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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

SHU HUNG,

Plaintiff and Appellant,

v.

KAISER PERMANENTE, et al.,

Defendants and Respondents.

H037515

(Santa Clara County

Super. Ct. No. CV153182)

After Shu Hung was forced to retire from her position as a Kaiser outpatient pharmacist, a position she had held for more than several decades, she brought an action for damages. The trial court granting respondents' motion for summary judgment (Code Civ. Proc., § 437c)¹ and a judgment was entered in favor of respondents Kaiser Foundation Health Plan, Inc., ("KFHP") and Kaiser Foundation Hospitals ("KFH"),² and Chris Oliva, the pharmacy director who made the decision to terminate Hung.

¹ All further statutory references are to the Code of Civil Procedure unless otherwise stated.

² According to respondents' evidence, "KFHP is a nonprofit, public benefit corporation organized" under California law and is "licensed as a health care service plan" "KFH is a nonprofit, public benefit corporation organized" under California law and "owns and operates hospitals in California and other states." The Permanente Medical Group, Inc. is "a group of licensed physicians organized as a for-profit professional corporation" under California law and is "privately owned and managed by

On appeal, Hung maintains that the judgment must be reversed because triable issues of material fact remain as to whether the articulated reasons for the decision to terminate her were pretext for discrimination on the basis of disability, age, and gender under the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.) and for retaliation on the basis of her exercise of rights under the Family and Medical Leave Act of 1993 (FMLA) (29 U.S.C., § 2601 et seq.). According to Hung, her evidence showed that the four medication-related incidents on which the termination decision was supposedly based were either fabricated or "occurred in a dramatically different fashion" than described by Oliva and, therefore, a jury should be permitted to "decide whose story is more credible."

Respondents presented sufficient evidence of legitimate, nondiscriminatory and nonretaliatory reasons for the decision to terminate appellant Hung. The evidence as a whole was insufficient to support a reasonable inference that the proffered reasons were untrue or those reasons were merely a pretext for discrimination or retaliation. Accordingly, we affirm.

I

Procedural History

On September 23, 2009, appellant Hung filed a damages complaint. The first cause of action alleged discrimination based on age, gender and disability under the FEHA. The second cause of action alleged retaliatory termination for her exercise of rights under the FMLA. The third cause of action alleged that, on July 29, 2008, while Oliva was reprimanding Hung, defendants assaulted her. On appeal, she does not assert that any triable issue remains as to the third cause of action.

its physician-shareholders." Kaiser Permanente is the trade name for the Kaiser Permanente Medical Care Program and is "not itself a legal entity"

II

Evidence

A. Undisputed Facts

The following facts are not disputed.³

Appellant Hung began working for Kaiser Permanente in 1976 as an outpatient pharmacist. Prior to her termination in August 2008, appellant Hung was employed as a pharmacist at Kaiser's Santa Clara Medical Center Homestead Campus in the outpatient pharmacy.

In January 2008, respondent Oliva began serving as the outpatient pharmacy director at the Santa Clara Medical Center for Kaiser Permanente. Respondent Oliva was responsible for managing pharmacy operations, including taking disciplinary actions against staff.

In late February or early March 2008, Kelvin Chan, one of appellant Hung's supervisors, approached Oliva and informed Oliva that he had concerns about Hung's attendance.

Appellant Hung knowingly allowed a Kaiser member to leave the pharmacy with a medication to which she was allergic.

³ In some instances, Hung's separate statement asserted that a fact set forth in respondents' separate statement was "disputed" but she failed to actually cite to any evidence contradicting the fact that respondents had contended was undisputed. We treat those facts as undisputed. "The opposition papers shall include a separate statement that responds to each of the material facts contended by the moving party to be undisputed, indicating whether the opposing party agrees or disagrees that those facts are undisputed. . . . Each material fact contended by the opposing party to be disputed shall be followed by a reference to the supporting evidence." (§ 437c, subd. (b)(3).) "An opposing party who contends that a fact is disputed must state, on the right side of the page directly opposite the fact in dispute, the nature of the dispute and describe the evidence that supports the position that the fact is controverted. That evidence must be supported by citation to exhibit, title, page, and line numbers in the evidence submitted." (Cal. Rules of Court, rule 3.1350(f).)

On June 5, 2008, outpatient pharmacy manager Ali Ghezavat told Oliva that he had spoken with a member who had been "improperly counseled by Hung to purchase and apply over-the-counter Hydrocortisone cream to an open foot wound." The member reported that he had "experienced extreme pain and had no resolution of the wound for several days" and then he had sought a further recommendation from Ghezavat.

On June 20, 2008, respondent Oliva met with appellant Hung and placed her on a five-day suspension retroactively beginning on June 17, 2008. At this meeting, Oliva presented her with a written disciplinary action for unsatisfactory conduct documenting that Hung had, on two occasions, provided incomplete and inaccurate information, instructions and directions to members. Oliva also presented appellant with a second written disciplinary action for unprofessional conduct in calling in sick on nine dates. During this meeting, Oliva did not say anything to appellant Hung about her age, gender, or TMJ problem.

After being disciplined for poor attendance, appellant Hung applied for leave under the FMLA. In early July 2008, Debra Contreras received appellant Hung's application for FMLA leave and processed it. On July 11, 2008, Hung's FMLA leave was approved for the period beginning on June 27, 2008 and ending on June 29, 2008.

During a member consultation on July 21, 2008, appellant Hung caught a dispensing error that had been made by another pharmacist, Kumar Atmuri, who had inappropriately dispensed penicillin to a patient who was allergic to that medication. Appellant "provided management with all of the information needed to complete a Drug Furnishing Incident ('DFI') report that same day."

Also, on July 21, 2008, appellant Hung committed a drug furnishing error when she furnished a filled prescription for the drug Travatan to the wrong member. She did not notice that the prescription for Travatan had another member's name on it. She

discovered the error only moments later when the member for whom the prescription was intended attempted to pick up the prescription.

Oliva did not learn about the July 21, 2008 Travatan furnishing error until July 25, 2008. At that point, "Oliva immediately began an investigation into the Travatan incident by reviewing the drug furnishing irregularity system." "He determined that no DFI report had been completed and could not locate any documentation of the Travatan error."

On July 24, 2008, appellant Hung filled a prescription for Prochlorperazine despite a notation that the member was allergic to the medication.

On Monday July 28, 2008, respondent Oliva spoke to appellant Hung regarding the Travatan error. After appellant Hung was reminded of the incident, she produced some documents related to the incident that she had been keeping in her smock pocket.

On July 29, 2008, respondent Oliva and Pharmacy Services Supervisors Debra Contreras and Susan Velasquez met with appellant Hung to investigate the drug furnishing incidents that had occurred on July 21, 2008 and July 24, 2008. At the conclusion of the meeting on July 29, 2008, respondent Oliva placed Hung on investigatory suspension.

During the July 29, 2008 meeting, Oliva referred to a small paperback book that contained a portion of the California pharmacy laws related to drug furnishing errors. Oliva did not verbally threaten to hit Hung. Oliva never touched Hung with the book.

On July 31, 2008, Oliva prepared and mailed a letter to Hung notifying her that she had been placed on a 10-day suspension with the intent to discharge her for cause due to unsatisfactory performance and unprofessional conduct.

Hung was given the choice of retirement or termination. After choosing retirement, she attempted to rescind her decision pursuant to her union rules. Hung had worked at Kaiser Permanente as an outpatient pharmacist for 32 years.

In her written discovery responses, appellant Hung "identified her disability as 'chronic pain.'" Hung "never discussed her TMJ with Oliva."

Hung identified only one younger employee, 35-year-old Atmuri, who she claimed made a dispensing error and was not fired. During the entire period that Oliva was supervising Hung, Oliva never made a comment to her about her age.

Appellant Hung never heard from any source that Oliva had a plan to get rid of her.

B. Evidence Submitted in Support of Summary Judgment

Respondents' evidence showed the following. "[A]ll of Kaiser's California pharmacies participate in a Drug Furnishing Incident—Quality Assurance Program ('DFI/QA Program') which outlines the mandatory protocol for the investigation, resolution, documentation and reporting of any Drug Furnishing Incident ('DFI')." "Kaiser maintains and enforces policies which mandate counseling and provide for progressive discipline for all employees who are implicated in Drug Furnishing Incidents." Its discipline policy for failures to report states that "[a]ny pharmacy employee . . . who does not report a DFI as required . . . shall be subject to discipline, up to and including termination."

Kaiser's DFI/QA program defines a DFI as "any reported or discovered incident where a patient may have received a drug not in compliance with pharmacy law or acceptable pharmacy or medical practice . . . and includes but is *not limited to* errors such as wrong drug, wrong strength, wrong quantity, wrong directions, or wrong patient." (Italics added.) The definition states that "[i]t is a DFI when the medication has left the control of pharmacy personnel into the control of the patient or patient's agent." A "Near Miss" is defined as "an event that would have resulted in a dispensing error if it had not been discovered before the medication or information had left the control of pharmacy personnel."

Kaiser's Outpatient Policy on resolving a DFI states: "Investigation shall begin immediately by obtaining and documenting sufficient information to take prompt appropriate action to resolve the DFI for purposes of patient safety and satisfaction. As soon as possible this information shall be entered on the DFI/QA Report Form" The policy with regard to near misses states that the "emphasis for Near Misses should be on reporting errors that potentially could have lead [sic] to serious events" and "identifying policies, procedures, systems or processes that may have contributed" to a particular "Near Miss." Its policy requires the original DFI/QA Report to be "given to the Pharmacy Manager immediately, or if the manager is not on duty, the very next time he/she is on duty" and addendums to the report to be "submitted to the manager as soon as possible." DFI reports are used to identify "near misses."

In about late February 2008, after Oliva became the outpatient pharmacy director at the Kaiser Permanente Santa Clara Medical Center, Chan informed Oliva that Hung had an attendance issue. On March 13, 2008, Oliva was copied on Chan's email to Velasquez. It indicated that Chan "coached" Hung on her attendance issue in late February 2008, appellant nevertheless called in sick the following week, and Chan wanted to give Hung "a Verbal on her excessive sick calls." In the message, Chan instructed Velasquez to prepare appellant's attendance card. On approximately March 31, 2008, Chan transferred to another Kaiser facility.

On May 12, 2008, Oliva overheard a patient complaining to a pharmacy clerk and he intervened. The patient explained to him that she had attempted to return a medication to the pharmacy because it contained red dye to which she was allergic. According to the patient, Hung had refused to return it and directed "the patient to use the medication if she needed to" and to "go to the emergency room if she had an allergic reaction to it." After resolving the patient's situation, Oliva began investigating appellant Hung's "job performance because [Hung's] conduct in the situation, as described to [him] by the

patient, was unprofessional, in violation of policy and put the patient at risk of severe harm and potentially death."

In her deposition, Hung admitted that the patient with the red dye allergy had requested to return the medication but Hung had not returned it because the pharmacy was very busy and instead told the patient to go tell her doctor to put the information into the system and then come back to pharmacy to exchange the medication. Hung acknowledged that she allowed the member to leave with the medication to which she was allergic.

On June 5, 2008, respondent Oliva received information regarding a second patient complaint. Ghezavat, who was the outpatient pharmacy manager for the second floor pharmacy at same medical center, informed Oliva that Hung had "counseled a patient to use Hydrocortisone cream on an open foot wound, despite the fact that this medication is not indicated for, and is an inappropriate treatment for, open wounds." "The patient suffered severe pain and the wound remained unimproved for several days until the patient obtained a further consultation from Ghezavat. "

On June 10, 2008, respondent Oliva met with appellant Hung in connection with his investigation of her work performance. Hung admitted that she had allowed a patient to leave the pharmacy with a medication to which she was allergic but she explained the pharmacy had been busy. Hung did not express concern for potential patient harm. With regard to the Hydrocortisone cream incident, Hung claimed that she never provides over-the-counter recommendations to patients and complained that she was not trained to diagnose such an issue. According to Oliva, however, "[p]harmacists are trained and expected to make recommendations to patients regarding the correct use of over-the-counter medications." "Hydrocortisone is contraindicated for open wounds."

On June 17, 2008, Oliva "informed Hung that she was being placed on an administrative leave of absence pending the outcome of an investigation of her job

performance." On June 20, 2008, Oliva met with Hung and gave her two written disciplinary actions. He suspended her for five days, beginning retroactively on June 17, 2008.

The first of the two disciplinary actions was for Hung's unsatisfactory job performance and unprofessional conduct related to the two medication-related incidents. The first involved Hung's refusal of a member's request to return a medication to which she was allergic, her instruction to the patient to take the medication regardless of the patient's allergy, and her failure to document the patient's allergy in the pharmacy information management system. The second incident involved Hung's incorrect recommendation to a member to apply Hydrocortisone to treat an open foot wound. The second disciplinary action was for calling in sick on nine occasions after she had been counseled regarding attendance by her former supervisor in late February 2008. That action stated that her absenteeism resulted in the pharmacy being understaffed, affected the level of service provided to members and was unfair to coworkers.

Oliva only learned of Hung's claimed disability during Hung's deposition after the initiation of the litigation. Oliva was not involved in the processing of Hung's leave application, he never had any conversation with anyone about "any disability Hung may have had," and he "did not perceive Hung as being disabled in any way."

On July 21, 2008, pharmacist Atmuri improperly dispensed penicillin to a patient who was allergic to that medication. Hung, who had caught the error, "provided management with the detailed information necessary to complete a DFI report on that same date." Shortly thereafter, Oliva counseled Atmuri about his dispensing error. Atmuri took complete responsibility and gave satisfactory responses to Oliva's inquiries regarding proper dispensing protocol.

Also, on July 21, 2008, appellant Hung dispensed the drug Travatan to the wrong member. In her deposition testimony, Hung admitted that she erred by failing to

recognize that one of the medications being picked up by a member was intended for another member. She indicated that the medications had been taped together and she realized her mistake when the next person tried to pick up the prescribed Travatan. She admitted that it was her responsibility to write up a DFI report as soon as the error occurred. Hung explained that she did not prepare the report that night because the pharmacy was already closing. She worked the next three days but she did not prepare the report during that time because the medication had not yet been returned to the pharmacy.

On about July 25, 2008, Oliva learned from the Santa Clara member services department that a member had spoken with a member services representative and complained that Hung had given his prescription for Travatan to another member. Oliva found no DFI report documenting the error.

Hung did not work on July 25-27, 2008. On Monday July 28, 2008, respondent Oliva questioned Hung regarding the Travatan error. Hung had difficulty remembering the incident at first and then admitted that she had not prepared a DFI report. Hung showed Oliva documents related to the error that she had been keeping in her smock pocket and said that she did not believe a DFI report was necessary. Based on Hung's demeanor and statements, Oliva believed that Hung was "keeping the related documents in her smock pocket in order to cover up her error." In her deposition, Hung admitted that she had not yet written up the Travatan error a week after the incident.

Later, respondent Oliva discovered that, on July 24, 2008, appellant Hung had "filled a prescription for a drug called Prochlorperazine for a patient without first checking the patient's allergy history, which had been updated on June 2, 2008 to reflect an allergic reaction to the medication." Another pharmacist caught the error during the patient consultation and immediately prepared a DFI report and sent it to a supervisor.

On July 29, 2008, respondent Oliva met with Hung to investigate the dispensing errors Hung had made on July 21, 2008 and July 24, 2008. Pharmacy supervisors Contreras and Velasquez were present at the meeting. When questioned about her dispensing errors, Hung made excuses for her behavior. She said that she did not have enough time to write a DFI report and said that a pharmacy clerk had taped together two bags of medication intended for two different patients. Hung refused to take responsibility for her errors. At the end of the meeting, Oliva placed Hung on investigatory suspension.

After the July 29, 2008 meeting, Oliva consulted with Ron Rich, who was Kaiser's Employee/Labor Relations Consultant, Contreras, and Velasquez and reviewed Kaiser policies. Oliva "determined that based on the frequency and severity of Hung's drug furnishing errors, together with her refusal to take responsibility for her actions and her failure to report her own DFI that occurred on July 21, 2008, Hung's continued employment as a pharmacist posed too high a risk to the health and safety of Kaiser's members" and, accordingly, he concluded that Hung should be terminated.

On July 31, 2008, Oliva "prepared and mailed a letter to Hung stating that she had been placed on a ten-day suspension with intent to discharge for cause due to unsatisfactory work performance and unprofessional conduct."

Hung's union representative requested that Hung be given the option of voluntary retirement instead of involuntary termination in light of her many years of employment and Oliva agreed to offer an option to retire and "health and dental insurance coverage through the end of the year" On August 7, 2008, Oliva and others met with Hung. Hung signed an agreement entitled, as revised, "Resignation (Retirement) Agreement and General Release."

In her declaration, Debra Contreras-Whaley ("Contreras") stated the following facts. Contreras had been employed by Kaiser for over 20 years and she was employed

by KFHP as an outpatient pharmacy services supervisor at the Santa Clara Medical Center outpatient pharmacy from June 23, 2008 to April 23, 2011. In early July 2008, she received appellant Hung's application for FMLA leave to retroactively cover June 27, 28, and 29 of 2008. On July 11, 2008, the FMLA leave was approved. Contreras was "never aware" of the medical condition or conditions underlying Hung's leave request and never provided "any information regarding her medical condition(s) to anyone."

Contreras was present during the July 29, 2008 meeting with appellant Hung, respondent Oliva, and Velasquez. Contreras observed that appellant Hung "did not take responsibility for her drug furnishing errors, and did not express any remorse for the risks they posed to patients." Hung did not complain that she was being singled out because of her age, gender or any disability.

On August 8, 2008, Contreras was copied on an email from Hung in which she indicated she was revoking the agreement that she had signed on August 7, 2008 and she wanted to take a normal retirement. Contreras "prepared and processed 'termination due to retirement' paperwork for [appellant Hung] on August 11, 2008."

Susan Velasquez stated in her declaration that she is an outpatient pharmacy services supervisor at the Santa Clara Medical Center outpatient pharmacy. She attended the July 29, 2008 meeting with Hung.

C. Evidence Submitted in Opposition to Summary Judgment

Hung submitted her declaration and portions of her deposition testimony, which reflected the following.

Hung began her employment with Kaiser in 1976. Long before Oliva arrived at the Santa Clara Kaiser facility, Hung told both of her direct managers, Kelvin Chan and Jean Damasco, that she had a TMJ problem. They were the main people in the pharmacy who knew she had a TMJ problem. She stated that her days off were usually due to a TMJ problem.

In 2008, Hung was working at the main pharmacy located on the first floor.

As to the first medication-related incident involving a patient's allergy, Hung recalled suggesting to the patient that she take the medication upstairs and tell the prescribing physician to put a notation about her red dye allergy into "Health Connect." She indicated that she made that suggestion because it would be faster than calling the doctor from the pharmacy and awaiting a return call. Hung "did not believe that allowing the member to leave the pharmacy to go up to her doctor's office would endanger the patient because the patient already knew she was allergic to the red-dye and would not take the medication." Hung stated that she did not "knowingly allow the member to leave the Kaiser facility with the amoxicillin red-dye medication." Hung denied telling the patient to take the medication and, if there was a problem, to go to the emergency room.

As to the second incident involving the recommendation to use Hydrocortisone on an open foot wound, Hung denied that it ever happened. She asserted that she never counseled a Kaiser member to purchase and apply Hydrocortisone to an open foot wound.

As to the third incident, the dispensing error concerning Travatan, Hung understood within minutes that she had given the prescription to the wrong person. In her deposition testimony, she explained that the Travatan prescription and another prescription had been taped together by another employee. Hung talked to the patient's husband, who had picked up the medication for his wife, that same evening and arranged for him to return the medication to the pharmacy. She learned during her phone call that the medicine was still sealed and unopened.

Hung scribbled notes regarding the incident on a piece of paper. She had been too busy serving patients on June 22, 2008 to prepare a DFI form. By the third day after the incident, Hung had partly filled out the form. She kept her notes in her smock pocket. Hung asserted that she "was not attempting to hide the Travatan incident" and she "had

every intention of documenting the Travatan incident so that a DFI could be completed"

As to the fourth incident, Hung stated that the "July 24, 2008 incident was not a dispensing error as described by company policy because the medication never left the control of the pharmacy personnel" ⁴ She explained that a note was attached to the Prochlorperazine prescription that "said, 'Do not sell until pharmacist consults with the patient first.' " She indicated that when a patient's allergy profile in the computer system fails to specify an allergic reaction, "pharmacists have NO control over this patient allergy profile unless the patient goes to the consultation pharmacist who can review the patient profile."

Oliva admitted at his deposition that the only source of information regarding the Hydrocortisone incident was the pharmacy manager Ghezabat. He never met with the Kaiser member or the member's agent.

Oliva acknowledged that Hung informed him that she had called the patient who had left with the Travatan. Oliva believed that action was appropriate.

Oliva admitted in his deposition testimony that, the previous Tuesday, Velasquez had notified him in person of another employee's family leave application. But he stated that such notification was not typical.

At the time of Oliva's deposition in April 2011, Atmuri was working at Kaiser Permanente South San Francisco facility as an outpatient pharmacy operations manager. In 2008, Atmuri was a pharmacist in charge. An outpatient pharmacy operations manager is a higher position than a pharmacist in charge.

⁴ The court sustained an objection to Hung's statement in her declaration that the Prochlorperazine prescription was "filled with the intent of NOT selling the prescription until the pharmacist consults with the patient first." This evidentiary ruling is not challenged on appeal and Hung may not rely on this evidence.

In her deposition, Jean Damasco indicated that she was the evening supervisor at the main pharmacy in Santa Clara and Hung and Tran were among those who reported to her in 2008. Hung had confided to her about health issues. During conversation, Hung would mention if her TMJ problem or her back was bothering her or she felt a little dizziness.

Damasco indicated that DFI reports are written up by the person who discovers the error and are entered online. But not every staff pharmacist has online access to fill out DFI reports but blank, hardcopy forms are available. Damasco considers it sufficient for a person to leave her written information about a dispensing error on a piece of paper. At a minimum, the problem and the patient should be identified so that the DFI can be resolved immediately. Damasco inputs the DFI information into the computer, prints out a hard copy, and keeps it in a binder.

In 2008, Damasco did not notice a difference in Hung's work performance compared to previous years. At that time, Damasco felt that Hung was still a competent pharmacist.

Kelly Tran in her deposition recalled that there were times when she did not fill out the formal DFI form. Tran would write the important information on a piece of paper because she did not have enough time, Tran would put the paper into Damasco's box, and Damasco would enter the information into the computer.

Tran remembered that, in 2008, Hung asked her to fill a prescription again because appellant had just given the medication, which she recalled was an eye drop, to the wrong patient. Tran saw Hung calling the patient; Hung informed Tran that she had instructed the patient to bring back the medication.

Tran stated that she filed a complaint with the Department of Fair Employment and Housing (DFEH) while working at Kaiser because she felt that she had received "differential treatment when [she] took the FMLA [leave] to care for [her] son." Tran felt

she was being pressured by her supervisor Jean Damasco and Chris Oliva. Damasco, who was her supervisor at the time, was pressuring her "on the wait time" and "assigning [her] different tasks."

III

Failure to Grant Continuance of Motion for Summary Judgment

Appellant Hung filed her opposition to summary judgment or summary adjudication on July 19, 2011. In a separate document entitled "Plaintiff, Shu Hung's Evidentiary Objections," filed July 19, 2011, appellant Hung raised numerous evidentiary objections to respondents' declarations. Appellant indicated in the introduction to her written evidentiary objections that she was also seeking a continuance pursuant to section 437c, subdivision (h), "to conduct the deposition of those affiants whose testimony has not yet been obtained."⁵

The trial court overruled appellant's evidentiary objections for failure to comply with California Rules of Court, rule 3.1354. That rule requires written objections to evidence to follow one of two specified formats. The court did not expressly rule on her requests for a continuance.

Section 437c, subdivision (h), provides: "If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication or both that facts essential to justify opposition *may* exist but cannot, for reasons stated, then be presented, the court *shall* deny the motion, or order a continuance to permit affidavits

⁵ Embedded within the evidentiary objections to one declaration, appellant Hung stated she was seeking a continuance pursuant to section 437c, subdivision (h), "to conduct the deposition of several witnesses identified by the affiant, the identity of whom as a declarant was not known." In her evidentiary objections to statements of other declarants, appellant asked for a continuance to conduct their depositions pursuant to section 437c, subdivision (h), but did not indicate that the declarants were unknown to her.

to be obtained or discovery to be had or may make any other order as may be just. . . ." (Italics added.)

"The statute mandates a continuance of a summary judgment hearing upon a good faith showing by affidavit that additional time is needed to obtain facts essential to justify opposition to the motion. [Citations.] Continuance of a summary judgment hearing is not mandatory, however, when no affidavit is submitted or when the submitted affidavit fails to make the necessary showing under section 437c, subdivision (h). [Citations.]" (*Cooksey v. Alexakis* (2004) 123 Cal.App.4th 246, 253-254.)

"A declaration in support of a request for continuance under section 437c, subdivision (h) must show: '(1) the facts to be obtained are essential to opposing the motion; (2) there is reason to believe such facts may exist; and (3) the reasons why additional time is needed to obtain these facts. [Citations.]' (*Wachs v. Curry* (1993) 13 Cal.App.4th 616, 623 . . .) ' "The purpose of the affidavit required by Code of Civil Procedure section 437c, subdivision (h) is to inform the court of outstanding discovery which is necessary to resist the summary judgment motion. [Citations.]" ' (*Bahl v. Bank of America* (2001) 89 Cal.App.4th 389, 397 . . .) 'It is not sufficient under the statute merely to indicate further discovery or investigation is contemplated. The statute makes it a condition that the party moving for a continuance show "facts essential to justify opposition may exist." ' (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 548 . . .)" (*Cooksey v. Alexakis, supra*, 123 Cal.App.4th at p. 254.)

In her opening brief, appellant states that the court's "failure to even address the merits of [her] requests for a continuance constituted an abuse of discretion by the Trial Court because . . . section 437c(h) entitled [her] to such a continuance." She fails to cite to any declaration supporting her request for continuance.

As far as we can tell, appellant Hung made no evidentiary showing that "facts essential to justify opposition *may* exist but cannot, for reasons stated, then be presented."

(§ 437c, subd. (h).) Although the record does not contain an express ruling on her request for a continuance, the court's grant of summary judgment implies a denial. (See *Frazee v. Seely* (2002) 95 Cal.App.4th 627, 634; Evid. Code, § 664.) In light of Hung's apparent failure to support her request for a continuance under section 437c, subdivision (h), with an affidavit or declaration, we find no trial court error.

IV

Grant of Motion for Summary Judgment

A. Standard of Review

A defendant has met the "burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action." (§ 437c, subd. (p)(2).) If that burden is satisfied, "the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto." (*Ibid.*)

A court grants a motion for summary judgment "if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (§ 437c, subd. (c).) In determining whether a triable issue of material fact exists, the court must "consider all of the evidence set forth in the papers, except that to which objections have been made and sustained by the court, and all inferences reasonably deducible from the evidence, except summary judgment may not be granted by the court based on inferences reasonably deducible from the evidence, if contradicted by other inferences or evidence, which raise a triable issue as to any material fact." (*Ibid.*)

Credibility questions ordinarily cannot be resolved on summary judgment. (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 476; see § 437c, subd. (e).) A court must deny a defendant's motion for summary judgment, "if the court concludes that the

plaintiff's evidence or inferences raise a triable issue of material fact" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 856.) "But, even though the court may not weigh the plaintiff's evidence or inferences against the defendants' as though it were sitting as the trier of fact, it must nevertheless determine what any evidence or inference *could show or imply to a reasonable trier of fact.*" (*Ibid.*)

"We review the trial court's decision de novo, liberally construing the evidence in support of the party opposing summary judgment and resolving doubts concerning the evidence in favor of that party. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037)" (*State v. Allstate Ins. Co.* (2009) 45 Cal.4th 1008, 1017-1018.)

B. FEHA Cause of Action

1. General Legal Principles of Disparate Treatment

Appellant Hung claims that triable issues of material fact exist as to whether respondents discriminated against her on the basis of her disability, gender, and age. FEHA prohibits employment discrimination based on, among other criteria, physical disability, mental disability, gender, or age.⁶ (Gov. Code, § 12940, subd. (a).)

"California has adopted the three-stage burden-shifting test established by the United States Supreme Court for trying claims of discrimination . . . based on a theory of disparate treatment. [Citations.]" (*Guz v. Bechtel Nat. Inc.* (2000) 24 Cal.4th 317, 354, fn. omitted.) " 'Disparate treatment' is *intentional* discrimination against one or more persons on prohibited grounds. [Citations.]" (*Id.* at p. 354, fn. 20.)

⁶ "Physical disability" includes, among other conditions, "any physiological disease, disorder, [or] condition" that affects a body system and "[l]imits a major life activity." (Gov. Code, § 12926, subd. (l)(1).) "Mental disability" includes, among other conditions, "any mental or psychological disorder or condition . . . that limits a major life activity." (Gov. Code, § 12926, subd. (j)(1).) " 'Gender' means sex" (Gov. Code, § 12926, subd. (q).) " 'Age' refers to the chronological age of any individual who has reached his or her 40th birthday." (Gov. Code, § 12926, subd. (b).)

That three-stage test, which was established in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 [93 S.Ct. 1817], "places on the plaintiff the initial burden to establish a prima facie case of discrimination." (*Guz v. Bechtel Nat. Inc., supra*, 24 Cal.4th at p. 354.) "This step is designed to eliminate at the outset the most patently meritless claims, as where the plaintiff is not a member of the protected class or was clearly unqualified, or where the job he sought was withdrawn and never filled. [Citations.] While the plaintiff's prima facie burden is 'not onerous' [citation], [a plaintiff] must at least 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.]' [Citation.]" (*Id.* at pp. 354-355.) "The specific elements of a prima facie case may vary depending on the particular facts. [Citations.] Generally, the plaintiff must provide evidence that (1) he was a member of a protected class, (2) he was qualified for the position he sought or was performing competently in the position he held, (3) he suffered an adverse employment action, such as termination, demotion, or denial of an available job, and (4) some other circumstance suggests discriminatory motive. [Citations.]" (*Id.* at p. 355.)

"If, at trial, the plaintiff establishes a prima facie case, a presumption of discrimination arises. [Citations.] This presumption, though 'rebuttable,' is 'legally mandatory.' [Citations.] Thus, in a trial, '[i]f the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.' [Citations.]" (*Ibid.*)

Where a plaintiff presents a prima facie case at trial, "the burden shifts to the employer to rebut the presumption by producing admissible evidence, sufficient to 'raise [] a genuine issue of fact' and to 'justify a judgment for the [employer],' that its action

was taken for a legitimate, nondiscriminatory reason. [Citations.]" (*Id.* at pp. 355-356.) If not discriminatory, "true reasons need not necessarily have been wise or correct. [Citations.]" (*Id.* at p. 358.) Legitimate reasons "in this context are reasons that are *facially unrelated to prohibited bias*, and which, if true, would thus preclude a finding of *discrimination*. [Citations.]" (*Ibid.*, fn. omitted.)

"If the employer sustains this burden, the presumption of discrimination disappears. [Citations.] The plaintiff must then have the opportunity to attack the employer's proffered reasons as pretexts for discrimination, or to offer any other evidence of discriminatory motive. [Citations.] In an appropriate case, evidence of dishonest reasons, considered together with the elements of the prima facie case, may permit a finding of prohibited bias. [Citations.] The ultimate burden of persuasion on the issue of actual discrimination remains with the plaintiff. [Citations.]" (*Id.* at p. 356.)

Where an employer brings a motion for summary judgment against a plaintiff's FEHA cause of action and sets forth competent, admissible evidence (see § 437c, subds. (b), (d)) of nondiscriminatory reasons for a challenged employment action that are manifestly unrelated to intentional discrimination, the employer has met its "burden of showing that a cause of action has no merit" (§ 437c, subd. (p)(2)). (See *Guz v. Bechtel Nat. Inc.*, *supra*, 24 Cal.4th at p. 360.) The burden then shifts to the plaintiff employee to avoid summary judgment by showing a triable issue whether the challenged employment action was actually made on a prohibited discriminatory basis. (*Ibid.*) "[A]n 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." (*Id.* at p. 361, fn. omitted.)

"While the objective soundness of an employer's proffered reasons supports their credibility . . . , the ultimate issue is simply whether the employer acted with *a motive to discriminate illegally*." (*Id.* at p. 358.) "The authorities suggest that, in an appropriate

case, an inference of dissembling may arise where the employer has given shifting, contradictory, implausible, uninformed, or factually baseless justifications for its actions. [Citations.]" (*Id.* at p. 363.) "[A]n inference of intentional discrimination cannot be drawn solely from evidence, if any, that the company lied about its reasons. The pertinent statutes do not prohibit lying, they prohibit discrimination. [Citation.] Proof that the employer's proffered reasons are unworthy of credence may 'considerably assist' a circumstantial case of discrimination, because it suggests the employer had cause to hide its true reasons. [Citation.] Still, there 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.]" (*Id.* at pp. 360-361; see *St. Mary's Honor Center v. Hicks* (1993) 509 U.S. 502, 516 [113 S.Ct. 2742] ["a reason cannot be proved to be 'a pretext for discrimination' unless it is shown both that the reason was false, and that discrimination was the real reason"].)

In *Guz v. Bechtel Nat. Inc., supra*, 24 Cal.4th 317, which involved a claim of age discrimination, the California Supreme Court determined that "Guz's circumstantial evidence of intentional discrimination, even if fully credited and technically sufficient to establish a prima facie case, raises, at most, a weak inference of prohibited bias." (*Id.* at p. 362, fn. 25.) It concluded that "the evidence, viewed as a whole, does not give rise to a rational inference of discrimination." (*Ibid.*)

2. *Burden on Appellant Hung to Show Pretext*

On appeal, appellant Hung maintains that her evidence was adequate to establish a prima facie case of disability, gender, and age discrimination under the FEHA.

A plaintiff presents a prima facie case of discrimination on the basis of a FEHA-protected disability by presenting 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 accommodations, and (3) was subjected to an adverse

employment action because of the disability or perceived disability. (*Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 254.)" (*Sandell v. Taylor-Listug, Inc.* (2010) 188 Cal.App.4th 297, 310.) A plaintiff establishes a prima facie case of age discrimination under the FEHA by presenting evidence that "the plaintiff (1) is over the age of 40; (2) suffered an adverse employment action; (3) was performing satisfactorily at the time of the adverse action; and (4) suffered the adverse action under circumstances that give rise to an inference of unlawful discrimination, i.e., evidence that the plaintiff was replaced by someone significantly younger than the plaintiff. (*Hersant, supra*, 57 Cal.App.4th at pp. 1002-1003.)" (*Id.* at p. 321.) Similarly, a plaintiff establishes a prima facie case of gender discrimination by showing that (1) she or he was within the protected class; (2) she or he was qualified for the position; (3) she or he was subject to an adverse employment action; and (4) the adverse action occurred under circumstances giving rise to an inference of unlawful discrimination. (See *Guz v. Bechtel Nat. Inc., supra*, 24 Cal.4th at p. 355; see also *Leibowitz v. Cornell University* (2d Cir. 2009) 584 F.3d 487, 498; cf. *Hall v. County of Los Angeles* (2007) 148 Cal.App.4th 318, 326-327.)

Hung maintains that she suffered from a FEHA-protected disability, specifically a TMJ problem. She points to her deposition testimony indicating that she has a disability that she calls "TMJ dysfunction" that results in dizziness, pain, and inability to perform cognitive tasks. According to Hung, the onset of her problem with her TMJ (temporomandibular joint) occurred 30 years ago and she was diagnosed with "TMJ" by a Dr. Awsare. But Hung acknowledged that her doctors did not agree that "TMJ" caused her symptoms and Dr. McLean, her internal medicine physician, had told her she had general depression. Dr. McLean had prescribed a medication commonly known as Valium, which Hung had been taking for many years. It was Hung's understanding that the Valium treats the "TMJ" by relaxing the muscles.

Hung claims that she had "a number of absences in 2008 due to her disability and applied for FMLA leave in June of 2008." She points out that during this same time, "Kaiser began taking adverse actions against [her] because of her absences due to her disability." She comments that "it is strange that [she] worked for 32 years without incident, then out of nowhere, after [she] has some absences because of her disability and she applies for FMLA leave, she suddenly has the alleged four errors occur." Hung asserts that the temporal proximity of her disability absences and FMLA leave and the adverse employment actions supports an inference of a causal connection between them and "[l]ooking at all of the evidence in a light most favorable to [her], she has demonstrated a prima facie case of disability discrimination under FEHA."

Hung also argues that she established a prima facie case of age and gender discrimination in that she is female and over the age of 40, "she was qualified for her position and performed capably for 32 years up until the time of the incidents in dispute, and she was disciplined and terminated for unsubstantiated dispensing errors." She implies that the evidence of the employer's treatment of Tran, a female, adds to that prima facie showing.

In support of summary judgment, however, respondents proceeded directly to the second stage of the *McDonnell Douglas* analytical framework by offering competent, admissible evidence of the legitimate, nondiscriminatory reasons for the disciplinary actions and decision to terminate Hung. (See § 437, subds. (b)(1), (d), *Guz v. Bechtel Nat. Inc.*, *supra*, 24 Cal.4th at p. 357.) This showing was sufficient to dispel a rebuttable presumption of discrimination arising from a prima facie showing. (See *id.* at p. 355.) Consequently, in the face of respondents' evidence, it was Hung's burden on summary judgment to additionally present sufficient evidence to raise a triable issue whether the given reasons for the adverse employment actions were actually a pretext for unlawful discrimination. (See *id.* at pp. 360, 362, 369-370; § 437c, subd. (p)(2).) Even assuming

Hung's evidence is sufficient to establish a prima facie case of discrimination on the basis of disability, age, and gender, the evidence is not sufficient to avoid summary judgment.

3. *No Triable Issue Regarding Disability Discrimination*

"By its terms, [Government Code] section 12940 makes it clear that drawing distinctions on the basis of physical or mental disability is not forbidden discrimination *in itself*. Rather, drawing these distinctions is prohibited *only* if the adverse employment action occurs *because of* a disability and the disability would not prevent the employee from performing the essential duties of the job, at least not with reasonable accommodation." (*Green v. State* (2007) 42 Cal.4th 254, 263, latter italics added.)

Appellant Hung asserts that there is evidence that Oliva either had direct knowledge of her disability and the reasons given for his decision to terminate her were pretext for disability discrimination or he was "influenced by other management level employees . . . who knew about [her] disability and had the requisite discriminatory animus."

a. *Pretext*

Oliva's reasons given for his termination decision could *not* be pretext for disability discrimination unless he actually knew Hung had a disability. As to evidence that Oliva knew of her disability, Hung points to her declaration in which she states that she "told both of [her] direct managers, Kelvin Chan and Jean Damasco, that [she] had TMJ, long before Oliva arrived at the Santa Clara Kaiser facility." She does not point to any evidence that this information was actually passed on to Oliva by either Chan or Damasco or anyone else. There was uncontradicted evidence that Oliva learned of Hung's claimed disability only after Hung sued.

Uncontradicted evidence shows that Contreras processed Hung's FMLA application in July 2008 and she was present during the July 29, 2008 meeting regarding Hung's medication-related errors. But Hung points to no evidence that Contreras had

informed Oliva that Hung had applied for or taken FMLA leave or Hung had a FMLA-protected disability, either at the July 29, 2008 meeting or any other relevant time.⁷

The evidence shows that Hung applied for the FMLA leave only after being disciplined for two medication-related errors and excessive absenteeism and her leave request, which was granted, applied retroactively to three days in late June 2008 for which she had *not* been disciplined. Hung presented no evidence that she had told Oliva, during the June 2008 meeting to discuss the two disciplinary actions or at any other relevant time, that any of the nine absences for which she was being disciplined involved a FEHA-protected disability, a TMJ problem or depression.

Evidence of one instance where Velasquez notified Oliva of a different Kaiser employee's FMLA leave application is not enough to support a reasonable inference that Velasquez notified Oliva that Hung had applied for FMLA leave or Oliva actually knew that Hung had a disability. Uncontradicted deposition testimony indicated that it was atypical for Velasquez to notify Oliva of family leave applications.

In any case, regardless of Oliva's knowledge of Hung's disability, the evidence was not sufficient to support a reasonable inference that his proffered legitimate reasons for his termination decision, the four medication-related incidents and Hung's failure to report a DFI, were merely pretext for unlawful disability discrimination. Contrary to Hung's assertion, no discriminatory intent may be inferred from Oliva's inconsistent treatment of her and pharmacist Atmuri for their drug furnishing errors.

"A showing that [an employer] treated similarly situated employees outside [an employee's] protected class more favorably would be probative of pretext." (*Vasquez v.*

⁷ Contreras specifically stated that she was unaware of the medical conditions underlying Hung's leave request and Contreras did not provide any information regarding any conditions to anyone. The record does not reveal whether Hung's claimed disability for purposes of FEHA protection and the disability for purposes of 2008 FMLA leave were actually the same disability.

County of Los Angeles (9th Cir. 2003) 349 F.3d 634, 641, fn. omitted; see also *McDonnell Douglas Corp. v. Green*, *supra*, 411 U.S. at p. 804 ["Especially relevant to [a showing of pretext] would be evidence that white employees involved in acts against [the employer] of comparable seriousness . . . were nevertheless retained or rehired"].) In general, "individuals are similarly situated when they have similar jobs and display similar conduct." (*Vasquez v. County of Los Angeles*, *supra*, 349 F.3d at p. 641.) Employees are not similarly situated when they "did not engage in problematic conduct of comparable seriousness" (*Ibid.*)

Here, the evidence was inadequate to show that pharmacist Atmuri, who was not terminated as a result of his dispensing error, was similarly situated to Hung. The evidence indicated that Atmuri's error was an isolated incident for which he was counseled and accepted complete responsibility whereas Hung committed four separate medication-related errors, two of which occurred after being disciplined for the initial two mistakes, she failed to submit written DFI information concerning the Travatan dispensing error, and she failed to accept responsibility for her errors.

Appellant Hung also argues that a triable issue of fact exists whether Oliva's explanation for the adverse employment actions is worthy of credence and pretext may be inferred from the evidence casting doubt whether the four medication-related incidents occurred as described by Oliva. The U.S. Supreme Court explained in an age discrimination case: "Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive. [Citation.] In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. . . . Moreover, once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its

decision. [Citation.] Thus, a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." (*Reeves v. Sanderson Plumbing Products, Inc.* (2000) 530 U.S. 133, 147-148 [120 S.Ct. 2097].)

As to the first two medication-related errors, Hung refers this court to her deposition statements, Oliva's acknowledgement in his deposition that he did not meet with the member who complained about Hung's recommendation to use Hydrocortisone cream, and Oliva's "refus[al] to give any credence to [her] side of the story." She contends that Oliva's investigation into these incidents was "shoddy."

As to the third incident involving Travatan, Hung asserts that Oliva mischaracterized her actions and intent. Appellant disputes "Oliva's claim that she failed to take responsibility and attempted to cover up the Travatan incident." Appellant points to her declaration that she "had every intention of documenting the Travatan incident so that a DFI could be completed" and she "was not attempting to hide the Travatan incident." As to the fourth incident, she maintains that it was not *dispensing* error as defined by Kaiser policy.

It is true that pretext may be demonstrated by showing that a proffered reason has no basis in fact. (See *Villanueva v. City of Colton* (2008) 160 Cal.App.4th 1188, 1195.) "An employee in this situation can not [sic] 'simply show the employer's decision was wrong, mistaken, or unwise. . . .' [Citations.]" (*Morgan v. Regents of University of Cal.* (2000) 88 Cal.App.4th 52, 75.) "It is not enough for the employee simply to raise triable issues of fact concerning whether the employer's reasons for taking the adverse action were sound. What the employee has brought is not an action for general unfairness but for [unlawful] discrimination." (*Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1005.) To support an inference of pretext, a plaintiff opposing summary judgment must demonstrate such weaknesses, implausibilities, inconsistencies,

incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a trier of fact could rationally find them unworthy of credence. (Ibid.)

In this case, however, Hung presented no evidence to indicate that Oliva had lied about receiving specific information from various persons concerning four separate medication-related errors committed by Hung within several months. Uncontradicted evidence showed that Hung had refused to return medication to which the patient had an allergy and Hung allowed her to leave the pharmacy with the medication.

Uncontradicted evidence disclosed that, after being disciplined for medication-related errors, Hung dispensed Travatan to the wrong member and she had not submitted written DFI information to a superior when questioned seven days later and she filled a prescription even though the patient had an allergy to the medication. Thus, proffered reasons for her termination had a strong basis in fact.

The evidence does not support an inference that Oliva gave fabricated reasons for the adverse employment actions. Hung failed to present sufficient evidence to raise a reasonable inference that Oliva's proffered reasons for his termination decision were actually a pretext for disability discrimination.

b. *Cat's Paw*

Hung insists that even if Oliva did not know about her disability, "Kaiser would still be liable because other supervisors and managers that were aware of [her] disability played a role in Kaiser's discrimination and termination of [her]." She argues that respondents cannot escape liability by claiming that Oliva had no knowledge of her disability and he was the sole individual who made the termination decision.

Relying upon this court's opinion of *Reeves v. Safeway Stores, Inc.* (2004) 121 Cal.App.4th 95 ("*Reeves*"), appellant Hung states that "[a]n employee can demonstrate causation 'by showing that *any* of the persons involved in bringing about the adverse action held the requisite animus.' [Citation.]" She is alluding to the "cat's paw" theory of

liability that this court discussed in *Reeves*. (See *Reeves, supra*, 121 Cal.App.4th at pp. 113-116.) "The term 'cat's paw' derives from a fable conceived by Aesop, put into verse by La Fontaine in 1679, and injected into United States employment discrimination law by Posner in 1990. See *Shager v. Upjohn Co.*, 913 F.2d 398, 405(CA7). In the fable, a monkey induces a cat by flattery to extract roasting chestnuts from the fire. After the cat has done so, burning its paws in the process, the monkey makes off with the chestnuts and leaves the cat with nothing." (*Staub v. Proctor Hosp.* (2011) 131 S.Ct. 1186, 1190, fn. 1 ("*Staub*").) In employment situations, the cat's paw is the unbiased decisionmaker who is influenced to make an adverse employment decision by the actions of a biased employee.

In *Staub*, the U.S. Supreme Court examined the "cat's paw" theory of liability and that case is instructive. The court considered "the circumstances under which an employer may be held liable for employment discrimination based on the discriminatory animus of an employee who influenced, but did not make, the ultimate employment decision." (*Staub, supra*, 131 S.Ct. at p. 1189 [case arose under the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), which prohibits employment discrimination based on membership or an obligation to serve in a uniformed service].) The court stated that "it is axiomatic under tort law that the exercise of judgment by the decisionmaker does not prevent the earlier agent's action (and hence the earlier agent's discriminatory animus) from being the proximate cause of the harm." (*Id.* at p. 1192.) The court did not "think that the ultimate decisionmaker's exercise of judgment automatically renders the link to the supervisor's bias 'remote' or 'purely contingent.'" (*Id.* at p. 1192) But "the biased supervisor's action" must be "a causal factor of the ultimate employment action" (*Id.* at p. 1193.) If a supervisor's "independent investigation relies on facts provided by the biased supervisor—as is necessary in any case of cat's-paw liability—then the employer (either directly or through the ultimate

decisionmaker) will have effectively delegated the factfinding portion of the investigation to the biased supervisor." (*Ibid.*) The high court held that "if a supervisor performs an act motivated by antimilitary animus that is *intended* by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA."⁸ (*Id.* at p. 1194, fns. omitted.)

Hung argues that Velasquez, Damasco, and Chan were aware that she had made a disability claim in 2007. But she improperly relies on evidence to which the trial court sustained evidentiary objections.⁹ The evidentiary ruling is not challenged on appeal.

Hung presented no evidence that Oliva's decision to terminate Hung was proximately caused by another employee's act that was motivated by discriminatory disability animus and intended to cause an adverse employment action. An inference of discriminatory intent on the part of Chan cannot be reasonably drawn from the evidence that Hung had told Chan at some point in time that she had a TMJ problem and Chan informed Oliva of her excessive absenteeism, even if Chan's action "drew negative attention" to Hung. Hung argues that an inference of discriminatory animus may be drawn if Chan did not tell Oliva about her disability when Chan informed Oliva of her absences. But Hung has not submitted evidence sufficient to raise an inference that the specific absences underlying Chan's concern were due to a FEHA-protected disability, Chan was aware that those absences were disability-related, or Chan's actions were motivated by discriminatory disability animus. Hung did not present any evidence that

⁸ *Staub* did not decide "whether the employer would be liable if a co-worker, rather than a supervisor, committed a discriminatory act that influenced the ultimate employment decision." (*Staub, supra*, 131 S.Ct. at p. 1194, fn. 4.)

⁹ Appellant Hung points to evidence of an earlier disability claim and a chain email, on which Chan and Velasquez were copied, which she submitted to demonstrate that respondents had notice of her disability. The trial court sustained respondent's objection to that evidence on foundational grounds.

Chan, who apparently transferred out in March 2008, influenced Oliva to take the June 2008 disciplinary actions against her or to make the decision to terminate her.

Appellant Hung repeatedly asserts that she was absent from work "because of" her disability. She does not, however, point to any evidence showing that the specified absences identified in one of the two June 2008 disciplinary actions resulted from a FEHA-protected disability.

Even though there was evidence that Hung shared complaints regarding a TMJ problem and other ailments with Damasco, Hung does not point to evidence that Damasco had shared Hung's health information with Oliva, Damasco was biased against Hung based on any disability, or Damasco participated in or influenced Oliva's decisions to discipline or terminate Hung.

The mere evidence that Contreras processed appellant Hung's 2008 FMLA leave application and she was subsequently present during the July 29, 2008 meeting does not alone support a reasonable inference that Contreras harbored discriminatory animus toward Hung based on disability. There is no additional evidence that Contreras took any actions or made any statements concerning Hung with discriminatory animus and the intent to cause an adverse employment action against Hung and such acts or statements were a proximate cause of Oliva's employment decisions regarding Hung.

It is not enough that certain employees other than Oliva were aware that she suffered from a TMJ problem, she had a FMLA-protected disability, or she had taken a brief FMLA leave in June 2008. There was simply no evidence to support a finding that Oliva was the instrumentality or "cat's paw" by which the discriminatory animus of another was carried into effect.

4. *No Triable Issue Regarding Gender or Age Discrimination*

Hung maintains that circumstantial evidence demonstrates that "Kaiser's supposedly 'legitimate' reasons for taking action" against her were simply pretext. She suggests that an inference of pretext may be drawn from the conflicting evidence surrounding the four incidences and the evidence concerning Kaiser's treatment of her coworkers Tran and Atmuri.

As we have indicated, the evidence was not sufficient to show that Atmuri, a younger male pharmacist, was similarly situated to Hung and, therefore, evidence regarding his more favorable treatment does not support a reasonable inference that the true reason for the adverse employment actions against Hung was gender or age discrimination. While an employer's conduct tending to demonstrate hostility towards a certain group is both relevant and admissible to show that an employer's general hostility towards that group is the true reason for firing an employee who is a member of that group (*Heyne v. Caruso* (9th Cir. 1995) 69 F.3d 1475, 1479-1480), the evidence regarding the treatment of Tran, another female, has very marginal, if any, probative value on the issue of pretext. There was no evidence that Tran suffered any adverse employment action¹⁰ or Oliva's or Damasco's actions toward Tran with regard to her FMLA leave were motivated by discriminatory animus on the basis of gender.

¹⁰ For purposes of the FEHA, an "adverse employment action" "must materially affect the terms, conditions, or privileges of employment to be actionable" (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1052.) "Minor or relatively trivial adverse actions or conduct by employers or fellow employees that, from an objective perspective, are reasonably likely to do no more than anger or upset an employee cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment and are not actionable, but adverse treatment that is reasonably likely to impair a reasonable employee's job performance or prospects for advancement or promotion falls within the reach of the antidiscrimination provisions of [Government Code] sections 12940(a) and 12940(h)." (*Id.* at pp. 1054-1055, fn. omitted.)

As already thoroughly discussed, the proffered nondiscriminatory reasons for the disciplinary actions and the decision to terminate Hung had a strong basis in fact as shown by uncontradicted evidence. Even if Hung's evidence is fully credited, the evidence was not sufficient to permit a rational inference that the adverse employment actions had been motivated by gender or age discrimination.

C. *FMLA Retaliation Cause of Action*

1. *General Principles*

The complaint's second cause of action is for retaliation against Hung for her exercise of her rights under the FMLA. The FMLA entitles eligible employees to take up to 12 work weeks of leave annually for a number of reasons, including "a serious health condition that makes the employee unable to perform the functions of the position of such employee." (29 U.S.C. § 2612(a)(1)(D).) The FMLA makes it "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided" by the act. (29 U.S.C., § 2615, subd. (a)(1).) "The Act's prohibition against 'interference' prohibits an employer from discriminating or retaliating against an employee . . . for having exercised or attempted to exercise FMLA rights. . . . [E]mployers cannot use the taking of FMLA leave as a negative factor in employment actions" (29 C.F.R. § 825.220(c).) "[A]lthough an employee who properly takes FMLA leave cannot be discharged for exercising a right provided by the statute, she nevertheless can be discharged for independent reasons. *Nagle v. Acton–Boxborough Reg'l Sch. Dist.*, 576 F.3d 1, 3 (1st Cir.2009)." (*Henry v. United Bank* (1st Cir. 2012) 686 F.3d 50, 55.)

A number of federal circuit courts have adopted the three-step *McDonnell Douglas* burden-shifting framework applicable to employment discrimination claims for the trial of retaliation claims under the FMLA. (See e.g. *Henry v. United Bank*, *supra*, 686 F.3d at p. 55; *Sabourin v. University of Utah* (10th Cir. 2012) 676 F.3d 950, 958,

Romans v. Michigan Dept. of Human Services (6th Cir. 2012) 668 F.3d 826, 842; *Wierman v. Casey's General Stores* (8th Cir. 2011) 638 F.3d 984, 999; *Yashenko v. Harrah's NC Casino Co., LLC* (4th Cir. 2006) 446 F.3d 541, 551; but see *Xin Liu v. Amway Corp.* (9th Cir. 2003) 347 F.3d 1125, 1136 [*McDonnell Douglas* framework did not apply to former employee's claim that her FMLA qualified leave influenced the decision to terminate her ; *Bachelder v. America West Airlines, Inc.* (9th Cir. 2001) 259 F.3d 1112, 1125 [*McDonnell Douglas* approach inapplicable to former employee's claim that her taking of FMLA-protected leave constituted a negative factor in the decision to terminate her; she could prove this claim by a preponderance of the evidence by either direct or circumstantial evidence].) "To make out a prima facie case of retaliation in violation of FMLA [under *McDonnell Douglas*], a plaintiff must show that '(1) he availed himself of a protected right under the FMLA; (2) he was adversely affected by an employment decision; [and] (3) there is a causal connection between the employee's protected activity and the employer's adverse employment action.' [Citations.]" (*Dudley v. Department of Transp.* (2001) 90 Cal.App.4th 255, 261; see *Metzler v. Federal Home Loan Bank of Topeka* (10th Cir. 2006) 464 F.3d 1164, 1171.) To rebut a prima facie showing of unlawful retaliation, an employer must present evidence of a legitimate, non-retaliatory reason for its adverse employment decision. (*Wierman v. Casey's General Stores* (8th Cir. 2011) 638 F.3d 984, 999.) In the final step, "[i]f the employer comes forward with evidence of a legitimate, nondiscriminatory reason for its treatment of the employee, the employee must then point to some evidence that the employer's proffered reason is pretextual. [Citation.]" (*Smith v. Allen Health Systems, Inc.* (8th Cir. 2002) 302 F.3d 827, 833.)

2. Application

Even assuming that appellant Hung has the benefit of the *McDonnell Douglas* analytical framework, she has not established that a triable issue of fact exists. We

assume for purposes of this appeal that the temporal proximity between Hung's FMLA-protected leave and her termination is sufficient to establish a prima facie case of retaliation since there is no dispute that Hung took FMLA leave (a protected activity) and the decision was made to terminate her (an adverse employment action) within a relatively short time span. (See *Metzler v. Federal Home Loan Bank of Topeka*, *supra*, 464 F.3d at pp. 1171-1172.) In support of their motion for summary judgment, however, respondents presented competent, admissible evidence of legitimate, non-retaliatory reasons, unrelated to her FMLA leave, which shifted the burden to Hung to submit enough evidence to create a triable issue of fact as to whether the termination decision was actually made in retaliation for her exercise of FMLA rights. (See § 437c, subs. (b), (d), (p)(2); cf. *Guz v. Bechtel Nat. Inc.*, *supra*, 24 Cal.4th 317, 357.)

Hung was disciplined for excessive absences and unprofessional conduct before she requested and took any FMLA-protected leave. "Evidence that the employer had been concerned about a problem before the employee engaged in the protected activity undercuts the significance of the temporal proximity. See *Smith v. Ashland, Inc.*, 250 F.3d 1167, 1174 (8th Cir.2001)." (*Smith v. Allen Health Systems, Inc.*, *supra*, 302 F.3d at p. 834.)

Hung's evidence showed that one person, Tran, felt she received differential treatment and felt she was pressured by Damasco and Oliva when taking FMLA leave to care for her son; she had filed a DFEH complaint. Hung did not present evidence of any specific adverse employment action taken against Tran or the specific allegations or outcome of Tran's DFEH complaint. The vague evidence concerning Tran's FMLA request for family leave is not enough to draw an inference that Oliva was biased against the exercise of FMLA rights and his employment actions against Hung were motivated by his desire to retaliate against Hung for exercising FMLA rights.

As already discussed, the evidence was not sufficient to show that pharmacist Atmuri was similarly situated to Hung. Hence, the evidence of their differing treatment did not permit any inference of retaliatory animus.

The mere evidence that Contreras processed appellant Hung's FMLA leave application and she was present during the July 29, 2008 meeting does not, without more, give rise to a triable issue whether the discharge decision was made to retaliate for Hung's exercise of FMLA rights. Hung failed to provide evidence showing that the proffered reasons for the termination decision were "so weak, implausible, inconsistent, incoherent, or contradictory" that they were unworthy of credence and a trier of fact could reasonably infer that those reasons were not the true reasons for the decision. (See *Metzler v. Federal Home Loan Bank of Topeka*, *supra*, 464 F.3d at p. 1180.) The mere evidence that Oliva did not take her word over others' statements is not enough. The evidence taken as a whole was insufficient to permit a rational inference that the reasons for deciding to terminate Hung were untrue or the real reason for the decision was to retaliate against Hung for exercising her FMLA rights. (Cf. *Guz v. Bechtel Nat. Inc.*, *supra*, 24 Cal.4th at pp. 361-362.)

DISPOSITION

The judgment is affirmed. Appellant Hung shall bear costs on appeal.

ELIA, J.

WE CONCUR:

RUSHING, P. J.

PREMO, J.