

One Minute Memo[®]



Court of Appeal Gives Favorable Guidance To Employers On Temporary Light-Duty Assignments And Essential Job Functions

In *Lui v. City & County of San Francisco*, the Court of Appeal found that the California Fair Employment and Housing Act (“FEHA”) does not obligate a police department to accommodate an officer by excusing him from the performance of essential job functions. The Court of Appeal also held that strenuous job duties are essential functions of a police officer’s job, even in administrative positions and even if the officer does not frequently engage in those activities.

The Facts

The Plaintiff, Kenneth Lui, was an officer with the San Francisco Police Department. In 2006, a heart attack and a diagnosis of coronary artery disease led Officer Lui to take 11 months of paid disability leave. He returned to work in a temporary modified duty (“TMD”) assignment, pursuant to a Department General Order (“DGO”), performing light-duty work in the records room. The DGO permitted no permanent light-duty assignments, and limited TMD to one year.

When his TMD assignment drew to a close, Lui sought to return to full duty. The Department required that he be able to perform the essential functions of a full-duty police officer position as described in the Department’s “Sworn Members Essential Job Functions” list (“EJF List”). Lui’s heart condition, however, made him unable to engage in the strenuous physical activity needed to perform certain functions on the EJF List.

The Department offered to identify for Lui some vacancies in positions that were not sworn officer positions. Lui rejected this offer and decided to retire. He then sued the City and County of San Francisco, alleging disability discrimination and failure to provide a reasonable accommodation, in violation of the FEHA.

The Trial Court’s Decision

Following a bench trial, the trial court ruled in favor of the Department, finding that although the duties on the EJF List were more typically performed by active patrol officers, the duties were also essential to officers in administrative positions, because the Department had a legitimate need to be able to deploy those officers in the event of emergencies and other mass mobilizations. Lui appealed.

The Court of Appeal’s Opinion

The Court of Appeal affirmed the trial court, finding that substantial evidence supported the Department’s position. The Court of Appeal agreed that the duties on the EJF List (which Lui could not perform) were essential functions even for the administrative positions that Lui sought. The Department did not have to accommodate Lui in a permanent modified duty administrative position, because, under the DGO, such permanent positions no longer existed.

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The Court of Appeal found that the EJP duties were essential functions because the Department had a legitimate need to limit the number of officers in the modified-duty assignments in order to maximize the number of officers available for deployment in case of emergencies, mass mobilizations, or other special circumstances. Also, other considerations supported the finding that the EJP duties were essential: (1) The EJP List reflected the Department's judgment that the functions on the list were essential. (2) The Department had eliminated permanent light-duty assignments. (3) The Department's job description specifically included the types of strenuous duties on the EJP List. (4) The Department has a history, in emergency/mass mobilization situations, of deploying non-disabled police officers in administrative positions.

Although officers in administrative positions did not spend most of their time performing the strenuous duties on the EJP List, the Court of Appeal found that this one factor was not determinative where the other considerations supported a finding that the strenuous duties were essential job functions.

Significantly, the Court of Appeal also held that the Department had no obligation to accommodate Lui by making his TMD assignment permanent or by converting a different administrative position into a permanent light-duty position. The Court of Appeal confirmed that although making reasonable accommodations may include job restructuring and modified schedules, the FEHA does not require employers to accommodate employees by excusing them from performing essential functions or giving them a temporary position indefinitely, once the employee's disability has become permanent.

What *Lui* Means For Employers

The *Lui* decision highlights that having an unlimited modified duty program may work against an employer in a lawsuit brought against it for failure to accommodate a disabled employee. Instead, employers should consider implementing a limited modified duty program, which may help define the scope of the employer's obligations with respect to providing an employee with an accommodation.

The *Lui* decision is also instructive on the question of what is an essential job function, and illustrates the importance of having up-to-date, written job descriptions that identify essential job functions. Employers should create a functional analysis of the essential job duties in the job descriptions if one does not already exist.

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