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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

LUIS CASTRO-RAMIREZ,

Plaintiff and Appellant,

v.

DEPENDABLE HIGHWAY EXPRESS,
INC.,

Defendant and Respondent.

B261165, B262524

(Los Angeles County
Super. Ct. No. BC511197)

APPEAL from a judgment and an order of the Superior Court for the County of Los Angeles, Richard Fruin, Judge. B261165 judgment reversed; B262524 order reversed.

Employees' Legal Advocates and A. Jacob Nalbandyan for Plaintiff and Appellant.

Gordon & Rees, Don Willenburg, Mark S. Posard and Jennifer M. Lynch for Defendant and Respondent.

Plaintiff Luis Castro-Ramirez sued his former employer, Dependable Highway Express, Inc. (DHE), alleging causes of action for disability discrimination, failure to prevent discrimination, and retaliation under the Fair Employment and Housing Act (FEHA or the Act) (Gov. Code, § 12900 et seq.), as well as wrongful termination in violation of public policy. (He alleged other claims not pursued on appeal.) Plaintiff's son requires daily dialysis, and according to the evidence, plaintiff must be the one to administer the dialysis. For several years, plaintiff's supervisors scheduled him so that he could be home at night for his son's dialysis. That schedule accommodation changed when a new supervisor took over and ultimately terminated plaintiff for refusing to work a shift that did not permit him to be home in time for his son's dialysis. The trial court granted defendant's motion for summary judgment and denied plaintiff's motion to tax costs.

We reverse the judgment and the order denying the motion to tax costs. Plaintiff has demonstrated triable issues of material fact on his causes of action for associational disability discrimination, failure to prevent discrimination, retaliation, and wrongful termination in violation of public policy.

FACTS AND PROCEDURE

1. The Complaint

Plaintiff alleged that, when DHE hired him to work as a truck driver in 2010, he told DHE he had a disabled son who required dialysis on a daily basis and he (plaintiff) was responsible for administering the dialysis. He requested work schedule accommodations that his supervisor initially granted, permitting him to attend to his son in the evening. In 2013, a new supervisor changed his work schedule. Plaintiff complained to the new supervisor about the change in schedule. On April 23, 2013, the supervisor gave plaintiff the 12:00 p.m. shift. Plaintiff objected and explained that the shift would not allow him to be home early enough in the evening to tend to his disabled son. The supervisor spoke to a manager and then terminated plaintiff's employment. The supervisor told plaintiff he "had quit by choosing not to take the assigned shift."

Plaintiff's complaint alleged a cause of action for associational disability discrimination in violation of FEHA, claiming defendant "was substantially motivated, in part, to terminate Plaintiff because of his association with his disabled family members" Plaintiff also alleged DHE's conduct was in retaliation for his assertion of rights under FEHA. Plaintiff alleged several other causes of action, including failure to take reasonable steps to prevent the unlawful discrimination, and wrongful termination in violation of public policy.

2. DHE's Motion for Summary Judgment

The pertinent facts reflected in the parties' summary judgment papers are as follows. DHE employed plaintiff at will. DHE hired plaintiff in December 2009 to work out of its Los Angeles terminal as a local driver. During his time with DHE, he drove different routes throughout Los Angeles County.

Plaintiff's son needs a kidney transplant and has required daily home dialysis treatments for the last 15 years. Plaintiff is the only person in his household who knows how to operate the dialysis machine for his son. One has to take classes to learn how to operate the machine.

When plaintiff first began work at DHE, he informed the recruiting manager who hired him that he had daily obligations at home related to administering dialysis to his son. Plaintiff reported to Armando Gomez and Winston Bermudez, who were his initial supervisors, for over three years. Bermudez became his supervisor in 2011, when Bermudez was promoted to the dispatcher position. When Bermudez became his supervisor, plaintiff told Bermudez that he had a disabled son to whom he needed to apply daily dialysis. He also told Bermudez he needed to end his shifts early enough to get home for his son's treatments. Bermudez accommodated plaintiff's needs as often as he could by giving him a shift that enabled him to care for his son. Bermudez never gave plaintiff a shift that began as late as noon. Gomez also knew about plaintiff's special need to go home early to care for his son and informed Bermudez of this when Bermudez first became a dispatcher. Thus, while the schedules of DHE's drivers varied from day to day, plaintiff's typical schedule was from 9:00 or 10:00 a.m. until 7:00 or 8:00 p.m.

There were times, however, when plaintiff worked shifts ending later, such as after 10:00 or 11:00 p.m.

Plaintiff's ability to work later depended on his son's condition on any given day. The amount of time his son needed to be connected to the machine varied between 10 and 12 hours. The time at which plaintiff would need to start administering dialysis also varied from between 7:00 p.m. and 12:00 a.m. There was no "normal day," beyond these general guidelines. On days when his son would need to be connected on the earlier side, plaintiff would communicate this to Gomez or Bermudez.

Throughout his employment, plaintiff performed satisfactorily with no problems. Plaintiff loved his job and appreciated DHE's assistance "from the heart." That assistance changed, however, when Bermudez was no longer his supervisor.

Sometime in March 2013, DHE promoted Bermudez to operations manager and Boldomero Munoz-Guillen (known as Junior) became plaintiff's supervisor (and Bermudez supervised Junior). When this happened, Bermudez told Junior that plaintiff had special needs related to his disabled son and needed to leave early. Bermudez asked Junior to "work with" plaintiff.

At some point later in March 2013, plaintiff complained to Bermudez that Junior had changed his hours, and he was starting later and finishing later and was unable to leave to tend to his son. Bermudez told Junior that plaintiff was complaining about his changing hours and his need to leave early. Junior told Bermudez that he did not need to bring plaintiff in earlier at the time, but Junior indicated he would "work on that." Bermudez never reported plaintiff's special needs to human resources and did not monitor plaintiff's schedule after plaintiff complained to him about Junior.

On April 15, 2013, approximately a week before plaintiff's termination, one of DHE's customers sent an e-mail to Bermudez and another manager (not Junior) asking for plaintiff, the "regular drive[r]," to do the customer's deliveries at 7:00 a.m. The customer stated that it "ha[d] always been done like that until recently." When plaintiff asked Junior about deliveries to this customer, Junior told him that the customer did not want plaintiff to make those deliveries and did not like plaintiff's work, and that was why

Junior had given him shifts starting later. A few days later, the customer called plaintiff directly. The customer asked plaintiff why he was not making deliveries. Plaintiff explained that Junior had said the customer did not like his work. The customer told plaintiff that was untrue and gave him a copy of the e-mail specifically requesting plaintiff's services. When deposed, Junior testified that he had seen the e-mail from the customer, but he could not recall exactly when.

On April 22, 2013, Junior assigned plaintiff a shift that started at 11:55 a.m., the latest he had ever started a shift, and ended at 9:04 p.m. He had "no problem" with the route that day because it still allowed him to be home in time for his son's dialysis. But he told Junior: "Please, I need to have my job like always. I've always had help from everyone except you."

The following day, on April 23, 2013, Junior assigned plaintiff a shift beginning at 12:00 p.m. Unlike the previous day, this assignment was for a route from Los Angeles to Oxnard and back, including multiple pickups and deliveries. Plaintiff explained to Junior that it was too late in the day for him to drive that route because he could not get back in time to administer dialysis to his son by 8:00 p.m. Plaintiff requested another route or simply to take that day off. He also reminded Junior that Bermudez had already talked to Junior about plaintiff's need for shifts enabling him to leave early for his son.

When plaintiff complained to Junior, Junior laughed and said, "Winston [Bermudez] doesn't work here anymore. Now it's me." Junior told plaintiff that if he did not do the route, he was fired. Plaintiff said he was sorry, but he could not do it. Junior told him to return the next day to sign the termination paperwork.

Plaintiff returned to DHE for three consecutive days after that because he wanted to work. On the third day, another manager told him that he had not worked for three days and "of course" he was terminated. DHE processed the termination as a "[v]oluntary [t]ermination" or "[r]esignation," with the stated reason being "[r]efused assignment." Plaintiff refused to sign the document stating he had resigned.

On the day Junior terminated plaintiff, Junior scheduled at least eight other drivers to start shifts well before noon, with start times at 4:54 a.m., 5:54 a.m., 7:00 a.m., 7:54 a.m., 8:06 a.m., 8:54 a.m., 9:00 a.m., and 10:54 a.m.

Maria Ramirez, defendant's human resources manager, testified: "It is not uncommon for drivers at [DHE] to refuse work assignments for a variety of reasons; if one of its drivers refuses a work assignment for any reason, this is grounds for termination." DHE's employee handbook states refusal to obey a supervisor's order or refusal to perform a job assignment is grounds for disciplinary action, including suspension without pay, discharge, counseling, and warning notices.

3. The Trial Court's Rulings

The trial court granted DHE's motion for summary judgment, concluding that there was no triable issue of material fact on any cause of action. The court rejected plaintiff's theory that DHE violated FEHA by terminating him for requesting an accommodation to care for a relative with a disability. The court concluded plaintiff's evidence at best showed that Junior was unwilling to provide accommodation to the same extent as plaintiff's previous supervisor. The court found no evidence to show the termination decision was based on plaintiff's association with his child, or in retaliation for his scheduling requests. Even assuming plaintiff could make a prima facie case, the court found inadequate evidence that defendant's stated reason for termination was pretextual. Plaintiff could not show the assignment he refused was improperly motivated, because plaintiff worked nearly identical hours the previous day without objection.

The court entered judgment for DHE and entered an amended judgment of dismissal several weeks later, awarding statutory costs to DHE in the amount of \$7,592.08. Still later, on January 8, 2015, the trial court denied plaintiff's motion to tax or strike DHE's costs, rejecting plaintiff's argument that an employer is not entitled to costs in a FEHA action.

Plaintiff appealed from the judgment and the subsequent order denying his motion to tax costs. We consolidated the appeals for purposes of briefing, oral argument, and decision.

STANDARD OF REVIEW

We review an order granting summary judgment de novo, “considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained.” (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334 (*Guz*.)

A defendant moving for summary judgment must show “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).) “In performing our de novo review, we must view the evidence in a light favorable to plaintiff as the losing party [citation], liberally construing [his or] her evidentiary submission while strictly scrutinizing defendants’ own showing, and resolving any evidentiary doubts or ambiguities in plaintiff’s favor.” (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.) We accept as true both the facts shown by the losing party’s evidence and reasonable inferences from that evidence. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 856; *Sada v. Robert F. Kennedy Medical Center* (1997) 56 Cal.App.4th 138, 148.)

Summary judgment is appropriate only when “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.” (Code Civ. Proc., § 437c, subd. (c).) A triable issue of material fact exists if the evidence and inferences therefrom would allow a reasonable juror to find the underlying fact in favor of the party opposing summary judgment. (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at pp. 850, 856.)

DISCUSSION

1. Associational Disability Discrimination

FEHA provides a cause of action for associational disability discrimination, although it is a seldom-litigated cause of action. (*Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal.App.4th 635, 656-657 (*Rope*.) As to disability discrimination generally, FEHA makes it is unlawful for an employer, “because of the . . . physical disability . . . of any person, . . . to discharge the person from employment . . . or

to discriminate against the person . . . in terms, conditions, or privileges of employment.” (Gov. Code, § 12940, subd. (a).)¹ The very definition of a “physical disability” embraces association with a physically disabled person. FEHA explains that the phrase “‘physical disability’ . . . includes a perception . . . that the person is associated with a person who has, or is perceived to have” a physical disability. (§ 12926, subd. (o).)² Accordingly, when FEHA forbids discrimination based on a disability, it also forbids discrimination based on a person’s association with another who has a disability.

A prima facie case of disability discrimination under FEHA requires a showing that (1) the plaintiff suffered from a disability, (2) the plaintiff was otherwise qualified to do his or her job, with or without reasonable accommodation, and (3) the plaintiff was subjected to adverse employment action because of the disability. (*Green v. State of California* (2007) 42 Cal.4th 254, 262 (*Green*); see *Nealy v. City of Santa Monica* (2015) 234 Cal.App.4th 359, 378-379; *Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 255 (*Jensen*.) Adapting this framework to the associational discrimination context, the “disability” from which the plaintiff suffers is his or her association with a disabled person. Respecting the third element, the disability must be a substantial factor motivating the employer’s adverse employment action. (Cal. Code Regs., tit. 2, § 11009, subd. (c); *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 229, 232; *Rope, supra*, 220 Cal.App.4th at p. 658.)

Once the plaintiff establishes a prima facie case, “the burden then shifts to the employer to offer a legitimate, nondiscriminatory reason for the adverse employment action.” (*Deschene v. Pinole Point Steel Co.* (1999) 76 Cal.App.4th 33, 44.) The

¹ Further undesignated statutory references are to the Government Code.

² The complete text states: “As used in [FEHA] in connection with unlawful practices, unless a different meaning clearly appears from the context: [¶] . . . [¶] (o) ‘Race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, age, sexual orientation, or military and veteran status’ includes a perception that the person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics.” (§ 12926, subd. (o).)

plaintiff may then show the employer’s proffered reason is pretextual (*Rope, supra*, 220 Cal.App.4th at p. 656) or offer any further evidence of discriminatory motive. (*Guz, supra*, 24 Cal.4th at p. 356.) “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.” (*Ibid.*)

Here, DHE challenges plaintiff’s case on several grounds. First, it argues that plaintiff’s “entire case hinges on his fervent belief that [DHE] had an obligation to provide him with a special schedule as an accommodation for his son’s illness,” but DHE had no such duty. Second, DHE argues that, as a matter of law, plaintiff cannot establish his association with his disabled son motivated his termination, and moreover he cannot show that DHE’s legitimate, nondiscriminatory reason for terminating him was pretextual. As we shall explain, none of these arguments entitle DHE to summary judgment.

a. Reasonable Accommodation in the Associational Disability Context

DHE maintains that this is fundamentally a reasonable accommodation case, and FEHA is “clear” that employers need not make accommodations for associates of the disabled—that is, only employees who are themselves disabled are entitled to reasonable accommodations. For his part, plaintiff tells us he has abandoned the reasonable accommodation cause of action pled in the complaint, and so that claim is not at issue on appeal. Even if plaintiff has abandoned his cause of action for failure to provide reasonable accommodation, the issue is relevant to his discrimination cause of action.

Moreover, it is not at all clear under FEHA that employers have no duty to provide reasonable accommodations in the associational disability context. No published California case has determined whether employers have a duty under FEHA to provide reasonable accommodations to an applicant or employee who is associated with a disabled person. We hold that FEHA creates such a duty according to the plain language of the Act.

FEHA provides separate causes of action for discriminating against employees because of their disabilities (§ 12940, subd. (a)) and failing to provide reasonable

accommodations for the disabilities of employees (§ 12940, subd. (m)(1)). (*Nealy v. City of Santa Monica, supra*, 234 Cal.App.4th at p. 371.) The elements of an accommodation cause of action are similar but not identical to those for a discrimination cause of action. An accommodation cause of action does not require proof that the employee’s disability resulted in an adverse employment action because the failure to accommodate violates the statute in and of itself. (*Jensen, supra*, 85 Cal.App.4th at p. 256.) Plaintiffs often pursue these two causes of action together. “[E]mployment discrimination cases, by their very nature, involve several causes of action arising from the same set of facts.” (*Brown v. Superior Court* (1984) 37 Cal.3d 477, 486.) But when, as here, the plaintiff has chosen to pursue only a discrimination cause of action, reasonable accommodation is still intertwined with that plaintiff’s case.

This is because, as discussed above, one element of the discrimination plaintiff’s case is that the plaintiff was qualified to do his or her job, *with or without reasonable accommodation*. (*Green, supra*, 42 Cal.4th at pp. 261-262; *Jensen, supra*, 85 Cal.App.4th at p. 255.) Section 12940, subdivision (a) prohibits discrimination based on physical disability. Subdivision (a)(1) clarifies that FEHA does *not* prohibit discharging an employee with a physical disability “where the employee, because of his or her physical . . . disability, is unable to perform his or her essential duties even with reasonable accommodations.” (§ 12940, subd. (a)(1).) Thus, “in disability discrimination actions, the plaintiff has not shown the defendant has done anything wrong until the plaintiff can show he or she was able to do the job with or without reasonable accommodation.” (*Green, supra*, 42 Cal.4th at p. 265.) On the other hand, the employer may have done something wrong if the plaintiff could perform the job with reasonable accommodation.

DHE wants us to modify this framework for a prima facie disability discrimination case so that the plaintiff must be qualified for his or her job *without* reasonable accommodation, not qualified *with or without* reasonable accommodation. DHE draws support from the portion of FEHA giving rise to a cause of action for failure to provide reasonable accommodation, section 12940, subdivision (m). The pertinent language

makes it an unlawful employment practice “[f]or an employer or other entity covered by this part to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee.” (§ 12940, subd. (m)(1).) Contrary to DHE’s assertion, this language does not limit the duty to accommodate to employees who personally experience physical disabilities. One must read the parts of a statutory scheme together and construe them in a manner that gives effect to each. (*City of Huntington Beach v. Board of Administration* (1992) 4 Cal.4th 462, 468.) And under section 12926, subdivision (o), “‘physical disability’ . . . includes a perception” that a person “is associated with a person who has, or is perceived to have,” a physical disability. An association with a physically disabled person is itself a disability under FEHA, in other words. Like the many other definitions set forth in section 12926, this definition of a physical disability applies “in connection with unlawful practices [under FEHA], unless a different meaning clearly appears from the context.” (§ 12926.) Accordingly, when section 12940, subdivision (m) says employers must reasonably accommodate “the known physical . . . disability of an applicant or employee,” the disabilities that employers must accommodate include the employee’s association with a physically disabled person.

FEHA creates an associational disability discrimination claim in this exact manner—by reading “association with a physically disabled person” into the Act where “physical disability” appears in section 12940, subdivision (a). (§ 12940, subd. (a) [it is unlawful “[f]or an employer, because of the . . . physical disability . . . of any person . . . to bar or to discharge the person from employment . . . or to discriminate against the person in compensation or in terms, conditions, or privileges of employment”]; *Rope, supra*, 220 Cal.App.4th at pp. 656-657.) Nothing in the Act convinces us that we should decline to read “association with a physically disabled person” into “physical disability” when it appears in another subdivision of equal dignity within section 12940 (subdivision (m)).

DHE also draws support for its argument from federal case law interpreting the Americans with Disabilities Act of 1990 (ADA) (42 U.S.C. § 12101 et seq.). These cases

and the ADA do not govern our analysis of this issue and may be meaningfully distinguished. We often look to federal law interpreting the ADA when construing FEHA, particularly when the question involves parallel statutory language. (*Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 57.) But the two statutory schemes are not coextensive. Our Legislature has expressly declared “[t]he law of this state in the area of disabilities provides protections independent from those in the [ADA]. Although the federal act provides a floor of protection, this state’s law has always, even prior to passage of the federal act, afforded additional protections.” (§ 12926.1, subd. (a).) One instance in which we should part ways with federal case authority is when the statutory language is *not* parallel. That is the case here.

The ADA creates a cause of action for associational disability discrimination using much different language than FEHA. The “[g]eneral rule” is that “[n]o covered entity shall discriminate against a qualified individual on the basis of disability” (42 U.S.C. § 12112(a).) “[T]he term ‘discriminate against a qualified individual on the basis of disability’ includes,” among other things, “excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association.” (42 U.S.C. § 12112(b)(4).) Unlike FEHA, the ADA does not define the term “disability” itself as including association with the disabled. It merely defines discrimination based on association as one type of “discriminat[ion] against a qualified individual on the basis of disability.” One cannot, therefore, read “association with a disabled person” into the ADA whenever one sees the term “disability.”

Elsewhere, the ADA states “discriminat[ing] against a qualified individual on the basis of disability” also includes “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual *with a disability who is an applicant or employee.*” (42 U.S.C. § 12112(b)(5)(A), italics added.) By these plain terms, the ADA requires reasonable accommodations only for applicants or employees who themselves have disabilities. (*Den Hartog v. Wasatch Academy* (10th Cir. 1997) 129 F.3d 1076, 1084.) The same cannot be said of FEHA, however, because of the way

it plainly defines disability as encompassing association with a disabled person. FEHA has provided broader protections than the ADA in this way, and we should give effect to the clear intent of our Legislature.

We thus have no disagreement with federal cases determining that, under the ADA, employers need not provide reasonable accommodations to employees who are relatives or associates of the disabled. FEHA's language is simply not parallel to the ADA in this regard. For this reason, we are not persuaded by DHE's citation to federal cases such as *Erdman v. Nationwide Ins. Co.* (3d Cir. 2009) 582 F.3d 500, 510, *Larimer v. International Business Machines Corp.* (7th Cir. 2004) 370 F.3d 698, 700 (*Larimer*), *Den Hartog v. Wasatch Academy, supra*, 129 F.3d at page 1084, and *Tyndall v. National Educ. Centers* (4th Cir. 1994) 31 F.3d 209, 214, all holding that the duty to accommodate under the ADA does not extend to nondisabled relatives or associates of the disabled.

To return to the first question raised by DHE's argument, if employers have a duty to provide reasonable accommodations for employees' association with disabled persons, there is no reason to excise the issue from the discrimination case. That is, the plaintiff must show he or she was qualified for the job, either with or without reasonable accommodation. (*Green, supra*, 42 Cal.4th at pp. 261-262; *Jensen, supra*, 85 Cal.App.4th at p. 255.) And, the employer may be liable if the employee could perform the essential functions of the job *with* reasonable accommodation. (*Green, supra*, at p. 265.) Hence, whether plaintiff here could perform his job with a reasonable accommodation (a modified schedule to administer dialysis to his son) was certainly relevant, and the circumstance that he might have required an accommodated schedule was no bar to his discrimination claim. DHE was not entitled to summary judgment on this ground.

Before moving on, we briefly consider the only reported California case expressly addressing the merits of an associational disability discrimination claim, *Rope, supra*, 220 Cal.App.4th 635. (We discuss *Rope* at more length in the following subpart.) *Rope* dealt with the third element of the plaintiff's discrimination case—whether the disability of his associate was a substantial factor motivating the employer's adverse employment action.

(*Id.* at pp. 656-658.) The court did not delve into or expressly decide whether FEHA requires reasonable accommodations in the associational disability context. *Rope* stated the elements of the plaintiff's prima facie discrimination case as: the plaintiff "was a member of a protected class; was qualified for the position he sought; suffered an adverse employment action, and there were circumstances suggesting that the employer acted with a discriminatory motive." (*Rope*, at p. 656.) *Rope* quoted *Jones v. Department of Corrections & Rehabilitation* (2007) 152 Cal.App.4th 1367, 1379 for this statement of the plaintiff's prima facie case. *Jones* was a gender and race discrimination case brought under FEHA, not a disability discrimination case. (*Jones*, at pp. 1373, 1380.)

Reasonable accommodations, which only figure into disability, medical condition, or religious cases (§ 12940, subds. (a)(1)-(2), (l)(1)-(4)), are irrelevant in a race and gender discrimination case. As such, it is unsurprising that *Jones*'s statement of the framework for the discrimination case made no mention of the plaintiff being qualified with or without reasonable accommodation. This is all to say that we do not feel bound by *Rope*'s statement of the prima facie disability discrimination case, given that it adopted the framework from a nondisability case.

b. Discriminatory Motive and Pretext

Moving to DHE's challenge to the evidence of discriminatory motive and pretext, our starting point is *Rope*. *Rope* relied substantially on *Larimer*, which the *Rope* court described as "the seminal authority on disability-based associational discrimination under the ADA." (*Rope, supra*, 220 Cal.App.4th at p. 656.)

In *Larimer*, the court opined that "[t]hree types of situation are, we believe, within the intended scope of the rarely litigated . . . association section [of the ADA]. We'll call them 'expense,' 'disability by association,' and 'distraction.'" (*Larimer, supra*, 370 F.3d at p. 700.) The court continued: "They can be illustrated as follows: an employee is fired (or suffers some other adverse personnel action) because (1) ('expense') his spouse has a disability that is costly to the employer because the spouse is covered by the company's health plan; (2a) ('disability by association') the employee's homosexual companion is infected with HIV and the employer fears that the employee may also have

become infected, through sexual contact with the companion; (2b) (another example of disability by association) one of the employee's blood relatives has a disabling ailment that has a genetic component and the employee is likely to develop the disability as well (maybe the relative is an identical twin); (3) ('distraction') the employee is somewhat inattentive at work because his spouse or child has a disability that requires his attention, yet not so inattentive that to perform to his employer's satisfaction he would need an accommodation, perhaps by being allowed to work shorter hours." (*Larimer, supra*, 370 F.3d at p. 700.)³

Rope described the three categories in which *Larimer* found a motive for associational disability discrimination (expense, disability by association, and distraction). At the same time, *Rope* observed that *Larimer* "provided an 'illustrat[ive],' rather than an exhaustive, list of the kind of circumstances which might trigger a claim of associational discrimination." (*Rope, supra*, 220 Cal.App.4th at p. 657.) "[A]nd more importantly, *Larimer* was decided under the ADA; the provisions of FEHA are broadly construed and afford employees more protection than the ADA." (*Ibid.*; see § 12926.1, subd. (a).) So while the *Rope* plaintiff's alleged facts did not "fit neatly within" one of *Larimer*'s three categories, the court concluded the plaintiff had sufficiently pleaded a prima facie "expense" claim for associational disability discrimination. (*Rope, supra*, at p. 657.)

In *Rope*, the employer hired the plaintiff in late 2010. When hired, he allegedly informed the employer that he intended to take a leave of absence to donate a kidney to his sister in February 2011. He requested a paid leave of absence to do so, under a then-new statute requiring the employer to provide paid leave. Two days before the statute took effect on January 1, 2011, the employer terminated him on the allegedly pretextual

³ *Larimer* inserted the "qualification concerning the need for an accommodation" into category three "because the right to an accommodation, being limited to disabled employees, does not extend to a nondisabled associate of a disabled person" under the ADA. (*Larimer, supra*, 370 F.3d at p. 700.) FEHA and the ADA do not align here, as just determined.

basis of poor performance. (*Rope, supra*, 220 Cal.App.4th at pp. 642-643, 658.) The “reasonable inference” from these facts was that the employer “acted preemptively to avoid an expense stemming from [the plaintiff’s] association with his physically disabled sister.” (*Id.* at p. 658.) The plaintiff had therefore met his burden “to show the adverse employment action occurred under circumstances raising a reasonable inference that the disability of his relative or associate was a substantial factor motivating the employer’s decision.” (*Ibid.*)

We agree with *Rope* that *Larimer* provided an illustrative, rather than an exhaustive, list of the kinds of circumstances in which we might find an associational disability discrimination claim. The common thread among the *Larimer* categories is simply that they are instances in which the “employer has a motive to discriminate against a nondisabled employee who is merely associated with a disabled person.” (*Larimer, supra*, 370 F.3d at p. 702.) As we discuss above, this is an element of a plaintiff’s prima facie case—that the plaintiff’s association with a disabled person was a substantial motivating factor for the employer’s adverse employment action. *Rope* held the alleged facts in that case could give rise to an inference of such discriminatory motive. Our facts do not fit neatly within one of the *Larimer* categories either, but they are not required to so long as a jury may infer the requisite discriminatory motive.

A jury could reasonably infer from the evidence here that plaintiff’s association with his disabled son was a substantial motivating factor in Junior’s decision to terminate him, and furthermore, that Junior’s stated reason for termination was a pretext. Junior knew that plaintiff needed to finish his assigned route at a time that permitted him to administer dialysis to his son. Bermudez told Junior of plaintiff’s needs in this respect and asked Junior to work with plaintiff when Junior took over as plaintiff’s supervisor. That same month, plaintiff complained to Bermudez that Junior was scheduling him later than usual, prompting Bermudez to remind Junior of plaintiff’s need to be home for his son’s dialysis. Despite knowing of plaintiff’s need to be home early, the month after Junior took over, he scheduled plaintiff for a shift that started at noon, later than plaintiff had ever started before. Junior did this even though eight other shifts well before noon

were available, and even though DHE’s customer had specifically requested that plaintiff—the customer’s regular driver—do their 7:00 a.m. deliveries. There was no apparent reason why Junior could not have scheduled plaintiff for one of these earlier shifts. (The explanation Junior proffered earlier for not assigning plaintiff the 7:00 a.m. shift was false. Junior told plaintiff the customer was unhappy with his work and did not want him making the customer’s deliveries, when the customer’s feedback was quite the opposite, and plaintiff never had any performance issues at DHE.) Plaintiff told Junior he could not work the shift and route assigned to him because he had to be home to administer dialysis to his son, but he asked to return the next day for assignment. It should have been apparent plaintiff was not acting in bad faith or simply being insubordinate. Yet Junior did not attempt to work with plaintiff. Instead, he laughed and told plaintiff Bermudez was not in charge anymore. Even though DHE’s policies allowed for less severe disciplinary action than termination, for plaintiff’s one-time refusal to work the shift assigned to him, Junior terminated him.

One reasonable inference from these facts is that Junior wanted to avoid the inconvenience and distraction plaintiff’s need to care for his disabled son posed to Junior as the person responsible for scheduling the drivers. Thus, Junior engineered a situation in which plaintiff would refuse to work the shift, giving Junior reason to terminate him. In other words, plaintiff’s termination for refusal to work the shift was a pretext for Junior’s desire to be rid of someone whose disabled associate made Junior’s job harder. Just as the facts in *Rope* gave rise to the inference that the employer acted preemptively to avoid the expense of paid leave (*Rope, supra*, 220 Cal.App.4th at p. 658), these facts may give rise to the inference that Junior acted proactively to avoid the nuisance plaintiff’s association with his disabled son would cause Junior in the future.

DHE contends a fact finder cannot infer any discriminatory motive from Junior’s actions because it is undisputed that plaintiff had no “set” schedule, he worked a nearly identical shift the day before his termination with no problems, and the time at which he administered dialysis to his son was “fully within his discretion.” DHE suggests these facts show Junior had no reason to know plaintiff would refuse to work the shift assigned

to him. But none of this evidence negated Junior's demonstrated knowledge that plaintiff had a disabled son at home constraining his schedule. Plaintiff may not have had a set schedule in the sense that he did not start or finish his shifts at the exact same time every day, but he had a typical schedule that allowed him to start around 9:00 or 10:00 a.m. and finish by 7:00 or 8:00 p.m. Furthermore, to say plaintiff had full discretion as to what time he could administer dialysis mischaracterizes plaintiff's responsibility. It is not as though plaintiff had the freedom to choose any time. The way he described it, the time varied based on his son's condition. On some days, his son's condition would worsen and the boy would need to be connected to the machine for a longer period of time. Plaintiff had learned how to check his son's condition and, on that basis, determine when the boy would need dialysis. Plaintiff could work the shift starting at 11:55 a.m. one day before his termination because it did not involve a route to far-away Oxnard and permitted him to be home in time for dialysis. The facts are that Junior knew plaintiff had a special need related to his disabled son, and plaintiff told Junior that was the reason he could not work the shift on April 23, 2013. Plaintiff was able to perform satisfactorily for over three years with the accommodations to the schedule that previous supervisors provided, until Junior took over and fired plaintiff shortly after becoming his supervisor.

Viewing the evidence in a light favorable to the nonmoving party and indulging the reasonable inferences in his favor, as we must, plaintiff has demonstrated a triable issue of material fact in response to DHE's showing. (*Miller v. Department Corrections* (2005) 36 Cal.4th 446, 470 (*Miller*) ["We stress that, because this is an appeal from a grant of summary judgment in favor of defendants, a reviewing court must examine the evidence de novo and *should draw reasonable inferences* in favor of the nonmoving party. [Citation.] We believe the Court of Appeal failed to draw such inferences and took too narrow a view of the surrounding circumstances."].)

A relatively recent district court case, *Kouromihelakis v. Hartford Fire Ins. Co.* (D. Conn. 2014) 48 F.Supp.3d 175, is instructive. *Kouromihelakis* denied an employer's motion to dismiss the plaintiff's claim that he was fired because of the known disability of his father. The plaintiff alleged that he had to regularly assist in the care of his

disabled father, who suffered a debilitating stroke; his job performance was excellent; he periodically did not report for work by 9:00 a.m.; the employer was aware of his father's disability and the reason for the plaintiff's tardiness; the plaintiff asked for, but was refused, a change in hours under the employer's "flex time" policy to accommodate his duties to his disabled father; and the employer terminated him after he arrived late one day. (*Id.* at pp. 178, 180-181.) The court concluded these allegations were sufficient to plead a plausible "distraction" claim under *Larimer*, and, viewed in a light most favorable to the plaintiff, supported "a reasonable inference that the defendant terminated the plaintiff's employment based on a belief about future absences." (*Kouromihelakis*, at pp. 180-181.) Like *Kouromihelakis*, the evidence here gives rise to the reasonable inference that Junior terminated plaintiff based on a belief that plaintiff would want earlier shifts in the future. Neither *Kouromihelakis* nor this case fit neatly within the distraction paradigm set forth in *Larimer*, but a neat fit is not required.

The cases on which DHE principally relies do not advance its case. In *Ennis v. National Assn. of Bus. and Educ. Radio, Inc.* (4th Cir. 1995) 53 F.3d 55, the court affirmed summary judgment for the employer because the plaintiff could not establish at least two elements of her prima facie case: (1) "at the time of the discharge, she was performing her job at a level that met her employer's legitimate expectations"; and (2) "her discharge occurred under circumstances that raise a reasonable inference of unlawful discrimination." (*Id.* at p. 58.) She could not show she was performing her job adequately because the employer had extensively documented numerous instances of poor job performance over the course of several years. (*Id.* at pp. 61-62.) Her employer terminated her for poor job performance. (*Id.* at p. 57.) She could not show her association with her HIV-positive minor son instead motivated her termination, especially in light of the strong evidence that she had performed poorly for years. (*Id.* at p. 62.) She had no facts credibly giving rise to an inference of unlawful discrimination. (*Ibid.*) Here, by contrast, there was no issue with plaintiff's performance, and thus no such strong showing that he was legitimately terminated. It was undisputed that he was performing satisfactorily during his entire time with DHE. His request for an

accommodated schedule only became an issue when Junior took over, and his onetime refusal to work a shift cannot compare to numerous instances of poor performance over several years.

Magnus v. St. Mark United Methodist Church (7th Cir. 2012) 688 F.3d 331, 339, is also distinguishable. In *Magnus*, the plaintiff asserted her employer terminated her because of her association with her mentally disabled daughter, emphasizing that the termination came two weeks after she received a merit-based raise, and one day after she arrived at work an hour late due to a medical situation with her daughter. (*Id.* at p. 333.) But the undisputed evidence showed the raise was an across-the-board increase given to all full-time employees regardless of merit, and the employer had decided to terminate her the weekend before she arrived late to work. (*Id.* at pp. 333-334, 338-339.) The plaintiff could not rebut the employer's legitimate, nondiscriminatory reasons for its actions. The employer based the termination on numerous documented performance deficiencies and her refusal to work weekends (because of the need to care for her daughter). (*Id.* at pp. 335-336, 338.) The court observed that the plaintiff's true complaint was that the church failed to accommodate her need to care for her disabled daughter because it mandated that she work weekends—but the ADA did not require employers to reasonably accommodate for an employee's association with a disabled person. (*Magnus*, at pp. 334, 339.) Like in *Ennis*, the many performance deficiencies in *Magnus* justified the plaintiff's termination, not just a one-time refusal to work that was arguably engineered. Our case is also unlike *Magnus* because FEHA imposes a duty to reasonably accommodate in the associational disability context, in contrast to the ADA.

In sum, DHE failed to show it was entitled to summary adjudication of the disability discrimination cause of action. Even if this case is about DHE's refusal to accommodate plaintiff's schedule so he could administer dialysis to his son, FEHA entitles associates of the disabled to reasonable accommodations. If plaintiff could perform the essential functions of his job with reasonable accommodation for his son's disability, and his son's disability substantially motivated his termination, then DHE may

be liable for associational disability discrimination. Plaintiff's evidence gives rise to reasonable inferences of discriminatory motive and pretext.

2. Retaliation

The retaliation provision of FEHA forbids an employer “to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under” FEHA. (§ 12940, subd. (h).) “Employees may establish a prima facie case of unlawful retaliation by showing that (1) they engaged in activities protected by the FEHA, (2) their employers subsequently took adverse employment action against them, and (3) there was a causal connection between the protected activity and the adverse employment action.” (*Miller, supra*, 36 Cal.4th at p. 472.)

DHE asserts plaintiff cannot establish retaliation because he lacks evidence of a protected activity, and even if he engaged in protected activity, he cannot show a causal link between that activity and the adverse employment action. We are not persuaded that DHE is entitled to summary adjudication on these grounds.

“Retaliation claims are inherently fact-specific” (*Yanowitz v. L’Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1052 (*Yanowitz*)), and “protected conduct can take many forms” (*id.* at p. 1042). “Standing alone, an employee’s unarticulated belief that an employer is engaging in discrimination will not suffice to establish protected conduct for the purposes of establishing a prima facie case of retaliation, where there is no evidence the employer knew that the employee’s opposition was based upon a reasonable belief that the employer was engaging in discrimination.” (*Id.* at p. 1046.) “[C]omplaints about personal grievances or vague or conclusory remarks that fail to put an employer on notice as to what conduct it should investigate will not suffice to establish protected conduct.” (*Id.* at p. 1047.)

But employees need not explicitly and directly inform their employer that they believe the employer’s conduct was discriminatory or otherwise forbidden by FEHA. (*Yanowitz, supra*, 36 Cal.4th at p. 1046.) “[A]n employee is not required to use legal terms or buzzwords when opposing discrimination. The court will find opposing activity if the employee’s comments, when read in their totality, oppose discrimination.” (*Id.* at

p. 1047.) “We do not believe employees should be required to elaborate to their employer on the legal theory underlying the complaints they are making, in order to be protected by the FEHA.” (*Miller, supra*, 36 Cal.4th at p. 474.) “[C]ourts should recognize that plaintiffs have limited legal knowledge.” (*Ibid.*, citing *Moyo v. Gomez* (9th Cir. 1994) 40 F.3d 982, 985.) FEHA does not protect “only the impudent or articulate. The relevant question . . . is not whether a formal accusation of discrimination is made but whether the employee’s communications to the employer sufficiently convey the employee’s reasonable concerns that the employer has acted or is acting in an unlawful discriminatory manner.” (*Yanowitz, supra*, at p. 1047.) Further, employees’ belief that they are complaining about prohibited conduct “may be inferred from the nature and content of their repeated complaints. The issue of a plaintiff’s subjective, good faith belief involves questions of credibility and ordinarily cannot be resolved on summary judgment.” (*Miller, supra*, at p. 476.)

Two California Supreme Court cases in particular illustrate the principle that employees need not complain with the clarity and precision of lawyers to engage in protected conduct: *Miller* and *Yanowitz*. In *Miller*, the plaintiffs asserted they complained about improper sexual relationships between a supervisor and several of his subordinates, favoritism accorded to those subordinates, and subsequent hostile or harassing treatment by those subordinates after the plaintiffs expressed their complaints. (*Miller, supra*, 36 Cal.4th at pp. 452, 472-473.) The Court of Appeal concluded that, although the plaintiffs opposed the supervisor’s conduct, “they had not expressed opposition to sex discrimination or sexual harassment. As the court understood the record, ‘[p]laintiffs were not complaining about sexual harassment but unfairness. This is not protected activity under the FEHA.’” (*Id.* at p. 474.) The Court of Appeal concluded the defendants were entitled to summary judgment on the plaintiffs’ retaliation claim. (*Id.* at p. 460.) Our Supreme Court reversed, holding that although the plaintiffs “may not have recited the specific words ‘sexual discrimination’ or ‘sexual harassment,’ the nature of their complaint certainly fell within the general purview of FEHA, especially

when we recall that this case is before us on review of a grant of summary judgment.”
(*Id.* at p. 475.)

In *Yanowitz*, the plaintiff’s manager instructed her to terminate a dark-skinned female sales associate at a retail store because he did not consider the sales associate to be sufficiently physically attractive. (*Yanowitz, supra*, 36 Cal.4th at p. 1038.) In response, the plaintiff asked the manager for an adequate justification for terminating the sales associate. (*Ibid.*) On several subsequent occasions, the manager asked the plaintiff if she had fired the sales associate, and the plaintiff each time asked for adequate justification. (*Ibid.*) The plaintiff ultimately refused to terminate the sales associate. She never explicitly told the manager that she believed his order was discriminatory. (*Ibid.*) Our Supreme Court held “a trier of fact properly could find that [the manager] knew that [the plaintiff’s] refusal to comply with his order to fire the sales associate was based on [the plaintiff’s] belief that [the manager’s] order constituted discrimination on the basis of sex—that is, the application of a different standard to a female employee than that applied to male employees—and that her opposition to the directive thus was not merely an unexplained insubordinate act bearing no relation to suspected discrimination. [Citation.] A trier of fact properly could find that by repeatedly refusing to implement the directive unless [the manager] provided ‘adequate justification,’ [the plaintiff] sufficiently conveyed to [the manager] that she considered the order to be discriminatory and put him on notice that he should reconsider the order because of its apparent discriminatory nature.” (*Id.* at p. 1048.) Thus, the plaintiff’s evidence permitted—though not necessarily compelled—a reasonable trier of fact to find that she engaged in protected activity. (*Ibid.*)

Likewise, here, the evidence would permit a reasonable trier of fact to find protected activity. Plaintiff complained to Bermudez in March 2013 that Junior had changed his hours so that he was having problems tending to his son. Bermudez communicated the complaint about the change in hours to Junior. Junior already knew that plaintiff required earlier hours because of his obligation to care for his disabled son—Bermudez told Junior this when Junior took over. When Junior assigned plaintiff a

later shift on April 22, 2013, the day before his termination, plaintiff worked it, but complained to Junior that he had “always had help from everyone except you,” and pleaded with Junior “to have my job like always.” The following day, plaintiff expressed opposition to the shift Junior assigned him because he could not return in time to care for his son, and plaintiff refused to work it. Junior terminated him directly.

The trier of fact could reasonably find that plaintiff’s repeated complaints to Bermudez and Junior about the change in his scheduling, when both knew that he required earlier hours to administer dialysis to his son, constituted opposition to the denial of a reasonable accommodation in his schedule. Put otherwise, plaintiff showed opposition to a practice forbidden by FEHA (§ 12940, subd. (h)). Tied as the complaints were to his son’s disability, the trier of fact also could find that Junior had reason to know plaintiff’s complaints were not just an unexplained insubordinate act bearing no relation to perceived unlawful practices. Rather, one hearing plaintiff’s complaints could infer that plaintiff believed the denial of an accommodated schedule to care for his son was unlawful. He need not have used the terms “unlawful” or “reasonable accommodation” themselves. Even if FEHA did not actually require DHE to reasonably accommodate plaintiff based on his son’s disability—which it does—plaintiff’s good faith belief that DHE’s was acting unlawfully was sufficient. (*Yanowitz, supra*, 36 Cal.4th at p. 1043.)

The evidence would also permit a trier of fact to infer a causal link between plaintiff’s complaints and his termination. Proximity in time between the employee’s protected activity and the adverse employment action suffices to satisfy the employee’s prima facie burden. (*McRae v. Department of Corrections & Rehabilitation* (2006) 142 Cal.App.4th 377, 388.) Plaintiff’s termination came the month after his first complaint and on the heels of his last two complaints. To the extent DHE argues it has offered evidence of a legitimate, nondiscriminatory reason to terminate plaintiff (his refusal to work), we have explained in part one that a trier of fact could find this reason pretextual.

DHE additionally maintains that, at best, plaintiff’s remarks constituted a request for reasonable accommodation, not a complaint that Junior denied him a reasonable accommodation he previously received. DHE cites *Rope* for the proposition that requests

for reasonable accommodation alone do not constitute protected activity. (*Rope, supra*, 220 Cal.App.4th at p. 652.) *Rope* is no longer good law on that point, however. On July 16, 2015, the Governor approved a bill clarifying that *Rope* erred on this issue. An amendment to section 12940, effective January 1, 2016, makes it unlawful for an employer to retaliate or otherwise discriminate against a person for requesting a reasonable accommodation, regardless of whether the employer granted the request. (§ 12940, subd. (m)(2).) The Legislature’s findings in enacting the amendment included this: “Notwithstanding any interpretation of this issue in *Rope . . .*, the Legislature intends (1) to make clear that a request for reasonable accommodation on the basis of religion or disability is a protected activity, and (2) by enacting paragraph (2) of subdivision (m) . . . , to provide protection against retaliation when an individual makes a request for reasonable accommodation under these sections, regardless of whether the request was granted. With the exception of its holding on this issue, *Rope . . .* remains good law.” (Stats. 2015, ch. 122, § 1, subd. (d), approved by Governor, July 16, 2015.)

3. Failure to Prevent Discrimination and Wrongful Termination in Violation of Public Policy

In DHE’s moving papers, it stated one argument against the causes of action for failure to prevent discrimination and wrongful termination—that they failed as a matter of law when no discrimination or other unlawful conduct in violation of public policy occurred. On appeal, DHE argues the same. Given that DHE is not entitled to summary adjudication on the discrimination and retaliation causes of action, it has not shown it is entitled to summary adjudication on failure to prevent discrimination and wrongful termination.

4. Costs Appeal

The court awarded DHE costs in the judgment as the prevailing party in the action. Plaintiff appealed from the court’s order denying his motion to tax costs. Because we are reversing the judgment, and DHE is no longer the prevailing party, DHE is no longer entitled to costs. The order denying the motion to tax costs should also be reversed.

DISPOSITION

The judgment in B261165 is reversed. On appeal, plaintiff has challenged the court's ruling on only four of his eight causes of action. The court shall enter an order granting DHE's motion for summary adjudication on the causes of action plaintiff has abandoned: (1) failure to provide reasonable accommodation, (2) failure to engage in good faith interactive process, (3) hostile work environment, and (4) failure to prevent harassment. The court's order shall deny summary adjudication on the remaining causes of action: (1) disability discrimination, (2) failure to prevent discrimination, (3) retaliation, and (4) wrongful termination in violation of public policy. The order denying the motion to tax costs in B262524 is reversed. Plaintiff shall recover his costs on appeal.

FLIER, J.

I CONCUR:

RUBIN, Acting P. J.

Castro-Ramirez v. Dependable Highway Express, Inc.
B261165; B262524
Grimes, J., Dissenting.

Respectfully, I dissent. I am not prepared to go where no one has gone before, to find a California employer may be liable under FEHA for failing to accommodate a nondisabled employee's request to modify his work schedule to permit him to care for a disabled family member. It is particularly inappropriate to do so in this case, because plaintiff expressly told us in his briefs he "has abandoned this theory of liability." Plaintiff repeatedly tells us "this is not an accommodation case." Plaintiff asserts the issue "whether reasonable accommodations are available to the associates of the disabled . . . is not before this Court." He points out that he has not challenged the trial court's ruling on his cause of action for failure to provide reasonable accommodations.

Instead, plaintiff asserts that even if he was not entitled to an accommodation under FEHA, he was "entitled to an intermittent medical leave of absence to care for his disabled son pursuant to the CFRA [California Family Rights Act (Gov. Code, § 12945.2)], at least on the day he was terminated."¹ Plaintiff states: "The fact that [defendant] may not have discriminated because it was not obligated to affirmatively act to protect [plaintiff's] employment under one set of laws (the reasonable accommodation provision of the FEHA) does not mean it did not discriminate when another set of laws (the child care leave provision of the CFRA) obligated [defendant] to affirmatively act to protect his employment. In effect, the CFRA forbade [defendant] from terminating [plaintiff] on April 23, 2013 after he voiced his inability to work his schedule for the day because of his child care obligations to his disabled son." Plaintiff never alleged defendant violated CFRA, raising this issue for the first time in his appellate reply brief. Assuming for the sake of argument that plaintiff might have been able to allege a CFRA violation, there is no basis for finding a FEHA violation here.

¹ Further statutory references are to the Government Code unless otherwise specified.

FEHA prohibits disability discrimination against an employee or applicant, including discrimination based on an association with a person who has a physical disability. (§ 12940, subd. (a) & § 12926, subd. (o).) And, “FEHA requires employers to make reasonable accommodation for the known disabilities of applicants and employees to enable them to perform a position’s essential functions, unless doing so would produce undue hardship to the employer’s operations.” (Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group 2014) ¶ 9:2250, p. 9-194, citing § 12940, subd. (m) and other authorities.)

The majority conflates the antidiscrimination provisions of sections 12940, subdivision (a) and 12926, subdivision (o) with the failure to accommodate provisions of section 12940, subdivision (m). The majority reasons that a person with no disability is statutorily declared to be “disabled” by association with a disabled person, thus triggering an employer’s duty to accommodate a nondisabled applicant or employee so he or she can care for a disabled family member. The parties have cited no legislative history, regulation, case law, administrative decision, or secondary authority to support the majority’s holding that FEHA creates a duty to accommodate a nondisabled applicant or employee who is associated with a nondisabled person. Such authority is absent from the majority opinion, as well.

The majority has gone out of its way to create a cause of action that no party to this appeal contends exists. The majority reverses the grant of summary judgment on the basis that “the plain language” of FEHA creates a duty to accommodate an employee’s disabled family member – which is simply not so. The majority has indeed boldly gone into a new frontier, fraught with danger for California employers, a mission best left to the Legislature.

Putting aside for the moment the absence of authority to support a cause of action for *failure to accommodate* a nondisabled person with a disabled family member, there is very little California authority on *discrimination* against a person associated with a disabled person. The only authority expressly involving a claim of associational disability discrimination is *Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220

Cal.App.4th 635 (*Rope*). In *Rope*, the court concluded the plaintiff pleaded facts sufficient to support a claim for association-based disability discrimination. (*Id.* at p. 642.) The plaintiff alleged he informed his employer in late 2010 that he intended to donate a kidney to his sister in February 2011. He requested a paid leave of absence to do so, under a then-new statute requiring the employer to provide paid leave, effective as of January 1, 2011. Two days before the statute took effect, the employer terminated the plaintiff's employment on the allegedly pretextual basis of poor performance. (*Id.* at p. 643.)

Rope observed that the "reasonable inference is that [the employer] acted preemptively to avoid an expense stemming from [the plaintiff's] association with his physically disabled sister." (*Rope, supra*, 220 Cal.App.4th at p. 658.) *Rope* relied on Judge Posner's opinion in *Larimer v. International Business Machines Corp.* (7th Cir. 2004) 370 F.3d 698 (*Larimer*), describing *Larimer* as "the seminal authority on disability-based associational discrimination under the ADA (Americans with Disabilities Act of 1990; 42 U.S.C. § 12101 et seq.)" (*Rope*, at p. 656.)

In *Larimer*, the court identified three circumstances in which an employer might have a motive to discriminate against an employee who is associated with a disabled person, and concluded these types of situation were within the intended scope of the "rarely litigated" association provision of the ADA. The court denominated the categories as "expense," "disability by association," and "distraction." (*Larimer, supra*, 370 F.3d at p. 700.)

Larimer explained: "[The three types] can be illustrated as follows: an employee is fired (or suffers some other adverse personnel action) because (1) ('expense') his spouse has a disability that is costly to the employer because the spouse is covered by the company's health plan; (2a) ('disability by association') the employee's homosexual companion is infected with HIV and the employer fears that the employee may also have become infected, through sexual contact with the companion; (2b) (another example of disability by association) one of the employee's blood relatives has a disabling ailment that has a genetic component and the employee is likely to develop the disability as well

(maybe the relative is an identical twin); (3) (‘distraction’) the employee is somewhat inattentive at work because his spouse or child has a disability that requires his attention, yet not so inattentive that to perform to his employer’s satisfaction he would need an accommodation, perhaps by being allowed to work shorter hours.” (*Larimer, supra*, 370 F.3d at p. 700.) As to the “distraction” category, the court continued: “The qualification concerning the need for an accommodation (that is, special consideration) is critical because *the right to an accommodation, being limited to disabled employees, does not extend to a nondisabled associate of a disabled person.*” (*Ibid.*, citing cases and 29 C.F.R. § 1630.8, italics added.)

In *Larimer*, the court affirmed summary judgment for the employer, where the employee was fired shortly after his twin children, who were born with a variety of serious medical conditions because of their prematurity, came home from the hospital. (*Larimer, supra*, 370 F.3d at p. 699.) The court held the plaintiff “must lose” because the case fit none of the categories the court described. (*Id.* at pp. 700, 701 [no evidence that health care costs were an issue, no evidence of communicable or genetic disease, and “no evidence that [the plaintiff] was absent or distracted at work because of his wife’s pregnancy or the birth and hospitalization of his daughters”].)

Other federal authorities preceding *Larimer*, and subsequent authorities following *Larimer* observe that under the ADA, an employer is not obliged to accommodate an employee who is associated with a disabled person. (E.g., *Tyndall v. National Educ. Centers* (4th Cir. 1994) 31 F.3d 209, 214 [affirming summary judgment for the employer; the ADA “does not require an employer to restructure an employee’s work schedule to enable the employee to care for a relative with a disability”]; *Den Hartog v. Wasatch Academy* (10th Cir. 1997) 129 F.3d 1076, 1084 [affirming summary judgment for the employer; the ADA “does not require an employer to make any ‘reasonable accommodation’ to the disabilities of relatives or associates of an employee who is not himself disabled”]; *Magnus v. St. Mark United Methodist Church* (7th Cir. 2012) 688 F.3d 331, 339 [affirming summary judgment for the defendant employer, rejecting claim the timing of plaintiff’s termination (one day after she arrived late to work because of a

medical situation with her disabled daughter) was sufficient to infer associational discrimination; “despite the fact that the [employer] may have placed [plaintiff] in a difficult situation considering her commendable commitment to care for her disabled daughter [by requiring her to work weekends], she was not entitled to an accommodated schedule”]).

FEHA, of course, is broader than the ADA. But in many ways FEHA is similar to the ADA, and we should not construe FEHA as departing from the ADA without a clear legislative statement of intent to do so. (See generally *Green v. State of California* (2007) 42 Cal.4th 254, 262-263 [“In passing [1992 amendment to FEHA], at least one legislative analysis observed the Legislature’s ‘conformity [to the ADA rules] will benefit employers and businesses because they will have one set of standards with which they must comply in order to be certain that they do not violate the rights of individuals with physical or mental disabilities’ ”].) Our Legislature has expressly provided broader protection in FEHA than the ADA in certain important areas. (See Chin et al., Cal. Practice Guide: Employment Litigation, *supra*, ¶¶ 9:2091 to 9:2100, pp. 9-173 to 9-175.) Notably, the Legislature has *not* stated an intent that FEHA depart from the ADA by requiring an employer to engage in the interactive process with, and accommodate a nondisabled employee with a disabled family member.

I am sympathetic to plaintiff’s point that his previous supervisors had accommodated his requests for earlier shifts, and that his last supervisor had discretion to assign him to earlier shifts on April 23, 2013. But I am left with no basis in the law on which to find a FEHA violation based on the assignment of a route to Oxnard with a noon start time (a schedule virtually identical to the shift plaintiff accepted the day before without complaint). Even in the case of a *disabled employee*, toward whom the employer *does* owe a duty to reasonably accommodate, it has been held that the employer’s past accommodations did not prove the reasonableness of the employee’s request to continue to provide those accommodations. (See, e.g., *Terrell v. USAir* (11th Cir. 1998) 132 F.3d 621, 626, fn. 6 [employer who temporarily reduced employee’s working hours to accommodate carpal tunnel syndrome was not obliged to create part-time position; “An

employer that ‘bends over backwards to accommodate a disabled worker . . . must not be punished for its generosity by being deemed to have conceded the reasonableness of so far-reaching an accommodation.’ ”].)

Finally, turning to the retaliation claim, I disagree that plaintiff demonstrated a triable issue of fact as to the first element of a retaliation claim: that he engaged in a protected activity. (*Yanowitz v. L’Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042 (*Yanowitz*)). Plaintiff contends he “oppos[ed] associational disability discrimination” when he complained about his supervisor “interfering with his schedule.” While a formal accusation of discrimination is unnecessary, it *is* necessary that “ ‘the employee’s communications to the employer sufficiently convey the employee’s reasonable concerns that the employer has acted or is acting in an unlawful discriminatory manner.’ [Citation.]” (*Id.* at p. 1047.) There is nothing at all in the evidence to suggest that plaintiff thought defendant’s scheduling was unlawful – as opposed to undesirable from plaintiff’s point of view. And certainly there is no evidence to suggest that plaintiff actually conveyed to defendant any belief that defendant’s actions were unlawful.

The majority likens this case to *Yanowitz*, where the plaintiff did not explicitly state to her superior that she believed his order to terminate a sales associate, because the associate was “ ‘not good looking enough,’ ” constituted unlawful sex discrimination. (*Yanowitz, supra*, 36 Cal.4th at p. 1044.) But in *Yanowitz*, the evidence permitted a finding that, in view of the nature of the order, the plaintiff’s “refusal to implement the order, coupled with her multiple requests for ‘adequate justification,’ sufficiently communicated to [her superior] that she believed that his order was discriminatory.” (*Id.* at p. 1048.) There is no comparable evidence here that plaintiff believed defendant’s scheduling was discriminatory or that he conveyed that belief to defendant. “Standing alone, an employee’s unarticulated belief that an employer is engaging in discrimination will not suffice to establish protected conduct for the purposes of establishing a prima facie case of retaliation, where there is no evidence the employer knew that the employee’s opposition was based upon a reasonable belief that the employer was engaging in discrimination.” (*Id.* at p. 1046.)

I would affirm the grant of summary judgment for defendant. I would reverse the trial court's order awarding defendant its costs and remand for a ruling under the standard announced in *Williams v. Chino Valley Independent Fire Dist.* (2015) 61 Cal.4th 97, 99-100 (“an unsuccessful FEHA plaintiff should not be ordered to pay the defendant’s fees or costs unless the plaintiff brought or continued litigating the action without an objective basis for believing it had potential merit”).

GRIMES, J.