. Accordingly, we affirm the trial court's grant of summary judgment.

4. The City's alleged failure to engage in interactive process.

To prevail "on a claim under section 12940, subdivision (n) for failure to engage in the interactive process, an employee must identify a reasonable accommodation that would have been available at the time the interactive process should have occurred." (*Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1018.)

Here, Robinson has not identified any reasonable accommodation for his disability other than the one offered by the City, i.e., as dispatcher. His interactive process claim therefore fails.

5. Claim of disability discrimination.

In view of the absence of a triable issue on Robinson's claims for failure to accommodate and failure to engage in the interactive process, his claim of disability discrimination likewise fails.

DISPOSITION

The judgment is affirmed. The parties shall bear their respective costs on appeal.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

MALLANO, P. J.

ROTHSCHILD, J.