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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**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

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| CHRISTINA VASQUEZ,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>DEL RIO SANITARIUM, INC.,<br><br>Defendant and Appellant. | B231327<br><br>(Los Angeles County Super. Ct. No. BC411724) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Victor E. Chavez, Judge. Affirmed.

Tredway, Lumsdaine & Doyle, Matthew L. Kinley and Pamela K. Tahim for Defendant and Appellant.

Employment Lawyers Group and Karl Gerber for Plaintiff and Respondent.

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Defendant and appellant Del Rio Sanitarium, Inc., appeals from a judgment following a jury trial in favor of plaintiff and respondent Christina Vasquez in this action for pregnancy discrimination in violation of the Fair Employment and Housing Act (FEHA)(Gov. Code, § 12900 et seq).[1] Del Rio contends: 1) the trial court erred by excluding evidence of Vasquez's absences from work; 2) the trial court erred by excluding expert testimony on the requirements for medical certification; 3) the trial court erred by excluding certain testimony about expert fees; 4) Del Rio was entitled to judgment as a matter of law, because Vasquez could not perform the essential functions of her job even with accommodation; 5) the award of past economic damages was excessive; 6) the award of future damages failed to account for mitigation; and 7) the amounts awarded for past and future noneconomic damages were inconsistent with the jury's finding that Vasquez did not suffer severe emotional distress and were not supported by substantial evidence. We find no abuse of discretion in the trial court's evidentiary rulings, ample evidence to support the finding that Vasquez could perform the essential duties of her job following a temporary job restructuring or transfer to light duty work, and there was sufficient evidence to support the jury's award of damages. We affirm.

## FACTS AND PROCEDURAL BACKGROUND

### Employment History and Separation

Vasquez received her nursing certification in 2004. She worked as a certified nursing assistant for approximately one month in June 2004. After an employment gap of two and a half years, she was hired to work at Target in November 2006. She took a second job as a certified nursing assistant at Del Rio's convalescent hospitals in June

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[1] All further statutory references are to the Government Code unless stated otherwise.

2007. Vasquez resigned her Target job when Del Rio began scheduling Vasquez for weekend work that conflicted with her schedule at Target.

Vasquez's direct supervisor at Del Rio was director of staff development Morena Elizabeth Aguilar. The licensed vocational nurse supervisor was Lisa Madison. Aguilar and Madison both reported to assistant administrator Jerry Maxwell, who reported to administrator Mark Gardiner.

On October 17, 2008, Vasquez requested a one-week leave of absence because she was not feeling well, she felt weak, tired and dizzy, had anxiety, and a rapid heartbeat. Her doctor diagnosed her as having anemia. Iron supplements and vitamins improved her symptoms.

On December 26, 2008, Vasquez went to gynecologist Chang Joon Lee, who confirmed that she was six weeks pregnant. Dr. Lee said there was a risk of miscarriage in the early stages of pregnancy, so he advised her to take it easy, rest and not lift heavy items. Dr. Lee gave her a note stating, "No heavy lifting, not more than 11 pounds" and "may return to work on December 29, 2008." The note reflected that Dr. Lee worked in obstetrics and gynecology.

On December 29, 2008, Vasquez provided her doctor's note to Del Rio.[2] She worked her shift that day. Her next day of work was January 1, 2009. Madison approached Vasquez to inquire about the lifting restriction. The parties' accounts of the conversation differ, but it is undisputed that after the conversation, Vasquez went home. Madison told Gardiner that Vasquez had a lifting restriction due to pregnancy and asked him to speak with Vasquez.

On January 2, 2009, Vasquez went to Del Rio and asked to speak with Gardiner. He met with her in the lobby. He told her that pregnant women can do many of the same

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[2] Vasquez testified that Aguilar paged her about the doctor's note on December 29, 2009. Vasquez confirmed the lifting restriction, but said she could perform her other job duties, and Aguilar allowed her to continue working. Aguilar denies that this conversation took place. However, the discrepancy is not material to any issue in this case.

duties as women who are not pregnant, and Del Rio did not have light duty work for certified nursing assistants unless the restriction was due to a work-related injury. He told her to go to her doctor, find out why she had the lifting restriction and try to get it removed. Vasquez said she would check with her doctor.

Vasquez went to her doctor on January 5, 2009, but he did not remove the lifting restriction. That day, Vasquez sent a letter to Maxwell by certified mail informing him as follows. She stated that she had brought a copy of her doctor's note to the front office on December 29, 2008. Aguilar had been aware of the note, but did not send her home. However, Madison sent her home on January 1, 2009, when she found out that Vasquez could not lift more than 11 pounds. Madison told Vasquez to return to her doctor and have him take away the restriction or she could not come to work. Vasquez spoke with Aguilar afterward, and Aguilar confirmed that Vasquez needed to get a new doctor's note without the lifting restriction or she could not be at work. Vasquez had not been able to work her scheduled shifts since she was sent home. She had returned to her doctor. Her doctor advised her to speak with her supervisor, because Del Rio should be able to accommodate her. She requested an opportunity to discuss options at work which would not require her to lift more than 11 pounds. She stated that other than lifting, she was able to perform all of her job requirements. She was also open to other job positions, light duty, or other options that might be available. She asked Maxwell to contact her at his earliest convenience to discuss options in more detail.

Vasquez's telephone records reflect that she made a one-minute telephone call to Del Rio on January 6, 2009. Her letter was received at Del Rio on January 7, 2009. Maxwell discussed the letter with Gardiner and gave the letter to either Madison or Gardiner.

Vasquez called Del Rio twice on January 7, 2009. The calls lasted one minute and three minutes. Vasquez made a three-minute call to Del Rio on January 9, 2009. Vasquez's telephone records do not show any call to or from Del Rio on January 12,

2009. In fact, Vasquez received no incoming calls from Del Rio on her telephone during this time.[3]

The Employment Development Department (EDD) mailed a notice to Del Rio on January 15, 2009, stating that Vasquez had applied for unemployment benefits. It showed the last day worked was January 1, 2009, and the effective date of her claim was January 4, 2009. The reason given for her separation from employment was that her employer would not accommodate her doctor's restrictions.

Del Rio received the notice from EDD on January 21, 2009. Del Rio employee Johanna Munoz wrote on the EDD form, "Employee brought in a [doctor's] note stating she is pregnant, and cannot lift [more than 11 pounds.] Employee was offered light duty, but didn't want to take it. Her [doctor] limited her from working." Munoz signed the form on January 21, 2009.

Aguilar prepared a "Job Abandonment" form on January 22, 2009, which stated that the effective date of Vasquez's termination was January 4, 2009, due to her filing for unemployment. She wrote, "Employee has been absent from work without contacting the facility [on January 2, 2009,] and is considered to have abandoned his/her job." She stated that she had called Vasquez on January 12, 2009, at Gardiner's request, to let her know that it was okay for her to return to work. Vasquez said she would talk to Gardiner, but never did.

Another employee prepared a "Termination/Resignation Report." The report stated that it was prepared on January 4, 2009, and the effective date of Vasquez's termination was January 4, 2009. It stated that Vasquez was terminated "due to filing for unemployment" and was not eligible for rehire. Maxwell signed the form and dated his signature January 4, 2009. However, Maxwell testified at trial that the document was generated after Del Rio received notice that Vasquez filed for unemployment benefits. He believed that under EDD's instructions, any individual filing for unemployment was

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[3] Del Rio had no other number for her. Vasquez had provided her boyfriend's cell phone number as her emergency contact, and her references included her boyfriend's work number and her uncle's telephone number.

considered "self-terminated." Maxwell stated that he dated his signature with the effective date, rather than the date that he signed it.

At some point, Gardiner wrote on the bottom of Vasquez's January 5, 2009 letter that Aguilar called Vasquez on January 12, 2009, and offered her two weeks of light duty work, but she did not want to come back.

Prior to her separation from employment, Vasquez worked approximately 40 hours per week at a salary of $9.00 per hour. In 2008, Vasquez earned $14,647.50. She started looking for work immediately and kept a list of the employers to which she applied.

On April 13, 2009, Vasquez filed a complaint against Del Rio for pregnancy discrimination under section 12900 et seq., discrimination in violation of the California Constitution, violation of Labor Code section 1102.5, subdivision (c), wrongful termination in violation of public policy, and intentional infliction of emotional distress.

Vasquez never stopped looking for work, even when her baby was born in August 2009. She sent in more than 30 applications and looked at job listings every day. Vasquez was miserable as a result of her termination. She had nightmares from it and regularly relived her conversations with Madison and Gardiner. She could not sleep at night, thinking about how she was treated. The nightmares lasted through 2009. Instead of being happy about her pregnancy, she felt very bad because she and her boyfriend could not afford to move out of his parent's house to an apartment, and she could not support her baby or pay her bills. Her emotional distress symptoms improved as time passed.

Before trial, Target hired Vasquez for a seasonal, part-time job earning $9.00 per hour. She began orientation for the job on November 23, 2010. A jury trial commenced on November 29, 2010.

**Additional Evidence Offered by Vasquez**

Vasquez testified to having the following conversation with Madison on January 1, 2009. When Madison asked why she could not lift more than 11 pounds, Vasquez asked to speak with her in private, then explained that she was pregnant and her doctor had restricted her not to lift more than 11 pounds. Madison said Vasquez could not be at work with her restriction and needed to go to the doctor to have the restriction removed. Vasquez said that the doctor gave her the restriction, and she was concerned about her pregnancy. Madison said Vasquez could speak with Maxwell, but he would also tell her that she could not be at work with the restriction. Madison sent Vasquez home.

On January 2, 2009, when Vasquez spoke with Gardiner, she explained that she was pregnant and her doctor had given her a note restricting her from lifting more than 11 pounds. She provided details of her conversations with Aguilar and Madison. Gardiner told her that Del Rio did not have to accommodate her restriction. He said that if she had been injured at work, they would accommodate her, but because her restriction resulted from something outside of work, they did not have to accommodate her. Vasquez asked for a letter explaining why she was not being allowed to work, because she did not want to be accused of abandoning her job. Gardiner refused to provide a letter. Vasquez asked what would happen if she came to work for her next scheduled shift. He said she could sit and wait in the lobby all day, but she would not be paid for it. She said that she had worked with pregnant women in the past who had performed lifting. Three people are required to lift a patient, but only two people do the actual lifting and one holds the wheelchair steady. Other pregnant employees had held the wheelchair. He told her that pregnant employees do the same things that they did before they got pregnant, and he advised her to go to the doctor to have him remove the lifting restriction.

Gardiner testified that an individual who required light duty work was not accommodated unless it was a work-related injury that caused the light duty restriction. During Gardiner's employment at Del Rio, a pregnant employee was allowed light duty

work because she had a work-related injury. Employees receiving workers' compensation are paid whether they are at home or at work, so Del Rio attempts to find them work and tries to help get them back to work.

Vasquez testified that she wrote to Maxwell on January 5, 2009, because she wanted to discuss her pregnancy, the doctor's restriction, and other positions that might be available, such as housekeeping, bed-making, or laundry. Each time that she called Del Rio in January, Vasquez asked to speak with Aguilar or Gardiner, but she was never put through. As far as Vasquez knows, Del Rio never called to offer her light duty work. If Del Rio had offered light duty work, she would have taken it.

**Additional Evidence Offered by Del Rio**

Madison testified that she did not tell Vasquez on January 1, 2009, that she could not work. Madison told Vasquez that she was not sure if Vasquez could work and needed to speak with an administrator. During Madison's employment at Del Rio, more than five certified nursing assistants have had light duty restrictions. Madison testified that certified nursing assistants with light duty restrictions covered through workers' compensation were permitted to work, but pregnant certified nursing assistants with light duty restrictions were not. There was light duty work in January 2009 that a certified nursing assistant could perform, such as folding laundry, watching the parking lot, or several patient care tasks. If Vasquez's light duty restriction had been caused by a work injury, she would have been allowed to work with light duty restrictions for more than two weeks.

Madison also testified that Gardiner told her to call Vasquez and offer her two weeks of light duty work. Madison claimed to have spoken with Vasquez on January 6 or 7, 2009, although she was not Vasquez's supervisor and Vasquez's telephone records do not reflect any incoming telephone calls from Madison. Madison did not know the telephone number that she called to reach Vasquez, but said that she probably got the number from an employee phone book. She did not offer any specific work to Vasquez

but told her that Gardiner said she could come back. She might have told Vasquez that she could come back for two weeks. She claimed Vasquez declined and said she would speak with Gardiner to explain her reasons. She told Gardiner that Vasquez was going to call and speak with him.

Aguilar testified that she did not learn Vasquez was pregnant until January 1, 2009, when Madison told her that Vasquez had a note with limitations, and she had sent Vasquez home. Gardiner told her to call Vasquez, so she called Vasquez from Del Rio on January 12, 2009. She told Vasquez that Gardiner wanted her to return to work and to come talk to him. Gardiner would explain the work that she would be doing.

Gardiner testified that even if Vasquez had come back to work, she would not have been allowed to more than two weeks of light duty work.

Dr. Lee does not remember talking to Vasquez about the lifting restriction or her employer's concerns about the lifting restriction after December 26, 2009. However, he believes a nursing assistant can work with an 11-pound lifting restriction and his records show that he saw Vasquez on January 5, 2009.

Del Rio's expert Dr. Felice Gersh explained general medical guidelines for pregnancy. She has never seen an 11-pound lifting restriction before. She testified that an 11-pound lifting restriction was unreasonable, and the average pregnant woman would be unable to function under such a restriction.

**Verdict and Posttrial Proceedings**

On December 3, 2010, the jury returned its verdict. The jury found that the requirement that a certified nursing assistance must be able to lift more than 11 pounds was reasonably necessary for the operation of Del Rio's business. However, the jury found one or more of the following to be true: Del Rio did not have a reasonable basis to believe all certified nursing assistants who cannot lift more than 11 pounds are unable to safely and efficiently perform the job, or it was not highly impractical to Del Rio to consider whether a particular certified nursing assistant unable to lift more than 11

pounds could safely and efficiently perform her job, or it was not highly impractical for Del Rio to rearrange the job responsibilities of a certified nursing assistant to avoid lifting more than 11 pounds.

In addition, the jury found that Vasquez's pregnancy limited her ability to lift more than 11 pounds, and Del Rio was informed of her limitation. Vasquez was able to perform her essential job duties with reasonable accommodation for her pregnancy. With reasonable accommodation, the 11-pound lifting restriction did not endanger the health and safety of others more than certified nursing assistants without the restriction. Del Rio failed to provide her with reasonable accommodation for her lifting restriction, and this failure was a substantial factor in causing her harm.

The jury found that Del Rio discharged Vasquez, and Vasquez's pregnancy was a motivating reason for the discharge. The discharge was a substantial factor in causing Vasquez harm. The jury found Vasquez suffered damages of $196,760, which consisted of lost earnings of $35,880, future lost earnings of $35,880, noneconomic loss of $75,000, and future noneconomic loss of $50,000.

Del Rio filed a motion for a new trial on the grounds of erroneously excluded evidence and excessive damages. Del Rio also filed a motion for judgment notwithstanding the verdict. Both motions were denied. Del Rio filed a timely notice of appeal from the judgment.

## DISCUSSION

### I. General Pregnancy Discrimination Law

The FEHA prohibits employment discrimination based on sex and other protected classifications. (§ 12940.) "Pregnancy discrimination is a form of sex discrimination. [Citations.]" (*Spaziano v. Lucky Stores, Inc.* (1999) 69 Cal.App.4th 106, 109-110 (*Spaziano*).)

Section 12945 of the FEHA is based on the federal Pregnancy Discrimination Act (PDA) (42 U.S.C. § 2000e(k)) and sets forth employment practices that constitute pregnancy discrimination, including practices relating to pregnancy leaves and temporary light duty assignments. (*Spaziano, supra,* 69 Cal.App.4th at p.110; *Williams v. MacFrugal's Bargain Close-outs, Inc.* (1998) 67 Cal.App.4th 479, 483.) Section 12945, subdivision (b)(1) requires an employer "to provide reasonable accommodation for an employee for conditions related to pregnancy, childbirth, or related medical conditions, if she so requests, with the advice of her health care provider." If an employer has a policy or practice requiring or authorizing the transfer of temporarily disabled employees to less strenuous or hazardous positions for the duration of the disability, it is an unlawful employment practice to refuse to transfer a pregnant female employee who so requests. (§ 12945, subd. (a)(3)(B).) Similarly, under section 12945, subdivision (a)(3)(C), it is an unlawful employment practice "[f]or an employer to refuse to temporarily transfer a pregnant female employee to a less strenuous or hazardous position for the duration of her pregnancy if she so requests, with the advice of her physician, where that transfer can be reasonably accommodated. However, no employer shall be required by this section to create additional employment that the employer would not otherwise have created, nor shall the employer be required to discharge any employee, transfer any employee with more seniority, or promote any employee who is not qualified to perform the job."

## II. Evidentiary Issues

Del Rio contends that the trial court abused its discretion by excluding evidence in three areas: absences from work, the industry standard for medical certification, and payment of an expert witness. No abuse of discretion has been shown.

### A. Standard of Review

"'To preserve an evidentiary ruling for appellate review, the proponent of the evidence must make an offer of proof regarding the anticipated testimony. [Citation.] The offer of proof must address the "substance, purpose, and relevance of the excluded evidence" (Evid. Code, § 354, subd. (a)), and must set forth the actual evidence to be produced and not merely the facts or issues to be addressed and argued [citation]. The trial court may reject a general or vague offer of proof that does not specify the testimony to be offered by the proposed witness. [Citations.]' [Citations.]" (*Bowman v. Wyatt* (2010) 186 Cal.App.4th 286, 329.)

We review the trial court's exclusion of evidence for an abuse of discretion. (*San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School Dist.* (2006)139 Cal.App.4th 1356, 1419.) " ' "In the absence of a clear showing that its decision was arbitrary or irrational, a trial court should be presumed to have acted to achieve legitimate objectives and, accordingly, its discretionary determinations ought not [to] be set aside on review." [Citation.]' [Citation.]" (*Ajaxo Inc. v. E*Trade Group Inc.* (2005) 135 Cal.App.4th 21, 45.) Even when evidence has been improperly excluded, reversal is only proper where there is a reasonable probability that a more favorable result would have been reached. (*Tudor Ranches, Inc. v. State Comp. Ins. Fund* (1998) 65 Cal.App.4th 1422, 1431-1432; see also Cal. Const., art. VI, § 13 [judgment will not be reversed for improper exclusion of evidence absent miscarriage of justice].)

### B. Work Absences

Del Rio contends that the trial court abused its discretion by excluding evidence of Vasquez's absences from work. After reviewing the argument and offer of proof on this issue, we find no abuse of discretion.

### 1. Additional Facts

Prior to trial, Vasquez filed a motion in limine to exclude evidence of her absences from work prior to separation, because there was no claim that she was terminated for excessive absences. Del Rio opposed the motion on the ground that Vasquez's attendance record showed increasingly frequent absences and apathy toward her job, which supported Del Rio's claim that she abandoned her job. In addition, Del Rio argued that Vasquez's absences were relevant to any determination of damages, because the absences showed Vasquez had emotional issues prior to her separation from Del Rio and was not likely to have worked consistently. The trial court ruled that the parties could not discuss the issue in opening statements and the admissibility of the evidence would be considered during trial.

During cross-examination of Vasquez, Del Rio attempted to ask about her work absences. Del Rio did not seek to introduce all of Vasquez's work absences, but only those related to symptoms for which Vasquez was seeking noneconomic damages, specifically, fatigue, depression, and anxiety. Vasquez argued that absences in 2007 and 2008 did not relate to her symptoms a year later. She noted that Del Rio was not claiming she had been terminated for any reason. The trial court pointed out that Vasquez had not testified to having any anxiety or depression caused by the termination. Del Rio responded that Vasquez had testified about nightmares and not feeling well. Del Rio argued that Vasquez had been absent 28 days in 2008, most of which were attributed to not feeling well, and some of which were for the same symptoms for which she was seeking emotional distress damages.

The trial court asked Del Rio which absences related to symptoms for which Vasquez was seeking emotional distress damages. Del Rio began pointing to absences on a list that were attributed to "not feeling well," but the trial court concluded that the offer of proof was consuming undue time while the jury waited. There is no explicit ruling on the record, but the court stated, "I will let you reopen if I change my mind. The ruling will stand. But I want you to parse it down to show me precisely what it is you want to

show and what you think is appropriate, what you think is relevant. . . . If we finish with the witness today, I'll let you reopen to go into that, if I allow that." Del Rio asked to provide an additional reason why the absences were relevant. The court stated, "I don't want to hear any more. . . . I want to talk to you when the jury is not here." The court concluded by saying, "We'll take it up afterwards. Once you're in a position to tell me precisely which ones of these you want to introduce into evidence or have the jury look at, I'll reconsider it."

Del Rio questioned Vasquez about her leave of absence in October 2008 without objection. She stated that she saw her doctor because she was not feeling well, by which she meant that she felt weak and tired. She stated that her symptoms for which she took the leave of absence were not the same as those related to her emotional distress claim. She stated that rapid heartbeat was a symptom similar to her claim in this case. The record does not reflect that Del Rio made any further attempt to introduce evidence of Vasquez's absences.

**2. Analysis**

Del Rio's offer of proof at the time of trial was insufficient. The absences that Del Rio sought to introduce did not match the evidence of the symptoms for which Vasquez was seeking damages. The offer of proof was insufficient to conclude that absences attributed to "not feeling well" were based on the same symptoms for which Vasquez was claiming damages. With the jury standing by, Del Rio pointed to different absences on a list and argued for admissibility. The haphazard presentation threatened to consume undue time under the circumstances. The trial court limited Del Rio's ability to inquire into absences at that time, but the court was willing to hear further argument on the admissibility of the evidence at an appropriate time. The record does not reflect that Del Rio sought to obtain any additional ruling on the admissibility of Vasquez's absences. No abuse of discretion has been shown.

### C. Medical Certification Requirements

Del Rio contends the trial court erred by excluding Dr. Gersh's testimony about the "industry standard" for medical certifications based on California Code of Regulations, title 2, section 7291.10. However, there was no evidence that Del Rio required medical certification. Therefore, the industry standard or statutory requirements for medical certification are irrelevant. No abuse of discretion has been shown.

#### 1. Additional Facts

Prior to trial, Vasquez filed a motion in limine seeking to prevent Dr. Gersh from testifying that an 11-pound lifting restriction was unreasonable or improper, on the ground that a medical certificate that meets statutory requirements cannot be questioned by the employer. Del Rio argued Dr. Gersh would testify that Vasquez's medical certification failed to comply with statutory requirements. Therefore, Del Rio was not required to accept it as sufficient, and Dr. Gersh could testify that the lifting restriction was unreasonable. The trial court granted the motion to exclude Dr. Gersh's testimony on this issue. However, during trial, the court modified its ruling. The court allowed Dr. Gersh to testify that the 11-pound lifting restriction was unreasonable. The court excluded Dr. Gersh's expert testimony about the adequacy of the medical certificate.

#### 2. Analysis

The Fair Employment and Housing Commission has promulgated regulations interpreting the FEHA. (See § 12935, subd. (a); Cal. Code Regs., tit. 2, § 7286.4.) California Code of Regulations, title 2, section 7291.10, subdivision (b) provides for medical certification as follows in pertinent part: "As a condition of granting a pregnancy disability leave or transfer, the employer may require medical certification, as defined in section 7291.2, subdivision (d), if the employer requires certification of other

similarly situated employees. If the certification satisfies the requirements of section 7291.2, subdivision (d), the employer must accept it as sufficient." "The employer may not ask the employee to provide additional information beyond that allowed by these regulations." (*Id*., subd. (b)(1).)

Under California Code of Regulations, title 2, section 7291.2, subdivision (d), "certification" is "a written communication from the health care provider of the employee that either the employee is disabled due to pregnancy or that it is medically advisable for the employee to be transferred to a less strenuous or hazardous position or to less strenuous or hazardous duties." A certification that it is medically advisable for the employee to be transferred should contain: "(A) The date on which the need to transfer became medically advisable; [¶] (B) The probable duration of the period or periods of the need to transfer; and [¶] (C) An explanatory statement that, due to the woman's pregnancy, the transfer is medically advisable." (*Id*., subd. (d)(2).)

In this case, Vasquez advised Del Rio of her need for accommodation. California Code of Regulations, section 7291.10, subdivision (b), allows employers to require medical certification as a condition of granting a transfer to less strenuous or hazardous duties. There is no evidence, however, that Del Rio required medical certification in accordance with section 7291.10, subdivision (b). In other words, there is no evidence that Del Rio required Vasquez provide a written communication from her doctor showing the date that the restriction became advisable, the probable duration of the restriction, and a statement that the restriction was medically advisable due to her pregnancy. Del Rio did not distribute an employee handbook or other notice to employees stating that Del Rio required medical certification. When Del Rio learned of Vasquez's need for accommodation, Del Rio did not provide her with any paperwork requesting medical certification. None of the staff members that she spoke with asked her for information that is permissible for an employer to require under California Code of Regulations section 7291.10, subdivision (b). Instead, Del Rio employees told her that pregnant employees can do all the same things that they did before pregnancy, the restriction would not be accommodated, and to have her doctor remove the restriction. Because

there is no evidence that Del Rio required Vasquez to provide medical certification, Dr. Gersh's proposed testimony about whether Dr. Lee's note satisfied the statutory requirements or the industry standard for medical certification is irrelevant. No abuse of discretion has been shown.

### D. Expert Witness's Hourly Rate

Del Rio contends the trial court abused its discretion by excluding certain testimony about Dr. Gersh's hourly rate. We disagree

#### 1. Additional Facts

During Del Rio's direct examination of Dr. Gersh, she testified she was paid $2,000 to review Vasquez's medical records and discuss the matter with the attorneys. On cross-examination, Dr. Gersh stated that she was being paid $800 per hour to testify. She had set aside the entire day to come to court, so she would be paid $4,200 for her work that day.

In re-examining Dr. Gersh, Del Rio's attorney asked what her standard hourly rate was for all cases. The trial court raised its own objection to the relevance of the question, and Del Rio argued it was necessary to show that Dr. Gersh's rate was no different in this case from other cases. The court found that issue had not been brought up during cross-examination and excluded the evidence as irrelevant.

#### 2. Analysis

Del Rio elicited testimony about Dr. Gersh's payment as an expert witness and she testified to her hourly rate on cross-examination. No evidence suggested that Dr. Gersh charged Del Rio more or less than her standard fee. The trial court could reasonably conclude testimony about the hourly rate that Dr. Gersh charges in unrelated cases was

irrelevant and beyond the scope of the cross-examination. The court did not abuse its discretion by excluding testimony about her hourly rate in other cases.

## III. Sufficiency of the Evidence

Del Rio contends there is no substantial evidence to support the jury's findings related to accommodation or damages. We disagree.

### A. Standard of Review

Contending that the trial court erred in denying a motion for judgment notwithstanding the verdict is functionally equivalent to contending there was insufficient evidence to support the jury verdict. "On appeal from the denial of a motion for [judgment notwithstanding the verdict], we determine whether there is any substantial evidence, contradicted or uncontradicted, supporting the jury's verdict. [Citation.] [¶] On the appeal from the judgment itself, we apply the substantial evidence test. We must affirm the judgment if there is any ponderable, credible evidence or reasonable inferences therefrom supporting the findings made by the jury. [Citation.]" (*Tognazzini v. San Luis Coastal Unified School Dist.* (2001) 86 Cal.App.4th 1053, 1058.)

### B. Accommodation

Del Rio contends the evidence showed Vasquez could not perform the essential functions of her job even with accommodation, and therefore, Del Rio was entitled to judgment as a matter of law. This is incorrect.

An employer may discharge an employee with a physical disability when the employee, because of the physical disability, is unable to perform the essential duties of his or her position even with reasonable accommodations. (§ 12940, subd. (a)(1).) "[A]n employer is liable under section 12940[, subdivision] (m) for failing to accommodate an

employee only if the work environment could have been modified or adjusted in a manner that would have enabled the employee to perform the essential functions of the job." (*Nadaf–Rahrov v. Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 975 (*Nadaf-Rahrov*).)

"'Reasonable accommodation' is defined in the FEHA and its implementing regulations only by way of example. [Citations.]" (*Nadaf–Rahrov, supra,* 166 Cal.App.4th at pp. 972–973.) Section 12926, subdivision (n) provides: "'Reasonable accommodation' may include either of the following: [¶] (1) Making existing facilities used by employees readily accessible to, and usable by, individuals with disabilities. [¶] (2) Job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities."

Reasonable accommodation can include a finite leave, whether paid or unpaid, provided it is likely that the employee will be able to perform his or her duties at the end of the leave. (*Hanson v. Lucky Stores, Inc.* (1999) 74 Cal.App.4th 215, 226; see *Humphrey v. Mem'l Hosps. Ass'n* (9th Cir. 2001) 239 F.3d 1128, 1135–1136 [under the Americans with Disabilities Act, a leave of absence for medical treatment may be a reasonable accommodation of an employee's disability, and when a leave of absence would permit the employee to perform the essential functions of the job upon his or her return to work, the employee is otherwise qualified].) The reasonableness of an accommodation is generally a factual question. (*Soldinger v. Northwest Airlines, Inc.* (1996) 51 Cal.App.4th 345, 370.)

In this case, there was ample evidence that temporarily restructuring Vasquez's job duties to accommodate the lifting restriction during her pregnancy was a reasonable accommodation. Other employees with lifting restrictions were accommodated through light duty assignments. In Vasquez's position as a certified nursing assistant, she could have been assigned to watch the parking lot or fold laundry. In fact, it was undisputed

that Vasquez could have been given a light duty assignment, because Del Rio claimed to have offered her two weeks of light duty work. The evidence showed temporary light duty work was available which Del Rio could have assigned Vasquez during her pregnancy without undue hardship. After providing this accommodation for a finite period of time, similar to providing a finite leave of absence, it was likely that Vasquez could perform the essential functions of her position. Substantial evidence supports the jury's verdict on this issue.

**C. Past Economic Damages**

Del Rio contends there is no substantial evidence to support the jury's finding that Vasquez suffered lost earnings of $35,880.

"'"The determination of damages is primarily a factual matter on which the inevitable wide differences of opinion do not call for the intervention of appellate courts. [Citation.] An appellate court, in reviewing the amount of damages, must determine every conflict in the evidence in respondent's favor and give him the benefit of every reasonable inference. [Citation.] An appellate court may not interfere with an award unless 'the verdict is so large that, at first blush, it shocks the conscience and suggests passion, prejudice or corruption on the part of the jury.'"' [Citation.]" (*Weller v. American Broadcasting Companies, Inc.* (1991) 232 Cal.App.3d 991, 1011-1012.)

Vasquez earned $9.00 per hour at Del Rio and worked approximately 40 hours per week, for a total of $360.00 per week. The parties agree that approximately 23 months, or 100 weeks, elapsed between Vasquez's last day of work and the date of the jury's verdict. There is no evidence concerning maternity leave or disability insurance policies. Therefore, an award of past economic damages up to $36,000 was supported by the evidence.

### D. Future Economic Damages

Del Rio contends the jury's award of future lost earnings of $35,880 is not supported by substantial evidence and fails to take into account Vasquez's duty to mitigate her damages by finding new employment. We disagree. The amount awarded Vasquez for future economic damages was approximately 23 months of her salary. Vasquez had no permanent employment at the time of trial, despite dedicated efforts to find work. At the time of trial, Vasquez had completed orientation for a part-time seasonal position at Target, which the jury could infer would provide her with one month of part-time employment. It took two and a half years for her to find a job between June 2004 and November 2006. She has limited work experience, and her only significant employer claims that she abandoned her job. It was a reasonable conclusion that Vasquez would be able to find permanent employment within two years and award future economic damages accordingly.

### E. Past Noneconomic Losses

Del Rio contends the jury's award of $75,000 for past noneconomic damages is not supported by substantial evidence and is inconsistent with the jury's finding that Vasquez did not suffer "severe" emotional distress.

The trial court instructed the jury in connection with noneconomic damages as follows: "No fixed standard exists for deciding the amount of damages for mental suffering and emotional distress. You must use your judgment to decide a reasonable amount based on the evidence and your common sense."

Vasquez was entitled to recover for mental suffering and emotional distress that she suffered as a result of Del Rio's discrimination. There was no requirement that the mental suffering and emotional distress be "severe" to recover noneconomic damages. Thus, the jury's finding that Vasquez did not suffer "severe" emotional distress necessary to prove intentional infliction of emotional distress was not internally inconsistent with its

award of noneconomic damages for mental suffering and emotional distress caused by discrimination. Vasquez testified about her emotional distress as a result of the discrimination. The award of past noneconomic damages approximately twice the amount of economic damages is not shocking, considering Vasquez was a low wage earner and her economic damages were relatively low. We find the award of past noneconomic damages is supported by the record.

### F. Future Noneconomic Losses

Del Rio contends the jury's award of $50,000 for future noneconomic damages is not supported by substantial evidence. We disagree.

The trial court additionally instructed the jury that "[t]o recover for future emotional distress and mental suffering, the plaintiff must prove that she is reasonably certain to suffer that harm."

The evidence was that Vasquez ceased to have nightmares in 2010 and her emotional distress was improving over time. The jury could infer from the evidence of emotional distress that Vasquez continued to suffer from emotional distress, although it was getting better. The jury's award of future noneconomic damages in an amount substantially less than the award of past noneconomic damages adequately reflects that Vasquez's mental suffering was improving over time. The award is not shocking and is supported by the record.

## DISPOSITION

The judgment is affirmed. Respondent Christina Vasquez is awarded her costs on appeal.

KRIEGLER, J.

We concur:

TURNER, P. J.

MOSK, J.