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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

CELESTE SASAKI-HAYWARD,

Plaintiff and Appellant,

v.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA et al.,

Defendants and Respondents.

B211391

(Los Angeles County Super. Ct. No. BC359240)

APPEAL from a judgment of the Superior Court of Los Angeles County, Soussan G. Bruguera, Judge. Affirmed.

Law Offices of Michael F. Baltaxe, Michael F. Baltaxe; and Harris L. Cohen for Plaintiff and Appellant.

Ballard Rosenberg Golper & Savitt, Linda Miller Savitt, Jonathan Rosenberg, and Christine T. Hoeffner for Defendants and Respondents.

In this employment discrimination action, plaintiff Celeste Sasaki-Hayward appeals from the summary judgment for defendants, The Regents of the University of California and Bernie Panylyk. Finding no triable issues of material fact, we affirm.

## BACKGROUND

From 1997 to December 2005 or January 2006, plaintiff was employed at the Medical Center at University of California at Los Angeles (UCLA). During her employment, plaintiff had two back surgeries, one in March 2003 and the other in January 2005. Plaintiff quit her employment in either December 2005 or January 2006 while still on medical leave for the second surgery. Plaintiff contends that she was subjected to a continuous course of discrimination and harassment that began after her first surgery in March 2003. However, she seeks damages only for the acts that allegedly occurred between 2004 and January 2006.

During all relevant periods, plaintiff was employed as a staffing coordinator and was supervised by defendant Panylyk. The staffing coordinator position was "staffed on a 24-hour, 7 days per week basis consisting of two 12-hour shifts, 8:00 a.m. to 8:00 p.m. and 8:00 p.m. to 8:00 a.m."

Following her first surgery in March 2003, plaintiff underwent physical therapy in a work hardening program, which was designed to increase her stamina and strength in order to allow her to return to work. In July 2003, her doctor released her to return to work for six hours, with restrictions of no bending, twisting, lifting over 10 pounds, or prolonged sitting.

Panylyk and UCLA's Rehabilitation Counselor Mark Briskie sought further clarification of plaintiff's work restrictions. Panylyk informed plaintiff "that UCLA would be able to accommodate her restrictions if it included an eight-hour shift instead of a six-hour shift." In Panylyk's view, a reduced six-hour shift was harder to provide than an eight-hour shift because of the difficulty in finding someone to cover the balance of a

12-hour shift. And because plaintiff normally worked a 12-hour night shift that ended at 8 a.m., a mid-shift change at 2 a.m. would pose safety concerns for employees in the parking lot at that time.

In September 2003, Panylyk informed plaintiff of "UCLA's intention to medically separate her employment because her medical leave had exceeded six months."[1] Panylyk requested that plaintiff inform him of any other considerations that would enable her to perform the essential functions of her job and return to work.

On September 24, 2003, plaintiff's doctor released her to return to work for eight hours, with restrictions that included no bending, twisting, lifting over 10 pounds, or prolonged sitting. Briskie contacted plaintiff's doctor to clarify the restrictions.

By October 2003, plaintiff "believed that she was being discriminated against, retaliated against, and denied reasonable accommodations." In November 2003, plaintiff filed a grievance through her union claiming that she was being discriminated against and requesting reinstatement.

In December 2003, UCLA agreed to accommodate plaintiff's restrictions, including the eight-hour shift restriction. Panylyk covered the four-hour balance of plaintiff's shifts by paying overtime to her coworkers in the staffing department or arranging for "relief employees who volunteered to work four hours in the Staffing Department and the remaining eight hours somewhere else."

In January 2004, plaintiff's doctor released her to return to her former 12-hour shift. Plaintiff resumed working her regular 12-hour shift in late January 2004.

Between February and April 2004, plaintiff had excessive unscheduled absences in violation of UCLA's attendance standards. Plaintiff did not inform Panylyk that her absences were related to medical issues.

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[1] At the time, UCLA's medical leaves of absence could not exceed six months. In 2005, medical leaves of absences were extended to 12 months within UCLA's nursing department.

In April 2004, plaintiff received a counseling memo and performance evaluation regarding her unscheduled absences. Between April and September 2004, plaintiff had additional excessive unscheduled absences in violation of the attendance standards.

In September 2004, Panylyk initiated a disciplinary proceeding regarding plaintiff's excessive unscheduled absences. Plaintiff was informed that her "salary was to be reduced by 5% for 4.5 months which was the equivalent of a three shift suspension without pay." Plaintiff filed a grievance challenging Panylyk's failure to follow progressive discipline procedures. Panylyk then revised the initial memo and rescinded the salary reduction.

Between October 2 and November 22, 2004, plaintiff had additional excessive unscheduled absences in violation of UCLA's attendance standards. On November 23, 2004, Panylyk initiated a new disciplinary proceeding regarding plaintiff's excessive unscheduled absences. On November 30, 2004, Panylyk issued a revised disciplinary action notice regarding an additional unscheduled absence.

On December 18, 2004, UCLA granted plaintiff's request for intermittent medical leave. On December 21, 2004, UCLA provided plaintiff with an eight-hour shift in response to her doctor's restriction for the two-week period preceding her second surgery, which was scheduled for January 6, 2005. UCLA also granted plaintiff's request for medical leave for the upcoming surgery.

In April 2005, plaintiff's doctor released "her to return . . . to work for four hours [per day] for three weeks, with the additional restrictions of no lifting in excess of 10 pounds and no prolonged bending or twisting." Between late April and June 2005, plaintiff and Briskie had five or six phone conversations regarding her work restrictions and request for accommodations. In June 2005, plaintiff's doctor lifted all of the work restrictions except the four-hour shift limitation.

In order to provide plaintiff with a temporary four-hour shift, UCLA would have had to cover the eight-hour balance of her 12-hour night shift, which was difficult because of safety and scheduling issues. According to UCLA, it discussed other options with plaintiff, including her willingness to work the day shift, which would provide

greater opportunities for a four-hour schedule, and her willingness to attend a physical therapy (work hardening) program in order to increase her stamina. Plaintiff conceded that she did not enroll in the physical therapy program, but denied that physical therapy qualified as an accommodation. She further denied any discussion regarding the day shift, and stated in her declaration that UCLA "never discussed any other positions or shifts or jobs with me."

At her deposition, plaintiff testified that by July or August 2005, she felt able to work an eight-hour shift, and by September 2005, she felt able to work a 12-hour shift. She testified that at some point between September 2005 and January 2006, her doctor had released her to return to school full-time and had verbally informed her that she could return to work full-time if she desired. However, after June 2005, she did not ask her doctor to increase the number of hours that she could work. She testified, "I'm sure that he would have had I asked him to, but I was waiting for UCLA to get back to me. He wanted me to start out at 4 hours."

Upon the expiration of plaintiff's 12-month medical leave, Panylyk sent plaintiff a January 4, 2006 letter "informing her of UCLA's intention to medically separate her from her position effective January 14, 2006." The letter requested that plaintiff provide any information regarding accommodations that would enable her to perform her essential job functions and return to work. Plaintiff never responded to the January 4 letter.

On January 18, 2006, Panylyk sent plaintiff a letter informing her that she was being medically separated from her position because she had failed to respond to the January 4 letter and had failed to provide any information regarding accommodations that would enable her to perform her essential job functions and return to work.

In response to UCLA's separate statement, plaintiff stated that she did not respond to the January 4 letter because she had already quit. According to plaintiff's declaration, "By December 2005, I had concluded that after months of being ignored by UCLA, and 6 months of their refusal to accommodate me, and the complete absence of any communication, or even the inkling that they were attempting to accommodate my disability, that I had to move on and quit. In December 2005, I therefore filed my

Department of Fair Employment and Housing Act complaint and quit my employment." When plaintiff received the January 4 letter regarding UCLA's "intention to medically separate" her, she "did not respond because 1) I had no new information that would change my medical condition or restrictions, and 2) I had already quit and after being ignored since May 2005, and not allowed to work for the last six (6) months, it was pointless to respond."

At her deposition, plaintiff testified that although she knew "from talking to Mr. Briskie that [Panylyk] was thinking about being able to accommodate [me] for 6 hours," she did not inform UCLA that she felt able to work an 8 or 12-hour shift. She testified that in the fall of 2005, her physician "verbally . . . said that I could work if I felt the need to or the desire to. But I don't think I ever got anything written." She testified that she did not ask for an 8 or 12-hour release because "I was still waiting for Bernie to get back to me."

In September 2006, plaintiff filed the present complaint for damages. Of the five causes of action pled in the complaint, only three remain relevant to this appeal: (1) failure to accommodate in violation of the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12940, subd. (m));[2] (2) failure to engage in a good faith

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[2] According to the opening brief, plaintiff does not challenge the summary adjudication of her fourth cause of action for retaliation in violation of the FEHA. According to the reply brief, plaintiff does not challenge the summary adjudication of her fifth cause of action for constructive discharge.

Unless otherwise indicated, all further statutory references are to the Government Code. Section 12940, subdivision (m) provides that it is an unlawful employment practice "[f]or an employer . . . to fail to make reasonable accommodation for the known physical or mental disability of an . . . employee. Nothing in this subdivision or in paragraph (1) or (2) of subdivision (a) shall be construed to require an accommodation that is demonstrated by the employer or other covered entity to produce undue hardship to its operation."

interactive process in violation of the FEHA (§ 12940, subd. (n));[3] and (3) disability discrimination in violation of the FEHA (§ 12940, subd. (a)).[4]

In August 2008, the trial court granted defendants' motion for summary judgment. With regard to the claim for failure to accommodate, the trial court found it meritless, as a matter of law, in light of the undisputed evidence that UCLA had provided plaintiff with "an extensive medical leave from January 3, 2005 until her separation on January 18, 2006," and had offered to enroll her in a physical therapy program to increase her stamina.

As to the claim for failure to engage in the interactive process, the trial court held that plaintiff could not prevail, as a matter of law, in light of the undisputed evidence that although plaintiff believed she "had recuperated enough as of July 2005 to have worked between eight and 12-hour work shifts, she never informed UCLA that she was able to work such a shift. . . . Moreover, despite receiving a verbal release from her doctor to

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[3] Section 12940, subdivision (n) provides that it is an unlawful employment practice "[f]or an employer . . . to fail to engage in a timely, good faith, interactive process with the employee . . . to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition."

[4] In relevant part, section 12940, subdivision (a) provides that it is an unlawful employment practice "[f]or an employer, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment.

"(1) This part does not prohibit an employer from refusing to hire or discharging an employee with a physical or mental disability, or subject an employer to any legal liability resulting from the refusal to employ or the discharge of an employee with a physical or mental disability, where the employee, because of his or her physical or mental disability, is unable to perform his or her essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger his or her health or safety or the health or safety of others even with reasonable accommodations."

return to work without restrictions as of September 2005, Plaintiff never asked her doctor to provide her with a written release and never told UCLA that she could work 12-hour shifts. . . . Had Plaintiff informed UCLA in July 2005 that she was able to return to work for eight-hour shifts, UCLA would have returned her to work immediately. . . . Plaintiff not only failed to communicate this essential information to UCLA between July and December 2005, she failed to provide such information to UCLA in response to a specific request to do so on January 4, 2006. . . . Thus, even if UCLA had failed to sufficiently interact with Plaintiff, since the breakdown of the communication was the result of Plaintiff's own conduct, her claim for failure to engage in the interactive process fails."

Regarding the disability discrimination claim, the trial court held that it must fail, as a matter of law, because plaintiff "cannot establish that she was subjected to actionable discrimination based upon her disability." The court concluded that the claim, which rested upon allegations that she had been terminated and discriminated against because of a disability, was belied by the evidence of UCLA's legitimate, nondiscriminatory reasons for each of its disputed employment actions.

The trial court entered judgment for defendants on August 12, 2008. Plaintiff timely appealed from the judgment.

## DISCUSSION

### I. Standard of Review

The standard of review for summary judgment is well established. The motion "shall be granted 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." (Code Civ. Proc., § 437c, subd. (c).) A moving defendant has met his burden of showing that a cause of action has no merit by establishing that one or more elements of a cause of action cannot be established or that there is a complete defense. (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 849-850; *Lackner v. North* (2006) 135 Cal.App.4th 1188, 1196.)

We independently review an order granting summary judgment, viewing the evidence in the light most favorable to the nonmoving party. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768; *Lackner v. North*, *supra*, 135 Cal.App.4th at p. 1196.) In performing our independent review of the evidence, "we apply the same three-step analysis as the trial court. First, we identify the issues framed by the pleadings. Next, we determine whether the moving party has established facts justifying judgment in its favor. Finally, if the moving party has carried its initial burden, we decide whether the opposing party has demonstrated the existence of a triable, material fact issue." (*Chavez v. Carpenter* (2001) 91 Cal.App.4th 1433, 1438.)

In determining whether there are triable issues of material fact, we consider all the evidence set forth by the parties, except that to which objections have been made and properly sustained. (Code Civ. Proc., § 437c, subd. (c); *Guz v. Bechtel National, Inc*. (2000) 24 Cal.4th 317, 334.) We accept as true the facts supported by plaintiff's evidence and the reasonable inferences therefrom (*Sada v. Robert F. Kennedy Medical Center* (1997) 56 Cal.App.4th 138, 148), resolving evidentiary doubts or ambiguities in plaintiff's favor (*Saelzler v. Advanced Group 400*, *supra*, 25 Cal.4th at p. 768).

**II. Failure to Accommodate**

Under the FEHA, an employer must make a reasonable accommodation for an employee's known physical disability. (§ 12940, subd. (m).) Plaintiff contends that triable issues of material fact exist regarding UCLA's failure to provide a four-hour shift in either her former position or another position consistent with her medical limitations. We disagree.

In rejecting plaintiff's assertion that UCLA's failure to provide a four-hour shift created a triable issue of material fact, the trial court reasoned: "The only accommodation Plaintiff sought which was not granted by UCLA was her request to work a four-hour night shift instead of her customary 12-hour shifts. However, it is undisputed that UCLA was unable to arrange coverage for the remaining eight hours of Plaintiff's shifts. . . . Although Plaintiff may not have been satisfied with UCLA's

inability to accommodate her four-hour shift request, the totality of the circumstances establishes that UCLA reasonably accommodated Plaintiff's disability. *Hansen v. Lucky Stores, Inc.,* 74 Cal.App.4th 215, 228 (1999); *Prilliman v. United Airlines, Inc.*, 53 Cal.App.4th 935, 948 (1997)."

Under California law, providing paid medical leave may be a reasonable accommodation if the plaintiff is expected to recover and return to her former job.[5] "Holding a job open for a disabled employee who needs time to recuperate or heal is in itself a form of reasonable accommodation and may be all that is required where it appears likely that the employee will be able to return to an existing position at some time in the foreseeable future. (See, e.g., *Hanson v. Lucky Stores, Inc.* (1999) 74 Cal.App.4th 215, 226.)" (*Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 263.)

In this case, after the second surgery, plaintiff's doctor imposed a temporary four-hour shift limitation for three weeks, which indicated that plaintiff was expected to improve within a relatively short period of time. As plaintiff concedes in her brief, the four-hour shift limitation was a "temporary shift work restriction," and "everybody knew that as time went on, she would be able to work more hours."

Given the temporary nature of the four-hour shift limitation and the practical difficulties of covering the balance of plaintiff's 12-hour night shift, we believe reasonable minds would clearly agree that keeping plaintiff on medical leave until she could work a six-hour shift was a reasonable accommodation under the circumstances. The fact that plaintiff was unhappy with this accommodation is irrelevant. As the appellate court explained in discussing a similar issue in *Hanson v. Lucky Stores, Inc.*, *supra*, 74 Cal.App.4th at page 228: "The employer is not obligated to choose the best accommodation or the accommodation the employee seeks. (*Soldinger v. Northwest Airlines, Inc.* (1996) 51 Cal.App.4th 345, 370.) Rather, 'The Appendix to the ADA regulations explains that "the employer providing the accommodation has the ultimate discretion to choose between effective accommodations, and may choose the less

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[5] The record reflects plaintiff was eligible for payments through UCLA's disability policy, and she does not claim that she did not receive them.

expensive accommodation or the accommodation that is easier for it to provide." [Citation.] As the Supreme Court has held in analogous circumstances, an employee cannot make his employer provide a specific accommodation if another reasonable accommodation is instead provided. [Citation.]' (*Hankins v. The Gap, Inc.* (6th Cir. 1996) 84 F.3d 797, 800-801, quoting from *Ansonia Board of Education v. Philbrook* (1986) 479 U.S. 60, 68-69 [107 S.Ct. 367, 371-372, 93 L.Ed.2d 305].) [Fn. omitted.]"

Plaintiff argues that a jury should decide whether a float pool worker could have covered the balance of her 12-hour shift, whether she could have been reassigned to a four-hour shift in a different position, or whether UCLA's refusal to discuss these options constituted a failure to accommodate. We disagree. The record shows that, as a matter of law: (1) other reasonable accommodations were provided; (2) plaintiff voluntarily quit when she felt capable of working the eight or 12-hour shift that would have been provided to her; and (3) plaintiff did not ask her doctor for an eight or 12-hour work release even though he had verbally told her that she could work full-time and he had released her to return to school full-time. Under these facts, the issues surrounding the alleged failure to provide a four-hour shift are irrelevant.[6]

## III. Failure to Engage in a Good Faith Interactive Process

Plaintiff contends there are triable issues of material fact regarding the extent and nature of UCLA's participation in the interactive process. She argues that the few communications that occurred were not conducted in good faith, and that by June 2005, all communications had ceased. She contends that the offer to enroll her in a physical therapy (work hardening) program was not made in good faith because she was able to work four hours per day and physical therapy is not an accommodation.

The trial court ruled that the evidence showed, as a matter of law, that UCLA had sufficiently interacted with plaintiff regarding her alleged disability and that any alleged breakdown in the interactive process was caused by plaintiff's own conduct. We agree.

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[6] Similarly, we conclude that the evidentiary issues raised in the opening brief are irrelevant and could not conceivably support a claim of prejudicial error.

There is no violation of the interactive process where, as here, the employer reasonably accommodates the employee. (*Hanson v. Lucky Stores, Inc.*, *supra*, 74 Cal.App.4th at p. 229 ["We see no reason why this employer should be subjected to liability for failing to engage in the interactive process where the employee was reasonably accommodated *not once but twice*"].) Moreover, the record established that, as a matter of law, any alleged breakdown in the interactive process was caused by plaintiff's own conduct. By her own testimony, plaintiff did not inform UCLA or her doctor that, as of July 2005, she felt capable of working an eight-hour shift. Given the undisputed evidence that UCLA would have provided an eight-hour shift, as it had done twice before, this was fatal to her claim.

The interactive process requires that both the employer and the employee must share "'information to achieve the best match between the employee's capabilities and available positions.' (*Goodman v. Boeing Co.* (1995) 127 Wn.2d 401 [899 P.2d 1265, 1269-1270].)" (*Prilliman v. United Air Lines, Inc.*, *supra*, 53 Cal.App.4th 935, 950.) "It is an employee's responsibility to understand his or her own physical or mental condition well enough to present the employer at the earliest opportunity with a concise list of restrictions which must be met to accommodate the employee." (*Jensen v. Wells Fargo Bank*, *supra*, 85 Cal.App.4th at p. 266.) "'[T]he interactive process of fashioning an appropriate accommodation lies primarily with the employee.' (*Spitzer* [*v. Good Guys, Inc.* (2000)] 80 Cal.App.4th [1376,] 1384.) An employee cannot demand clairvoyance of his employer. (*Conneen v. MBNA America Bank, N.A.* (3d Cir. 2003) 334 F.3d 318, 331 . . . .)" (*King v. United Parcel Service, Inc.* (2007) 152 Cal.App.4th 426, 443.)

## IV. Disability Discrimination

To prove a disability discrimination claim, the plaintiff must show that (1) she is disabled, (2) she is a qualified individual (can perform essential functions of the job), and (3) she was subjected to an adverse employment action because of her disability. (*Arteaga v. Brink's, Inc.* (2008) 163 Cal.App.4th 327, 344-345.) Where an employer offers a legitimate, nondiscriminatory motive for the adverse employment decision, the

plaintiff must prove the employer's proffered reason was pretextual. (*Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718, 1730.)

Plaintiff contends there are triable issues of material fact regarding her disability discrimination claim. UCLA, however, denies that plaintiff was terminated because of a disability. UCLA argues that plaintiff: (1) quit and was not terminated; (2) was not disabled but merely had a temporary condition; and (3) was reasonably accommodated and, therefore, was not discriminated against. We agree.

As we understand plaintiff's theory, she was subjected to a continuous course of discrimination after returning to work following her first surgery, including the negative performance reviews and disciplinary proceedings regarding her attendance violations. She contends that UCLA's discriminatory conduct regarding the disciplinary proceedings is separately actionable under the continuing violation doctrine.

However, the disciplinary proceedings were triggered by plaintiff's attendance problems, and there is no evidence that plaintiff notified UCLA that her absences were due to a disability. An employee must notify her employer of a needed modification in work schedule due to a disability before missing work. The employer's duty to make a reasonable accommodation applies only to an employee's *known* physical disability. (§ 12940, subd. (m).) An employer need not excuse previously unexcused absences simply because the employee later reveals they were due to a disability. (See *Burch v. Coca-Cola Co.* (5th Cir. 1997) 119 F.3d 305, 320, fn. 14 ["a 'second chance' or a plea for grace is not an accommodation as contemplated by the ADA"].)

## DISPOSITION

The summary judgment is affirmed. Defendants are awarded their costs.

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SUZUKAWA, J.

We concur:

WILLHITE, Acting P.J.

MANELLA, J.