

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

DAYNA CHRISTINE DERRY,

Plaintiff and Appellant,

v.

RENUANCE AESTHETIC CARE, INC. et  
al.,

Defendants and Respondents.

E053915

(Super.Ct.No. RIC530802)

OPINION

APPEAL from the Superior Court of Riverside County. John Vineyard,  
Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Law Offices of Don Featherstone and Mark N. Strom for Plaintiff and Appellant.

Creason & Aarvig, Maria K. Aarvig and Diane K. Huntley for Defendants and  
Respondents.

Plaintiff and appellant Dayna Derry appeals from a summary judgment on her  
second amended complaint, alleging employment discrimination and other causes of

action based on the failure of her former employers to reinstate her to her former position when she attempted to return to work following maternity leave.

We will affirm the judgment.

### PROCEDURAL HISTORY

Derry sued her former employers, Renuance Cosmetic Surgery Center, Renuance Aesthetic Care, Inc., and Brian J. Eichenberg, M.D. (hereafter defendants), under the California Fair Housing and Employment Act (Gov. Code, § 12900 et seq.)<sup>1</sup> (FEHA). In her second amended complaint (the operative complaint for our purposes), she alleged four causes of action: (1) employment discrimination based on her sex and/or medical condition in violation of section 12940, subdivision (a); (2) failure to participate in a timely, good faith and interactive process in violation of section 12940, subdivision (n);<sup>2</sup>

---

<sup>1</sup> All further statutory citations refer to the Government Code.

<sup>2</sup> In pertinent part, section 12940 provides:

“It is an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:

“(a) For an employer, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, or sexual orientation of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment.

[¶] . . . [¶]

“(n) For an employer or other entity covered by this part to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition.”

(3) termination of employment and discriminatory compensation, terms, conditions, and/or privileges of employment, motivated by Derry's pregnancy, childbirth and related medical conditions, in violation of section 12945;<sup>3</sup> and (4) wrongful discharge in violation of the FEHA and the general public policy against discrimination in employment.

After defendants filed their answer, Derry dismissed the first and second causes of action without prejudice. Defendants then filed their motion for summary judgment or summary adjudication as to the third and fourth causes of action.

The motion for summary judgment was granted, and judgment was entered for defendants on April 20, 2011. Notice of entry of judgment was filed on April 28, 2011, and Derry filed a timely notice of appeal on June 23, 2011.

### FACTS

As shown in the parties' moving and opposition papers to defendants' motion for summary judgment, the following facts are undisputed, except where otherwise noted:

---

<sup>3</sup> Section 12945 provides, in pertinent part:

“(a) In addition to the provisions that govern pregnancy, childbirth, or a related medical condition in Sections 12926 and 12940, each of the following shall be an unlawful employment practice, unless based upon a bona fide occupational qualification:

“(1) For an employer to refuse to allow a female employee disabled by pregnancy, childbirth, or a related medical condition to take a leave for a reasonable period of time not to exceed four months and thereafter return to work, as set forth in the commission's regulations. The employee shall be entitled to utilize any accrued vacation leave during this period of time. Reasonable period of time means that period during which the female employee is disabled on account of pregnancy, childbirth, or a related medical condition.”

Dr. Eichenberg, a plastic surgeon, operated a medical practice called Renuance Cosmetic Surgery Center. He also operated a nonmedical cosmetic spa called Renuance Aesthetic Care, Inc. (We will refer to the three entities collectively as defendants, to the medical practice as the medical practice, and to the spa as Renuance). The two businesses shared premises and used the same staff.

As of May 1, 2008, defendants employed a total of 11 employees. One of their employees was a certified nursing assistant named Layla Naasz. Naasz worked as a surgical scrub technician for the medical practice. Defendants stated that Naasz had also worked some hours as a receptionist and administrative assistant for the spa since January 2007. Derry stated that Naasz never worked as a receptionist/administrative assistant while Derry was employed by defendants.

On May 12, 2008, defendants hired Derry as a full-time administrative assistant and receptionist. Defendants state that at that time, they employed one full-time receptionist/administrative assistant, that other employees assisted at the front desk part time, and that Derry was hired as a second full-time receptionist/administrative assistant. Derry does not dispute that defendants had one full-time receptionist/administrative assistant when she was hired, but apparently does dispute that any employee other than Naasz assisted at the front desk part time.

In August 2008, Derry learned that she was pregnant. Her pregnancy was uneventful and she worked without interruption until January 7, 2009, the day she gave birth to her baby.

Defendants and Derry had agreed that Derry would take 12 weeks of maternity leave and would return to work on April 6, 2009. Before Derry could return to work, however, general economic conditions caused a slowdown in defendants' business, and defendants decided to return to their former practice of having only one full-time receptionist and administrative assistant. It was defendants' usual business practice to operate with as minimal a staff as possible. On April 2, 2009, Darla Phillips, defendants' office manager, informed Derry that "[due] to economic times" and to a "decline in the practice," "the practice will have to lay you off."

As of the date of the summary judgment motion, defendants employed nine staff members. The majority of defendants' employees are women, and several had taken maternity leave and then returned to work for defendants. One employee had taken maternity leave twice. The sole male employee had taken family leave when his child was born.

## LEGAL ANALYSIS

### *Standard of Review*

We review orders granting motions for summary judgment de novo, applying the same rules the trial court was required to apply in deciding the motion. (*Johnson v. United Cerebral Palsy/Spastic Children's Foundation* (2009) 173 Cal.App.4th 740, 753.)

A defendant moving for summary judgment has the burden of demonstrating as a matter of law, with respect to each of the plaintiff's causes of action, that one or more elements of the cause of action cannot be established, or that there is a complete defense

to the cause of action. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849 (*Aguilar*)). If a defendant's moving papers will support a finding in its favor on one or more elements of the cause of action or on a defense, the burden shifts to the plaintiff to present evidence showing that a triable issue of material fact actually exists as to those elements or the defense. (*Aguilar*, at p. 849.)

In a case alleging discrimination in employment, if the employer moving 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. [Citations.] In determining whether these burdens were met, [the reviewing court] must view the evidence in the light most favorable to [the] plaintiff, as the nonmoving party, liberally construing her evidence while strictly scrutinizing [the] defendant's. [Citation.]” (*Kelly v. Stamps.com, Inc.* (2005) 135 Cal.App.4th 1088, 1097-1098, citing, inter alia, *Aguilar, supra*, 25 Cal.4th at pp. 850-851, 856; accord, *Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1005.)

*Derry Did Not Meet Her Burden of Producing Evidence Showing a Triable Issue of Fact That Her Termination Was Motivated by a Discriminatory Animus.*

Defendants argued in their motion for summary judgment that there was no evidence that they acted with a discriminatory animus and thus no triable issue of fact as to both of Derry's causes of action, which they characterized as allegations of employment discrimination based on Derry's pregnancy or her election to take maternity leave. They supported their argument with a declaration from Dr. Eichenberg, stating that because of the economic downturn which affected his practice, he chose to eliminate Derry's position as a second full-time receptionist and return to his previous level of staffing, which included only one full-time receptionist with as-needed assistance from other employees. In her opposition, Derry did not produce any evidence that she was discharged for discriminatory reasons. Rather, she asserted that her position was not eliminated but was instead taken over by another employee, Layla Naasz. She asserted that pursuant to section 12945, she had no burden to establish a motive for defendants' refusal to reinstate her after her maternity leave. In their reply, defendants asserted that Derry failed to meet her burden to produce evidence which would support a finding of discrimination. The parties take the same positions on appeal. Defendants are correct as to the fourth cause of action, but not as to the third cause of action.

Derry's fourth cause of action is based solely on a claim of wrongful discharge motivated by her pregnancy. Violation of FEHA provisions may provide the policy basis for a wrongful termination claim. (*Trop v. Sony Pictures Entertainment, Inc.* (2005) 129

Cal.App.4th 1133, 1144.) Under the FEHA, discrimination in employment based on sex includes discrimination based on the employee’s pregnancy. (§ 12926, subd. (q).)<sup>4</sup>

Consequently, in order to prevail on defendants’ summary judgment motion, Derry was required to produce substantial evidence that defendants’ economic concerns were merely a pretext. (*Kelly v. Stamps.com, Inc., supra*, 135 Cal.App.4th at pp. 1097-1098.)

Because Derry did not produce any evidence that she was discharged for discriminatory reasons, summary adjudication was clearly proper as to that cause of action. (*Ibid.*)

Derry’s third cause of action, for violation of section 12945, is also couched in terms of unlawful discrimination: It alleges that her discharge was “motivated by her pregnancy, childbirth, and related medical conditions” and that she suffered “discriminatory compensation, terms, conditions, and/or privileges of employment on account of her pregnancy, childbirth, and related medical condition.” If a violation of section 12945 requires a discriminatory motivation, then Derry’s failure to produce evidence to refute Dr. Eichenberg’s declaration that he eliminated her position solely for economic reasons is a valid basis for summary adjudication as to the third cause of action as well. However, Derry is correct that an employer’s unlawful refusal to allow an

---

<sup>4</sup> “As used in this part in connection with unlawful practices, unless a different meaning clearly appears from the context: [¶] . . . [¶]

“(q) ‘Sex’ includes, but is not limited to, pregnancy, childbirth, or medical conditions related to pregnancy or childbirth. ‘Sex’ also includes, but is not limited to, a person’s gender. ‘Gender’ means sex, and includes a person’s gender identity and gender expression. ‘Gender expression’ means a person’s gender-related appearance and behavior whether or not stereotypically associated with the person’s assigned sex at birth.” (§ 12926.)

employee to return to work following maternity leave violates section 12945 without regard to the employer's motives.

In pertinent part, section 12945 makes it unlawful for an employer "to refuse to allow a female employee disabled by pregnancy, childbirth, or a related medical condition to take a leave for a reasonable period of time not to exceed four months and thereafter return to work, as set forth in the commission's regulations." Nothing in the statute requires a discriminatory motive. Nor, as we discuss below, does the applicable regulation. Consequently, the complaint's allegations in the third cause of action concerning defendants' motivation for refusing to reinstate Derry after her maternity leave are surplusage. (We note that in her general allegations, Derry alleges that her termination was in violation of section 12945 "[which provides that] it is unlawful to terminate/discharge an employee returning from an authorized and approved family care or medical leave.")

The question to be decided, therefore, is whether defendants produced evidence which would defeat Derry's section 12945 claim, and if so, whether Derry demonstrated the existence of a triable issue of fact with respect to whether defendants eliminated Derry's position for a permissible reason, as they assert.<sup>5</sup>

---

<sup>5</sup> In her reply brief, Derry asserts her claim is for interference with her rights under the Family Medical Leave Act (FMLA) (29 U.S.C. § 2601 et seq.) and the California Family Rights Act (CFRA, also known as the Moore-Brown-Roberti Family Rights Act) (Gov. Code, §§ 12945.1, 12945.2).

Derry did not allege a cause of action arising under either statute, however, and as defendants correctly point out, it is the allegations of the pleadings to which a summary judgment motion must respond. (*Carleton v. Tortosa* (1993) 14 Cal.App.4th 745, 752.)

[footnote continued on next page]

*Derry Did Not Meet Her Burden of Producing Evidence That Defendants Did Not Eliminate Her Position.*

With respect to an employee's right to reinstatement following leave for pregnancy disability, the FEHA's implementing regulations provide:

“The following rules apply to reinstatement from any leave or transfer taken for disability because of pregnancy.

“(a) Guarantee of Reinstatement

“Upon granting the pregnancy disability leave or transfer, the employer shall guarantee to reinstate the employee to the same position, or, if excused by section 7291.9, subdivisions (c)(1)(A) or (c)(1)(B), to a comparable position, and shall provide the guarantee in writing upon request of the employee. *It is an unlawful employment practice for any employer, after granting a requested pregnancy disability leave or transfer, to refuse to honor its guarantee of reinstatement unless the refusal is justified by the defenses below in subdivision (c)(1) and (c)(2).* [¶] . . . [¶]

“(c) Permissible Defenses

“(1) Right to Reinstatement to the Same Position

---

*[footnote continued from previous page]*

Moreover, both FMLA and CFRA apply only to individuals who have been employed for at least 12 months and/or to employers which employ 50 or more employees. (29 U.S.C. § 2611(2)(A)(i), (2)(B)(ii); Gov. Code, § 12945.2, subds. (a), (b).) Derry had worked for defendants for approximately eight months when she went on maternity leave and approximately 11 months when she was discharged, and defendants had only 11 employees when Derry was hired and fewer when she was discharged.

“An employee has no greater right to reinstatement to the same position or to other benefits and conditions of employment than if the employee had been continuously employed in this position during the pregnancy disability leave or transfer period. *A refusal to reinstate the employee to her same position or duties is justified if the employer proves, by a preponderance of the evidence, either of the following:*

*“(A) That the employee would not otherwise have been employed in her same position at the time reinstatement is requested for legitimate business reasons unrelated to the employee taking a pregnancy disability leave or transfer (such as a layoff pursuant to a plant closure).*

“(B) That each means of preserving the job or duties for the employee (such as leaving it unfilled or filling it with a temporary employee) would substantially undermine the employer’s ability to operate the business safely and efficiently.

“(2) Right to Reinstatement to a Comparable Position

“An employee has no greater right to reinstatement to a comparable position or to other benefits and conditions of employment than an employee who has been continuously employed in another position that is being eliminated. If the employer is excused from reinstating the employee to her same position, or with the same duties, a refusal to reinstate the employee to a comparable position is justified if the employer proves, by a preponderance of the evidence, either of the following:

“(A) That there is no comparable position available. A position is ‘available’ if there is a position open on the employee’s scheduled date of reinstatement or within 10

working days thereafter for which the employee is qualified, or to which the employee is entitled by company policy, contract, or collective bargaining agreement.

“(B) For an employer whose employee takes a pregnancy disability leave which does not qualify as a FMLA leave, that a comparable position is available, but filling the available position with the returning employee would substantially undermine the employer’s ability to operate the business safely and efficiently.” (Cal. Code Regs., tit. 2, § 7291.9, emphasis added.)

Dr. Eichenberg’s declaration that economic conditions did not permit staffing at the previous level is sufficient to meet defendants’ initial burden of producing evidence of a complete defense, i.e., that the decision not to reinstate Derry was for a legitimate business reason unrelated to her pregnancy. Consequently, the burden shifted to Derry to produce evidence showing that a triable issue of material fact actually exists as to that defense. (*Aguilar, supra*, 25 Cal.4th at p. 849.)

Derry contends that there is a triable issue of fact because there is evidence which shows that her position was not eliminated but was instead filled in her absence and following her scheduled return to work by Layla Naasz.<sup>6</sup>

---

<sup>6</sup> Derry does not actually directly address the sufficiency of the evidence to show that Dr. Eichenberg’s claim of economics-driven staff reduction was a pretext. Rather, she limits her argument to contending that the trial court engaged in issue determination rather than issue finding. She leaps, illogically, from that contention to the conclusion that as a result of the court’s application of an incorrect standard, there is a question of fact whether her position was eliminated or was filled by another employee. Since our review is de novo, we do not review the trial court’s ruling. (*Hartline v. Kaiser Foundation Hospitals* (2005) 132 Cal.App.4th 458, 465.) However, because Derry does  
[footnote continued on next page]

This contention is untenable, in part because Derry, in her separate statement of material facts, agreed with defendants' statements that before Derry could return to work, general economic conditions caused a slowdown in defendants' business, and defendants decided to return to their former practice of having only one full-time receptionist and administrative assistant. By conceding that defendants decided to return to having only one full-time receptionist/administrative assistant, Derry conceded that defendants *did* eliminate her position as the second full-time receptionist/administrative assistant. (See *Leep v. American Ship Management* (2005) 126 Cal.App.4th 1028, 1038 [failure to dispute opposing party's statement of fact may be treated as concession].) In addition, Derry did not dispute defendants' assertion that Naasz "was never a full time administrative assistant."

Moreover, even viewing the evidence apart from Derry's concessions in the light most favorable to Derry (see *Kelly v. Stamps.com, Inc., supra*, 135 Cal.App.4th at p. 1098), it fails to constitute substantial evidence that Derry was discharged so that Naasz could take her position, primarily because there is no evidence whatsoever that Naasz *ever* worked full time as a receptionist/administrative assistant. Nor is there any evidence that anyone else replaced Derry as a full-time receptionist and administrative assistant.

It was undisputed that Naasz, a certified nursing assistant, worked as a medical assistant for Dr. Eichenberg's medical practice and also worked as a

---

*[footnote continued from previous page]*

discuss the evidence which she contends supports her position, we will nevertheless exercise our discretion and address the substance of the dispute.

receptionist/administrative assistant for both the medical practice and Renuance. Naasz and Dr. Eichenberg both declared that Naasz never worked full time. Naasz's payroll records also showed that even during Derry's leave, Naasz worked only part time, and that not all of her part-time hours were spent as a receptionist/administrative assistant.

Derry claims that deposition testimony by Darla Phillips, defendants' office manager, and by Kelly Craft, a former employee of defendants, shows that Naasz did work full time during Derry's maternity leave. Phillips did testify that when Derry went out on maternity leave, "someone" replaced her as a full-time receptionist/assistant. She *thought* it was Naasz: "If I had to guess, I think it was [Naasz]" who took over Derry's position full time. However, Naasz's time records refute Phillips's recollection. The records show that Naasz worked in that position part time and worked other hours as a medical assistant. Moreover, Phillips testified at another point in her deposition that Naasz never worked as a full-time administrative assistant, as far as she could recall. Phillips also testified that another employee had been laid off because of the downturn in the businesses.

Derry relies on the deposition of Kelly Craft to establish that Derry's job was "never eliminated." However, Craft did not state directly that Derry's job was never eliminated, nor can her testimony support the inference that Derry's job was not eliminated. Craft, who was the other full-time receptionist/assistant while Derry worked for defendants, testified that after Derry went on maternity leave, Naasz "eventually" worked at the front desk along with Craft. When Naasz first worked at the front desk

with her, Naasz worked Wednesday, Thursday and Friday. She later added Tuesdays. However, Craft never said how many hours Naasz worked on those days. And, when Craft was asked if, in her observation, Naasz had replaced Derry, Craft said only that Naasz started working at the front desk with her when Derry left. She never said that Naasz worked full time. Consequently, her testimony does not support the inference that Naasz replaced Derry as a full-time receptionist/administrative assistant. Moreover, Naasz's payroll and time records show that she worked less than full time in all of 2009 and that between April 15, 2009 and December 30, 2009, Naasz always worked in her other capacities as well as working as a receptionist/administrative assistant.

For all of these reasons, summary adjudication was proper as to the fourth cause of action, and summary judgment on the second amended complaint was properly granted.<sup>7</sup>

---

<sup>7</sup> At oral argument, Derry contended that if her position was not eliminated but was reduced to a part-time position, defendants were required to offer her the part-time position as comparable position. (§ 12945.2, subd. (a).) However, section 12945.2, subdivision (c)(4) provides that “‘Employment in the same or a comparable position’ means employment in a position that has *the same or similar duties and pay* that can be performed at the same or similar geographic location as the position held prior to the leave.” (Italics added.) The pay for a part-time job is not the same as or similar to the pay for a full-time position. Consequently, a part-time job entailing the same duties is not comparable to a full-time job. In any event, there is no evidence that the job *was* reduced to a part-time position. Rather, the evidence is that the second receptionist position was eliminated and other workers, including Naasz, assisted the receptionist as needed.

DISPOSITION

The judgment is affirmed. Defendants are awarded costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MCKINSTER  
Acting P. J.

We concur:

RICHLI  
J.

KING  
J.