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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

PATRICIA HANCOCK, Plaintiff and Respondent, v. TIME WARNER CABLE SERVICES, LLC, et al., Defendants and Appellants.	B266532 (Los Angeles County Super. Ct. No. BC482161)

APPEAL from a judgment of the Superior Court of Los Angeles County. Raphael A. Ongkeko, Judge. Reversed and remanded with directions.

Hill, Farrer & Burrill, James A. Bowles, Casey L. Morris and Elissa L. Gysi for Defendants and Appellants.

Kokozian Law Firm, Bruce Kokozian and Jill P. McDonell for Plaintiff and Respondent.

Defendant Time Warner Cable appeals from the jury's verdict that it failed to engage in the process of accommodating the disability of plaintiff Patricia Hancock after she was injured on the job. We reverse the judgment because the evidence shows that Time Warner did not know (1) she was disabled or (2) Hancock had asked for any accommodations, as required by law. We therefore remand the matter to the trial court with directions to enter judgment for Time Warner.

FACTS AND PROCEDURAL HISTORY

Patricia Hancock worked for Time Warner Cable for several years as a warehouse technician, preparing cable boxes for their return to Time Warner customers. Her work involved using a hydraulic pallet jack to move pallets stacked with several hundred pounds worth of cable boxes to her work station. Her job duties included the ability to lift up to 75 pounds at a time. She was considered a valuable employee, and had good relations with her coworkers and supervisors.

After new supervisor Andy Sabala took over, he increased the number of cable boxes that were stacked on individual pallets, thereby increasing the weight of the pallets. On August 22, 2011, Hancock injured her back while moving a fully loaded pallet. According to Hancock, she felt a very sharp pain up her back after she lowered the pallet jack and began to pull it out from the pallet. She felt another sharp pain across her shoulders as she bent down to remove the plastic shrink wrap that held the cable boxes in place.

Hancock went to Sabala's office and said, "I hurt my back and neck out there moving the pallets. You guys have them piled way too high in the back. You're allowing them to pile the boxes way up high. I hurt myself moving it. In the future, you're going

to have to ask them to help me. I need help if they're going to pile them up like that." Sabala, who was busy working, said "all right" while he continued looking at his computer. Hancock left and returned to her work station, where she finished her shift, but worked at a reduced rate due to her back pain. She did not ask to go home early, and did not testify that she asked to see a doctor at the time of her injury.

After Hancock got home, the pain was so bad that at 6:00 p.m. she took a hydrocodone tablet that had been prescribed to her following an earlier surgery. She then took another at 11:00 p.m. The next morning Hancock tried to get an appointment at Kaiser Permanente for her back pain, but was told she needed to be seen by a workers' compensation doctor because she had suffered a workplace injury. Hancock phoned Sabala, who said he should have written up a report and taken her to the doctor the day before, and also told her to come in to work so he could drive her to Time Warner's workers' compensation clinic.

Sabala drove Hancock to the Southern California Immediate Medical Center in Lakewood, which was Time Warner's approved workers' compensation medical provider. The clinic's intake form asked Hancock to list her "current medications." Hancock did not include the hydrocodone she had taken the night before because she believed the question called for her to identify only the medications she took on a regular basis.

Hancock was seen by Dr. Kimberley Ann Ludlow. According to Hancock, Ludlow performed a perfunctory five-minute exam and did not ask her about her job's lifting requirements. Ludlow told Hancock that x-rays showed she had

severe arthritis in her neck, along with a back strain, but did not show the full extent of that strain. Ludlow never mentioned anything to her about whether or not she was cleared to return to work. However, Ludlow's written report stated that Hancock had been cleared to return to full duty at work. Hancock was also scheduled for a follow-up examination in one week.

Hancock was also required to take a urine test. After Hancock was seen by Ludlow, someone at the clinic's front desk told Hancock she had tested positive for a pain reliever and that she could go back to work, but with restrictions on her use of ladders, heavy machinery and forklifts. There is no evidence that a pallet jack falls within these categories. She was told nothing about restrictions on her ability to lift objects. Hancock asked the front desk person to relay that information to Sabala, who called Time Warner Human Resources Manager Lillian Gomez.

Sabala told Gomez that Hancock had been cleared to return to work, but had tested positive for drugs. Gomez told him that Hancock could "clear" the results by bringing a prescription for the substance detected by the test, and also told him that Hancock could not return to work until the clinic "cleared" the test results. Gomez instructed Sabala to place Hancock on paid administrative leave until Hancock cleared up the situation. Sabala took Hancock back to Time Warner, and she went home from there. Hancock claims that Sabala did not relay what Gomez had said until about one hour after she returned home.

Time Warner had a policy against drug use and Sabala told her she had violated it. She explained that she had taken the medication the night before due to her back injury. Hancock remained at home and was off work all day on August 23. Gomez testified that drug testing was required for all warehouse

employees because it was a "safety sensitive" area. Reading from Time Warner's employee manual, Gomez described the company's post-accident drug testing requirement, which called for the immediate termination of employees who tested positive for drugs or alcohol. According to Gomez, responsibility for determining the results of those tests lay with Ludlow.

On August 24 someone from the workers' compensation clinic called Hancock and told her she needed to provide a copy of her hydrocodone prescription by the following day. She told them she no longer had the prescription bottle but would get a copy from Kaiser. Hancock phoned Kaiser, which told her they could only send it by mail, which would take seven days. Hancock called the clinic back and told them she had ordered a copy of her prescription.

Two days later, Hancock phoned Gomez and told her she had ordered a copy of the prescription and that it would take seven days. Although Gomez denies it, Hancock claims Gomez replied, "we'll see." Gomez did not give her any deadline to provide a copy of the prescription. Gomez contends, but Hancock denied, that Hancock agreed to quickly obtain a copy from Kaiser's website.

Because Hancock had not yet provided a copy of her prescription, Gomez phoned Hancock on September 2 to tell her she was fired for violating the company's drug-free policy. Hancock testified that she asked for more time and offered to go on unpaid leave, but that Gomez said no because she would then be treated differently from other employees who were fired for drug use. She also asked Gomez if she could bring the prescription in after it came in the mail, but Gomez said no. Gomez also told Hancock she could not come on the premises to

get her last pay check, and that the check would be FedEx'd to her instead. Gomez denied telling Hancock she could not bring in the prescription after being fired.

On September 4, Hancock received a copy of her hydrocodone prescription in the mail. However, she never contacted Gomez or anyone else at Time Warner, in part because she had been told they would not accept it, and in part because she had been told she could not enter the premises. Time Warner also had an internal appeal process for employees who believed they had been discriminated against. Hancock did not pursue Time Warner's internal appeal process because she believed it applied to only current employees.

Hancock sued Time Warner, stating several causes of action for disability discrimination under the California Fair Employment and Housing Act based on the alleged disability resulting from her back injury. (Gov. Code, § 12900, et seq. (FEHA).)[1] These were: (1) discrimination based on disability (§ 12940, subd. (a)); (2) failure to accommodate her disability (§ 12940, subd. (m)(1)); (3) failure to engage in an interactive process in order to determine the reasonable accommodations she required (§ 12940, subd. (n)); (4) wrongful termination based on her disability (§ 12940, subd. (c)); (5) retaliating against Hancock for having requested reasonable accommodations (§ 12940, subd. (m)(2)); and (6) failure to provide medical leave (§ 12945.2).

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[1] All further undesignated section references are to the Government Code.

Hancock also stated causes of action for termination in violation of public policy and defamation.[2]

Hancock finally produced a copy of her hydrocodone prescription as part of her responses to pretrial discovery requests from Time Warner. Once she did, Time Warner offered to unconditionally reinstate her, an offer that Hancock declined.[3]

The trial court granted a nonsuit on the medical leave cause of action before trial. At trial, the jury found that although Hancock had a known disability, Time Warner had not discriminated or retaliated against her based on the disability and had not wrongfully terminated her. The jury also found that Time Warner had not defamed her. The jury found for Hancock on two causes of action: for failing to accommodate her disability and for failing to engage in the interactive process required to fashion a reasonable accommodation. The jury awarded her more than $692,000 in compensatory damages and more than $2.7 million in punitive damages.

Time Warner filed motions for new trial and judgment notwithstanding the verdict (JNOV). The trial court denied the JNOV motion outright and conditionally granted the new trial motion on the punitive damages award unless Hancock agreed to reduce it to the same amount as her compensatory damage

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[2] Hancock sued Time Warner Cable Services, LLC; Time Warner Entertainment; and Time Warner Cable, LLC. We refer to these parties collectively as Time Warner. Hancock also sued Sabala, but agreed to dismiss him on the eve of trial.

[3] Hancock never pursued a workers' compensation claim against Time Warner.

award. Hancock did so.[4] The trial court later awarded Hancock attorney's fees of more than $848,000 and prejudgment interest of nearly $60,000.

DISCUSSION

1. *The Law Applicable to Disability Accommodation Claims*

Under FEHA, an employer can be liable for failing "to make reasonable accommodation for the known physical or mental disability" of an employee. (§ 12940, subd. (m)(1).) In conjunction with that requirement an employer can also be liable for failing "to engage in a timely, good faith, interactive process with the employee . . . to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee . . . with a known physical or mental disability or known medical condition." (§ 12940, subd. (n).)[5]

Liability does not attach under these provisions unless: (1) the employer knows of the disability; and (2) the employee has made known in some fashion his need for a particular accommodation. (*Avila v. Continental Airlines, Inc.* (2008) 165 Cal.App.4th 1237, 1252-1253 (*Avila*); *King v. United Parcel Service, Inc.* (2007) 152 Cal.App.4th 426, 443. (*King*).) The employee cannot "expect the employer to read his mind and know he secretly wanted a particular accommodation and sue the

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[4] Although Time Warner's appeal is based in part on its new trial and JNOV motions, we reverse on the alternative ground that the verdicts were not supported by substantial evidence, and therefore need not discuss the specifics of those two motions.

[5] Because these two concepts are interrelated, we will sometimes refer to them collectively as the accommodation process.

employer for not providing it." (*Avila,* at pp. 1252-1253, quoting *Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 954.) The interactive process of fashioning an appropriate accommodation lies with the employee. (*King,* at p. 443.) The employee is responsible for understanding his own physical or mental condition well enough "to present the employer at the earliest opportunity with a concise list of restrictions which must be met to accommodate the employee." (*Ibid.,* quoting *Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 266.) The employee must tender a specific request for a necessary accommodation. (*Ibid.*)

Finally, because FEHA's disability discrimination provisions are based on the federal Americans With Disabilities Act of 1990 (42 U.S.C. § 12112(a)) and other similar laws, decisions interpreting those analogous federal laws are relevant when interpreting FEHA. (*Brundage v. Hahn* (1997) 57 Cal.App.4th 228, 235.)

2. *Hancock Failed to Present Sufficient Evidence that She Asked Time Warner to Accommodate a Known Disability*

Time Warner contends there was insufficient evidence that it knew Hancock was disabled or that she made known her need for accommodation. We agree.

Although we resolve all conflicts and indulge all reasonable inferences in favor of the judgment, our search for substantial evidence does not mean we blindly seize on any evidence to affirm the judgment. (*Carter v. CB Richard Ellis, Inc.* (2004) 122 Cal.App.4th 1313, 1328.) A mere scintilla of evidence is not enough. Instead, the evidence must possess ponderable legal significance. Any inferences drawn from the evidence must be a product of logic and reason, not speculation or conjecture. (*Ibid.*)

Our analysis begins with the fact that even though the jury found Time Warner knew Hancock had a qualifying disability, it did not fire her because of the disability. As a result, Time Warner did not engage in disability discrimination and did not wrongfully terminate Hancock. The only possible, remaining justification for Time Warner's decision to fire Hancock was her failure to prove in a timely manner that the hydrocodone in her system had been prescribed by a doctor.[6] However, the failure to accommodate is a separate ground of liability under FEHA and does not depend on a finding that the employer also committed some disability-motivated, adverse employment action. (*King, supra,* 152 Cal.App.4th at p. 442.)

In analyzing this issue, our focus is on what Hancock did or said and what Time Warner knew in regard to the existence of her disability (her back injury) and her need for accommodation. Hancock testified that immediately after the injury she told Sabala she had hurt herself because the pallets were over-stacked and therefore too heavy. She did not ask to leave work early or to see a doctor. Instead, all she said was that in the future she would need help moving the pallets.

The next day Sabala took her to see the workers' compensation physician when Hancock for the first time mentioned that she needed medical attention. That physician cleared Hancock for a return to full duty, with the proviso that she would be reevaluated if necessary. That was the information

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[6] As part of its new trial motion, Time Warner argued that those findings rendered the verdict fatally inconsistent. Because we hold that the accommodation findings were not supported by substantial evidence in the first instance, we need not reach that issue.

Sabala possessed and passed along to Gomez. The term "disability" requires a limitation of major life activities, including work. (§ 12926, subd. (m)(1)(A),(B).) "Pain alone does not always constitute or establish a disability," and an employer need not accept an employee's subjective belief but may instead rely on medical information in that respect. (*Arteaga v. Brink's, Inc.* (2008) 163 Cal.App.4th 327, 347-348.)

Hancock contends that Time Warner knew she was disabled because: she told Sabala about her back injury right after it happened on August 22; she asked for the next day off for the same reason; her medical expert witness testified that his review of the medical evidence showed Hancock was temporarily disabled as of the time the injury occurred; and the incident report that Sabala filled out on August 23 listed the injury as having occurred on August 22. We do not doubt the jury's conclusion that Hancock was in fact disabled as a result of her workplace injury. However, the test is what the employer knew or should have reasonably inferred from the circumstances. As set forth above, the evidence shows that Time Warner knew only that Hancock had been injured and cleared to return to full duty, except for the limitations apparently imposed as a result of her positive drug test. (*Avila, supra,* 165 Cal.App.4th at p. 1249 [employer not on notice of disability where physician's forms said only that plaintiff could not work on four days due to an unspecified condition and had been hospitalized for three days, but did not specify that plaintiff suffered from a condition that qualified as a disability].)

The evidence also shows that Hancock never communicated her need to have that disability accommodated in some manner. As noted above, when the injury happened she told Sabala that

she got hurt moving the heavy pallets and would need help moving them in the future. To the extent that might be construed as a request for accommodation, there is no evidence that Time Warner failed to comply. Nothing in the record suggests Time Warner refused to reconsider the height of the stacked cable boxes. Hancock moved no more pallets that day and never returned to work due to the prescription drug issue. Ultimately, Hancock's own testimony makes clear that she never requested any accommodations.

Hancock testified that neither Gomez or Sabala ever asked her about accommodations and that she never discussed the issue with either of them. Asked whether she understood she had been cleared to return to work after her August 23 medical examination, Hancock said yes, with the restrictions regarding the use of heavy machinery and forklifts. However, she also testified that she never drove forklifts or company vehicles. Hancock testified that she was willing to "try to go back to work. If the company was going to accommodate me in some way, I felt that I would be able to work, but I wasn't sure because I was in a lot of pain. . . . *But I was going to see what we could work out and what we could do to help me get back to work."* (Italics added.)

In short, Hancock planned to discuss accommodations with Time Warner after she returned to work and determined what she needed, and did not raise the issue before that time. Hancock contends that Time Warner should have been taking part in the accommodation process once it knew she had been injured on August 22, and that she asked for accommodations that were ignored: help with the pallets and the next day off work. Hancock also adopts a theory fashioned by the trial court in denying Time Warner's JNOV motion: that Sabala's failure to

file a report and take Hancock for medical care immediately set off the chain of events that led to her termination because, had she been drug tested on that day, the test would have been negative.

As mentioned above, Sabala's awareness that Hancock suffered an injury of some sort on August 22 was insufficient to trigger the accommodation requirements because, at that point, Hancock did not ask for medical care, did not ask to leave early, and finished her shift. At most, she established pain, not disability, and her request for help moving the pallets must be evaluated in that light.[7] (*Alejandro v. ST Micro Elecs., Inc.* (N.D. Cal. 2015) 129 F.Supp.3d 898 [interpreting ADA and FEHA, holding that "Vague or conclusory statements revealing an unspecified incapacity are not sufficient . . . ."].)

As for the rest, Hancock's request for time off on August 23 was granted, and her appearance at work that day was for the sole purpose of arranging for the medical treatment she required. Assuming that Time Warner refused, as Hancock testified, to give her more time to obtain a copy of her prescription, that conduct was unrelated to her disability and cannot give rise to a claim for failure to engage in the accommodation process. (*Oak Harbor Freight Lines, Inc. v. Antti* (D. Ore. 2014) 998 F.Supp.2d 968, 980-981 [company required doctor's note each time employee took intermittent disability leave, and, despite the absence of a

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[7] Sabala testified that he immediately directed his employees to stack fewer cable boxes on the pallets, a process that would take a few weeks to complete. Hancock contends, and the trial court agreed when denying Time Warner's JNOV motion, that Sabala's testimony was suspect because it was uncorroborated and because his testimony regarding the date of injury listed in his incident report made him untrustworthy.

written deadline for doing so, interpreted the policy to impose a 15-day deadline; company's refusal to give employee more time to obtain note after doctor refused to write one without examining employee was not a failure to accommodate because the term "accommodation" relates solely to the ways in which employee can perform essential job functions]; accord *Nadaf-Rahrov v. Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 973-974 [reasonable accommodations are modifications or adjustments to the workplace that enable employees to perform the essential functions of their jobs].)

DISPOSITION

The judgment is reversed and the matter is remanded to the trial court with directions to enter a new judgment in favor of Time Warner and conduct any other proceedings consistent with our opinion. Time Warner to recover costs on appeal.

RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

GRIMES, J.