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

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

JULIA ALGARA,

Plaintiff and Appellant,

v.

AUTOMOBILE CLUB OF SOUTHERN  
CALIFORNIA,

Defendant and Respondent.

E054171

(Super.Ct.No. INC086917)

OPINION

APPEAL from the Superior Court of Riverside County. John G. Evans, Judge.

Affirmed.

Vincent P. Nolan for Plaintiff and Appellant.

Frieda A. Taylor for Defendant and Respondent.

Julia Algara, plaintiff, was terminated from her employment at Automobile Club of Southern California (Automobile Club), after multiple extensions of her medical leave of absence. She sued for disability discrimination, failure to accommodate and failure to engage in the interactive process under the California Fair Employment and Housing Act

(FEHA; Gov. Code, § 12900 et seq.) The superior court granted Automobile Club's motion for summary judgment after determining that plaintiff was terminated for a nondiscriminatory purpose. Plaintiff appealed.

On appeal, plaintiff argues: (1) There is insufficient evidence to support the trial court's finding that the termination was for a nondiscriminatory reason; (2) the termination violated FEHA for lack of reasonable accommodation or interactive process. We affirm.

### BACKGROUND

Plaintiff's most recent employment at the La Quinta office of the Automobile Club commenced in 1990, when she returned to work after taking time off to care for a child with medical problems. On April 2, 2008, plaintiff went out on a medical leave of absence for surgical repair of multiple incisional hernias. Plaintiff was informed that her leave of absence was approved and that her disability pay was approved through June 27, 2008. Plaintiff was also advised in writing that her job guarantee would expire on June 25, 2008.

Although plaintiff originally planned to return to work on May 20, 2008, a series of complications, some of which required further surgery and at least one of which resulted in hospitalization in the intensive care unit, required her to seek extensions of her medical leave. Automobile Club extended her leave of absence through August 15, 2008, and reminded plaintiff that her job guarantee expired on June 25, 2008.

On August 26, 2008, after more than 12 weeks of medical leave, plaintiff

contacted Automobile Club to advise her employer that her doctor had extended her medical leave of absence to November 1, 2008. Because plaintiff's job guarantee had expired, and because there was a business need to have someone fill the position, the decision was made to replace plaintiff. Automobile Club advised plaintiff to seek long-term disability benefits in order to continue receiving benefits. Plaintiff's leave of absence was administratively extended to allow time for the third party carrier to process her application for long term disability benefits.

Plaintiff contacted Automobile Club to inquire about the long-term disability notification, and was informed that once on long-term disability, her employment would terminate at the end of December 2008, but if she did not apply for long-term disability, her employment would terminate in late October or early November. Plaintiff did not want to go on long-term disability; she wanted to return to work. Although her doctor had previously indicated she could not return to work until November 2008, plaintiff informed her immediate supervisor by email that she planned to return to work on October 6, 2008. Her supervisor replied that her position had been filled and advised plaintiff to contact the employee benefits person regarding other possible positions at Automobile Club.

Plaintiff contacted the Palm Springs office of Automobile Club and was informed that there were openings, but that a hiring freeze was in effect. Plaintiff could not work in any other branch office because she was unable to drive, so she made no inquiries at any other branches. On November 6, 2008, plaintiff received a telephone call informing

her that she had been terminated from her employment. She subsequently received a written Notice of Change of Employee Status showing her services had been terminated due to “assumed resignation from leave.”

Plaintiff filed a complaint with FEHA, which issued a “Right to Sue” letter on April 28, 2009. On May 28, 2008, plaintiff filed a complaint against Automobile Club, alleging causes of action for disability discrimination, failure to accommodate, and failure to engage in interactive process under Government Code section 12940. On January 26, 2011, Automobile Club filed a motion for summary judgment. On May 3, 2011, the motion was granted by the superior court, and judgment in favor of Automobile Club was entered accordingly. Plaintiff timely appealed.

### **DISCUSSION**

Plaintiff asserts that the trial court erred in granting summary judgment in favor of Automobile Club. She urges that there was insufficient evidence to support the trial court’s finding that Automobile Club terminated plaintiff’s employment for a non-discriminatory reason, because Automobile Club had not presented uncontroverted evidence of a “need” to fill plaintiff’s position. She also argues that Automobile Club failed to make reasonable accommodation for her disability and failed to engage in the interactive process.

We disagree. Automobile Club provided extended medical leave and short-term disability benefits to plaintiff, thereby satisfying the statutory requirement of accommodation, and plaintiff declined to seek long-term disability benefits, obviating the

need for further interactive process. Once Automobile Club presented evidence to support its position that plaintiff was terminated for a non-discriminatory reason, the burden shifted to plaintiff to prove that the reason was a pretext in order to avoid summary judgment. Failing to carry her burden, we affirm the trial court's ruling.

#### **A. Standard of Review**

We review the grant of summary judgment de novo. (*Szadolci v. Hollywood Park Operating Co.* (1993) 14 Cal.App.4th 16, 19.) We make an independent assessment of the correctness of the trial court's ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law. (*Iverson v. Muroc Unified School Dist.* (1995) 32 Cal.App.4th 218, 222.) A defendant moving for summary judgment meets its burden of showing that there is no merit to a cause of action by showing that one or more elements of the cause of action cannot be established or that there is a complete defense to that cause of action. (Code Civ. Proc., § 437c, subd. (p)(2).)

Once the defendant has made such a showing, the burden shifts back to the plaintiff to show that a triable issue of one or more material facts exists as to that cause of action or as to a defense to the cause of action. (*Moser v. Ratinoff* (2003) 105 Cal.App.4th 1211, 1216-1217; *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849, 853.)

In performing our de novo review, we strictly construe the affidavits of the

moving party, while those of the party opposing the motion are liberally construed, and doubts as to the propriety of granting the motion must be resolved in favor of the party opposing the motion. (*Lane v. City of Sacramento* (2010) 183 Cal.App.4th 1337, 1343, citing *Miller v. Bechtel* (1983) 33 Cal.3d 868, 874.) In other words, we liberally construe plaintiffs' evidentiary submissions and strictly scrutinize defendants' own evidence, in order to resolve any evidentiary doubts or ambiguities in plaintiffs' favor. (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142.)

With respect to each cause of action, we determine 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.)

## **B. General Principles Relating to Unlawful Employment Practices.**

It is well-settled that long, successful service, standing alone, does not demonstrate an implied-in-fact contract right not to be terminated at will. (*Guz v. Bechtel National, Inc.*, *supra*, 24 Cal.4th at p. 343.) Nevertheless, termination of employment on prohibited grounds, such as intentional discrimination based on physical disability or medical condition, which does not impact the employee's ability to perform the work, constitutes an unlawful employment practice. (Gov. Code, § 12940, subd. (a).)

Under the FEHA, an employer has an affirmative duty to make a reasonable accommodation for a disabled employee. Failure to do so may constitute a violation of

FEHA. (Gov. Code, § 12940, subd. (k).) Reasonable accommodation may, but does not necessarily, include, nor is it limited to, such measures as making existing facilities used by employees readily accessible to individuals with disabilities or restructuring a job or reassigning the disabled employee to a vacant position, part-time or modified work schedule, or other similar actions. (*Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 947.)

Reasonable accommodation also includes providing the employee accrued paid leave or additional unpaid leave for treatment. (*Hanson v. Lucky Stores, Inc.* (1999) 74 Cal.App.4th 215, 226.) A finite leave of absence can be a reasonable accommodation under FEHA, provided it is likely that at the end of the leave, the employee would be able to perform his or her duties. (*Ibid.*) Holding a job open for a disabled employee who needs time to recuperate or heal is a form of reasonable accommodation and may be all that is required where it appears likely that the employee will be able to return to an existing position at some time in the foreseeable future. (*Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 263.)

Reasonable accommodation does not require the employer to wait indefinitely for an employee's medical condition to be corrected. (*Hanson v. Lucky Stores, Inc., supra*, 74 Cal.App.4th at pp. 226-227.) Reasonable accommodation does not require an employer to undertake an accommodation that would create an undue hardship. (*Prilliman v. United Air Lines, Inc., supra*, 53 Cal.App.4th at p. 948.) Nor does the FEHA require that employers transform temporary work assignments into permanent

positions. (*Raine v. City of Burbank* (2006) 135 Cal.App.4th 1215, 1226-1227.)

The California Family Rights Act of 1993<sup>1</sup> (CFRA), codified in Government Code section 12945.2, entitles eligible employees to take up to 12 unpaid workweeks in a 12-month period for family care and medical leave to care for family members, or to recover from their own serious health conditions. (*Rogers v. County of Los Angeles, supra*, 198 Cal.App.4th at p. 487.) An employee who takes CFRA leave is guaranteed that taking leave will not result in a loss of job security or any other adverse employment actions. (*Neisendorf v. Levi Strauss & Co.* (2006) 143 Cal.App.4th 509, 517.) Upon an employee's timely return from CFRA leave, an employer must generally restore the employee to the same or similar position. (*Rogers*, at p. 487.) The right to reinstatement applies only when an employee returns to work on or before the expiration of the 12-week period. (*Id* at p. 488.)

However, an employer is not required to reinstate an employee who cannot perform his or her job duties after the expiration of a protected medical leave. (*Rogers v. County of Los Angeles, supra*, 198 Cal.App.4th at pp. 488-489, citing *Neisendorf v. Levi Strauss & Co., supra*, 143 Cal.App.4th at p. 519.) The aggregate amount of leave taken under the CFRA may not exceed 12 workweeks in a 12-month period. (Gov. Code,

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<sup>1</sup> Government Code section 12945.2, expressly refers to its federal counterpart, the Family and Medical Leave Act of 1993 (FMLA). (29 U.S.C. § 2601 et seq.) Because the two statutory schemes contain nearly identical provisions regarding family or medical leave, California courts routinely rely on federal cases interpreting the FMLA when reviewing the CFRA. (*Rogers v. County of Los Angeles* (2011) 198 Cal.App.4th 480, 487.)

§ 12945.2, subd. (s).) An employer does not violate the act when it fires an employee who is unable to return to work at the conclusion of the 12-week protected period.

(*Niesendorf*, at p. 518.)

It is within this framework that we review the trial court's ruling on the motion for summary judgment.

**C. There Was No Triable Issue of Fact that the Termination Was for a Nondiscriminatory Reason.**

Plaintiff challenges the trial court's finding that Automobile Club terminated her employment for a non-discriminatory reason. We conclude the trial court correctly found a lack of discriminatory reason for plaintiff's termination, and that plaintiff failed to present significant probative evidence that Automobile Club's stated reason was untrue or a pretext for discrimination. (*Guz v. Bechtel National, Inc.*, *supra*, 24 Cal.4th at p. 367; see also *Cucuzza v. City of Santa Clara* (2002) 104 Cal.App.4th 1031, 1038.)

The Government Code prohibits discrimination on the ground of an employee's medical condition, among other grounds, as a violation of civil rights. (Gov. Code, § 12921, subd. (a).) Government Code section 12940, makes it an unlawful employment practice for an employer to discriminate against a disabled employee unless the disability renders the employee unable to perform his or her essential duties. (Gov. Code, § 12940, subd. (a)(1).) It is also an unlawful employment practice for an employer to fail to make reasonable accommodation for known physical or mental disabilities of an employee (Gov. Code, § 12940, subd. (m)), or to engage in a timely, good faith, interactive process

with the employee to determine effective reasonable accommodations in response to an employee's request. (Gov. Code, § 12940, subd. (n).)

A prima facie case for discrimination on grounds of physical disability under the FEHA requires the plaintiff to show: (1) he or she suffers from a disability; (2) he or she is otherwise qualified to do the job; and (3) he or she was subjected to adverse employment action because of the disability. (*Deschene v. Pinole Point Steel Co.* (1999) 76 Cal.App.4th 33, 44.) On a motion for summary judgment brought against such a cause of action, plaintiff bears the burden of establishing a prima facie case of discrimination for physical disability, which shifts the burden to the employer to offer a legitimate, nondiscriminatory reason for the adverse employment action. (*Ibid.*; *Faust v. Portland Cement Co.* (2007) 150 Cal.App.4th 864, 886.)

A defending employer seeking summary judgment in a discrimination case may meet its burden by showing that one or more of these prima facie elements is lacking, or that the adverse employment action was based on legitimate nondiscriminatory factors. (*Cucuzza v. City of Santa Clara, supra*, 104 Cal.App.4th at p. 1038.) Once the employer produces substantial evidence of a legitimate, nondiscriminatory reason for the adverse employment action, the presumption of discrimination created by the prima facie case simply drops out of the picture and the burden shifts back to the employee to prove intentional discrimination. (*Jenkins v. County of Riverside* (2006) 138 Cal.App.4th 593, 603.)

At this point, the plaintiff must offer evidence that the employer's stated reason is

either false or pretextual, or that the employer acted with discriminatory animus, or a combination of the two, such that a reasonable trier of fact would conclude that the employer intentionally discriminated. (*Deschene v. Pinole Point Steel Co.*, *supra*, 76 Cal.App.4th at p. 44, citing *Horn v. Cushman & Wakefield Western* (1999) 72 Cal.App.4th 798, 806.) The plaintiff is required to produce “substantial responsive evidence” that the employer’s showing was untrue or pretextual, and for this purpose, speculation cannot be regarded as substantial responsive evidence. (*Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718, 1735.)

Pretext may be demonstrated by showing that the proffered reason had no basis in fact, or did not actually motivate the discharge, or was insufficient to motivate the discharge. (*Hanson v. Lucky Stores, Inc.*, *supra*, 74 Cal.App.4th at p. 224.) A plaintiff may rely on inferences rather than direct evidence to create a factual dispute on the question of motive, but a material triable controversy is not established unless the inference is reasonable. (*Cucuzza v. City of Santa Clara*, *supra*, 104 Cal.App.4th at p. 1038.) If a plaintiff fails to produce substantial responsive evidence to demonstrate a material triable controversy, summary judgment is properly granted. (*Ibid.*)

Here, Automobile Club presented evidence that plaintiff was terminated, consistent with its employment policies, for a legitimate, nondiscriminatory reason. Automobile Club provided accommodation to plaintiff during her medical disability by providing extended medical leave, short-term disability benefits, and by not filling her position for more than 24 weeks, long past the 12-week guarantee period. Automobile

Club terminated plaintiff's position because the guarantee period had expired and it needed to fill the position. This evidence of a legitimate, nondiscriminatory reason for plaintiff's discharge shifted the burden to plaintiff to produce "substantial responsive evidence" that the employer's showing was untrue or pretextual," thereby raising at least an inference of discrimination. (*Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1004.)

Plaintiff did not meet this burden. On appeal, plaintiff addresses the matter for the first time in her reply brief. There, plaintiff asserted that the evidence of Automobile Club's nondiscriminatory reason for discharging her "doesn't square with Algara's testimony" that other employees were available to assist with customer service. The fact there may have been other personnel capable of doubling up their duties to cover those of plaintiff's position does not establish Automobile Club's decision to fill her position was discriminatory, where the need for other employees to double up extended well beyond plaintiff's protected leave expired.

She also refers to the deposition testimony of her immediate supervisor who testified that he had discussions with human resources about the options of waiting or replacing plaintiff. However, these discussions occurred after plaintiff's protected 12-week leave had expired, and they appear to have resulted in extensions of her medical leave. The fact that her supervisor had access to computerized information about other openings at Automobile Club and did not discuss them with plaintiff does not demonstrate that the reason for the discharge was discriminatory. The same information

was available to plaintiff. None of the chronological facts set out in the reply brief demonstrate that the decision to terminate plaintiff was motivated by a discriminatory reason related to her medical disability and none show that Automobile Club's stated reasons for her termination were false or pretextual, or gave rise to an inference of a discriminatory motive for the termination.

Plaintiff's position was kept unfilled for approximately six months, 12-weeks longer than required by statute or by the employment policies of Automobile Club, in anticipation of her return to work. Automobile Club was not required to keep her position unfilled indefinitely, and was not required to create a new position to accommodate her. (*Raine v. City of Burbank, supra*, 135 Cal.App.4th at pp. 1226-1227.) Plaintiff has not demonstrated a triable issue of any material fact that Automobile Club engaged in unlawful employment practices.

DISPOSITION

The judgment is affirmed. Automobile Club is awarded costs on appeal.

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RAMIREZ

P. J.

We concur:

HOLLENHORST

J.

CODRINGTON

J.