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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

ARPIK KHACHATOURIAN, Plaintiff and Appellant, v. MACY'S, INC., Defendant and Respondent.	B265439 (Los Angeles County Super. Ct. No. BC528723)

Appeal from a judgment of the Superior Court of Los Angeles County, Michael L. Stern, Judge. Affirmed.

Doumanian & Associates and Nancy P. Doumanian for Plaintiff and Appellant.

Littler Mendelson and Michelle Rapoport for Defendant and Respondent.

Plaintiff Arpik Khachatourian filed a disability discrimination action against Macy's alleging (among other things) that she had been terminated from employment on the basis of a medical condition, and that Macy's had refused to offer any form of reasonable accommodation. Macy's filed a motion for summary judgment arguing that the undisputed evidence demonstrated: (1) plaintiff suffered a stroke that left her totally disabled; (2) Macy's provided plaintiff 14-months of medical leave to recuperate from her injuries; and (3) at the end of her leave period, plaintiff remained totally disabled, and was unable to estimate when she would be able to return to work. Macy's contended these undisputed facts showed it had attempted to accommodate plaintiff's medical condition by providing an extended medical leave period, and was justified in terminating her employment due to the indefinite duration of her injuries. Plaintiff, however, argued there were triable issues of fact whether Macy's had decided to terminate her after receiving information indicating that she intended to return to work after her leave period expired.

The trial court granted the motion, and entered judgment in favor of Macy's. We affirm.

FACTUAL BACKGROUND

A. Events Preceding the Filing of Khachatourian's Complaint

1. Summary of plaintiff's injury and initial medical leave request

Plaintiff Arpik Khachatourian began working for Macy's in November of 1996. Prior to her termination, plaintiff had been serving as a sales associate in the women's clothing department. Her primary job duties included assisting customers with purchases, entering sales into the cash register, processing returns, conducting inventory, folding clothes and transporting customers to fitting rooms. Khachatourian's duties required her to walk "a lot," and to remain on her feet for extended periods of time.

On June 26, 2011, Khachatourian suffered a stroke while assisting a customer. The stroke left her completely paralyzed on the left side of her body. She remained hospitalized for approximately three and a half weeks.

Several days after Khachatourian's stroke, her daughter faxed Macy's a letter informing the company that she would be unable to "return[] to work for 3 [to] 6 months depending on her recovery." The fax included a report from Khachatourian's physician confirming that she had suffered a stroke, and that she would be "out of work 3-6 months." On July 19, 2011, Khachatourian signed a form requesting a medical leave of absence. The form included a notification explaining that under the Family and Medical Leave Act of 1993 (FMLA) (29 U.S.C. §§ 2601 et seq.) and the California Family Rights Act (CFRA) (Gov. Code, §§ 12945.1 et seq.), Khachatourian was entitled to up to 12 weeks of unpaid leave over the following one-year period. The form indicated that plaintiff had notified Macy's of her need for medical leave on June 29, 2011, and that her estimated return to work date was December 24, 2011. After receiving further certification from plaintiff's health care provider, Macy's approved the leave request.

2. Khachatourian's requests for extensions to her medical leave

On December 16, 2011, plaintiff sent a letter requesting that Macy's accommodate her medical condition by extending her leave of absence for an additional six-month period. In support of her request, Khachatourian submitted a medical form from her physician certifying that her medical condition had impaired her ability to engage in "major life activity." The treating physician checked a box on the form stating that he was "unable to give a return date in the reasonably foreseeable future, as the leave is indefinite." The form also indicated, however, that plaintiff's estimated return to work date was June 16, 2012.

On December 28, 2011, Macy's sent plaintiff a letter notifying her that the company had approved her request to extend her leave of absence. The letter explained that plaintiff had been on "a continuous leave since June 26, 2011, and exhausted all eligible leave under the [FMLA] on September 17, 2011, and exhausted all entitlement under Macy's leave policy on December 25, 2011." The letter further stated that "based on the information [Macy's had] received from [plaintiff's] health care provider, the extension [was being] approved as a reasonable accommodation . . . through June 15, 2012, with the expectation [she would] be able to return to work on June 16, 2012." The letter also stated, however, that if plaintiff was "unable to return to work by

[the] new return date of June 16, 2012, [Macy's] m[ight] not be able to grant an additional extension to [the] medical leave of absence due to the indefinite nature of [the] return to work date."

After plaintiff failed to return to work at the end of her leave period, Macy's sent her a letter (dated June 29, 2012) stating, in relevant part: "According to the most recent information from your Health Care Provider, you were released to return to work as of June 16, 2012. As of the date of this letter you have not returned to work and we have not received any information from you indicating you are unable to work at this time. [¶] In order to maintain your leave of absence, we must receive updated information from your Health Care Provider that outlines your new anticipated return to work date. . . . If we do not receive this information, and you do not return to work, we will process your separation from the company."

On July 13, 2012, attorney Edvin Massinian, who was representing Khachatourian in a related workers' compensation suit, sent Macy's a letter in response explaining that plaintiff had been receiving treatment from three physicians: "Dr. Zlotolow," described as "her Primary Treating Physician in the field of internal medicine"; "Dr. Aminian," described as "a treating physician in the field of neurology"; and "Dr. Shamie," described as "a treating physician in the field of psychology." The letter further explained: "As of the date of this correspondence, we have not been notified that [plaintiff] is released from treatment in the fields of neurology and psychology. Enclosed you can find a disability status letter issued by Dr. Aminian . . . as well as a letter from Dr. Shamie where it is indicated that applicant is still Temporarily Totally Disabled and she is still receiving treatment. At this time, applicant is unable to go back to work until all her treating physicians have released her."

The attached status report from Shamie, dated July 10, 2012, stated that Khachatourian was currently under the physician's care, and that "she continues to temporarily totally disable [sic] until approximately August 30, 2012. She is being seen on a weekly basis for individual therapy and once a month for psychopharmacology." A separate report from Aminian, dated July 12, 2012, included four check boxes that were filled out as follows:

[ ] May return to work with no restrictions on: _____

[ ] Temporarily partially disabled and may return to work with the following restriction beginning:_____

[¶] . . . [¶]

[**X**] Temporarily totally disabled from work until: _4 WKS_____

[ ] Patient has reached a permanent and stationary status and:

[ ] May return to work with no restrictions.

[ ] May return to work with the following restrictions . . .

On August 15, 2012, Macy's sent plaintiff a letter responding to her "request for an extension to [her] medical leave of absences. . . ." After summarizing plaintiff's prior medical leave requests, the letter explained: "We are now in possession of a note dated July 10, 2012, from M.A. Shamie, M.D., who wrote that you are under his care and unable to work through approximately August 30, 2012. Dr. Shamie has not explained how granting you any further extension to your leave would allow you to return to work in the reasonable foreseeable future. Based on an analysis of all the information, it has been determined that your leave is indefinite. We are not required to grant a leave indefinitely. As such, we will process your separation from employment effective August 27, 2012, as unable to return to work from leave." The letter further stated that plaintiff was "encouraged to contact HR services . . . regard[ing her] change in employment status," and provided contact information for Macy's human resources department.

Plaintiff did not respond to the letter, and was subsequently terminated.

3. Summary of communications regarding the cancellation of plaintiff's health insurance

Shortly after plaintiff had initiated her medical leave in June of 2011, Macy's sent a letter notifying her that, while on leave, she would be "responsible for making payments to continue [her health] benefit coverage." The letter set forth the amount Khachatourian was required to pay each week to retain her health insurance. The letter also warned plaintiff that the failure to pay her premiums in a timely manner could result in the

cancellation of her insurance: "You have a 30-day grace period in which to make your payment. If any weekly payment is more than 30-days past due, your coverage is subject to cancellation."

On August 25, 2011, Macy's sent another letter informing plaintiff that she had failed to make her required premium payment: "We previously notified you by mail that you are responsible for submitting payments for benefit coverage during your leave of absence. Our records indicate that these payments have not been maintained and that payments are currently at least 30 or more days [past due]. To avoid cancellation of your coverage, payment must be postmarked within 15 days of the date of this letter. The amount you owe as of 8/25/2011 is $249.75. Failure to pay this amount within 15 days will result in the cancellation of your coverage. Unless payment is made or you call to arrange your payment immediately, your coverage will be cancelled retroactively to 7/23/2012." The letter included contact information regarding billing questions, and provided the address directing where her payment should be sent. Macy's sent additional letters on September 8, 2011 and September 26, 2011 notifying plaintiff of additional unpaid premiums.

On October 12, 2011, Macy's sent another letter notifying plaintiff that, as of that date, she owed $569.82 for unpaid health insurance premiums. The letter again warned that "[f]ailure to pay [the] amount within 15 days will result in the cancellation of your coverage. Unless payment is made or you call to arrange for payment immediately, your coverage will be canceled retroactively to August 20, 2011." Two weeks later, Macy's sent another letter stating that, as of October 26, 2011, $704.40 in premium payments were past due, and that her insurance would be canceled retroactively to September 3, 2011, if payment was not received within 15 days. Another letter date November 9, 2011 notified plaintiff that she owed $792.34 for unpaid premiums, and that failure to pay the amount within 15 days would result in cancellation of coverage retroactive to September 24, 2012. Finally, on November 30, 2012, plaintiff received a letter stating that her insurance was "being retroactively cancelled due to non-payment of premiums. Your coverage was in effect through 9/24/2011."

One week later, Khachatourian sent Macy's a letter stating: "I am writing this letter to appeal about my medical health benefits. Recently my health benefits were terminated due to not paying the full amount owed. This was a misunderstanding on my part. I did not realize that my benefits would terminate if I didn't pay the full amount . . . Please reinstate my insurance and let me know what I need to do in order to have my insurance benefits."

On February 15, 2012, Macy's sent a response letter explaining why it had cancelled her insurance: "When payments are more than 30 days past due, a warning letter is sent notifying associates of the need to make payments to prevent cancellation. A warning letter was sent on October 26, 2011 requesting payment of $704.04 within 15 days. We received check [no. ****] in the amount of $169.82 on November 7, 2011. This paid for coverage through September 24, 2011. A final warning letter was sent on November 9, 2011 requesting payment of $792.34. Payment was required within 15 days of the letter to retain coverage. However, no payment was received and your coverage was cancelled effective September 24, 2011, the last day through which your previous payment had paid for coverage. A letter was sent to you on November 30, 2011 notifying you of the cancellation of your coverage. Because timely payments were not received your request for reinstatement has been denied. You will be eligible to re-enroll in coverage upon returning to work."

Macy's also informed plaintiff that if she disagreed with the company's decision, and had "additional significant information not previously considered," she could submit a "second request for review by the Plan Administrator."

B. Summary of Khachatourian's Complaint

Approximately 15-months after her termination, Khachatourian filed a complaint against Macy's alleging claims under the Fair Employment and Housing Act (Gov. Code §§ 12900, et. seq.) (FEHA), including discrimination on the basis of a "medical condition and/or physical disability," failure to reasonably accommodate her disability and failure to engage in the interactive process. The complaint alleged several additional claims related

to her termination, including wrongful termination in violation of public policy and intentional infliction of emotional distress.[1]

In the "Factual Background" section of her complaint, Khachatourian alleged she had informed Macy's she was "ready, willing and able to return to work at the expiration of her . . . leave of absence and fully expected to resume her former position in clothing sales, with some reasonable accommodation for her medical condition/physical disability." She further alleged that although she had "kept Macy's informed about her medical status," the company had elected to terminate her without any prior notice. Plaintiff also asserted she had "requested reasonable accommodation from Macy's to assist her in her return work [sic] at the expiration of her approved medical leave, to include additional time off of work and a change in plaintiff's work hours and work duties. The defendant employer denied plaintiff's request," and "discontinued the plaintiff's health insurance coverage."

In support of her discrimination claim, Khachatourian alleged, among other things, that she was "wrongfully discriminated against . . . and ultimately terminated . . . based on her medical condition and/or physical disability." She further alleged that at the time of her termination, she was "able to perform her job duties with reasonable accommodation for her medical condition and/or physical disability," and that her condition had been "a motivating reason for the defendant's termination."

Plaintiff's claim for failure to provide reasonable accommodation alleged Macy's "could have easily and reasonably accommodated her medical condition and/or disability" by, among other things, "changing job responsibilities"; "reassigning [her] to a less physically demanding position";

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[1] In addition to the five causes of action listed above, Khachatourian's complaint alleged claims for failure to prevent discrimination and violation of the CFRA. Plaintiff's appellate brief, however, presents no argument regarding either of these claims. We therefore treat the claims as abandoned. (See *Long v. Cal.-Western States Life Ins. Co.* (1955) 43 Cal.2d 871, 883 ["grounds of appeal [not raised] in the[] briefs . . . will be deemed to have been abandoned"]; *Wall Street Network, Ltd. v. New York Times Co.* (2008) 164 Cal.App.4th 1171, 1177 ["[F]ailure to address summary adjudication of a claim on appeal constitutes abandonment of that claim"].)

"modifying or providing equipment and assistive devices"; or "providing other similar accommodations for an individual with a physical disability or medical condition." Plaintiff's claim for failure to engage in the interactive process similarly alleged that although she had requested "reasonable accommodation for her medical condition . . . so that she would be able to perform the essential job requirements," Macy's had "failed to participate in a timely good faith interactive process with Plaintiff to determine whether reasonable accommodations could be made."

Plaintiff's claims for termination in violation of public policy and intentional infliction of emotional distress were predicated on the same misconduct she had alleged in support of her FEHA claims.

*C. **Macy's Motion for Summary Judgment***

1. Summary of Macy's motion for summary judgment and supporting evidence

On March 6, 2015, Macy's filed a motion for summary judgment or, in the alternative, summary adjudication, seeking dismissal of Khachatourian's claims. Macy's argued it was entitled to judgment on plaintiff's FEHA claims because the undisputed evidence showed that: (1) at the conclusion of her 14-month leave period, plaintiff remained totally disabled, and unable to return to work; (2) plaintiff had provided no information regarding when (or whether) she would be able to return to work; (3) plaintiff remained totally disabled several months after her termination; and (4) plaintiff never contacted Macy's after being notified of her pending termination, and never requested any specific form of accommodation. Macy's argued that, considered together, this undisputed evidence showed the company had terminated plaintiff because, after having been provided a substantial leave period to recuperate from her injuries, she remained unable to work and unable to provide any estimate as to when she might be able to return to her job. Macy's further contended that the evidence showed it had made a reasonable attempt to accommodate her medical condition by providing almost 14-months of medical leave.

In support of its motion, Macy's provided copies of numerous written communications regarding Khachatourian's medical condition and her prior

medical leave requests. As summarized above, the written communications showed that: (1) Macy's had approved two separate medical leave periods totaling almost 14-months; (2) at the end of her leave period, plaintiff informed the company her physicians had not released her to return to work, and that she would remain totally disabled through approximately August 30, 2012; (3) the company informed plaintiff it intended to terminate her because the information she had provided suggested her leave had become indefinite; and (4) her medical insurance had been cancelled for failure to pay her premiums.

In addition to the written communications, Macy's submitted portions of plaintiff's deposition testimony showing that: (1) she never informed Macy's that she intended to return to work; (2) she did not respond to Macy's letter notifying her of its termination decision; (3) six-months after her termination, plaintiff felt too "weak" to return to work, even with reasonable accommodations. Macy's also provided copies of medical reports from plaintiff's neurologist indicating that she remained totally disabled during the six-month period after her termination.

2. Khachatourian's opposition to the motion for summary judgment

In her opposition, Khachatourian argued there were disputed issues of material fact regarding her disability discrimination claim. Specifically, plaintiff contended that she had presented evidence that Macy's knew, or should have known, she intended to return to her position on August 30, 2012, and that she was capable of "perform[ing] the essential job functions . . . on [that date]." Khachatourian relied on three pieces of evidence in support. First, she cited language in the July 10, 2012 status report her psychologist (Shamie) had provided to stating that she "continues to temporarily totally disable [sic] until approximately August 30, 2012." According to Khachatourian, the trier of fact could infer from Shamie's statement that she had notified Macy's of her intent to return to work on or around August 30, 2012. Second, plaintiff cited deposition testimony from January of 2015, in which she had stated that she felt "ready to come to work" as of August 27, 2012. Third, plaintiff cited the following statements set forth in a declaration filed in support of her opposition: "I never asked Macy's for an indefinite leave of absence. I only needed through August 30,

2012, at which time I planned to return to work." Her declaration also attempted to clarify a statement she had made during a deposition in her related workers' compensation case, which occurred in March of 2013 (six-months after her termination). At that time, plaintiff testified that she felt too "weak" to return to work, even with accommodations. Khachatourian's declaration asserted that this prior testimony was intended to convey that, as of March 2013, she felt "weak emotionally after having been [wrongly] fired" from Macy's, and not that she felt weak as the result of any "medical condition or physical disability."

On her reasonable accommodation claim, Khachatourian argued there were factual disputes regarding whether Macy's could have accommodated her medical condition by extending her leave of absence until her planned return date of August 30, 2012. According to plaintiff, Macy's had provided no evidence that extending her leave to the end of August would "have resulted in . . . undue hardship to [the company's] business" She also argued that Macy's provided no evidence that it had "explored plaintiff's ability to do the retail sales job, with or without accommodation." In support, plaintiff cited to a statement in her declaration asserting that Macy's had never contacted her or her physicians to discuss whether she could return to work with reasonable accommodations.

Khachatourian raised similar arguments on her claim for failure to engage in the interactive process, asserting there were "triable issues of fact in regards to" (among other things): (1) whether "Macy's should have reached out to the plaintiff or plaintiff's doctors when it received [the July 13, 2012] letter [from her attorney] to clarify any perceived 'ambiguities' in the enclosed doctor's notes"; and (2) whether Macy's "should have engaged . . . with the plaintiff to determine what accommodation, if any, she needed to return to work as opposed to unilaterally concluding that plaintiff was seeking an indefinite leave."

Plaintiff raised essentially identical arguments in support of her claim for termination in violation of public policy, asserting that the evidence showed she had been terminated "four weeks prior to her anticipated return to work date . . . because Macy's unilaterally determined that plaintiff was requesting an 'indefinite leave.' Plaintiff never requested an indefinite leave,

rather, she merely requested an additional four weeks (or through August 30, 2012) in which to return to work. Plaintiff was ready, willing and able to return to her position. . . ."

Finally, plaintiff argued that the circumstances of her termination, combined with the fact that Macy's had cancelled her health insurance during her leave of absence, were "more than [enough] to support a cause of action for intentional infliction of emotional distress."

3. Trial court's order granting the motion for summary judgment

After a hearing, the trial court granted Macy's motion for summary judgment. In a written order, the court explained that the undisputed evidence established Macy's had "done nothing wrong[:] It provided [plaintiff] the requisite leave, kept in communication with the plaintiff . . . and after all of her leave was taken, terminated plaintiff per company policy and the law. There were no alternatives available for plaintiff's work as she never was able to go back to work and still cannot."

The court further concluded that: (1) the indefinite nature of plaintiff's injuries qualified as a legitimate, nondiscriminatory reason for Macy's termination decision, and (2) plaintiff had provided "no evidence of discriminatory animus in response." The court also found plaintiff had failed to establish a material factual dispute with respect to her remaining FEHA claims, and failed to identify any "extreme or outrageous conduct" that would support a claim for intentional infliction of emotional distress claim.

DISCUSSION

A. Standard of Review

"A motion for summary judgment or summary adjudication is properly granted 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.' [Citation.] We review a grant of summary judgment de novo and decide independently whether the facts not subject to triable dispute warrant judgment the moving party or a determination a cause of action has no merit as a matter of law. [Citations.] The evidence must be viewed in the light most favorable to the nonmoving party.

[Citations.]" (*Soria v. Univision Radio Los Angeles, Inc.* (2016) 5 Cal.App.5th 570, 582 (*Soria*).)

"When a defendant moves for summary judgment in a situation in which the plaintiff would have the burden of proof at trial by a preponderance of the evidence, the defendant may, but need not, present evidence that conclusively negates an element of the plaintiff's cause of action. Alternatively, the defendant may present evidence to "'show[ ] that one or more elements of the cause of action . . . cannot be established" by the plaintiff.' [Citations.] """The moving party bears the burden of showing the court that the plaintiff 'has not established, and cannot reasonably expect to establish,'" the elements of his or her cause of action."" [Citations.]" (*Soria, supra*, 5 Cal.App.5th at p. 582; see also *Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1002-1003, ["the defendant must present evidence that would preclude a reasonable trier of fact from finding that it was more likely than not that the material fact was true [citation], or the defendant must establish that an element of the claim cannot be established, by presenting evidence that the plaintiff 'does not possess and cannot reasonably obtain, needed evidence'"].) "A defendant can satisfy its initial burden to show an absence of evidence through 'admissions by the plaintiff following extensive discovery to the effect that he has discovered nothing' [citation], or through discovery responses that are factually devoid. [Citations.] [¶] Only after the defendant's initial burden has been met does the burden shift to the plaintiff to demonstrate, by reference to specific facts, not just allegations in the pleadings, there is a triable issue of material fact as to the cause of action. [Citation.]" (*Chavez v. Glock, Inc.* (2012) 207 Cal.App.4th 1283, 1302.)

"""As with an appeal from any judgment, [on review of a summary judgment] it is the appellant's responsibility to affirmatively demonstrate error and, therefore, to point out the triable issues the appellant claims are present by citation to the record and any supporting authority. In other words, review is limited to issues which have been adequately raised and briefed." [Citation.]' [Citations.]" (*Bains v. Moores* (2009) 172 Cal.App.4th 445, 455 (*Bains*).) "[D]e novo review does not obligate us to cull the record for

the benefit of the appellant in order to attempt to uncover the requisite triable issues." (*Ibid.*)

B. Macy's Is Entitled to Judgment on Khachatourian's Claim for Disability Discrimination

1. Procedures used to assess discrimination claims under FEHA

"FEHA prohibits an employer from, among other things, discharging a person from employment because of a medical condition or physical disability." (*Soria, supra*, 5 Cal.App.5th at p. 583.) "In employment discrimination cases under FEHA, plaintiffs can prove their cases in either of two ways: by direct or circumstantial evidence." (*DeJung v. Superior Court* (2008) 169 Cal.App.4th 533, 549.)

"Because direct evidence of intentional discrimination is rare and most discrimination claims must usually be proved circumstantially, in FEHA employment cases California has adopted the three-stage burden-shifting test established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792. [Citations.] '[A] plaintiff has the initial burden to make a prima facie case of discrimination by showing that it is more likely than not that the employer has taken an adverse employment action based on a prohibited criterion." (*Soria, supra*, 5 Cal.App.5th at p. 591.) "To establish a prima facie case for unlawful discrimination, a plaintiff must provide evidence that '(1) he [or she] was a member of a protected class, (2) he [or she] was qualified for the position he [or she] sought or was performing competently in the position he [or she] held, (3) he [or she] suffered an adverse employment action, such as termination, demotion, or denial of an available job, and (4) some circumstance suggests discriminatory motive.' [Citation.]" (*Id.* at pp. 583-584 [citing and quoting *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 355].)

"A prima facie case establishes a presumption of discrimination. The employer may rebut the presumption by producing evidence that its action was taken for a legitimate, nondiscriminatory reason. If the employer discharges this burden, the presumption of discrimination disappears. The plaintiff must then show that the employer's proffered nondiscriminatory reason was actually a pretext for discrimination, and the plaintiff may offer any other evidence of discriminatory motive. The ultimate burden of

persuasion on the issue of discrimination remains with the plaintiff.' [Citations.]"[2] (*Soria, supra*, 5 Cal.App.5th at p. 591.)

"An employer moving for summary judgment on a FEHA cause of action may satisfy its initial burden of proving a cause of action has no merit by showing either that one or more elements of the prima facie case 'is lacking, or that the adverse employment action was based on legitimate nondiscriminatory factors.' [Citations.] Once the employer sets forth a nondiscriminatory reason for the decision, the burden shifts to the plaintiff to produce '"substantial responsive evidence" that the employer's showing was untrue or pretextual.' [Citations.] '[A]n employer is entitled to summary judgment if, considering the employer's innocent explanation for its actions, the evidence as a whole is insufficient to permit a rational inference that the employer's actual motive was discriminatory.' [Citations.]" (*Soria, supra,* 5 Cal.App.5th at pp. 591-592; see also *Kelly v. Stamps.com Inc.* (2005) 135 Cal.App.4th 1088, 1097-1098 (*Kelly*) [if a defendant employer's motion for summary judgment "relies in whole or in part on a showing of nondiscriminatory reasons for the [adverse employment action], the employer satisfies its burden as moving party if it presents evidence of such nondiscriminatory reasons that would permit a trier of fact to find, more likely than not, that they were the basis for the [adverse action]. [Citations.] To defeat the motion, the employee then must adduce or point to evidence raising a triable issue, that would permit a trier of fact to find by a preponderance that intentional discrimination occurred"].)

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[2] Although plaintiff's brief utilizes the *McDonnell Douglas* framework to analyze whether Macy's was entitled to judgment on her discrimination claim, a subsection of her brief appears to argue that we should not apply the *McDonnell Douglas* test in this case. In that subsection, plaintiff quotes language from *Wallace v. County of Stanislaus*, (2016) 245 Cal.App.4th 109, explaining that the *McDonnell Douglas* "three-stage framework . . . do[es] not apply in discrimination cases where . . . the plaintiff presents direct evidence of the employer's motivation for the adverse employment action." (*Id.* at p. 123.) Plaintiff has not, however, argued that there is any direct evidence indicating that Macy's unlawfully discriminated against her on the basis of her medical condition. We will therefore apply the *McDonnell Douglas* framework, as both parties have done in their appellate briefs.

2. Macy's provided evidence that its decision to terminate Khachatourian was based on nondiscriminatory factors

As the party moving for summary judgment, Macy's had the initial burden to show either that Khachatourian could not establish an element of her prima facie case, or that its adverse employment action was based on legitimate, nondiscriminatory factors. For purposes of this appeal, we shall assume plaintiff can establish a prima facie case of discrimination, and examine whether Macy's proffered evidence showing it had a legitimate, nondiscriminatory reason for terminating her.

Macy's asserts that it terminated plaintiff because, at the end of her 14-month medical leave period, she was unable to return to work, and provided no information regarding when (if ever) she would be able to do so. Stated more simply, Macy's contends it terminated plaintiff because the information it had received suggested her medical condition had rendered her incapable of returning to work for an indefinite time period. (See generally *Hanson v. Lucky Stores, Inc.* (1999) 74 Cal.App.4th 215, 227-228 [FEHA does "'not require the employer to wait indefinitely for an employee's medical condition to be corrected'"]; *Nealy v. City of Santa Monica* (2015) 234 Cal.App.4th 359, 377-378 (*Nealy*) ["FEHA does not require the employer to provide an indefinite leave of absence"]; *Nadaf-Rahrov v. Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 988 ["an employer need not provide repeated leaves of absence for an employee who has a poor prognosis of recovery"]; see also *Department of Fair Employment and Housing v. Lucent Technologies, Inc.* (9th Cir. 2011) 642 F.3d 728, 744 ["California law [does not require an employer to] extend[] the disability period indefinitely"]; *Gantt v. Wilson Sporting Goods Co.* (9th Cir. 1998) 143 F.3d 1042, 1048 [affirming summary judgment on disability discrimination claim under the Americans with Disabilities Act (42 U.S.C § 12101 *et seq*.) where undisputed evidence showed plaintiff had been absent "for an entire year [and] gave no indication as to when she would be able to return to work"][3]; *McCarthy v. R.J. Reynolds Tobacco Co.* (E.D. Cal. 2011) 819 F.Supp.2d 923, 936 ["Employers need not

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[3] "Because FEHA is modeled on . . . the [ADA], decisions interpreting [that] law[] [are] relevant in deciding cases brought under FEHA." (*McCullah v. Southern Cal. Gas Co.* (2000) 82 Cal.App.4th 495, 499.)

retain an employee on the payroll on an indefinite leave of absence when that employee is unable to work"].)

Macy's submitted a significant amount of evidence in support of this factual claim. First, Macy's provided copies of letters and documents confirming that it had granted plaintiff a six-month medical leave, and a six-month extension, to recuperate from a stroke that had left her totally disabled. In a letter approving plaintiff's request for a six-month extension, Macy's specifically informed her that if she remained unable "to return to work by [the] new return date of June 16, 2012, [Macy's] m[ight] not be able to grant an additional extension to [the] medical leave of absence due to the indefinite nature of [the] return to work date."

Macy's also provided copies of correspondence showing that after plaintiff failed to return to work on June 16, 2012, the company requested that she provide updated information regarding her medical condition and her "anticipated return to work date." In response, Khachatourian's attorney provided a letter stating that: (1) plaintiff was still "Temporarily Totally Disabled"; (2) plaintiff would remain "unable to go back to work until all her treating physicians had released her"; and (3) plaintiff's neurologist (Aminian) and her psychologist (Shamie) had not yet issued a "release." The attorney's letter included a status report from Shamie stating only that plaintiff "continues to temporarily totally disable [sic] until approximately August 30, 2012." The attorney also provided a second report from Aminian that declined to provide an anticipated return to work date, and stated that plaintiff was "Temporarily totally disabled from work until: [4 weeks]."

Macy's also presented evidence that after receiving these materials from Khachatourian's attorney, it sent plaintiff a letter, dated August 15, 2012, notifying plaintiff that she would be terminated on August 27, 2012 because Shamie had "not explained how granting. . . any further extension to [her] leave would allow [her] to return to work in the reasonable foreseeable future." The letter further informed plaintiff that if she had questions about the company's decision, she could contact the human resources department.

Macy's also submitted deposition testimony showing that after being notified of the company's termination decision, plaintiff did not contact the company to discuss her medical status. Instead, she had initiated a workers'

compensation claim against Macy's, and then filed her employment discrimination complaint approximately 15-months after her termination.

Taken together, this evidence "would permit a trier of fact to find, more likely than not" (*Kelly, supra,* 135 Cal.App.4th at p. 1098), that Macy's terminated plaintiff because it believed the injuries she had suffered from her stroke had rendered her incapable of returning to work for an indefinite time period.

3. Khachatourian failed to produce substantial responsive evidence showing that Macys' reasons for her termination were a pretext for unlawful discrimination

Because Macy's presented evidence showing that its termination decision was based on legitimate, nondiscriminatory factors, Khachatourian had the burden to produce "'substantial responsive evidence" that would allow a trier of fact to conclude Macy's reasons for the termination were "'untrue or pretextual.' [Citations.]" (*Soria, supra,* 5 Cal.App.5th at p. 591.) Khachatourian does not dispute that an employer may lawfully terminate an employee whose medical condition has rendered him or her incapable of returning to work for an indefinite time period. She argues, however, that the evidence she produced in opposition to Macy's motion for summary judgment raised triable issues of fact as to whether the company's asserted reasons for her termination were pretext for discrimination.

First, Khachatourian contends she produced evidence showing Macy's knew she was not seeking an indefinite medical leave, but rather intended "to return to work on August 30, 2012." In support, plaintiff relies solely on the July 10, 2012 medical report Shamie provided to the company, which states: "Khachatourian continues to totally disable [sic] until approximately August 30, 2012. She is being seen on a weekly basis for individual therapy and once a month for psychotherapy." According to plaintiff, a reasonable trier of fact could infer from this statement that Macy's knew, or should have known, that plaintiff intended to return to her position on August 30, 2012.

We reject plaintiff's assertion that, standing alone, the language in Shamie's report would support a finding that she informed Macy's of her intent to return to work at the end of August. Although Shamie's letter states plaintiff would remain totally disabled through August 30, 2012, it

contains no language indicating that her disability would end on that date, or that she would be able to return to work on that date. The letter from Khachatourian's attorney that accompanied Shamie's report likewise contains no language indicating that plaintiff intended to, or would be capable of, returning to work on August 30, 2012. Instead, the attorney's letter states only that: (1) plaintiff remained totally disabled, and unable to return to work; (2) she would not be able to return to work until her physicians released her; and (3) two of her physicians had not yet done so.

Moreover, it is undisputed that after receiving the letter from Khachatourian's attorney and Shamie's medical report, Macy's informed plaintiff that it intended to terminate her employment because the information she had provided did not indicate when, if ever, she would be able to return to work. It is also undisputed that, after receiving this notification, plaintiff never contacted Macy's to discuss its termination decision, nor did she object to her termination at any point prior to filing her employment discrimination complaint. In sum, the language in Shamie's July 10th report, considered in conjunction with the other undisputed evidence in the record, is not sufficient to support an inference that plaintiff told Macy's she "would be returning to work" on August 30, 2012.[4]

Plaintiff next contends the trier of fact could infer pretext based on evidence that she was physically capable of returning to work on August 30, 2012. In support, plaintiff relies on statements she made in a deposition on

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[4] Khachatourian also argues that the fact "Macy's personnel did not reach out to [her] or to the doctors" to clarify the meaning of Shamie's report raises an inference that the company acted with discriminatory intent. Plaintiff, however, has provided no legal argument (or citation to authority) supporting her assertion that Macy's had an affirmative duty to seek additional information regarding plaintiff's medical condition beyond that which she had elected to provide to the company. We therefore need not consider this argument. (*In re S.C.* (2006) 138 Cal.App.4th 396, 408 (*S.C.*) ["When a point is asserted without argument and authority for the proposition, 'it is deemed to be without foundation and requires no discussion by the reviewing court.' [Citations]. Hence, conclusory claims of error will fail"]; *Bains, supra*, 172 Cal.App.4th at p. 455 ["review is limited to issues which have been adequately raised and briefed"].)

January 1, 2015, and a declaration she filed in support of her opposition to the motion for summary judgment. In both her deposition and her declaration, plaintiff stated that she felt physically capable of returning to work on or before August 30, 2012. These statements appear to conflict with prior deposition testimony she provided in her workers' compensation suit on March 6, 2013. During that deposition, which occurred more than six-months after her termination, plaintiff stated that she still felt too "weak" to return to her position at Macy's, even with reasonable accommodations. (See generally *Preach v. Monter Rainbow* (1993) 12 Cal.App.4th 1441, 1451 ["In determining whether any triable issue of material fact exists, the trial court may, in its discretion, give great weight to admissions made in deposition and disregard contradictory and self-serving affidavits of the party. [Citations.] 'In reviewing motions for summary judgment, the courts have long tended to treat affidavits repudiating previous testimony as irrelevant, inadmissible, or evasive'"].) The statements also appear to conflict with status reports her neurologist issued in August of 2012, October 2012, December 2012 and February of 2013, all of which indicate that the neurologist still evaluated plaintiff as being "totally disabled."

In any event, even if the statements plaintiff made in 2015 would be sufficient to support a finding that she was in fact physically capable of returning to her job in August of 2012, she has provided no evidence that she actually told Macy's she felt capable of returning to work at that time. Plaintiff's unexpressed, subjective belief that she was physically capable of returning to her sales position on August 30, 2012 does not show that the nondiscriminatory factors Macy's has provided in support of its termination decision are pretext for discrimination.

Finally, plaintiff argues a trier of fact could infer that Macy's reasons for her termination were pretextual based on evidence showing the company "cut[] her health insurance while she was on leave." Plaintiff appears to contend that, based on the evidence, the trier of fact could find that Macy's acted improperly in cancelling her health insurance, thereby raising an inference that the company also acted improperly with respect to her termination. Even if we were to assume that Macy's wrongful cancellation of plaintiff's health insurance would, if proven, support an inference of

discriminatory intent, the undisputed evidence shows Macy's had a valid basis for cancelling her insurance. As explained in the factual summary above, Macy's provided copies of numerous written communications showing that it notified plaintiff she was responsible for paying her insurance premiums during her leave period. The communications also show that: (1) Macy's repeatedly warned plaintiff that her premiums were overdue, and that her insurance would be cancelled if she did not pay within 15 days; and (2) despite such warnings, plaintiff still failed to pay her premiums, resulting in the cancellation of her insurance.

Plaintiff has provided no conflicting evidence on any of these issues, nor has she provided any argument explaining why Macy's could not lawfully cancel her insurance given her failure to pay her premiums. Accordingly, even if a trier of fact could infer discriminatory intent based on a finding that Macy's improperly cancelled her insurance, she has failed to demonstrate any evidence that would support such a finding.

In summary, the three categories of evidence plaintiff has relied on in opposing Macy's motion for summary judgment, which include Shamie's July 10th medical report, her own subjective beliefs regarding her ability to return to work in August of 2012 and Macy's decision to cancel her health insurance, are insufficient "to permit a rational inference" (*Soria, supra,* 5 Cal.App.5th at p. 592) that Macy's asserted reason for the termination (plaintiff's continuing inability to return to work) was pretext for intentional discrimination.

C. Macy's Is Entitled to Judgment on Khachatourian's Claim for Failure to Reasonably Accommodate her Disability

1. Governing law

"A reasonable accommodation is a modification or adjustment to the work environment that enables the employee to perform the essential functions of the job he or she holds or desires. [Citation.] FEHA requires employers to make reasonable accommodation for the known disability of an employee unless doing so would produce undue hardship to the employer's operation. [Citation.] The elements of a reasonable accommodation cause of action are (1) the employee suffered a disability, (2) the employee could perform the essential functions of the job with reasonable accommodation,

and (3) the employer failed to reasonably accommodate the employee's disability." (*Nealy, supra,* 234 Cal.App.4th at p. 373.)

"Generally, "'[t]he employee bears the burden of giving the employer notice of the disability. [Citation.] This notice then triggers the employer's burden to take 'positive steps' to accommodate the employee's limitations. . . . [¶] . . . . The employee, of course, retains a duty to cooperate with the employer's efforts by explaining [his or] her disability and qualifications. [Citation.] Reasonable accommodation thus envisions an exchange between employer and employee where each seeks and shares information to achieve the best match between the employer's capabilities and available positions." [Citation.]' [Citation.] [¶] FEHA does not obligate an employer to choose the best accommodation or the specific accommodation a disabled employee or applicant seeks. [Citation.] It requires only that the accommodation chosen be 'reasonable.' [Citation.]" (*Raine v. City of Burbank* (2006) 135 Cal.App.4th 1215, 1222-1223.)

2. Plaintiff has failed to establish the existence of a triable issue of fact regarding her reasonable accommodation claim

Plaintiff argues there are triable issues of fact whether Macy's could have reasonably accommodated her medical condition by extending her leave period until August 30, 2012. Plaintiff contends she provided sufficient evidence to allow a trier of fact to infer that: (1) Macy's knew or should have known plaintiff was capable of returning to her job by August 30, 2012; (2) despite such knowledge, Macy's declined to extend her leave period until that date; and (3) Macy's failed to show that this brief extension to her leave period would have resulted in "any undue hardship to [its] business."

The only evidence plaintiff cites in support of her claim that Macy's knew or should have known she could return to work by August 30, 2012 is the report Shamie provided to the company stating that Khachatourian "continues to temporarily totally disable [sic] until approximately August 30, 2012." For the reasons discussed above in relation to plaintiff's discrimination claim, Shamie's report is not sufficient to show that Macy's knew or should have known she intended to return to work on August 30, 2012. Nor can Shamie's report be reasonably construed as a request that

Macy's accommodate plaintiff's medical condition by extending her leave until August 30, 2012.

To the extent plaintiff is suggesting there are triable issues of fact whether Macy's could have reasonably accommodated her medical condition by extending her leave for an unspecified amount of time, we reject that argument. Our courts have previously held that "[a] finite leave can be a reasonable accommodation under FEHA, provided it is likely that at the end of the leave, the employee would be able to perform his or her duties." (*Hanson, supra,* 74 Cal.App.4th at p. 226.) "'Reasonable accommodation does not, [however], require the employer to wait indefinitely for an employee's medical condition to be corrected. . . .' [Citation.]" (*Id.* at pp. 226-227.) Federal courts assessing reasonable accommodation claims under the ADA have applied a similar analysis, explaining that while "[a]n allowance of time for medical care or treatment may constitute a reasonable accommodation[,]' [citation] . . . '[a]n indefinite unpaid leave is not a reasonable accommodation where the plaintiff fails to present evidence of the expected duration of her impairment.' [Citation.]" (*Taylor v. Pepsi-Cola Co.* (10th Cir. 1999) 196 F.3d 1106, 1110; see also *Watkins v. J & S Oil Co., Inc.* (1st Cir. 1998) 164 F.3d 55, 61-62 [although "under some circumstances an employer may be required to hold a position open for some duration as a 'reasonable accommodation,'" an employer is "not required, for ADA purposes, to provide . . . an 'indefinite leave'"].)

In *Hanson, supra,* 74 Cal.App.4th 215, Division Three of this District applied these principles in concluding that a 16-month leave period qualified as a reasonable accommodation under FEHA. The plaintiff in *Hanson* suffered a wrist injury that rendered him incapable of performing his job duties. Although the plaintiff was entitled to only nine-months of leave under the applicable collective bargaining agreement (CBA), the employer had provided 16-months of leave before terminating him. The court explained that "[i]ndubitably, the seven extra months of leave beyond the CBA period that [the defendant] granted [plaintiff] for the purpose of recuperation constitutes a reasonable accommodation. . . . The fact that, at the end of his leave, [the employee had not yet recovered] . . . d[id] not render the leave period itself unreasonable." (*Id.* at p. 227.)

A similar analysis applies here. It is undisputed that Macy's approved almost 14-months of medical leave. This leave period was approximately 11-months longer than required under the CFLA and FMLA,[5] and six-months longer than was provided for under Macy's standard policies. Moreover, at the end of her leave period, plaintiff's attorney told Macy's she could not return to work, and provided no information regarding when, or even whether, she might be able to return. As in *Hansen*, we conclude that under such circumstances, Macy's 14-month medical leave allowance satisfied its reasonable accommodation requirements.

The two federal decisions Khachatourian has cited in support of her reasonable accommodation claim involved substantially different facts than those presented here. In *Garcia-Ayala v. Lederle Parenterals, Inc*. (1st Cir. 2000) 212 F.3d 638 (*Garcia-Ayala*), the plaintiff underwent cancer treatment in March of 1995, which caused her to miss extended periods of work over the next year. In April of 1996, plaintiff informed her employer that her "doctors [had] certified . . . [she] would be able to return to work on July 30, 1996," and requested that her "job be reserved until" then. (*Id*. at p. 642.) On June 10, 1996, however, the employer notified plaintiff that "her one-year period for job reservation had elapsed in March 1996, and that her employment was terminated." (*Ibid*.) In an ensuing ADA action, the employer argued that, as a matter of law, the one-year leave period it had provided to plaintiff was a reasonable accommodation. The appellate court disagreed, explaining that although an employer need not provide an indefinite medical leave, the plaintiff's "requested accommodation of a few additional months of unsalaried leave" was reasonable given plaintiff's certification that she would be able to return to work by a specified date. Unlike the plaintiff in *Garcia-Ayala*, Khachatourian has presented no evidence that her physicians certified she would be able to return to work by a certain date, nor did she present any

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5 Under both the CFLA and the FMLA, an employer is required to grant certain categories of employees up to 12 workweeks of unpaid leave in a 12 month period for a "serious health condition that makes the employee unable to perform the functions of the position of that employee." (Gov. Code, § 12945.2, subd. (a), (c)(3)(C); see also 29 U.S.C. § 21612(a)(1)(D).)

evidence that she requested Macy's to hold her position open for only a few additional weeks.

Nunes v. Wal-Mart Stores, Inc., (9th Cir. 1999) 164 F.3d 1243, is also distinguishable. The plaintiff in *Nunes* suffered from a fainting disorder that caused her to experience episodes of unconsciousness at work. On March 3, 1995, plaintiff took a medical leave to receive treatment for her condition. Her physicians provided a certification that she would remain unable to work until November 15, 1995. Although the employer's policies allowed employees "medical leaves of absence for up to one year" (*id*. at p. 1245), plaintiff was terminated on October 27, 1995, less than eight-months into her leave period. Moreover, contrary to the defendant's policies, the company had failed to contact plaintiff about the current status of her injuries before making its termination decision. The court concluded that under such circumstances, the plaintiff had "raised a genuine issue of material fact as to whether" extending her medical leave period "was a reasonable accommodation." (*Id*. at p. 1247.) Unlike in *Nunes*, Khachatourian has provided no evidence that she was provided less medical leave time than Macy's normally provides to its employees. Moreover, she received almost 14-months of leave, whereas the plaintiff in *Nunes* was terminated after less than eight-months of leave. Finally, contrary to the situation in *Nunes*, the evidence in this case shows that Macy's did inquire about Khachatourian's medical status prior to making its termination decision.

Plaintiff has failed to establish there is a triable issue of fact whether Macy's failed to reasonably accommodate her medical condition by refusing to extend her medical leave beyond the 14-month period it had already provided.[6]

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[6] Khachatourian also argues the trial court erred in dismissing her reasonable accommodation claim because the evidence shows Macy's "did nothing to explore [her] ability to do the retail sales job, with or without accommodation in July 2012 when it received [the letter from her] [a]ttorney." The evidence in the record shows, however, that the letter from plaintiff's attorney stated that she remained totally disabled, and unable to return to work. Having received this information, we fail to see why Macy's nonetheless had a duty to inquire whether she could perform the job with reasonable accommodations.

D. Plaintiff Has Failed to Present Adequate Legal Argument in Support of Her Claim for Failure to Engage in the Interactive Process

1. Governing law

"'Under FEHA, an employer must engage in a good faith interactive process with the disabled employee to explore the alternatives to accommodate the disability.' [Citations.] FEHA requires an informal process with the employee to attempt to identify reasonable accommodations, not necessarily ritualized discussions. [Citation.]" (*Nealy, supra,* 234 Cal.App.4th at p. 379.) "Once initiated, the employer has a continuous obligation to engage in the interactive process in good faith. [Citation.] 'Both employer and employee have the obligation "to keep communications open" and neither has "a right to obstruct the process." [Citation.]. . . . "Liability hinges on the objective circumstances surrounding the parties' breakdown in communication, and responsibility for the breakdown lies with the party who fails to participate in good faith." [Citation.]' [Citation.]" (*Swanson v. Morongo Unified School Dist.* (2014) 232 Cal.App.4th 954, 971-972.)

"To prevail on a claim for failure to engage in the interactive process, the employee must identify a reasonable accommodation that would have been available at the time the interactive process occurred. [Citation.] 'An employee cannot necessarily be expected to identify and request all possible accommodations during the interactive process itself because """[e]mployees do not have at their disposal the extensive information concerning possible alternative positions or possible accommodations which employers have. . . ."""' [Citation.] But the employee should be able to identify specific, available reasonable accommodations through the litigation process, and particularly by the time the parties have conducted discovery and reached the summary judgment stage." (*Nealy*, *supra*, 234 Cal.App.4th at p. 379.)

2. Plaintiff has failed to establish the court erred in granting summary adjudication on her interactive process claim

Although plaintiff's opening appellate brief contains an extended discussion of the legal standards that govern a claim for failure to engage in the interactive process, her brief contains only one paragraph of argument explaining why she believes the trial court erred in dismissing her interactive

process claim: "It is respectfully submitted that there are triable issues of fact in regards to the following: (1) Did Macy's properly engage in a good faith interactive process with the Appellant at any point in time prior to her termination? (2) Did Macy's properly engage in a good faith interactive process when it received Attorney Minassian's July 13, 2012 letter and enclosed doctors notes which Macy's interpreted as a request for indefinite leave? (3) should Macy's have reached out to the Appellant or her attorneys or her doctors when it received Attorney Minassian's letter to clarify any perceived 'ambiguities' in the enclosed doctors notes? (4) Should Macy's have engaged in good faith interactive process with Appellant to determine what accommodations, if any, she needed to return to work as opposed to unilaterally concluding that plaintiff was seeking an indefinite leave? These disputed facts mitigate against the grant of summary judgment in this case." The paragraph does not contain any evidentiary citations, nor does it cite any legal authority.

"The [trial] court's judgment is presumed to be correct, and it is appellant's burden to affirmatively show error. [Citation.] To demonstrate error, appellant must present meaningful legal analysis supported by citations to authority and citations to facts in the record that support the claim of error. [Citations.] When a point is asserted without argument and authority for the proposition, 'it is deemed to be without foundation and requires no discussion by the reviewing court.' [Citations]. Hence, conclusory claims of error will fail." (*S.C., supra,* 138 Cal.App.4th at p. 408.) As stated by one court: "'[A]n appellant must do more than assert error and leave it to the appellate court to search the record and the law books to test his claim.' [Citation.] 'It is not our place to construct theories or arguments to undermine the judgment and defeat the presumption of correctness.' [Citation.]" (*Flores v. Department of Corrections & Rehabilitation* (2014) 224 Cal.App.4th 199, 204 (*Flores*).) In this case, plaintiff has simply asserted there are triable issues of fact with respect to her interactive process claim. She has provided no evidentiary citations showing that any such factual disputes actually exist, nor has she provided any legal analysis explaining why her claim is valid. Plaintiff's assertion that there are triable issues of

fact regarding her interactive process claim is insufficient to show the trial court erred in dismissing the claim.

E. Plaintiff Has Failed to Establish Any Triable Issue of Fact with Respect to her Remaining Claims

Khachatourian also argues the trial court erred in entering judgment on her claim for termination in violation of public policy, asserting: "FEHA's policy prohibiting disability discrimination in employment is sufficiently substantial and fundamental to support a claim for wrongful termination in violation of public policy. . . . Appellant contends that she was wrongfully terminated . . . due to her medical condition/physical disability which arose from a stroke she suffered." Plaintiff's statements make clear that her wrongful termination claim is derivative of her FEHA disability discrimination claim. We have concluded, however, that Macy's is entitled to judgment on plaintiff's disability discrimination claim. It is therefore also entitled to judgment on plaintiff's derivative claim for wrongful termination.

Finally, Khachatourian argues that the evidence shows "the manner in which Macy's personnel conducted themselves toward her more than supports a claim for intentional infliction of emotional distress against Macy's. The actions of Macy's personnel went above and beyond ordinary management or personnel decisions and instead were intended to inflict injury on an already fragile and eggshell employee." Plaintiff's brief lists eight "facts" that allegedly support her emotional distress claim, all of which relate to the circumstances of her termination and the cancellation of her health insurance. The brief further asserts that "the totality of the[] facts more than support a cause of action for intentional infliction of emotional distress. This same argument applies to the Appellant's contention that the trial court erred in striking the prayer for punitive damages."

Plaintiff's brief does not cite any evidence in support of the eight "facts" underlying her claims for intentional infliction of emotional distress and punitive damages. Nor does the brief contain any legal analysis (or citation to legal authority) explaining why these eight facts are sufficient to support her claims for emotional distress or punitive damages. In particular, she has provided no analysis explaining why these facts are sufficient to show Macy's engaged in "extreme and outrageous" conduct (see *Burnett v. Chimney Sweep*

(2004) 123 Cal.App.4th 1057, 1068 [to prevail on claim for intentional infliction of emotional distress claim, plaintiff must show "extreme and outrageous conduct by the defendant"]), or that Macy's acted with "oppression or malice." (See *Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1162 [stating legal standard for punitive damages] [citing and quoting Civ. Code, § 3294, subd. (a)].) Plaintiff's contention that various "facts," all of which are unsupported by evidentiary citations, are sufficient to support her claims for intentional infliction of emotional distress and punitive damages does not constitute "pertinent or intelligible legal argument." (*Flores, supra*, 224 Cal.App.4th at p. 205.) She has therefore abandoned her appeal with respect to these claims. (*Ibid*. ["While plaintiff sets out many legal propositions and cites authority for them, he does not relate them to the facts of this case or show how they apply to demonstrate error in the trial court's actions"].)[7]

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[7] Even if we did not deem plaintiff's appeal of these claims to be abandoned, her argument lacks merit. Seven of the eight "facts" plaintiff has listed in support of her emotional distress and punitive damages claims have been addressed above. Four of the "facts" involve Macy's decision to cancel her health insurance. As discussed above, however, Macy's presented extensive documentation showing that it cancelled her insurance because she neglected to pay her premiums after having been repeatedly warned that her failure to do so would result in cancellation. Plaintiff has cited no conflicting evidence on these issues. Three of the remaining four "facts" involve Macy's decision to terminate her. We have concluded, however, that plaintiff has failed to identify any evidence that Macy's termination decision was unlawful. The final alleged fact, which claims that Macy's acted improperly in denying a related worker's compensation claim, is not supported by any evidence in the record. Although the record indicates plaintiff litigated a worker's compensation claim against Macy's, she has presented no argument or evidence showing that the workers' compensation claim was in fact meritorious.

DISPOSITION

The judgment is affirmed. The respondent shall recover its costs on appeal.

ZELON, J.

We concur:

PERLUSS, P. J.

SMALL, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.