



## *Laboring Results*

A Monthly Dispute Resolution E-zine  
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*Recently, I have been mediating several claims involving the Raine v. City of Burbank (2006) decision. I thought you would be interested in how to deal with the problem.....*

### **Flash Flood Warning: After the Early *Raine* Decision this Year, Employers' Are Creating a Weather System That Forecasts a Hurricane**

After the *Raine v. City of Burbank* decision earlier this year, Employers' are creating a weather system that will create a storm that could produce massive flood of claims, unless they accommodate the levees to avoid a break.

Recently, I mediated many claims where the employee, permanently disabled from a work related injury, was terminated following the finality of the workers' compensation claim. These claims were filed against small as well as the super size employer. The problem stemmed from the misinterpretation of *Raine v. City of Burbank* decision. The employers, as well as their legal counsel, stated the holding of *Raine* correctly, but applied it incorrectly. *Raine* stood for the proposition that an employer does not have the duty to convert a temporary accommodation into a permanent job assignment when so doing would create a new position for the disabled employee. Employers are taking the holding to the extreme and arguing that any accommodation in the permanent job position of an employee is creating a new position. Unfortunately, employers are missing the vital component in analyzing whether a new position is being created, whether or not it is a reasonable accommodation.

Employers still become very confused on how to handle an accommodation under a worker's compensation claim that turns into a FEHA/ADA accommodation. Employers' understand that in a work related injury that they should provide 'light duty' positions in order to reduce their workers' compensation costs and liability. Usually these 'light duty' positions are a requirement of the employer's workers' compensation insurance carrier. But once the employee's workers' compensation injury is found permanent and stationary, which results with the employee being rated with a permanent disability, what does an employer do? *Raine* is an instructive opinion in that it gives the employer a step by step approach in finding whether an employee's request is reasonable in order to accommodate. *Raine* teaches employers' how to avoid the eye of the Hurricane.

### **1. During The Employees Workers' Compensation Claim: Temporary Duty or Light Duty**

Extend temporary duty (reassignment to a different job) or light duty (temporarily remove part of the employee's task of the existing job) to the employee while under the care of the doctor and while the employee has not been rendered permanent and stationary, no matter how long it takes. In the *Raine* case, Raine was assigned to temporary duty (a different job) for six years, when he was finally rated permanent and stationary. During the time the employee is under medical restrictions and performing light duty, the employer should document how the essential functions of the employee's position are being handled.

### **2. After The Workers' Compensation Employee Is Permanent And Stationary And The Employee's Injuries Are Rendered Permanent: Interactive Job Analysis**

Once the doctor has concluded the employee is permanent and stationary, the employer should discuss with the employee whether the employee will have permanent medical restrictions, and if so can the employee still perform the essential functions of his permanent position with or without a reasonable accommodation? In *Raine* the doctor said that Raine had a permanent disability. The Burbank Police Department arranged for a job analysis, with input from Raine and his immediate supervisor, as part of the interactive process mandated by FEHA to determine the effective reasonable accommodation, if any. Burbank concluded that it had no available position for a sworn police officer with Raine's qualifications and physical limitations. Burbank did not have to create a new job position that called for a sworn police officer's qualifications with no physical demands. Given the facts, creating a new position was not a reasonable accommodation.

### **3. Find Available Alternative Employment Opportunities, If Reassignment Is Requested,**

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 for which the employee is qualified. However, a reassignment is not required if there is no vacant position for which the employee is qualified.

Was there a job that Raine was qualified for, that he could perform and that Burbank could offer him? Yes. Burbank offered Raine a police technician civilian position; however, because it was a civilian position he would forfeit his police retirement benefits. Raine turned down the alternative employment.

When it begins to rain, we are never certain whether it will pour. At least with the weather satellites and meteorological forecasting, we can be prepared for a storm, attempt to prevent any damage the storm may cause. The *Raine* decision is our weather satellite and gives us three valuable storm warnings to prevent a hurricane of disability discrimination claims.

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