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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

ROXANNE HERRERA, Plaintiff and Appellant, v. CU COOPERATIVE SYSTEMS, INC., Defendant and Respondent.	E052869 (Super.Ct.No. CIVRS908019) O P I N I O N

APPEAL from the Superior Court of San Bernardino County. Barry L. Plotkin, Judge. Affirmed.

Eisenberg & Associates, Michael B. Eisenberg and Joseph S. Socher for Plaintiff and Appellant.

Richardson Harman Ober, Paul F. Schimley and Richard C. Moore for Defendant and Respondent.

I. INTRODUCTION

Plaintiff and appellant, Roxanne Herrera, sued her former employer, defendant and respondent, CU Cooperative Systems, Inc. (CO-OP), alleging three violations of the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12940 et seq.)[1] based on her pregnancy. She alleged that CO-OP wrongfully terminated her because she was pregnant (first cause of action), wrongfully denied her pregnancy disability leave (PDL) by terminating her while she was on PDL (second cause of action), and wrongfully failed to accommodate her pregnancy-related medical condition, gestational diabetes, by refusing to allow her to eat meals at her desk (third cause of action). The trial court entered judgment in favor of CO-OP after granting its motion for summary judgment. Herrera appeals, claiming she presented sufficient evidence to raise triable issues of fact on each of her three causes of action. We disagree and affirm the judgment in favor of CO-OP.

II. FACTUAL AND PROCEDURAL BACKGROUND[2]

A. *Overview*

Herrera was a supervisor in the fraud department of CO-OP. She began working for CO-OP in 1996, and was promoted from project coordinator to fraud supervisor in August 2007. In October 2008, the fraud department of CO-OP or "Falcon call center,"

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[1] All further statutory references are to the Government Code unless otherwise indicated.

[2] The facts are taken from the separate statements of material fact and the evidence cited therein (*Sandell v. Taylor-Listug, Inc.* (2010) 188 Cal.App.4th 297, 303, fn. 1) and are stated in the light most favorable to Herrera, the party opposing the motion (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*)).

as it was known, employed around 30 investigators and four supervisors, including Herrera. The investigators spent most of their time on the telephone with ATM cardholders who had reported unauthorized withdrawals or whose spending patterns had abruptly changed, suggesting unauthorized uses of their ATM cards. The manager of the fraud department, Bill Freer, was Herrera's direct supervisor.

Herrera was terminated effective November 5, 2008, shortly after she went on PDL effective October 21, 2008. On October 9, 2008, Herrera asked Freer for permission to eat meals at her desk as an accommodation for her gestational diabetes, a pregnancy-related medical condition. After she was terminated, Herrera claimed that Freer never gave her permission to eat meals at her desk.

In support of its motion, CO-OP presented evidence that Herrera was terminated for a nondiscriminatory reason unrelated to her pregnancy—for counseling a subordinate employee, Mauricio Mendez, to lie about the reason he needed to leave work early on June 14, 2008. Through CO-OP's instant messaging system, Mendez told Herrera he wanted go to Raging Waters, but Herrera counseled Mendez to give her a better reason to leave 60 to 90 minutes early. Mendez then made up a family emergency, and Herrera recorded that reason in the supervisor's log as the reason she allowed Mendez to leave early. Mendez and Herrera admitted the incident and both were terminated.

Based on the evidence that Herrera was terminated for a reason unrelated to her pregnancy, the trial court agreed that CO-OP was entitled to summary adjudication on Herrera's first and second causes of action. The court also ruled that Herrera's third

cause of action for failure to accommodate her gestational diabetes had no merit because the evidence indisputably showed that Freer never told Herrera she could not eat meals at her desk or leave the work area to eat, and because supervisors had discretion to leave their desks to eat even when no other supervisors were present.

B. *Additional Factual Background*[3]

1. Herrera Tells Freer She is Pregnant

On July 15, 2008, Herrera told Freer she was pregnant. According to Herrera, Freer's reaction to the news was "strained and negative." Initially, Freer was silent, then asked Herrera: "Oh, is that what you really want?" Herrera responded that she was very happy and excited to be pregnant, and it was a blessing for her. Freer then asked Herrera whether she would be returning to work right after the baby was born. Herrera assured Freer that she planned to return to work just as she had done following her two prior pregnancies while working at CO-OP.

Based on Freer's questions and the tone of his voice, Herrera believed Freer was "very disappointed," "upset," and "angry" that she was pregnant. She claims Freer "made [her] feel like" it was not the right time for her to be pregnant because they had just started a new department and "now [she was] pregnant." She felt she had to explain to Freer that she had had two prior pregnancies while working at CO-OP "to prove to him

[3] Herrera claims the trial court erroneously overruled one of her evidentiary objections to Freer's declaration in support of the motion, and erroneously sustained several of CO-OP's objections to her evidence. It is unnecessary to address these claims, because all of the disputed evidence is of marginal relevance to the issues and inconsequential to the merits of the motion.

. . . [she] was coming back like [she] did before" and would not "just leave [him] hanging . . . ." Herrera claims Freer "just smiled and told [her] thank you for informing me [about your pregnancy,] but [he] never did congratulate [her]."

According to Herrera, Freer treated her differently after she told him she was pregnant. Previously, he treated her as his "right hand" and consulted with her on many business issues, but stopped consulting with her as often after she told him she was pregnant. In addition, Herrera claimed Freer excluded her from a training program for a new product after he learned she was pregnant.

2. Herrera Asks Freer for Permission to Eat Meals at Her Desk

On October 9, 2008, Herrera told Freer she had developed gestational diabetes as a result of her pregnancy, and needed to follow a medically-prescribed meal plan. The meal plan required Herrera to eat frequent meals and snacks during the course of the day in order to prevent blood sugar imbalances and additional medical complications. Herrera showed Freer a copy of her meal plan and asked him for permission to eat at her desk.

Herrera claims her requested accommodation conflicted with two CO-OP rules: (1) employees were not allowed to eat at their desks; and (2) supervisors were not allowed to leave the work area or "floor" unless another supervisor was present. Because Herrera was the only supervisor "on the floor" or in the work area during most of her shift, she claims she had to eat at her desk in order to follow her prescribed meal plan.

According to Herrera, when she asked Freer for permission to eat meals at her desk, he told her: "Well, I can't allow you to do it, because if I allow you, then I have to allow the rest of the staff, and that's not going to happen." Freer told Herrera she could have snacks at her desk, "like an apple," but could not eat meals at her desk. When Herrera told Freer that having snacks would not allow her to follow her meal plan, Freer said, "[w]ell, you know, at this point we will see what we can work with," but Herrera claims Freer never gave her "a yes or a no" answer to whether she could eat meals at her desk. Between October 9 and 21, 2008, when Herrera left on PDL, she "tried the best that [she] could" to follow her meal plan by eating snacks at her desk.

At some point, Herrera told Mary Monise, the manager of the human resources department, that she had gestational diabetes. Monise told Herrera to "take care of [her]self," but Herrera did not seek permission from Monise or from anyone other than Freer to eat meals at her desk, or to leave the work area to eat when no other supervisor was present. Herrera testified that taking the matter up with human resources "would be like going above [Freer]."

According to Freer, CO-OP had no policy requiring supervisors "to always be present" in the work area during working hours, and he denied ever telling Herrera she could not leave her desk when she needed to, "whether for meals, bathroom breaks or any other reason." Freer testified that supervisors were allowed to eat at their desk at their discretion, but he also said: "We tried to have a supervisor on the floor as much as possible."

Freer claimed that on "every one of the nine days in question" between October 9, when Herrera asked to eat meals at her desk, and October 21, the last day Herrera worked before going on PDL, there were "at least two and often three supervisors scheduled to work," suggesting that Herrera would have been free to leave her desk to eat as necessary. Still, Freer did not say that another supervisor was always present during the hours Herrera worked, and he did not deny that he never gave her permission to eat meals at her desk after she asked him for permission.

3. Freer Reviews Herrera's "Chat Logs" and Discovers the Mendez Incident

All fraud department employees had access to company-owned computers with instant messaging capability in order to communicate among themselves and with their supervisors without interrupting a telephone call with an ATM cardholder. All employees signed a consent form acknowledging that CO-OP could monitor all communications on its computers and that any abuse of the system was grounds for disciplinary action, up to and including termination. The IT department of CO-OP was able to track the volume of instant messages sent and received by each employee and to print, verbatim, time-stamped records of all messages sent and received by a given employee. These records were known as "chat logs."

On September 3, 2008, Freer asked the IT department to provide him with the volume statistics and chat logs for June and July 2008, but he did not receive the information from the IT department until September 30, 2008. Because the volume of

instant messages sent and received by Herrera seemed "excessively high," Freer decided to review Herrera's chat logs.

Many of the messages on Herrera's June and July 2008 chat logs were in Spanish and unintelligible to Freer. Freer was concerned about this because in his view there was no reason for in-house communications to be in Spanish. He also noticed that many of the messages appeared to contain "inappropriate 'nick-names'" and other language that, according to Freer, "had no business in the workplace."

Freer noticed that on June 13 and 14, 2008, Herrera counseled a subordinate fraud department employee, Mendez, "to make up an excuse to get out of work early so he could go to an amusement park." Freer was not previously aware of this, and brought the matter of Herrera's chat logs to the attention of the human resources department, "for . . . further review and translation."

Thereafter, the human resources department showed Freer a partial copy of Herrera's chat logs for June 2008, with handwritten translations. According to Freer, the translated chat logs showed that Herrera was abusing the instant messaging system, and Herrera and Mendez had been using the system for "protracted personal exchanges." Freer was also given a copy of an e-mail that Herrera sent to Mendez on October 2, 2008, cautioning him not to send Herrera any more instant messages because Freer was reviewing them.

The chat logs showed that on June 13, 2008, Mendez sent an instant message to Herrera asking for permission to leave early on June 14 so he could go to Raging Waters

with his family. In reply, Herrera told Mendez to "send the supervisors an email reminding us that tomorrow is your dentists appt at (whatever time) and you would need to leave by (whatever time)." On June 14, Mendez sent another instant message to Herrera saying he "could have an emergency [at 12:00 noon]."

Herrera then sent a message to Mendez, telling him "you send me an IM, . . . you tell me something, then I will give you permission to leave." Mendez responded by saying he "just got a call from home something happened is it ok if I leave early[?]" Herrera allowed Mendez to leave early, and wrote in the supervisor's log that: "[Mendez] received a call around noon today from his home and he informed me that he needed to leave because he had an emergency. He logged off. I told him to drive safely and call us if he needed anything."

Freer sent a copy of Herrera's June 14, 2008, notation in the supervisor's log to Monise. He also brought the matter to the attention of Connie Trudgeon, CO-OP's vice-president of operations and Freer's direct supervisor. Trudgeon had recommended Herrera for the position as a fraud supervisor.

4. Herrera Goes on PDL and is Later Terminated

On October 21, 2008, Herrera requested and was granted a leave of absence from work for pregnancy disability, and went on pregnancy leave effective October 21. Mendez was terminated effective October 23, 2008. On November 4, 2008, while Herrera was still on PDL, Monise contacted Herrera by telephone and terminated her

effective November 5, 2008. Freer and Trudgeon recommended Herrera's termination to the company's vice-president of human resources, Jill DeNiro.

Herrera admitted what she did was wrong but claimed she had authority to let a subordinate leave early. Trudgeon agreed that supervisors had authority to allow subordinates to leave early, but according to Freer, "no other supervisor in the Fraud Department ha[d] ever been caught counseling a subordinate to lie under similar circumstances."

According to Trudgeon, Herrera's counseling of Mendez to lie and her recording of the lie in the supervisor's log was *the only* reason she was terminated. Trudgeon denied that Herrera was terminated based on "inappropriate content" in her instant messages, for her "excessive use" of the instant messaging system, or for giving "preferential treatment to an employee[.]"

Prior to her termination effective November 5, 2008, Herrera had never received any "write-ups," "formal discipline," or "a negative performance evaluation," but had received numerous raises and promotions. CO-OP did not have a written policy of subjecting employees to "progressive discipline," such as giving warnings, reprimands, or suspensions prior to termination. During her employment, Herrera signed a form acknowledging that she was an "at will" employee and could be terminated at any time, for any or no reason.

According to Trudgeon, no consideration was given to disciplining Herrera rather than terminating her due to "the severity" of her act of falsifying company records, the

supervisor's log. Still, Herrera was the only supervisor whom Freer knew of who was terminated without receiving any prior discipline, such as a "write-up" or a warning.

C. *The Legal Bases of Herrera's Claims*

In June 2009, Herrera filed a complaint against CO-OP alleging three causes of action for violations of the FEHA. (§ 12940 et seq.) In her first cause of action for "pregnancy discrimination," Herrera alleges she was wrongfully terminated based on her pregnancy. (§ 12940, subd. (a).) The FEHA provides that it is an unlawful employment practice for an employer of five or more persons to discharge an employee on the basis of "sex" (§ 12940, subd. (a)), and defines "sex" as including "pregnancy, childbirth, or medical conditions related to pregnancy or childbirth" (§ 12926, subd. (p)).

In her second cause of action for "failure to provide pregnancy leave," Herrera claims she was wrongfully denied PDL because she was wrongfully terminated while on PDL. Under section 12945 of the FEHA, known as the PDL law, it is an unlawful employment practice, unless based on a bona fide occupational qualification, "[f]or an employer to refuse to allow a female employee disabled by pregnancy, childbirth, or related medical conditions to take a leave for a reasonable period of time not to exceed four months [16 work weeks] and thereafter return to work . . . ." (§ 12945, subd. (a); Cal. Code Regs., tit. 2, § 7291.7, subd. (a); 1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 2012) § 5.36, p. 266.) Herrera concedes that her second cause of action fails if she was not wrongfully terminated based on her pregnancy.

In her third cause of action, Herrera claims that CO-OP, through Freer, unlawfully refused to reasonably accommodate her pregnancy-related medical condition, gestational diabetes, by refusing to allow her to eat meals at her desk between October 9, 2008, the day she requested the accommodation, and October 21, 2008, the day she left work on PDL. Under the PDL law (§ 12945), it is an unlawful employment practice "[f]or an employer to refuse to provide reasonable accommodation for an employee for conditions related to pregnancy, childbirth, or related medical conditions, if she so requests, with the advice of her health care provider" (§ 12945, subd. (b)).

D. *The Trial Court's Ruling on the Motion*

The trial court granted CO-OP's motion for summary judgment, finding no triable issues of fact on any of Herrera's three causes of action. On the first and second causes of action, the court concluded there was "no credible evidence" that CO-OP's claimed reason for terminating Herrera—counseling Mendez to lie and recording the lie in the supervisor's log—was a pretext for terminating her based on her pregnancy. The court pointed out that Herrera admitted her misconduct, and that "[i]ntegrity, honesty and reliability" were critical characteristics that employers look for in employees.

The court also found "speculat[ive]" Herrera's claim that Freer was "upset" about her pregnancy when she told him she was pregnant, simply because he did not congratulate her. The court concluded that Herrera's only evidence of pregnancy discrimination, or that she was wrongfully terminated based on her pregnancy, was that Freer did not "exhibit what, in her view, was an appropriate response to her

announcement that she was pregnant," and this was "hardly . . . sufficient to create a triable issue of fact."

The court also found "insubstantial" Herrera's evidentiary showing in support of her third cause of action that CO-OP failed to reasonably accommodate her gestational diabetes by refusing to let her eat meals at her desk. The court pointed out that there were only nine working days between October 8, 2008, the date Herrera told Freer she was diabetic and needed to eat at her desk, and October 21, when her PDL began, and that Herrera's "own documents" showed she went on leave because she was hyperglycemic, not hypoglycemic.

The court also pointed out that Herrera conceded that Freer "never said" she could not leave her desk to eat, and was relying on prior instances when Freer said supervisors could not leave the work area unless another supervisor was present. The court pointed out that Freer "*never . . . gave her a yes or no*" as to whether she could eat at her desk, but told her, "[w]e will see what we can work with." (Italics added.)

The court also emphasized that Freer denied telling Herrera she could not eat at her desk, and that Freer and others testified Herrera "wasn't prohibited from leaving her desk to have her meals in the break room or some other location." The court said that none of Herrera's witnesses testified that Freer would not allow Herrera to leave the work area to eat. In sum, the court found "very weak" any inference that "the conduct of defendant's agents constituted a failure to provide pregnancy accommodation."

III. DISCUSSION

Herrera claims CO-OP's motion for summary judgment was erroneously granted because she presented sufficient evidence to raise triable issues of fact on each of her three causes of action. She claims she made a sufficient evidentiary showing to allow a reasonable trier of fact to conclude that that she was unlawfully terminated based on her pregnancy and, accordingly, unlawfully denied up to four months' PDL because she was terminated while on PDL (first and second causes of action). She also claims she presented sufficient evidence to allow a reasonable trier of fact to conclude that CO-OP failed to reasonably accommodate her gestational diabetes, because Freer did not give her permission to eat meals at her desk, and she did not have discretion to leave her desk to eat when no other supervisor was present (third cause of action).

We conclude that the evidence is too weak to allow a reasonable trier of fact to conclude that she was terminated because she was pregnant, and not because she showed she was an untrustworthy supervisor by counseling Mendez to lie and recorded the lie in her supervisor's log. The evidence also fails to support a reasonable inference that CO-OP refused to reasonably accommodate Herrera's gestational diabetes.

A. *Standard of Review on Summary Judgment*

Summary judgment is properly granted when all of the papers submitted on the motion show there are no triable issues of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) A defendant is entitled to summary judgment if it establishes a complete defense to each of the plaintiff's causes

of action or shows that one or more elements of each cause of action cannot be established. (*Id*., subd. (*o*); *Aguilar, supra*, 25 Cal.4th at p. 849.) A moving defendant bears an initial burden of making a prima facie showing that there are no triable issues of material fact. If the defendant meets this burden, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of material fact. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar, supra*, at pp. 850-851.)

On appeal from the grant of a motion for summary judgment, we independently determine whether there are any triable issues of material fact and the moving party is entitled to judgment as a matter of law. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.) We consider all of the evidence set forth in the moving and opposition papers, together with inferences reasonably deducible from the evidence, and we view the evidence in the light most favorable to the party opposing the motion. (*Aguilar, supra*, 25 Cal.4th at p. 843; *Ambriz v. Kelegian* (2007) 146 Cal.App.4th 1519, 1530.)

B. *Intentional Employment Discrimination Claims*

Disparate treatment is the theory underlying Herrera's first and second causes of action. Disparate treatment is intentional discrimination against one or more persons on prohibited grounds; i.e., treating similarly situated individuals differently in their employment because of a protected characteristic. (*International Bro. of Teamsters v. United States* (1977) 431 U.S. 324, 335-336, fn. 15; *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 355 (*Guz*).) Intentional discrimination may be proved by direct evidence, such as epithets and derogatory remarks, or it may be proved by circumstantial evidence

supporting a reasonable inference of intentional discrimination. (*Godwin v. Hunt Wesson, Inc.* (9th Cir. 1998) 150 F.3d 1217, 1221.)

"Due to 'the similarity between state and federal employment discrimination laws, California courts look to pertinent federal precedent when applying our own statutes. [Citation.] In particular, California has adopted the three-stage burden-shifting test established by the United States Supreme Court for trying claims of [intentional] discrimination . . . .'" (*Wills v. Superior Court* (2011) 195 Cal.App.4th 143, 159, citing *Guz, supra,* 24 Cal.4th at p. 354.)

"This so-called *McDonnell Douglas*[4] test reflects the principle that direct evidence of intentional discrimination is rare, and that such claims must usually be proved circumstantially. Thus, by successive steps of increasingly narrow focus, the test allows discrimination to be inferred from facts that create a reasonable likelihood of bias and are not satisfactorily explained." (*Guz, supra,* 24 Cal.4th at p. 354.)

In the first stage, the plaintiff bears the burden of establishing a prima facie case of discrimination. (*Guz, supra*, 24 Cal.4th at p. 354.) The prima facie evidentiary burden is "'not onerous'" (*id*. at p. 355); the evidence necessary to sustain the burden is minimal (*Sandell v. Taylor-Listug, Inc., supra,* 188 Cal.App.4th at p. 310). Generally, a plaintiff can make a prima facie showing of discrimination based on disability by producing evidence that he or she "(1) suffered from a disability, or was regarded as suffering from a disability; (2) could perform the essential duties of the job with or without reasonable

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[4] *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792.

accommodations, and (3) was subjected to an adverse employment action [including termination] because of the disability or perceived disability." (*Sandell v. Taylor-Listug, Inc.*, *supra*, at p. 310; see *Guz, supra*, at p. 355.) At the very least, the plaintiff must show "'"actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were 'based on a [prohibited] discriminatory criterion . . . .' [Citation.]" [Citation.]' [Citations.]" (*Guz, supra*, at p. 355.)

If the plaintiff makes this prima facie evidentiary showing, a presumption of discrimination arises. (*Guz, supra*, 24 Cal.4th at p. 355.) The burden then shifts to the employer to rebut the presumption by producing evidence sufficient to raise a triable issue of fact, and justify a judgment in favor of the employer, that the employer terminated the employee, or undertook the adverse employment action, for a "legitimate, nondiscriminatory reason." (*Id*. at pp. 355-356.) Importantly, if the employer sustains this burden, the presumption of discrimination disappears. (*Id*. at p. 356.) Finally, if the employer meets its burden, the burden shifts back to the plaintiff to establish that the defendant intentionally discriminated against him or her. (*Wills v. Superior Court, supra*, 195 Cal.App.4th at pp. 159-160.)

"A defendant employer's motion for summary judgment slightly modifies the order of [the *McDonnell Douglas*] showings. If, as here, the motion for summary judgment relies in whole or in part on a showing of nondiscriminatory reasons for the discharge, the employer satisfies its burden as moving party if it presents evidence of

such nondiscriminatory reasons that would permit a trier of fact to find, more likely than not, that they were the basis for the termination. [Citations.] To defeat the motion, the employee then must adduce or point to evidence raising a triable issue, that would permit a trier of fact to find by a preponderance that intentional discrimination occurred." (*Kelly v. Stamps.Com Inc.* (2005) 135 Cal.App.4th 1088, 1097-1098, citing *Aguilar, supra,* 25 Cal.4th at pp. 850-851 & *Guz, supra,* 24 Cal.4th at p. 357.)

More specifically, when, as here, the employer makes an unrebutted evidentiary showing that it terminated the employee for a permissible, nondiscriminatory reason, the employee must adduce evidence sufficient to allow a reasonable trier of fact to conclude that, more likely than not, the employer's proffered reason for terminating the employee was false, and the true reason for the termination was impermissible discrimination. (*Reeves v. Sanderson Plumbing Products, Inc.* (2000) 530 U.S. 133, 148-149; see *Aguilar, supra,* 25 Cal.4th at pp. 850-851; *Guz, supra,* 24 Cal.4th at pp. 361-362.) Thus, if the employee fails to produce "'"substantial responsive evidence . . . of the untruth"'" of the employer's proffered reason for the termination, the discrimination claim may be summarily resolved in favor of the employer. (*Slatkin v. University of Redlands* (2001) 88 Cal.App.4th 1147, 1156 [Fourth Dist., Div. Two].)

C. *Summary Judgment Was Properly Granted in favor of CO-OP*

The trial court correctly determined that there were no triable issues of material fact and that CO-OP was entitled to summary judgment on Herrera's complaint as a matter of law. We examine each cause of action in turn.

1. The Discrimination Claims (First and Second Causes of Action)

As discussed, CO-OP presented evidence that it terminated Herrera not because she was pregnant, as she alleged in her complaint, but because she counseled Mendez to give her a false reason for his need to leave work early on June 14, 2008, then recorded the lie in her supervisor's log as the reason she allowed him to leave early. Importantly, Herrera admitted her conduct and does not dispute that the incident occurred. Thus, CO-OP had a legitimate, nondiscriminatory reason for terminating Herrera. The only question is whether Herrera adduced sufficient evidence to allow a reasonable trier of fact to conclude that, more likely than not, CO-OP's proffered reason was false and a pretext for terminating Herrera based on her pregnancy.

As indicated, Herrera retained the overall burden of persuasion on the issue of actual discrimination, and in response to the motion was required to present evidence sufficient to allow a reasonable trier of fact to conclude that, more likely than not, CO-OP's nondiscriminatory reason for terminating her "was false and a pretext" for terminating her based on her pregnancy. (*Kelly v. Stamps.Com Inc.*, *supra*, 135 Cal.App.4th at pp. 1097-1098; *Aguilar*, *supra*, 25 Cal.4th at pp. 850-851.) Herrera's evidence had to have "sufficient probative force" to allow a finding of intentional

discrimination, in the face of CO-OP's "strong and unrebutted showing" of a nondiscriminatory reason for terminating her. (*Guz, supra*, 24 Cal.4th at pp. 353-354.) The stronger the employer's showing of a legitimate, nondiscriminatory reason for termination, the more compelling must be the plaintiff's evidence from which to infer an improper motive. (*Id.* at p. 362.)

Our assessment of Herrera's evidentiary showing "'requires a disciplined analysis of what inferences may be drawn from the admissible evidence. . . .' [Citations.]" (*Faust v. California Portland Cement Co.* (2007) 150 Cal.App.4th 864, 877.) A motion for summary judgment may not be granted "'based on inferences . . . , if contradicted by other inferences or evidence, which raise a triable issue as to any material fact.' (Code Civ. Proc., § 437c, subd. (c).)" (*Aguilar, supra*, 25 Cal.4th at p. 856.) The inferences must be liberally in favor of Herrera as the nonmoving party. (*Ibid.*) Nonetheless, Herrera's evidence was too weak to raise a rational inference that she was terminated based on her pregnancy, in the face of CO-OP's strong and unrebutted evidentiary showing she was terminated because she counseled Mendez to lie, recorded the lie in her supervisor's log, and in so doing demonstrated she was not a trustworthy supervisor.

As the trial court pointed out, Freer's failure to "congratulate" Herrera when she told him she was pregnant does not support a reasonable inference that Freer was "upset," "angry," or even disappointed to learn that Herrera was pregnant, as Herrera claimed. In addition, Herrera had two prior pregnancies while employed at CO-OP; took pregnancy leave both times; and returned to raises and promotions.

Herrera also claims that Freer did not consult with her as often after she told him she was pregnant, and excluded her from a training program for a new product. Yet in her deposition, Herrera could not recall a single instance of being excluded from a meeting or training session. And in a journal she kept during 2008, Herrera referred to an out-of-state training seminar that she alone, of all the supervisors in the fraud department, attended with Freer and other members of middle management—*after* she told Freer she was pregnant.

Herrera also argues that the timing of Freer's review of her June and July 2008 chat logs, in which he discovered the June 14, 2008, incident concerning Mendez, suggests that Freer was looking for a reason to terminate her because she was pregnant. The record does not support this claim. On September 3, 2008, after he learned Herrera was pregnant, Freer requested the volume statistics and chat logs for the months of June and July 2008, and subsequently reviewed Herrera's chat logs for June 2008. But June 2008—the month *before* Herrera told him she was pregnant—was the first month that Freer reviewed his employees' uses of the instant messaging system. That month, Freer reviewed the volume statistics for May 2008 and "[m]aybe half a dozen" employee chat logs for May 2008. Freer waited until September 3, 2008, to request volume statistics and chat logs for June and July 2008, because "[i]t was a challenge" for the IT department to deliver the chat logs to him on a regular basis. Freer's review of other employee chat logs before he knew Herrera was pregnant undermines any rational

inference that he reviewed Herrera's chat logs in September 2008 because he was looking for a reason to terminate her.

To be sure, Herrera worked for CO-OP for more than 12 years, received numerous raises and promotions, and was never disciplined before she was terminated effective November 5, 2008, shortly after she went on PDL. Herrera was also the first fraud department supervisor to be fired without prior discipline. But CO-OP did not have a written policy of progressively disciplining employees by issuing warnings, reprimands, or write-ups before termination, and Trudgeon testified that the severity of Herrera's act of falsifying the supervisor's log warranted her termination *without* prior or progressive disciplinary action. In the face of this evidence Herrera produced no evidence that any other supervisor was subjected to progressive discipline, rather than summarily terminated, for committing an act comparable to hers. In addition, the record shows that Mendez was summarily terminated for the same incident, without prior discipline or a warning.

In sum, because Herrera failed to produce """substantial responsive evidence . . . of the untruth"""" of CO-OP's proffered, legitimate reason for terminating her, her first cause of action for wrongful termination based on pregnancy was properly summarily resolved in favor of CO-OP. (*Slatkin v. University of Redlands, supra,* 88 Cal.App.4th at p. 1156.) For the same reason, CO-OP established that Herrera's second cause of action for failure to provide her with a reasonable period of PDL had no merit. (§ 12945, subd. (a).) Herrera alleged she was wrongfully denied PDL only because she was terminated

based on her pregnancy, and concedes that if her first cause of action for intentional discrimination fails her second cause of action must also fail.

2. Failure to Accommodate Gestational Diabetes (Third Cause of Action)

Herrera's third cause of action for "failure to provide pregnancy accommodation" is based on her claim that CO-OP failed to accommodate her gestational diabetes by refusing to allow her to eat meals at her desk, and by refusing to allow her to leave her desk to eat meals. (§ 12945, subd. (b).) Herrera maintains that she was refused this accommodation during the nine working-day period between October 8, 2008, when she requested the accommodation, and October 21, 2008, when she went on PDL.

The trial court found "insubstantial" and "very weak" Herrera's evidentiary showing that she was not allowed to eat meals at her desk or leave her desk to eat meals. We agree. In support of its motion, CO-OP presented evidence that Herrera was not refused the accommodation, and in response Herrera failed to present evidence sufficient to allow a reasonable trier of fact to conclude that, more likely than not, she was refused the accommodation. (See *Aguilar, supra,* 25 Cal.4th at pp. 850-851.)

Herrera admits that Freer never gave her a "yes or no" answer when she asked him whether she could eat meals at her desk. Thus it is undisputed that Freer *never told Herrera she could not eat meals at her desk* as necessary to follow her medically-prescribed meal plan. At most, the evidence shows that Freer may have discouraged Herrera from eating meals or anything more than snacks at her desk. But as the trial

court put it, Herrera's evidentiary showing that Freer refused to allow her to eat when and as necessary to follow her meal plan was insubstantial.

According to Freer, CO-OP had no policy requiring supervisors "to always be present" in the work area during working hours, and he denied ever telling Herrera that she could not leave her desk when she needed to, "whether for meals, bathroom breaks or any other reason." Freer also testified that supervisors were allowed to eat at their desk at their discretion, but he also said: "We tried to have a supervisor on the floor as much as possible."

In any event, at some point Herrera told Mary Monise, the manager of the human resources department, that she had gestational diabetes, and Monise told her to "take care of [her]self." In the face of Monise's undisputed admonition, Herrera did not present sufficient evidence to allow a reasonable trier of fact to conclude that, more likely than not, she was not allowed to eat meals at work when, where, and as necessary to follow her medically-prescribed meal plan.

IV. DISPOSITION

The judgment is affirmed. The parties shall bear their respective costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

KING
J.

We concur:

HOLLENHORST
Acting P. J.

MILLER
J.