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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

PAMELA SCHOFIELD,

Plaintiff and Appellant,

v.

FOUNTAINHEAD, INC., et al.,

Defendants and Respondents.

A135590

(Alameda County
Super. Ct. No. RG10539101)

Plaintiff Pamela Schofield appeals an adverse judgment entered after the court granted defendants' motion for summary judgment on her claims of employment discrimination. The record portrays an unfortunate deterioration in what for many years had been a positive employment relationship between plaintiff and her private school employer, following plaintiff's affliction with breast cancer. Despite generous accommodations to plaintiff's medical condition, plaintiff construed criticisms of her performance as harassment and discrimination. When ultimately removed from her supervisory position with no loss of pay, plaintiff construed the decision as a constructive discharge and declined the offer to return to work in her teaching position. The trial court found that plaintiff presented a prima facie case of discrimination, but that defendants had established legitimate and non-discriminatory reasons for plaintiff's demotion and that plaintiff failed to produce evidence that these reasons were pretextual. Our review of the record convinces us that the trial court correctly assessed the evidence and that there are no triable issues of material fact warranting trial. We shall therefore affirm the judgment.

Background

Defendant Fountainhead, Inc., doing business as Fountainhead Montessori Schools (Fountainhead), is a nonprofit educational corporation. Defendant Shandy Cole is its executive director and defendant Janet Schmidt its child development director. Plaintiff was employed by Fountainhead from 1983 through September 2008. She began in an entry level position, rose to the position of “Head Teacher of the Pre-Kindergarten/Kindergarten” class and, in 1997, was promoted to site director of Fountainhead’s Danville campus. As site director, plaintiff was responsible for managing the campus’s employees and ensuring that Fountainhead’s policies and practices were adhered to. It is undisputed that plaintiff “was commended for her performance and received positive reviews throughout her employment until she informed defendants of her breast cancer.”

In mid-August of 2007, plaintiff advised Ms. Cole that she had been diagnosed with breast cancer. Although in the exchange of the statements of undisputed material facts and the responses thereto plaintiff contends that what transpired thereafter is disputed, the evidence cited by both sides reveals no disagreement in the material facts, at most a disagreement as to the relevance of certain facts and as to the motivation and characterization of other facts. Plaintiff filed 81 objections to most of the evidence submitted in support of defendants’ summary judgment motion, most asserting such objections as irrelevance, lack of foundation, vagueness, and often hearsay. The court overruled all but one of those objections and plaintiff challenges only three of those rulings on appeal. We concur in the trial court’s rulings and, in all events, in making our independent review of the record, consider only the underlying facts on which the parties agree and those documented in the contemporaneous e-mails and letters exchanged between the parties.

The day after plaintiff informed Ms. Cole of her diagnosis, Fountainhead’s staff development director and human resources manager, Maryanna Higgenbottom, called plaintiff, offering to bring the assistant site director from the Pleasant Hill campus to Danville to co-teach and act as co-site director so that plaintiff would be able to come and

go as she pleased. Plaintiff's husband, an attorney, immediately called Ms. Higgenbottom, asserting that plaintiff "would not tolerate discriminatory treatment" and that plaintiff had not requested any accommodations. Shortly thereafter, on August 20, 2007, plaintiff delivered a letter to Cole advising that on August 23 she would be undergoing "a non-elective medical procedure" but expected to return to work on September 4. She requested that defendants fax her the master copy of her current class enrollment so that she could prepare the necessary sign-in sheets at home. On August 29 Cole faxed the documents to plaintiff along with a handwritten note which included the following explanation: "I am sorry that our proposal of a temporary support person was not as clear as it should have been. The proposal was intended as a short term solution to cover the needs of the campus while allowing you the time to attend to yourself [without] having to adhere to your regular schedule. I hope that you can concentrate on whatever it takes to come back healthy [and] strong. I am here to support both you and the campus to the best of my abilities."

The next day, Cole sent an e-mail to plaintiff asking what her schedule would be after the completion of her medical procedure, and inquiring whether another employee was needed to cover plaintiff's usual hours of 7:00 a.m. to 2:00 or 3:00 p.m. Plaintiff responded that she intended to reduce her hours to 8:00 a.m. to 1:00 p.m. in order to "ease back into the schedule" and that one of the other teachers, Shawna, would be on campus at 7:00 a.m. to cover for her. Cole replied in an e-mail advising plaintiff to "take it easy for as long as it takes" and to "[f]eel free to have [Shawna] open as long as you would like."¹

¹ This exchange of e-mails read as follows:

August 30, Cole to plaintiff: "Hi Pam – Sorry to keep bugging you but I was wondering what the schedule will be starting Tuesday? Are you working your usual 7am-2-3? Or should I have Shawna open? Please let me know what you would prefer. Thanks, Shandy"

August 31, plaintiff to Cole: "Shandy, The letter and the back to school night and time are fine. Shawna will be opening for me the first week of school. I will work from about 8:00 –1:00ish the first week just to ease back into the schedule. Shawna is happy to open and I will resume my regular schedule as soon as I'm sure I'm physically up to it.

Near the end of September plaintiff told Cole that she would be undergoing chemotherapy for 16 weeks through December 2007. Cole told plaintiff to “[p]lease take care of yourself” and requested that she “just drop us a line when you will not be [at work]” Throughout this period, plaintiff worked shortened hours and missed days at work, particularly in mid-December when she was hospitalized for two days because of medical complications. Cole advised plaintiff to “[p]lease stay home if you are not well” and had the child development director, Janet Schmidt, frequently cover for her.

In January, plaintiff sent a letter to the parents of her students explaining her absences, thanking “everyone for their support throughout my illness,” and advising that her “very last chemo treatment will be on Mon. Jan. 14” and that her doctors assure her “that prognosis is excellent and treatment is complete.”

When Schmidt began substituting for plaintiff, she began to observe problems in the way various matters were being handled at the Danville campus and reported her concerns regarding management of the campus to Cole. At Cole’s request Schmidt began compiling a record of communications with plaintiff and of issues concerning her performance, and at some point entries were inserted concerning issues brought to plaintiff’s attention previously, in 2006. While some of these issues were brought to plaintiff’s attention before April, on April 21, 2008 Cole, Schmidt and Higgenbottom met with plaintiff and advised her of their multiple concerns with her performance as site director, including the failure to ensure that children were properly signed in as they

My surgery went well and I’m getting stronger each day. I saw my doctor today and he said I was good to go back to work, but not to overdo it as the healing takes several weeks. Thank you and all the office so very much for the lovely roses. The colors are just amazing. See you soon, Pam.”

September 1, Cole to plaintiff: “Hi Pam – Glad to hear everything went well with the procedure. Please take it easy for as long as it takes, your health is the most important thing. If Shawna is game to open that sounds perfect. Feel free to have her open as long as you would like. If there is anything I or Fountainhead can do to help in your recovery please let me know. We really wanted to take the stress off of you but that is not how it came across. We are truly behind you so please let me know if I/we can help. Best, Shandy.”

arrive on campus, permitting a member of the staff (plaintiff's daughter) to shorten her teaching hours, and a general failure to properly supervise staff.²

Following this meeting, the problems that defendants perceived in plaintiff's performance persisted, particularly including the failure to obtain completed sign-in/out sheets for each student. Cole and Schmidt met with plaintiff again on June 23, 2008, to discuss these issues and, as the problems persisted, met again with Higgenbottom and plaintiff on July 16, 2008. The memorandum memorializing this meeting, signed by Cole, Schmidt and plaintiff, reflects the following discussion: "1. Fountainhead expects and requires that all sign in and out sheets to be complete. Inaccurate sign in and out sheets are grounds for a type A violation, which triggers notification to all enrolled children and enable CCL to initiate closure of a facility if they see fit. We also expect the safety of all children to be overseen at all times. Fountainhead will need to see significant improvement over the next 30 days in these areas. ¶ 2. If staff members do not respond to site director's feedback, write ups or other disciplinary action must be taken. Staff members need training from the site director. All current and new staff need on-going support and feedback. ¶ 3. The cleanliness of the classrooms and the preparedness of the works are large issues. Jumbled and missing pieces of works are on shelves. The materials we have asked site directors to replace are still on the shelf, etc. This shows poorly and there is no reason for such a shoddy environment. There is also no excuse for

² The write-up of this discussion prepared by Cole with a copy delivered to plaintiff reads in part: "We talked with Pam about issues on her campus. They included the Extended Day teacher who was not adhering to our Time table and lesson plan requirements. Pam knew about this and never told us this was going on, we had to find out ourselves. We told her that by not saying anything she was implicitly approving of such behavior. We also told her that her playground was being poorly maintained. We have talked to her many times about this. She said she was having a hard time getting her staff to do the tasks listed. We gave her pointers on how she might better manage her staff. We also told her that we were concerned about supervision at her campus and that all staff on site must be accountable for child safety. There are also issues with staff not clocking children into childcare. I told her this was stealing from Fountainhead and it would not be tolerated. . . . She needs to work on her management skills overall. The campus is being run in a sloppy man[ner]. ¶ . . . We told Pam we would check in with her on a monthly basis to see how it was going."

the poor storage of very expensive materials. ¶ 4. Shandy mentioned that attitude of staff toward the organization. There is no cause for the silent treatment being exhibited to any Fountainhead representative, and actions of this nature are apparent to families and children and are unacceptable in the work place. In addition the lack of staff attendance and dedication is a significant concern. ¶ 5. We discussed that Fountainhead policy was not being followed in a number of respects.” In closing, the memorandum stated that “Fountainhead expects to see significant improvement on the above issues over the next 30 days. Failure to address these issues may result in your removal as site director. As discussed, we are open to any discussion about staff changes, management training, or other needs to resolve the above issues.”

Four days later, on July 20, plaintiff wrote a lengthy letter to Cole, Schmidt and Higgenbottom stating what she had done to address each of the concerns that were discussed on July 16. She stated the letter was “intended to be positive feedback to be sure that you recognize that your concerns are being addressed.” Nonetheless, deficiencies in the completion of sign-in/out sheets continued into August (although the parties disagree as to how often) and meeting hours of a class were shortened without Cole’s knowledge or approval (although plaintiff contends this was required by a shortage of staff and defendants’ failure to provide additional staff which she requested). In all events, on August 21, 2008, Cole, Schmidt and Higgenbottom met again with plaintiff and advised her that she was being replaced as site director. On August 24, plaintiff wrote to Cole stating that she was “stunned to hear you say that I was no longer the Site Director” and requesting Cole to provide a “written review.” Two days later Cole responded with a six-page letter, setting forth “a listing . . . of some of the times that management and leadership issue were discussed,” from November 2, 2007, through August 21, 2008. The letter concluded, “In closing, I am surprised that after so many communications you would not see that there were some serious and systemic management issues at your campus. This failure to recognize the problem is itself now an additional concern. Fountainhead has tried many times to offer you support, additional

training, or other means of helping you maintain your Site Director position. [¶] If you have any further questions please feel free to contact me.”

August 27, 2008 was the first day of the Fall semester. Although plaintiff had participated in preparing the campus for the students’ arrival and was in her classroom that morning, before class started she unexpectedly left the campus, claiming illness. On September 1 she sent Cole and Schmidt an e-mail message, stating that she was “still feeling quite ill, and will not be at school tomorrow. . . . It has been emotionally devastating to me since I was demoted, to the point of physical illness. When I went to school last Wednesday morning, it upset me greatly to think about your failures to accommodate my cancer treatment, and I would be moved to tears every time I saw failures by you that I had already, or would have, taken care of,” enumerating several problems which she said she had observed. Cole promptly responded in writing, disputing that plaintiff had been denied any accommodations³ and the existence of the specific problems mentioned in plaintiff’s message. The letter also stated, “The problem we are encountering has nothing to do with your cancer treatment. It is rather a matter of performance. As my 6 page letter of August 26, 2008 noted, there have been ongoing performance issues which have been brought to your attention over a lengthy period of time, and my 6 page letter was only a partial list. If you, however, feel you are unable to perform your work as an employee of Fountainhead because of the ‘upset’ you perceive,

³ In this respect, the letter stated: “[Y] our statement about ‘failures to accommodate my cancer treatment’ could not be more incorrect. Fountainhead, on numerous occasions, made specific accommodations because of your cancer treatment, and offered to do even more during that time, such as providing you with staff assistance. You frequently declined these offers of accommodation, but that does not mean the accommodations were not offered. For example, we added a third person to your classroom because of your cancer treatment issues so you would have more flexibility as you went through treatment. We offered to put in a temporary Director when you advised us of your initial diagnosis, but you declined that accommodation. At various time we offered a number of other proposals to you regarding your work hours and schedule. [¶] There were in fact many accommodations that were offered, and were accepted. That other accommodations were not accepted by you doesn’t mean that we didn’t offer every accommodation that was reasonable for us to provide.”

then perhaps the time has come to terminate our at-will employment relationship.” The letter concluded, “If you feel you can no longer continue as a Fountainhead employee, please let me know.”

Plaintiff promptly responded in a letter to Cole dated September 5, 2008, claiming she had been constructively discharged. The letter read in part: “Even though it was obvious from your comments and demeanor when you demoted me on August 21, 2008, that you intended that I should not accept the demotion, and quit, I have tried to continue working because, as you know, I am a cancer patient. I am in the midst of ongoing treatment, and cannot be without health insurance. The demotion presents a substantial reduction in income from the reduced hours, to the point that it is questionable whether I would even have enough income to cover the insurance benefits and tax withholding, even though you stated that you were ‘rewarding’ me for my quarter-century of service by not reducing my wages. Furthermore, your long history of making employees quit to avoid unemployment benefits, the hostile work environment you have created through your numerous discriminatory actions, failures to accommodate, retaliatory actions, false accusations, as well as the coldness and hostility you, [Schmidt and Higgenbottom] have shown to me, makes it obvious that you have no intention of allowing me to continue even as a Head Teacher for long. Your actions demonstrate that you have effectively terminated me.”⁴

Cole promptly responded, advising plaintiff she was welcome to return to her teaching position, and denying the suggestion that she had forced other employees to quit or that anyone had been cold or hostile towards her. Cole’s letter, dated September 9, 2008, read in part: “I was disappointed to read your correspondence of September 5, 2008, which I received September 8, 2008, that you have decided not to return to Fountainhead. I had expected you to be back at school that day, and instead I received your correspondence. [¶] I believe you are making this decision based upon your

⁴ The letter continued with examples of what plaintiff considered Cole’s “nasty email, based entirely on false information” and comments which plaintiff construed as criticism for her absences when receiving treatment.

emotional reaction to being demoted from site director to head teacher. While there were clearly issues that I felt required me to make that staffing decision, I want to assure you that you are welcome to return as a head teacher, for in fact I believe you have the ability to excel in that position. ¶ . . . While I understand you are upset by the demotion, in fact your hourly pay and benefits have stayed the same. . . . ¶ . . . ¶ I want to give you the opportunity to make sure that you are clear in your decision to leave Fountainhead. You have been an employee for a long time, and I want to give you the opportunity to reconsider your decision to leave. I assure you are welcome to come back, but I need to know today, as obviously we need to make staffing decisions. If you would like to come back, please call me. ¶ . . . ¶ Pam, if you would like to discuss any of these issues, please feel free to call me.”

Plaintiff did not return to work and instead filed a complaint with the Department of Fair Employment & Housing, which issued a right-to-sue notice on October 1, 2009. Plaintiff filed her complaint in superior court on September 29, 2010, and following the granting of defendants’ motion for summary judgment and the entry of judgment, timely filed her notice of appeal.

Discussion

Plaintiff’s complaint contains 10 causes of action. Summary judgment was granted as to the final four causes of action on statute of limitations and other grounds which plaintiff does not challenge on appeal. The first six causes of action the subject of the appeal are labeled by plaintiff as follows: first cause of action: discrimination on the basis of medical condition and age; second cause of action: harassment on the basis of medical condition and age; third cause of action: retaliation; fourth cause of action: failure to prevent discrimination, harassment and retaliation from occurring; fifth cause of action: failure to provide reasonable accommodations; and sixth cause of action: failure to engage in the good faith interactive process. Fountainhead is named as a defendant in all of the causes of action; Cole and Schmidt are named only in the second cause of action.

All of these causes of action are based on the claimed violation of the California Fair Employment & Housing Act (FEHA), Government Code⁵ section 12940 et seq.

Section 12940, subdivision (a) of FEHA provides that it is an unlawful employment practice (with inapplicable exceptions) “[f]or an employer, because of the . . . medical condition . . . [or] age . . . of any person . . . to discharge the person from employment . . . or to discriminate against the person in compensation or in terms, conditions, or privileges of employment.” All parties agree that plaintiff’s discrimination and retaliation claims must be analyzed under the three-part burden shifting process established in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 and applied to employment discrimination cases under FEHA. (*Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 214-215; *Arteaga v. Brink’s, Inc.* (2008) 163 Cal.App.4th 327, 342-343.)

The trial court applied this three-part analysis. Because we conclude that it did so correctly, we set out in full the pertinent portion of its explanation of its ruling. The trial court reasoned as follows: “Plaintiff states a prima facie claim of discrimination claims with the evidence that she worked for the 24 years from 1983 through the summer of 2007 without discipline and that after she requested medical leave in the summer of 2007, defendant reviewed and criticized her work, changed her responsibilities, and constructively terminated her in September 2008. The chronology establishes a prima facie case. (*Arteaga v. Brink’s, Inc.*, *supra*,] 163 Cal.App.4th [at p.] 353.) [¶] Defendant Fountainhead presents evidence of legitimate and non-discriminatory reasons for its criticism of plaintiff regarding the accurate use of sign in/out sheets and the operation of the extended school day. Defendants also counseled plaintiff several times regarding the asserted deficiencies in her work performance. Defendant presents evidence that it engaged in the interactive process and provided reasonable accommodations by offering plaintiff reduced responsibilities and time off from work. [¶] Plaintiff has not presented evidence that raises a triable issue of fact that defendant’s actions were a pretext for unlawful discrimination. It is undisputed that it was important for Fountainhead to

⁵ All statutory references are to the Government Code unless otherwise noted.

maintain accurate sign-in/out documents, that plaintiff was required to ensure that children were signed in and out, and that Fountainhead's review of plaintiff's performance lead it to reasonably conclude that plaintiff was not consistently maintaining accurate sign-in/sign-out documents. Plaintiff has not presented evidence that defendants treated similarly situated persons differently or denied any of her requests for accommodation. In addition, the activity log created by Fountainhead to document plaintiff's transgressions identified incidents both before and after she disclosed her medical issue. Chronology alone does not create a triable issue regarding pretext, and this is especially so where 'the employer raised questions about the employee's performance *before* he disclosed his symptoms, and the subsequent termination was based on those performance issues.' [(*Ibid.*)]" Based on this analysis, the court summarily adjudicated the six causes of action in favor of the defendants.

"On appeal after a motion for summary judgment has been granted, we review the record de novo, considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained. [Citation.] Under California's traditional rules, we determine with respect to each cause of action whether the defendant seeking summary judgment has conclusively negated a necessary element of the plaintiff's case, or has demonstrated that under no hypothesis is there a material issue of fact that requires the process of trial, such that the defendant is entitled to judgment as a matter of law." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.)

Our review of the record confirms the trial court's conclusion that plaintiff failed to present evidence creating a triable issue as to her claims of discrimination and retaliation. Although we question whether the evidence supports a claim for constructive discharge, plaintiff's demotion from her position as site director was an adverse employment action sufficient to support the FEHA claims. However, defendants unquestionably presented substantial evidence of non-discriminatory work-related reasons for the demotion, so that the burden shifted back to plaintiff to present evidence of pretext. Like the trial court, we are unable to find in the record any evidence sufficient to carry that burden.

The fact that that the criticism of plaintiff's performance as site director began shortly after she was diagnosed with breast cancer and began missing work for her treatment may be sufficient to support the inference that the criticism and ultimate demotion was prompted by her medical condition, making a prima facie case of discrimination. But the trial court rightly relied on *Arteaga* for the proposition that while "the temporal proximity between an employee's disclosure of his symptoms and a subsequent termination may satisfy the causation requirement at the *first step* of the burden shifting process," "temporal proximity alone is not sufficient to raise a triable issue as to pretext once the employer has offered evidence of a legitimate, nondiscriminatory reason for the termination." (*Arteaga v. Brink's, Inc., supra*, 163 Cal.App.4th at p. 353.) The court in that case stated that was "especially so" when the employer raised questions about the employee's performance before the employee's symptoms were known, but the court did not state that the absence of prior complaints necessarily rendered the temporal factor sufficient to establish pretext. Indeed, the court quoted from *Padron v. Bellsouth Telecommunications, Inc.* (S.D.Fla. 2002) 196 F.Supp.2d 1250, 1257, *affd. mem.* (11th Cir. 2003) 62 Fed.Appx. 317, for the proposition that " 'Standing alone against Defendant's strongly supported legitimate reason for terminating [plaintiff], temporal proximity does not amount to more than a scintilla of evidence of discrimination.' " (163 Cal.App.4th at p. 353.) Thus, while plaintiff is correct that defendants did not bring earlier concerns over plaintiff's performance to her attention, or insert them into the log that Schmidt collected, until after plaintiff's cancer diagnosis, that fact does not suggest that the concerns did not exist prior to plaintiff's illness or that they were raised later to conceal discriminatory animus.

Contrary to the manner in which plaintiff characterizes many of defendants' actions and statements, none suggest that defendants' criticisms of plaintiff's performance were motivated by her cancer (much less by her age) or by her absences necessitated by her medical treatment. To the contrary, all of the objective facts reflect a manifested concern for plaintiff's condition and welfare and a willingness to accommodate her need for treatment by using other staff members to temporarily perform

her job duties. The evidence confirms that defendants never denied plaintiff a request to be excused from attendance; rather, defendants offered assistance to plaintiff that plaintiff herself rejected.

Moreover, the undisputed evidence provides a simple explanation of the reason for which performance issues came to the fore after plaintiff's cancer diagnosis. To cover for plaintiff while she was receiving treatment, Janet Schmidt, Fountainhead's child development director, began to fill in for her at the Danville campus. There, the evidence shows, Schmidt first became aware of what she considered serious problems in the management of the campus and brought her concerns to Cole's attention. As the record reflects, these concerns did not relate to plaintiff's illness or to her absences but to specific issues that were addressed in meetings with plaintiff in April, June and July after the completion of her medical treatment. While the record does indicate some disagreement on plaintiff's part with the extent of and responsibility for the problems defendants identified, there is no evidence that suggests defendants' concerns were not genuine or were a reaction to plaintiff's medical condition. "[I]f nondiscriminatory, [defendant's] true reasons need not necessarily have been wise or correct." (*Guz v. Bechtel National, Inc.*, *supra*, 24 Cal.4th at p. 358.) "It is not enough for the employee simply to raise triable issues of fact concerning whether the employee's reasons for taking the adverse action were sound. What the employee has brought is not an action for general unfairness but for . . . discrimination." (*Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1005.)

"[T]here must be evidence supporting a rational inference that *intentional discrimination, on grounds prohibited by the statute, was the true cause* of the employer's actions. [Citation.] Accordingly, the great weight of federal and California authority holds that an employer is entitled to summary judgment if, considering the employer's innocent explanation for its actions, the evidence as a whole is insufficient to permit a rational inference that the employer's actual motive was discriminatory . . . [¶] . . . [¶] . . . [S]ummary judgment for the employer may thus be appropriate where, given the strength of the employer's showing of innocent reasons, any countervailing

circumstantial evidence of discriminatory motive, even if it may technically constitute a prima facie case, is too weak to raise a rational inference that discrimination occurred.” (*Guz v. Bechtel National, Inc.*, *supra*, 24 Cal.4th at pp. 361-362.) As was true in *Guz*, “[s]uch is the case here.” (*Ibid.*; *Hersant v. Department of Social Services*, *supra*, 57 Cal.App.4th 997; *Hicks v. KNTV Television, Inc.* (2008) 160 Cal.App.4th 994, 1003.)

Similarly, there is no evidence supporting plaintiff’s claim of harassment. In support of that claim, plaintiff refers to numerous inquiries allegedly made to her during the summer she took off before being diagnosed with cancer as to her plans to return, and to defendants’ several requests that she notify them of days she would miss school when receiving or recuperating from treatment. Plaintiff also contends that Cole’s inquiries concerning her condition in and around August 2007 were overly intrusive and she refers critically to requests that she attempt to obtain substitutes for her absences. Plaintiff also refers in this context to Schmidt’s compilation of the log concerning plaintiff’s performance issues. However, none of this conduct can fairly be regarded as so pervasive or severe as to constitute harassment. (Cf. *Hughes v. Pair* (2009) 46 Cal.4th 1035, 1043-1044; *Haberman v. Cengage Learning, Inc.* (2009) 180 Cal.App.4th 365, 378-382, 386, 388; *Gathenji v. Autozoners, LLC* (E.D. Cal. 2010) 703 F.Supp.2d 1017, 1032-1034.) Moreover, there is no evidence that substantiates the motivations that plaintiff ascribes to the defendants’ conduct.

In short, plaintiff’s evidence fails to create a triable issue that the reasons given for her demotion were a pretext for medical condition or age discrimination, or any form of retaliation. In the absence of such discrimination or retaliation there is no basis for a claim that Fountainhead wrongly failed to prevent such misconduct. And the evidence fails to indicate that defendants did not accommodate plaintiff’s medical condition or engaged in any conduct that a trier of fact could consider to have been unlawful harassment. Thus, defendants’ motion for summary judgment was properly granted.

Disposition

The judgment is affirmed.

Pollak, Acting P.J.

We concur:

Siggins, J.

Jenkins, J.