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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

VERGINE BARSEGHYAN, Plaintiff and Appellant, v. COUNTY OF LOS ANGELES, Defendant and Respondent.	B249184 (Los Angeles County Super. Ct. No. BC480877)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ronald M. Sohigian, Judge. Affirmed in part and reversed in part.

Mancini & Associates, Marcus A. Mancini, Christopher M. Barnes, Benedon & Serlin, Gerald M. Serlin, Kelly R. Horwitz for Plaintiff and Appellant.

Peterson · Bradford · Burkwitz, George E. Peterson, Richard Barrios for Defendant and Respondent.

Plaintiff and appellant Vergine Barseghyan ("employee") brought an action against her employer, defendant and respondent County of Los Angeles ("employer"), alleging disability discrimination and retaliation under the Fair Employment and Housing Act.[1] Employer filed a Motion for Summary Judgment or for Summary Adjudication in the Alternative. The trial court granted summary judgment in favor of employer and entered judgment thereon. Appellant appeals from the judgment of the trial court.

When a party, as in the instant case, moves for summary judgment in a multi-count complaint or for summary adjudication in the alternative, in order for the court to grant summary judgment, the court must find in favor of the defendant as to each cause of action. In the present case the court granted summary judgment in favor of employee and did not rule on the motion for summary adjudication. However, by granting the motion for summary judgment, the trial court in effect ruled that there were no triable issues of material facts as to any of the causes of action and, therefore impliedly granted the motion for summary adjudication as to each of the causes of action of the complaint. (See Code Civ. Proc., § 437c, subdivision (f)(1).) In the present case, for the reasons set forth below, we affirm the decision of the trial court granting summary adjudication as to the cause of action for retaliation for having filed the sexual harassment complaint, but reverse the trial court's granting of summary adjudication as to the remaining two causes of action.

FACTUAL AND PROCEDURAL BACKGROUND

In March of 2000, employee began work with employer as a clerk with the Department of Public and Social Services ("DPSS"). A few months later, employee went

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[1] We note that employee abandoned her cause of action for harassment on appeal by failing to address it in her opening brief. (*Kelly v. CB & I Constructors, Inc.* (2009) 179 Cal.App.4th 442, 451-452; *Lyons v. Chinese Hosp. Ass'n* (2006) 136 Cal.App.4th 1331, 1336; *Behr v. Redmond* (2011) 193 Cal.App.4th 517, 538.) In addition, she waived her cause of action for violation of the California Family Rights Act in the trial court. Thus, the only remaining causes of action subject to this appeal are those for (a) retaliation for reporting prior alleged sexual harassment, (b) disability discrimination, and (c) retaliation based on disability.

to work with the DPSS's Greater Avenue for Independence or GAIN program. The GAIN program provides employment-related services to welfare recipients to aid them in locating employment, to stay employed, and to move on to higher paying jobs with the ultimate goal of self-sufficiency and independence.

On December 6, 2008, while she was a GAIN Services Worker at DPSS's Beverly Boulevard office, employee filed an internal complaint charging that two coworkers had sexually harassed her. On March 25, 2009, employee filed a Department of Fair Employment and Housing complaint alleging sexual harassment, discrimination, and retaliation against employer related to the alleged sexual harassment. On December 8, 2009, employer and employee entered into a settlement agreement pursuant to which employer transferred employee to a new location and promoted her to "Acting" GAIN Services Supervisor ("AGSS") in exchange for employee waiving all of her above-stated claims against employer. At no time was employee promised that her position as an AGSS would change to a "Permanent" GSS. The settlement also did not provide that employee's bilingual bonus (for speaking both English and Armenian) would continue at her new job and location, where she would not be required to do any translating. Nor did employer promise any guaranteed overtime at her new job.

On January 11, 2010, also as part of the settlement between employer and employee, employee reported to her new position in the Integrated Services Operation Section. Employee's immediate supervisors at her new job were Human Services Administrator I, Miriam Kemp ("Kemp"), and Human Services Administrator II, Darryl Baker ("Baker"). Baker and Kemp were both unaware of employee's previous complaints of sexual harassment, or of the settlement agreement which resulted in her transfer to her new position.

Upon her transfer to her new position, employee informed Baker that she did not have any medical restrictions and did not request any accommodations. Baker later learned that employee had work restrictions at her prior position and requested that employee provide a medical note from her doctor outlining any restrictions so that he could accommodate them at her new position. Employee was adamant, however, that she

did not have any medical restrictions and did not need or want any accommodations and therefore would not be providing a note from a physician in this regard.

Almost immediately upon employee's beginning her new job, she raised various complaints, as follows:

1. She did not receive her computer access codes in a timely manner and without them she could not work effectively. She commenced work on January 11, 2010, but despite repeated requests, she did not receive the access codes until February 17, 2010.

2. She was not invited to staff meetings and was told she was not part of the "team."

3. She was not given a 9/80 schedule, which she had at her prior job, which allows an employee to work 80 hours in 9 days, with the 10th day off.

4. She was not promoted from AGSS to permanent GSS when others in her new location were promoted.

5. She was not given an opportunity to work overtime.

6. She was rated "competent" in her October 10, 2010 performance evaluation, while at her prior job she was rated "Very Good."

7. Her requests for an ergonomic desk and work area were ignored.

On March 14, 2012, employee filed this lawsuit against employer. Following employer's demurrers, employee filed her operative complaint, which alleged the following five causes of action: (1) Retaliation for Opposing Alleged Sexual Harassment; (2) Disability Discrimination; (3) Harassment based on Disability; (4) Retaliation Based on Disability; and (5) a Violation of the California Family Rights Act.

Employer moved for summary judgment or, in the alternative, summary adjudication of all of employee's causes of action. The trial court held oral argument on the motion. During oral argument, employee abandoned her cause of action for a violation of the California Family Rights Act, Government Code section 12945.2 et seq. The court overruled employee's objections to the evidence presented by employer, and

granted the summary judgment/adjudication motion. A judgment based on that order was subsequently entered.

Employee timely filed her Notice of Appeal challenging the trial court's rulings on summary judgment.

STANDARD OF REVIEW

In performing our independent review of a defendant's summary judgment motion, we apply the rules pertaining to summary judgment and summary adjudication in the trial court. A defendant moving for summary judgment and/or summary adjudication has the initial burden of showing that a cause of action lacks merit because one or more elements of the cause of action cannot be established or there is a complete defense to that cause of action. "If defendant fails to make this initial showing, it is unnecessary to examine the plaintiff's opposing evidence, and the motion must be denied. However, if the moving papers make a prima facie showing that justifies a judgment in the defendant's favor, the burden shifts to the plaintiff to make the prima facie showing of the existence of a triable issue of material fact." (*Powell v. Kleinman* (2007) 151 Cal.App.4th 112, 120.) A plaintiff may not rely upon mere allegations or denials in his pleadings to show that a triable issue of material fact exists as to that cause of action. A prima facie showing is one that is sufficient to support the position of the party in question. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850-851.) In addition, a summary judgment motion is directed only to the issues framed by the pleadings. (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1252.) Those are the only issues a motion for summary judgment must address. (*Conroy v. Regents of University of Cal.* (2009) 45 Cal.4th 1244, 1249-1250.) We review the trial court's decision to grant the summary judgment motion de novo. (*Coral Const. Inc. v. City and County of San Francisco* (2010) 50 Cal.4th 315, 336.) We make an independent assessment of the correctness of the trial court's ruling applying the same legal standards as did the trial court in determining whether there are any genuine issues of triable fact or whether the moving party is entitled to a judgment as a matter of law.

DISCUSSION

1. *The trial court properly granted employer's motion for summary adjudication on her cause of action alleging that she was retaliated against for having filed a sexual harassment claim against her employer*

To establish a prima facie case of retaliation for filing a sexual harassment claim, a plaintiff must prove: (1) he or she engaged in a protected activity; (2) the employer subjected the employee to an adverse employment action; and (3) there was a causal connection between the protected activity and the employer's action. (*Akers v. County of San Diego* (2002) 95 Cal.App.4th 1441, 1453.) Once an employee establishes a prima facie case, the employer is then required to offer a legitimate, non-retaliatory reason for the adverse employment action. (*Ibid*.) If the employer produces a legitimate reason for the adverse employment action, the burden shifts back to the employee to prove that the employer's alleged legitimate reason for the adverse employment action was pre-textual. (*Ibid*.)

There is no dispute in the present case that employee engaged in a protected activity, i.e., the filing of a sexual harassment claim. The dispute is whether (a) the employee was subjected to adverse employment actions as a result of her engaging in this protected activity; and (b) whether employee had produced evidence of a causal connection between the alleged adverse employment actions and the alleged retaliation. To prevail at trial, employee must be able to prove both, and to defeat a motion for summary adjudication she must show that there is a triable issue of material fact as to both of these elements of the cause of action.

In performing our independent review of a defendant's summary judgment/ summary adjudication motion, we apply the rules pertaining to summary judgment procedure discussed above. A defendant moving for summary judgment has the initial burden of proving that a cause of action lacks merit because one or more elements of the cause of action cannot be established or there is an affirmative defense to that cause of action. If defendant fails to make this initial showing, it is unnecessary to examine the plaintiff's opposing evidence, and the motion must be denied. However, if the moving

papers make a prima facie showing that justifies a summary judgment in the defendant's favor, the burden then shifts to the plaintiff to make a prima facie showing of the existence of a triable issue of material fact. (*Powell v. Kleinman, supra,* 151 Cal.App.4th at p. 121.) A plaintiff may not rely upon mere allegations or denials in his or her pleadings to show that a triable issue of material fact exists, but instead must set forth specific facts showing that a triable issue of material fact exists as to that cause of action.

In the present case, employer contends that the undisputed evidence before the trial court in regard to the cause of action for retaliation for filing a sexual harassment claim showed that (a) employee did not suffer an adverse employment action; (b) even if there was evidence presented of an adverse employment action, there was no evidence presented of causation between the adverse employment action and the protected activity; and (c) in any event, employer had legitimate business reasons for the alleged adverse employment actions. We will discuss the issue of causation first.

Assuming arguendo that employer engaged in any adverse employment actions against employee, and had no legitimate business reason for doing so, has employee introduced competent evidence to show that such actions were taken in retaliation for her having filed a sexual harassment claim against employer? We hold that she has not.

A necessary element of a cause of action for retaliation is a "'causal link between [an employee's] protected activity and the employer's action.' [Citation.]" (*Reeves v. Safeway Stores, Inc.* (2004) 121 Cal.App.4th 95, 107 (*Reeves*).) "'The causal link may be established by an inference derived from circumstantial evidence, "such as the employer's knowledge that the [employee] engaged in protected activities and the proximity in time between the protected action and allegedly retaliatory employment decision."' [Citation.]" (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 614-615.) "Essential to a causal link is evidence that the employer was aware that the plaintiff had engaged in the protected activity." (*Cohen v. Fred Meyer, Inc.* (9th Cir. 1982) 686 F.2d 793, 796; *Gunther v. County of Washington* (9th Cir. 1979) 623 F.2d

1303, 1316.)[2] Employee alleges she suffered adverse employment actions at her new position as a result of her having complained about being sexually harassed at her old position. However, the record does not support this contention. The undisputed evidence establishes that in January 2009, employee transferred from her position as GAIN Services Worker at the DPSS's Beverly Boulevard office to a new position as an AGSS at the Integrated Services Operation Section office in Burbank, pursuant to the provisions of the settlement agreement between employer and employee settling employee's sexual harassment complaint. Employee's new supervisors, Kemp and Baker, both testified that they were unaware of employee's previous complaints for sexual harassment made by her before she was transferred to her new position in Burbank, and employee acknowledges that Baker and Kemp were the only persons who she alleges engaged in adverse employment actions against her. She further admits that she has no evidence to suggest that either of them were aware of her prior sexual harassment complaint.

Relying on the holding in *Reeves, supra,* 121 Cal.App.4th 95, employee contends that she has submitted evidence sufficient to raise a triable issue of material fact as to the causation element. In *Reeves,* the plaintiff was a male clerk at a supermarket who reported sexual harassment of female employees. The plaintiff complained to his store manager about the sexual harassment, who trivialized the plaintiff's complaints. In an unrelated incident, the plaintiff returned to the store following the completion of his shift at midnight to use the store bathroom, but was denied access by a coworker in charge of the night crew at the store. Plaintiff, who was reportedly drunk, became irate, swore, and pushed his coworker, although plaintiff denied such actions on his part. Upon learning of the incident, the store manager advised the store's security department officer to investigate the incident. The security department officer advised the district manager about the results of the investigation, and the store's district manager decided to terminate plaintiff because his actions against the coworker violated a company policy against

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[2] Because state and federal employment discrimination laws are similar, California courts look to pertinent federal precedent in applying California anti-discrimination statutes. (*Guz v. Bechtel Nat. Inc.* (2000) 24 Cal.4th 317, 353.)

battery. Plaintiff filed a complaint with the Department of Fair Employment and Housing alleging that he was discharged because he had reported sexual harassment in the workplace, and after receiving a right to sue letter, filed a lawsuit against his employer alleging retaliation under FEHA. The trial court granted summary judgment in favor of the employer because there was no causation established because the district manager was unaware of the report of sexual harassment against other employees made by the plaintiff at the time he decided to terminate the plaintiff. However, the appellate court reversed the trial court because it held that, but for the actions of the store manager who had animus against the plaintiff, the security department officer would not have investigated and the district manager would not have received the investigation results which led to his decision to fire the plaintiff. Under such circumstances, the knowledge of reported sexual harassment conveyed to the store manager was imputed to the district manager who made the ultimate decision to fire the plaintiff.

Unlike the situation in *Reeves, supra,* 121 Cal.App.4th 95, in this case there was no instrumentality that was put in place that caused the alleged adverse employment actions against employee. Here, the only two persons who allegedly instituted adverse employment actions against employee were Kemp and Baker. There wasn't anyone (such as the store manager in *Reeves*) who acted with animus towards employee after she had filed a sexual harassment complaint. Both Kemp and Baker were unaware of employee's reporting of alleged sexual harassment against her at her former job location, which was not the case with the store manager in *Reeves*. Thus since both Baker and Kemp were unaware of the protected activity engaged in by employee at her former job location, and because they were the only two persons alleged to have committed adverse employment actions against employee, the holding in *Reeves* does not apply to the facts in the present case.

Thus, employee presented no evidence of causation between the alleged adverse employment acts of employer and employee's engagement in a protected act at her prior job location. In light of our decision that employee failed to present material facts to support a finding of causation, we need not consider the issues of the adverse

employment actions, whether employer presented evidence of legitimate business reasons for any alleged adverse employment actions, and whether employee demonstrated that such alleged legitimate business reasons were pre-textual.

2. *The trial court erred in granting the employer's motion for summary adjudication on employee's claim that she was retaliated against because she complained to her supervisors about their failure to address her need for a disability accommodation*

Employee contends that she has raised several triable issues of material fact in support of her claims of retaliation. She contends that in response to her complaints to her supervisors about their failure to address her needs for an ergonomic evaluation of her desk and work space to determine what accommodation needed to be made to address the pain and discomfort she was suffering due to her disability, they purposely delayed the implementation of an ergonomic study and the provision of an accommodation to her based thereon, and further retaliated against her by transferring her office to a hot "storage-like" room with no ventilation, next to a noisy conference room.

a. *The ergonomic evaluation and subsequent accommodation.* Employee had suffered from dermatomyositis (a connective tissue disease) for a number of years. Before her transfer to Burbank, employer had successfully accommodated her disability. When she moved to her new job, she did not think that she would need an accommodation; she found, however, that the design of her desk exacerbated her disability, which in turn caused her to suffer severe pain and discomfort. Starting in February 2010, she repeatedly requested of Kemp that she be provided with an ergonomic evaluation of her work space (including her desk) to determine what accommodations could be made to relieve her pain and discomfort. Despite her many requests, the ergonomic evaluation was not initiated for approximately five months. She was not provided with the requested accommodation for over a year after she first requested the ergonomic study, and only after she had been hospitalized for her disability

which she attributed to her inadequate desk. She contends that the failure to accommodate her disability for over a year constitutes disability discrimination.[3]

Employer contends that the above-referenced facts do not constitute a basis for determining that there was an adverse employment action. It makes light of employee's medical problem leading to her pain and suffering. It contends that employee is merely looking for an "idyllic retreat" and the failure to provide employee with an ergonomic evaluation for over a year was at most merely an inconvenience to her. Employer implies that the whole problem is about nothing more than employee wanting for sake of personal comfort to cross her legs when she worked, and the inability to do so does not constitute an adverse employment action. It said that it just took a long time to find her a suitable desk. We disagree. Obviously, the parties' dispute about whether or not employer's yearlong delay in accommodating employee's disability constituted a discriminatory adverse employment action raises a triable issue of material fact.

b. *The propriety of the accommodation belatedly provided to employee.* When employee was finally provided with a replacement desk, it was located in a room that she described as "like a storage room," which contained a plastic Christmas tree, cleaning supplies, boxes holding paper ready for shredding, a fax machine, and various items of clothing. There was no ventilation in the room except for a fan on the floor; the room was uncomfortably hot. The office was located next to a conference room which when occupied made it very difficult for employee to talk to anyone in the room or on the telephone due to the noise coming from the conference room. When she first came to employee's new work location, Kemp commented: "Oh, my God there's no air." As the result of the lack of ventilation, employee felt like she could not breathe, which in turn made her feel weak and sleepy. It was so hot in her "office" that she often worked with

[3] Evidence was presented by employee in opposition to the motion for summary adjudication and summary judgment that taking a year to complete an ergonomic evaluation and provide a disability accommodation for employees of Los Angeles County is "unheard of."

the lights off to try to keep the temperature down. Despite her many complaints about the condition of her office and the employer's acknowledgement of the problem, no action was taken to correct same.

Employer contends that there was no evidence that the "new" desk was in a storage room as argued by employee's counsel. However, employee clearly stated that the replacement desk was located in a "storage-like" room, in which miscellaneous items, such as a plastic Christmas tree, cleaning supplies, clothing, and boxes containing paper ready to be shredded, were kept. Additionally, the room was hot, had no ventilation, and at times was so noisy that a conversation could not take place. Employee contends that putting her into this room constituted disability discrimination and was done in retaliation for her having made complaints which ultimately forced the employer to perform an ergonomic study resulting in employer being required to provide employee with a "new" desk to accommodate her disability. This raised two questions of triable issues of fact, namely: (a) the condition of the room the employee was transferred to, and (b) whether her transfer to this "storage-like" room was in retaliation for her having complained about the failure of her supervisors to initiate an ergonomic study, and for their failure for over one year to provide her with an accommodation. This raised triable issues of material fact to be decided by the trier of fact.

c. Other claims of adverse employment actions. Employee also makes certain other claims of disability discrimination consisting of the following: (i) a delay in providing her with the computer codes after her transfer to her new location; (ii) the denial of her request to continue working the 9/80 schedule which she worked at her prior job with the employer; (iii) her exclusion from staff meetings and being told that she was not considered "part of the team;" (iv) the loss of the bilingual bonus in her new job; and (v) the alleged delay in her promotion from acting to permanent status. Assuming arguendo that each of these claims is true, employee has provided no evidence whatsoever to show that these adverse employment actions resulted from disability discrimination. They all occurred at the time of her transfer, or shortly thereafter, and

prior to employee's requests for a disability accommodation, including an ergonomic study of her work area. No evidence, direct or indirect, was presented by employee to tie these complaints to her disability. Furthermore, if employee contends that the discrimination resulted from her transfer to her new job in Burbank, then she has the same problem she encountered in conjunction with her cause of action based on retaliation for filing her sexual harassment claim, namely, lack of evidence of causation.

3. *The trial court erred in granting the motion for summary adjudication on employee's claim for disability discrimination*

The Fair Employment and Housing Act (Gov. Code,[4] § 12900 et seq.) ("FEHA") makes it an unlawful employment practice to discriminate against any person because of a physical or mental disability. (§ 12940, subd. (a).) In order to prevail on a claim of disability discrimination, an employee must show: (1) he or she suffers from a disability; (2) he or she is otherwise qualified to do the job; and (3) he or she was subjected to adverse employment action because of her disability. (*Deschene v. Pinole Point Steel Co.* (1999) 76 Cal.App.4th 33, 43; *Mixon v. Fair Employment & Housing Com.* (1987) 192 Cal.App.3d 1306, 1317.) Once an employee meets this burden of proof, then the employer must provide a legitimate, non-discriminatory reason for the adverse employment action. If the employer does so, then the burden shifts back to the employee to show that the proffered reason by the employer was a pretext for an impermissible motive. (*McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792; see also *Sandell v. Taylor-Listug, Inc.* (2010) 188 Cal.App.4th 297, 314.) This three-stage burden-shifting test for discrimination claims is called the "*McDonnell-Douglas* test." (See *Guz v. Bechtel Nat. Inc., supra,* 24 Cal.4th at p. 354.) In demonstrating that an employer's proffered nondiscriminatory reason is false or pre-textual, an employee "cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the

[4] Subsequent statutory references are to this code.

employer is wise, shrewd, prudent, or competent. . . . Rather, the [employee] must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action[s] that a reasonable factfinder *could* rationally find them 'unworthy of credence,'. . . and hence infer 'that the employer did not act for [the asserted] non-discriminatory reasons. [Citations.]" (*Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1005.) An employee can prove by indirect evidence that an employer's proffered reasons are motivated by animus by showing that the reasons are unworthy of credence. (*Mixon v. Fair Employment & Housing Com.*, *supra*, 192 Cal.App.3d at pp. 1318-1320.)

A plaintiff may show that she suffered from intentional discrimination through two distinct avenues. (*Mokler v. County of Orange* (2007) 157 Cal.App.4th 121, 138.) First, she may provide direct evidence which, if believed, proves the fact of discriminatory animus, without inference or presumption. (*DeJung v. Superior Court* (2008) 169 Cal.App.4th 533, 550; *Trop v. Sony Pictures Entertainment Inc.* (2005) 129 Cal.App.4th 1133, 1145.) Where a plaintiff offers direct evidence of discrimination that is believed by the trier of fact, the defendant can only avoid liability by proving the plaintiff would have been subjected to the same employment decision without reference to the unlawful factor. A "'plaintiff is required to produce "very little" direct evidence of the employer's discriminatory intent to move past summary judgment.' [Citation.]" (*Morgan v. Regents of University of Cal.* (2000) 88 Cal.App.4th 52, 69.)

However, direct evidence is rarely available, and thus a plaintiff must usually rely on circumstantial evidence to prove his or her case. (*Guz v. Bechtel Nat. Inc.*, *supra*, 24 Cal.4th at p. 354; *Trop v. Sony Pictures Entertainment Inc.*, *supra*, 129 Cal.App.4th at p. 1144; *Morgan v. Regents of University of Cal.*, *supra*, 88 Cal.App.4th at pp. 67-68.) When a plaintiff seeks to prove her case through indirect or circumstantial evidence, then the previously discussed *McDonnell-Douglas* test comes into play. The *McDonnell-Douglas* test "reflects the principle that direct evidence of intentional discrimination is rare, and that such claims must usually be proved circumstantially. Thus, by successive steps of increasingly narrow focus, the test allows discrimination to be inferred from facts

that create a reasonable likelihood of bias and are not satisfactorily explained." (*Guz v. Bechtel Nat. Inc., supra,* 24 Cal.4th at p. 354.) The *McDonnell-Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination. (*Trans World Airlines, Inc. v. Thurston* (1985) 469 U.S. 111, 121.)

It is to be noted, however, that "the *McDonnell-Douglas* test was originally developed for use at trial, not in summary judgment proceedings. 'In such pretrial proceedings, the trial court will be called upon to decide if the plaintiff has met his or her burden of establishing a prima facie case of unlawful discrimination. If the employer presents admissible evidence either that one or more of plaintiff's prima facie elements is lacking, or that the adverse employment action was based on legitimate, nondiscriminatory factors, the employer will be entitled to summary judgment *unless the plaintiff produces admissible evidence which raises a triable issue of fact material to the defendant's showing.* In short, by applying *McDonnell Douglas's* shifting burdens of production in the context of a motion for summary judgment, "the judge [will] determine whether the litigants have created an issue of fact to be decided by the jury."' (*Caldwell v. Paramount Unified School Dist.* [(1995)] 41 Cal.App.4th [189] at p. 203, italics added.) Thus, '"[a]lthough the burden of proof in a title VII action claiming an unjustifiable refusal [to hire] ultimately rests with the plaintiff . . . , in the case of a motion for summary judgment or summary issue adjudication, the burden rests with the moving party to negate the plaintiff's right to prevail on a particular issue. . . . In other words, the burden is reversed in the case of a summary issue adjudication or summary judgment motion. . . ."' [Citation.]" (*Sada v. Robert F. Kennedy Medical Center* (1997) 56 Cal.App.4th 138, 150-151.)

Employer does not dispute in the present case that employee suffers from a disability (she suffers from dermatomyositis – a connective tissue disease which causes muscle pain and fatigue) or that she is otherwise qualified to do her job. Rather, it contends that there was no evidence, direct or indirect, that employee was subjected to

adverse employment actions[5] due of her disability. Employee contends, however, that she produced evidence that while she was at her new job she was subjected to several adverse employment actions because of her disability. These consisted of: (a) giving a very good performance review, but then rating her performances as merely competent, and then telling her she received that "poor rating" due to her disability; (b) taking over one year to initiate and implement an ergonomics study of the employee's work area and to provide her with the accommodation recommended in the report, causing her disability to be exacerbated and causing her to be hospitalized as a result thereof; and (c) relocating her office to a hot "storage-like" room which had inadequate ventilation.

In regard to her performance review, employee presented both direct and indirect evidence of disability discrimination. The comments on employee's annual performance review for the period from November 1, 2009 to October 1, 2010 were all very positive, yet she was only rated "qualified" for her job. Employee provided evidence that when she asked Kemp why she had only received a qualified rating when for some 10 years prior as an employee of the County she had always received much higher ratings, Kemp stated: "[I]t's because of your [medical] condition. I think you are not doing your best."

Comments which are made contemporaneously with an adverse employment action constitute direct evidence of discrimination. (*DeJung v. Superior Court, supra,* 129 Cal.App.4th at p. 550; *Trop v. Sony Pictures Entertainment Inc., supra,* 129 Cal.App.4th at p. 1147.) The trial court could not, but did in fact, disregard this direct evidence of discrimination, in granting summary adjudication on employee's cause of

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[5] An adverse employment action is one which "materially affects the terms, conditions, or privileges of employment. . . ." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1051.) Adverse employment actions are not limited "to so-called ultimate employment actions such as termination or demotions, but covers "the entire spectrum of employment actions that are reasonably likely to adversely and materially affect an employee's job performance or opportunity for advancement in his or her career . . . ." (*Id.*, at p. 1054.)

action for disability discrimination.[6]

Employer contends, however, that a performance review which rates employee's performance as "competent" cannot by law be deemed an adverse employment action, because only negative evaluations can be deemed an adverse employment action. (*Yanowitz v. L'Oreal USA, Inc., supra,* 36 Cal.4th at p. 1052.) In her reply brief on appeal, employee argues that what constitutes a negative evaluation is an issue of fact, citing *Lelaind v. City and County of San Francisco* (N.D. Cal. 2008) 576 F.Supp.2d 1079, 1098.) She argues: "A trier of fact could conclude from [employee]'s testimony that, in light of her historical performance evaluations, Administrator Kemp's 'Competent' rating was in fact a negative employment evaluation. This dip in [employee]'s performance evaluation after years of 'Very Good' ratings is reasonably likely to affect [employee]'s opportunity for advancement in her career and, as such, qualifies as an adverse employment action."

The totality of the evidence provided by employee to support her claim that she was subjected to adverse employment actions by employer, such as (a) giving her a very good performance review but then rating her performance as being merely satisfactory and then telling her that she received her "poor" rating due to her disability, (b) taking over one year to initiate and implement an ergonomics study of the employee's work area and to provide her with the accommodation recommended in the study, causing her

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[6] At the hearing on the Motion for Summary Judgment or Summary Adjudication, employee's counsel brought the direct evidence issue to the court's attention. "I don't believe the court addressed the . . . direct evidence of discrimination in the case and the court's made no ruling about that. There's a specific comment by one of the decision makers that the reason they were doing specific actions was because of – related to our disability. The court makes no reference to that and I don't think that's the complete record. I think the court needs to make reference to whether or not plaintiff has shown direct evidence." The court made no ruling or comment on this issue.

disability to be exacerbated and causing her to be hospitalized as a result thereof, and (c) relocating her office to a hot "storage-like" room with inadequate ventilation, was more than sufficient to raise triable issues of material fact to be decided by the trier of fact.

Because employee proffered direct evidence of discrimination, the employer could only defeat her claim by showing either that her testimony was not true or that she would have been subject to the same action without reference to her disability. (*Trop v. Sony Pictures Entertainment Inc., supra,* 129 Cal.App.4th at p. 1145.) As to the former showing, denying the truth of employee's testimony would in and of itself raise a triable issue of material fact; as to the latter, the employer did not make this argument. Thus the trial court's granting of the motion for summary adjudication on this claim was error.

CONCLUSION

We hold the moving papers made a prima facie showing justifying a summary judgment or summary adjudication in defendant's favor, so the burden shifted to the plaintiff to show the existence of a triable issue of material fact to support her (1) cause of action for retaliation for engaging in protected activities and (2) cause of action for disability discrimination. Employee was not able to show that there was a triable issue of material fact on the element of causation in her cause of action for retaliation for filing her complaint for sexual harassment. Employee did, however, show that triable issues of material fact exist as to the retaliation cause of action based on employee's request for an ergonomic evaluation and an accommodation based thereon, and as to the disability discrimination cause of action.

DISPOSITION

The judgment of the trial court is thus affirmed as to the cause of action for retaliation based on employee's claim of sexual harassment, and reversed as to her causes

of action for disability discrimination and for retaliation based on her request for accommodation of her disability. Employee is to recover her costs of appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MINK, J.*

We concur:

TURNER, P.J.

MOSK, J.

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