



SAN DIEGO COUNTY
REGIONAL AIRPORT AUTHORITY
STAFF REPORT

Item No.
10

Meeting Date: **MARCH 7, 2013**

Subject:

Authorize the Rejection of the Claim of Melvin McFarlin

Recommendation:

Adopt Resolution No. 2013-0024, authorizing the Rejection of the Claim of Melvin McFarlin.

Background/Justification:

On January 7, 2013, Melvin McFarlin ("McFarlin") filed a claim (Attachment A) with the Authority alleging that on December 14, 2012, he suffered damages when he was forced to exit the Deferred Retirement Option Program ("DROP") sponsored by the San Diego City Employees Retirement System ("SDCERS") and instead retire within the SDCERS Industrial Disability Retirement Program. McFarlin claims economic damages in an amount that exceeds \$350,000.00 to include lost wages and DROP contributions.

McFarlin alleges in his claim that SDCRAA violated the California Fair Employment and Housing Act (Gov. Code Section 12940(a), (c)); failed to prevent discrimination and harassment (Gov. Code Section 12940(k)); failed to provide reasonable accommodation (Gov. Code Section 12940(m)); and failed to engage in the interactive process (Gov. Code Section 12940(n)). McFarlin alleges in his claim that he was injured on the job while performing his duties on September 3, 2009. Several days after the injury he went to see his personal physician and returned to work with a slip from his physician placing him on modified duty. He alleges he gave the modified duty slip from his physician to both the Human Resources Department and his lead. On March 1, 2010, he says he formally notified SDCRAA of his injury of September 3, 2009. He claims he filed an additional accident form in July of 2010 for additional and repetitive use injuries of his knees and back. Subsequently, on December 31, 2010, McFarlin entered the DROP program, which required him to continue working and retire from the SDCRAA no later than five years from that date. In April of 2012, Mr. McFarlin's work status was changed and he applied for Industrial Disability Retirement and worked his last day at SDCRAA on May 18, 2012. McFarlin was approved for Industrial Disability Retirement on December 14, 2012.

McFarlin's claim should be denied. An investigation into the events surrounding this claim revealed documentation that conflicts with and refutes the allegations in this claim.

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Fiscal Impact:

Not applicable.

Authority Strategies:

This item supports one or more of the Authority Strategies, as follows:

- Community Strategy Customer Strategy Employee Strategy Financial Strategy Operations Strategy

Environmental Review:

- A. California Environmental Quality Act: This Board action is not a project that would have a significant effect on the environment as defined by the California Environmental Quality Act (CEQA), as amended. 14 Cal. Code Regs. §15378. The Board action is not a "project" subject to CEQA. Cal. Pub. Res. Code §21065.
- B. California Coastal Act: This Board action is not a "development" as defined by the California Coastal Act. Cal. Pub. Res. Code §30106.

Equal Opportunity Program:

Not applicable.

Prepared by:

SUZIE JOHNSON
PARALEGAL

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& ASSOCIATES**
A Professional Corporation

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OF COUNSEL: WILLIAM N. PABARCUS
LEAH M. PEER

January 31, 2013

San Diego County Regional Airport Authority
Tony Russell, Director, Corporate Services/Authority Clerk
Corporate Services Department
P.O. Box 82776
San Diego, CA 92138-2776

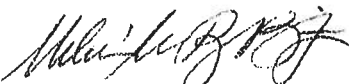
Re: *Melvin R. McFarlin*

Dear Sir or Madam:

Please find enclosed the original and two copies of Mr. McFarlin's *San Diego County Regional Airport Authority Accident or Damage Claim Form*. Once the original has been filed, please stamp and return the copies reflecting the filing date to our office. I am providing a self-addressed stamped envelope for your convenience.

Should you have any questions or comments, please do not hesitate to contact our office.

Yours very truly,
DONALD R. HOLBEN & ASSOCIATES, APC


Melanie M. Rynne-Benitez,
Paralegal

/mmr
Enclosure(s) - as stated



SDCRAA

FEB 04 2013

Corporate Services

FOR AUTHORITY CLERK USE ONLY

Document No.: CL-193

Filed: 2-4-13

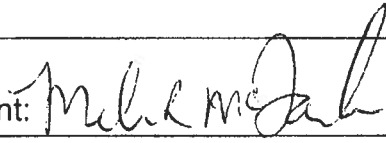
SAN DIEGO COUNTY REGIONAL AIRPORT AUTHORITY ACCIDENT OR DAMAGE CLAIM FORM

Please complete all sections. Incomplete submittals will be returned, unprocessed. Use typewriter or print in ink.

1) Claimant Name: MELVIN R. McFARLIN
2) Address to which correspondence regarding this claim should be sent: C/O DONALD R. HOLBEN & ASSOCIATES, APC
3) Date and time of incident: 12/14/2012
4) Location of incident: San Diego County Regional Airport Authority / San Diego International Airport
5) Description of incident resulting in claim: Please see attached EXHIBIT 'A'
6) Name(s) of the Authority employee(s) causing the injury, damage or loss, if known: M.R. Ellington, Manager, Human Resources
7) Persons having firsthand knowledge of incident: Witness(es) Name: Please see attached EXHIBIT 'A' Physician(s) Name: Address: Phone:

8) Describe property damage or personal injury claimed:
Please see attached EXHIBIT 'A'
9) Owner and location of damaged property or name/address of person injured:
Not Applicable.
10) Detailed list and amount of damages claimed as of date of presentation of claim, including prospective damages. If amount exceeds \$10,000.00, a specific amount need not be included.
Total Amount Claimed: In excess of \$350,000.00
Please see attached EXHIBIT 'A'

Dated: January 31, 2013

Claimant: 

(Signature) MELVIN R. McFARLIN

Notice to Claimant:

Where space is insufficient, please use additional paper and identify information by proper section number.

Return completed form to:

Tony Russell, Director, Corporate Services/Authority Clerk
 Corporate Services Department
 P.O. Box 82776
 San Diego, CA 92138-2776

EXHIBIT 'A'

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DETAILED STATEMENT OF THE CLAIM OF MELVIN R. McFARLIN

The Employees and/or Entities Alleged to Be Liable Are:

San Diego County Regional Airport Authority

M.R. Ellington, Manager, Human Resources

Torts Committed By Entities and/or Employees:

Claimant alleges the following torts have been committed by the above entity and individual:

Violation of the California Fair Employment and Housing Act (Employment Discrimination on Basis of Physical Disability and Medical Condition) [Gov. C. § 12940(a), (c)];

Failure to Prevent Discrimination and Harassment [Gov. C. § 12940(k)];

Failure to Provide Reasonable Accommodation [Gov. C. § 12940(m)];

Failure to Engage in the Interactive Process [Gov. C. § 12940(n)].

The Factual Basis For These Claims Are as Follows:

1. Mr. McFarlin first started working for the San Diego Unified Port District (the "Port") in April of 1998 as a full-time employee working 40 hours a week. The San Diego County Regional Airport Authority became Mr. McFarlin's employer when it was founded in 2003.

2. Initially, Mr. McFarlin was hired as a custodian at the convention center and the Port's administration building. After his first year, Mr. McFarlin was promoted to Maintenance Worker I. Mr. McFarlin's job duties required him to climb, move furniture, do setups, crawl, bend, squat, restart elevators and escalators, and adjust doors, among other things.

3. On September 3, 2009, at approximately 1:30 p.m., Mr. McFarlin was injured while working in the course and scope of his employment as a Maintenance Worker I for the San Diego County Regional Airport Authority. Mr. McFarlin was throwing away some trash in the dumpster

by the control tower at the airport. His truck was full of bags of trash and he had to throw the bags over his shoulder into the dumpster with a twisting motion. The bags were 10 to 20 pounds each. As Mr. McFarlin was throwing the trash in the dumpster, he felt something in his lower back.

4. A couple of days after the injury, Mr. McFarlin went to his doctor at Kaiser Permanente with regard to pain in his back. At that time, Mr. McFarlin's doctor put him on modified work duty with no heavy lifting, no bending or squatting and no climbing. Mr. McFarlin gave the medical slip from his doctor to the San Diego County Regional Airport Authority's Human Resources Department as well as to his "lead."

5. On March 1, 2010, Mr. McFarlin then filled out an accident form with regard to the September 3, 2009 injury at the instruction of his supervisor. In July of 2010, Mr. McFarlin then filed a second accident claim form in which he reported he hurt his back and knees through continuous and repetitive use.

6. Since September 3, 2009, Mr. McFarlin performed modified work duties for the San Diego County Regional Airport Authority. In this regard, Mr. McFarlin did escorts for those without security clearance who entered the airport facility, he delivered baggies and foot covers to the check points, he opened doors, picked up light trash, and he assisted in the office with both mail and telephones.

7. On approximately December 31, 2010, Mr. McFarlin joined the Deferred Retirement Option Program ("DROP"). When he did so, Mr. McFarlin signed an irrevocable contract with the San Diego City Employees' Retirement System ("SDCERS") and the San Diego County Regional Airport Authority in which he agreed that he would leave employment and retire no later than five

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years from the date he entered DROP. Based on this, it was Mr. McFarlin's intention and desire to work for the next five years and retire at the end of 2015.

8. Mr. McFarlin worked for the San Diego County Regional Airport Authority on a modified duty for the next year and a half after entering DROP without incident. On or about April 18, 2012 that all changed. On that date, Mr. McFarlin received a telephone call from M.R. Ellington, Manager, Human Resources for the San Diego County Regional Airport Authority. During the telephone conversation and a subsequent meeting on April 19, 2012, Mr. Ellington informed Mr. McFarlin that the San Diego County Regional Airport Authority had "recently learned" through its workers' compensation carrier that Mr. McFarlin was formally deemed "permanent and stationary" by his treating physician.

9. Although Mr. McFarlin had been satisfactorily performing his job on modified duty for more than two and a half years – since September 3, 2009 – suddenly, Mr. Ellington determined that Mr. McFarlin was "unable to perform the duties required of a full-time Maintenance Worker I." As a result, Mr. Ellington placed Mr. McFarlin on two weeks paid administrative leave pending the results of his "investigation" into an alternative work assignment for Mr. McFarlin.

10. In a letter Mr. Ellington sent Mr. McFarlin after their meeting on April 19, 2012, Mr. Ellington professed that he would conduct an "investigation" to determine alternative work assignment opportunities for Mr. McFarlin and he was "committed to canvassing the organization for other open/soon to be open positions." Mr. Ellington failed to do so. In reality, Mr. Ellington never provided Mr. McFarlin with a single "open/soon to be open position" for his consideration.

11. In his April 19, 2012 letter, Mr. Ellington also stated: "[s]ince you are 'permanent and stationary', it unfortunately is not possible for you to perform your duties as a Maintenance Worker

I on a full time basis, so I have asked that you consider the Maintenance Worker I job duties and let me know as soon as possible if there might be something for the Authority to consider as a reasonable accommodation regarding the Maintenance Worker I full time job.”

12. At the follow-up meeting between Mr. McFarlin and Mr. Ellington on May 3, 2012, Mr. McFarlin explained to Mr. Ellington that he had been fulfilling his job duties as a Maintenance Worker I on a modified basis since September 3, 2009 and with the same reasonable accommodations he had employed for the last two and a half years, he could continue to work full time as a Maintenance Worker for the San Diego County Regional Airport Authority until his five year retirement date under DROP.

13. Unfortunately, Mr. Ellington had other plans for Mr. McFarlin and would not consider allowing him to continue to perform the job functions he had been doing for the last two and a half years. Instead, Mr. Ellington “suggested” that Mr. McFarlin “consider” a disability retirement through the SDCERS. In reality, Mr. Ellington gave Mr. McFarlin no choice. Mr. McFarlin was told by Mr. Ellington that he would be terminated from his employment at the San Diego County Regional Airport Authority if he was not “approved” for Industrial Disability Retirement by SDCERS.

14. Given no option but termination, Mr. McFarlin filed an Application for Industrial Disability Retirement with the SDCERS. As a result, Mr. McFarlin exited DROP and performed his last day of work at the San Diego County Regional Airport Authority on May 18, 2012. After that, Mr. McFarlin could do nothing but wait to see if his Application for Industrial Disability Retirement would be approved by the SDCERS or whether he would ultimately be terminated by

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the San Diego County Regional Airport Authority. In this regard, on August 20, 2012, Mr. McFarlin was examined by a SDCERS-appointed physician.

15. On November 9, 2012, the SDCERS' Staff Report from the Disability Division was issued. In the report, the staff recommended that the Disability Committee approve the industrial disability retirement application of Mr. McFarlin. In so doing, the Staff Report states: "There are no conflicts in the evidence that Mr. McFarlin is permanently incapacitated from performing full duty as a Maintenance Worker I and that his incapacity is the result of industrial injury. There is also no conflict in the evidence that Mr. McFarlin's incapacity renders his retirement necessary and that his incapacity is not the result of a preexisting condition or a nervous or mental disorder."

16. Thereafter, on December 14, 2012, Mr. McFarlin learned that he would not be terminated from his employment at the San Diego County Regional Airport Authority. Instead, Mr. McFarlin was informed that "[o]n December 14, 2012, by an 11-0 vote, SDCERS' Board adopted staff's recommendation to approve your application for industrial disability retirement. The Board's Disability Retirement Committee approved staff's recommendation on December 13, 2012 by a 6-0 vote."

17. The FEHA [Gov C. § 12900, et seq.] prohibits employment discrimination on the basis of "physical disability, mental disability [and] medical condition. . ." [Gov. C. § 12940(a).] The Legislature enacted the FEHA to provide effective remedies to eliminate such discrimination. [Gov. C. § 12920]. The FEHA declares as public policy "that it is necessary to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination" on the basis of physical or mental disability, among other things. [Gov. C. § 12920]. In *Colmenares* the court expressly held that a "chronic back injury" that "limits" work activities

qualifies as FEHA disability. [*Colmenares v. Braemar Country Club, Inc.* (2003) 29 Cal.4th 1019, 1024.]

18. The FEHA makes the following employment practices unlawful: An employer may not base the following employment decisions on an individual's disability: refuse to hire or employ a person; refuse to select the person for a training program leading to employment; bar or discharge the person from employment or from a training program leading to employment; or discriminate against the person in compensation or in terms, conditions or privileges of employment. [Gov C. § 12940(a), (c).] The FEHA prohibits disability discrimination resulting from either: intentionally discriminatory acts; or facially neutral employment practices or policies that have a disproportionate effect on employees suffering from a disability. [*Avila v. Continental Airlines, Inc.* (2008) 165 Cal.App.4th 1237, 1246.]

19. Here, Mr. McFarlin suffers from a disability – a “chronic back injury.” Mr. McFarlin was qualified to do his job. *After* his injury on September 3, 2009, Mr. McFarlin continued to perform his job duties on a modified basis for more than two and a half years. Lastly, Mr. McFarlin was subjected to an adverse employment action because of his disability. Mr. McFarlin was suspended from his job as a Maintenance Worker I and forced into disability retirement because the San Diego County Regional Airport Authority unilaterally determined that it could not “reasonably accommodate” Mr. McFarlin’s disability. Based on this, Mr. McFarlin has a viable claim for violation of the FEHA against the San Diego Regional Airport Authority.

19. In addition, an employer must provide a reasonable accommodation for an applicant or employee with a known mental or physical disability unless the accommodation would cause undue hardship. [Gov. C. § 12940(m); see *Avila v. Continental Airlines, Inc.* (2008) 165

Cal.App.4th 1237, 1247.] Failure to do so is an unlawful employment practice for which a damages action will lie after plaintiff obtains a right-to-sue letter. [Gov. C. § 12965; *Bagatti v. Department of Rehabilitation* (2005) 97 Cal.App.4th 344, 357.]

20. To establish a “failure to accommodate” claim, plaintiff must show: (1) plaintiff suffers from a disability covered by the FEHA; and (2) defendant has failed reasonably to accommodate plaintiff’s disability. [*Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 256; see *Avila v. Continental Airlines, Inc.* (2008) 165 Cal.App.4th 1237, 1246-1247.] Here, as set forth above, Mr. McFarlin suffers from a disability covered by the FEHA. Moreover, the San Diego County Regional Airport Authority failed to reasonably accommodate Mr. McFarlin’s disability when it unilaterally determined that Mr. McFarlin could no longer perform his job duties on a modified basis after he had satisfactorily done so for more than two and a half years.

21. Lastly, it is unlawful for an employer to “fail to engage in a timely, good faith interactive process” with a disabled employee to determine effective reasonable accommodations. [Gov. C. § 12940(n).] To this end, some courts have held that the FEHA (unlike the ADA) “allows an independent cause of action for employees whose employers fail to engage in the interactive process,” so that employer liability for failing to engage in the interactive process does not depend on showing a reasonable accommodation was possible. [*Wysinger v. Automobile Club of So. Calif.* (2007) 157 Cal.App.4th 413, 425; see also *Claudio v. Regents of Univ. of Calif.* (2005) 134 Cal.App.4th 224, 245; *Wilson v. County of Orange* (2009) 169 Cal.App.4th 1185, 1193.]

22. Here, the San Diego County Regional Airport Authority was informed of Mr. McFarlin’s back injury within days of it occurring on September 3, 2009. Despite this, the San Diego County Regional Airport Authority waited more than two and a half years after learning of

Mr. McFarlin's disability to engage in any "interactive process." This delay was far from reasonable. As a result, Mr. McFarlin has an independent cause of action against the San Diego County Regional Airport Authority for its failure to engage timely and in good faith in the interactive process.

23. The remedies for violation of the FEHA may include, but are not limited to, backpay; reinstatement or front pay; injunctive relief; reasonable attorneys' fees and costs; and compensatory damages for pain and suffering.

24. As a result of the San Diego County Regional Airport Authority's violations of the FEHA as outlined above, Mr. McFarlin has suffered damages. Mr. McFarlin would not have retired from his employment with the San Diego County Regional Airport Authority until December 31, 2015 if he had not been forced into disability retirement. As a result, Mr. McFarlin has lost approximately three and a half years of additional contributions into DROP which is valued at approximately \$30,000.00. In addition, Mr. McFarlin would have continued to collect a salary from the San Diego County Regional Airport Authority for the next approximate three and a half years. As a result, Mr. McFarlin will lose approximately \$180,000.00 in future wages.

25. Moreover, Mr. McFarlin has suffered compensatory damages for pain and suffering and has also been forced to incur, and will continue to incur, attorney's fees and costs as a result of this case.

RESOLUTION NO. 2013-0024

A RESOLUTION OF THE BOARD OF THE
SAN DIEGO COUNTY REGIONAL AIRPORT
AUTHORITY AUTHORIZING THE REJECTION OF
THE CLAIM OF MELVIN MCFARLIN.

WHEREAS, on February 4, 2013, Melvin McFarlin filed a claim with the San Diego County Regional Airport Authority for damages he allegedly incurred as a result of disenrolling from the Deferred Retirement Option Program ("DROP") sponsored by the San Diego City Employees Retirement System ("SDCERS") and entering its Industrial Disability Retirement Program following a workplace injury at San Diego International Airport; and

WHEREAS, at its regular meeting on March 7, 2013, the Board considered the claim filed by Melvin McFarlin, the report submitted to the Board, and found that the claim should be rejected.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby AUTHORIZES the rejection of the claim of Melvin McFarlin.

BE IT FURTHER RESOLVED that this Board DETERMINES this action is not a "project" as defined by the California Environmental Quality Act (CEQA), Cal. Pub. Res. Code §21065; nor is it a "development" as defined by the California Coastal Act, Cal. Pub. Res. Code §30106.

PASSED, ADOPTED, AND APPROVED by the Board of the San Diego County Regional Airport Authority at a regular meeting this 7th day of March, 2013, by the following vote:

AYES: Board Members:

NOES: Board Members:

ABSENT: Board Members:

ATTEST:

TONY R. RUSSELL
DIRECTOR, CORPORATE SERVICES/
AUTHORITY CLERK

APPROVED AS TO FORM:

BRETON K. LOBNER
GENERAL COUNSEL

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