



## LAW UPDATE LABOR AND EMPLOYMENT

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### NON-REELECTIONS: A CASE STUDY IN WHAT NOT TO DO

The appellate court in *Swanson v. Morongo Unified School District*<sup>1</sup> recently confirmed that although probationary teachers may be dismissed through the non-reelection process, the protections of the Fair Employment and Housing Act (FEHA) still apply to such employees. While reasons for a non-reelection need not be given, districts cannot legally non-reelect a probationary teacher for unlawful and discriminatory reasons.

In August 2006, Morongo Unified School District (District) hired an elementary teacher with more than 30 years' experience to be a technology/reading specialist and computer laboratory teacher. In the 2006-2007 school year, Lauralyn Swanson taught in a school computer laboratory and received excellent performance evaluations.

In July 2007, Swanson was diagnosed with breast cancer and underwent a mastectomy. She began radiation and chemotherapy treatments in October and was on medical leave until early March 2008. Due to missing a large portion of the school year, Swanson was not evaluated in her new position as a reading specialist but received a positive recommendation from her principal John Lowe.

Lowe offered Swanson a fifth grade position for the 2008-2009 school year. Swanson objected because this was her third assignment in three years and her health would prevent her from doing the necessary preparatory work for the new assignment. She requested that if she were to be reassigned, she be assigned to an open second grade position due to her recent experience with that grade level in another district. Lowe instead assigned Swanson to a kindergarten position, refusing to change the assignment even after she expressed a fear of exposure to the many illnesses of kindergarten children in light of her weakened immune system and cancer treatments.

Following a hospitalization in September and a leave of absence until December 2008, Swanson was evaluated by Lowe in January and February 2009. Swanson's evaluation observations were initially poor. After establishing a remediation plan, Lowe gave Swanson a "meets expectation" rating on nearly every category in the first of three second-round observations. Despite this apparent improvement, when meeting to discuss Swanson's next observation rating, Lowe asked Swanson to resign her teaching position in lieu of receiving a non-reelection notice. Before the final observation and remediation plan were completed, the District's Board of Education voted not to renew Swanson's contract for the 2009-2010 school year.

After being non-reelected, Swanson filed a lawsuit against Morongo Unified in November 2009. She alleged the District violated the FEHA by (1) discriminating against her based on medical condition or physical disability, (2) failing to reasonably accommodate a known condition or disability, and (3) failing to engage in the interactive process to determine a reasonable

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<sup>1</sup> 2014 Cal.App.LEXIS 1183.

accommodation for a known condition or disability. At the trial court level, the District moved for summary judgment and prevailed. Swanson appealed.

The District did not dispute that Swanson had a medical condition and physical disability protected by the FEHA. But, it contended Swanson's discrimination claims failed because it decided not to renew her teaching contract for the legitimate, nondiscriminatory reason she performed below expectations. Swanson presented evidence demonstrating that after the District was informed of her breast cancer and medical leave for treatment, it began a course of conduct designed to set her up for failure. She alleged the District did so in order to later use her performance as a pretext for its decision not to renew her contract. In finding a triable issue existed on Swanson's first claim, the court commented, "[n]either Swanson's probationary status nor the District's discretion to make teaching assignments deprives Swanson of the FEHA's protections or otherwise allows the District to unlawfully discriminate against her."<sup>2</sup>

In regard to Swanson's second claim, the District argued that it was not required to grant Swanson's request for the second grade assignment under the FEHA's requirement that employers reasonably accommodate a disabled employee. The court found that to win the motion for summary judgment on this claim, the District had to present evidence demonstrating either the second grade position sought by Swanson was not available or was not a reasonable accommodation, or the fifth grade or kindergarten assignments offered by the District were reasonable accommodations that would have allowed Swanson to adequately perform her essential job functions. The District failed to do so and failed to meet its burden on the motion for summary judgment.

Addressing Swanson's third claim, the District asserted it engaged in the interactive process by reassigning Swanson from fifth grade to kindergarten when she opposed the fifth grade assignment. The court found this did not satisfy the District's burden on summary judgment and held that the FEHA required the District to engage in an "ongoing dialogue" related to the accommodations Swanson believed she needed as a result of her cancer-related conditions. The court commented that the District simply assigned Swanson to teach kindergarten and failed to engage in any further discussion with her.

In reversing the trial court's grant of the District's motion for summary judgment, the appellate court did not ultimately decide the merits of this case. Instead, it found the case may go to trial to resolve the issues. The outcome of this case serves as a reminder for districts considering non-reelections of probationary staff: while no cause must be given for a non-reelection notice, districts must be able to demonstrate legitimate, non-discriminatory bases for the decision to non-reelect. Probationary employees should be provided the necessary resources and support during their probationary years prior to making a decision to non-reelect. Further, any decision to non-reelect should be evidenced by appropriate and timely performance evaluations and/or disciplinary write-ups.

If you have any questions concerning this issue, please do not hesitate to contact our office.

– Melissa H. Brown

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<sup>2</sup> *Id.* at 22.