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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

KARYN BARRUS, Plaintiff and Appellant, v. HENKEL CORPORATION et al., Defendants and Respondents.	B290795 (Los Angeles County Super. Ct. No. BC632724)

APPEAL from a judgment of the Superior Court of Los Angeles County. Elizabeth Feffer, Judge. Affirmed.

Felahy Employment Lawyers and Allen B. Felahy for Plaintiffs and Appellants.

Duane Morris, Robert D, Eassa and Delia A. Isvoranu for Defendants and Respondents.

INTRODUCTION

In this appeal, Karyn Barrus challenges the grant of summary judgment in favor of her employer, Henkel Corporation, Henkel of America, Inc., and Henkel Consumer Goods, Inc. (collectively, Henkel).

Barrus argues that the evidence she presented in opposition to Henkel's motion for summary judgment was admissible and created triable issues of fact on her various employment-related causes of action. Because the trial judge did not rule on Henkel's evidentiary objections to plaintiff's evidence submitted in opposition to the motion, Barrus argues that those objections are waived on appeal. Further, if this court considers Henkel's evidentiary objections, Barrus argues that we will conclude that they are without merit. Admissible evidence supports Barrus's allegations that she was terminated from her employment with Henkel because of her mental disability and that any claimed business reasons now cited by her employer are pretextual. Similarly, Barrus alleges that triable issues of fact exist to support her claim that Henkel failed to engage in the interactive process or to provide a reasonable accommodation. As to her fourth cause of action for retaliation and sixth cause of action for a violation of the California Family Rights Act (CFRA), Barrus argues that the trial court's failure to discuss or consider these claims constitutes reversible error.

Henkel counters that the trial court properly entered judgment in its favor because the admissible evidentiary record supports the conclusion that it had legitimate business reasons for terminating Barrus's employment unrelated to her disability or medical leave. Henkel reasserts its evidentiary objections to much of plaintiff's evidence in opposition to the summary

judgment motion and asks this court to rule on them. Once inadmissible evidence is properly excluded, Henkel asserts that Barrus presented no triable issues of material fact. Henkel also asserts that the trial court adequately described its reasons for its rulings on all of Barrus's causes of action—including the fourth and sixth causes of action. Moreover, even if the trial court had failed to do so, that would not be a basis for reversal. Rather, as our review is de novo and subject to this court's independent review of the evidence, we can determine whether summary adjudication on Barrus's various causes of action is proper.

For the reasons discussed below, we affirm. The uncontroverted evidence is that Henkel had no knowledge of Barrus's claimed mental disability when the decision to discharge her was made. Further, we find that the uncontroverted evidence establishes that Barrus was not a qualified individual at the time when she was ultimately terminated. Where, as here, an employee is unable to perform his or her essential duties even with reasonable accommodations, the eventual discharge of that person is not actionable. Further, the uncontroverted evidence supports the conclusion that the employer's termination decision was motivated solely by nondiscriminatory business considerations. Where, as here, plaintiff presents no competent evidence to support a claim of pretext, there is no triable issue of discriminatory intent. Nor can there be liability found for any alleged failure to prevent discrimination or retaliation. Finally, there is no admissible evidence that Barrus was retaliated against or terminated for taking CFRA leave.

BACKGROUND FACTS

Barrus is a former at-will employee of Schwarzkopf Inc., a subsidiary of Henkel. She was employed as a National Corporate Trainer. From October 2013 through her eventual termination, Barrus was supervised by Linda Gilbride. Barrus worked as part of a team that created educational programs on Schwarzkopf products and provided educational programs to customers in the United States.

Barrus had problems in performing her job and received repeated counseling on those performance problems from Gilbride. Gilbride reported a number of those instances in Barrus's 2013 Performance Assessment. Specifically, Gilbride noted a number of areas where Barrus was not meeting performance requirements, including the quantity and quality of her work. To help Barrus improve, Gilbride and Joanne Thompson, the Director of Human Resources, decided to place her on a 60-day Individual Performance Plan (IPP) from January 2014 until March 2014. The IPP identified specific areas where Barrus's performance needed improvement and provided an action plan for her to do so. Barrus's performance improved and she was taken off the IPP after 60-days. Barrus was expected, however, to maintain good performance and continue to meet all of Henkel's expectations going forward. In fact, the IPP expressly warned Barrus that if she were to show a decline in her performance, that fact would constitute a ground for her immediate termination.

The uncontroverted evidence establishes that in 2015 Barrus's work performance again declined and was unacceptable. The same deficiencies in performance from 2014 were observed by her superiors in 2015. Barrus lacked focus, was unable to

properly prioritize her work, failed to meet deadlines and complete tasks, and was disorganized. Barrus's work was of poor quality and she failed to communicate her difficulties with her team or supervisors. Barrus's inability to meet deadlines caused her entire team to struggle to meet deadlines and her work had to be rewritten or completed by other team members. Barrus's late work cost Henkel thousands of dollars because printed training materials that she had prepared had to be printed at the last minute.

Due to these ongoing performance issues, and the fact that Barrus had already been placed on an IPP without any apparent results, Gilbride decided that Barrus should be discharged. Having made that decision, Gilbride texted and e-mailed Barrus several times on September 11, 2015, and sent Barrus a calendar invitation to a September 14 meeting. Gilbride later confirmed that Barrus had read the e-mails and calendar invitation. The purpose of this meeting was for Gilbride to tell Barrus that she was being terminated.

At the time that Gilbride decided to terminate Barrus, Gilbride did not know or have reason to suspect that Barrus suffered from severe clinical depression/anxiety with panic attacks and psychomotor retardation—which is the disability alleged in this action. Nor, as Barrus admitted at her deposition, had she ever communicated to Gilbride or anyone at Henkel that she required a reasonable accommodation because of this mental disability before the initial decision to terminate her was made.

Gilbride flew to California to meet with Barrus on September 14, 2015, to tell her that her employment was being terminated. Less than an hour before the planned meeting, Barrus e-mailed Gilbride that she was "sick" and would not be

coming in to work. Gilbride and Thompson decided to postpone acting on the termination decision until Barrus returned to work. Barrus called in sick for the rest of that week. Gilbride postponed her meeting with Barrus until the next Monday, September 21, 2015. A week later, Barrus did not come to work, although no one heard from Barrus that she would still be out sick. Although Gilbride received periodic updates that Barrus's doctor was extending her absence, Barrus never discussed her mental condition with Gilbride.

From September 14, 2015—the date that she first called in sick—through March 1, 2016, Barrus never returned to work and she was never released to return to work by her physician. Henkel granted Barrus's request to use paid sick time for her absences, even though neither she nor her doctor provided any information during this time period that she had a serious health condition that qualified for either the Family Medical Leave Act (FMLA) or CFRA. On September 27, 2015, when plaintiff's doctor's note said that she would be off work for another two weeks, Thompson mailed Barrus information about how to initiate a Short-Term Disability (STD) claim with the State of California and Henkel's third party administrator, Liberty Mutual. On September 28, Barrus notified Henkel for the first time that her doctor was recommending that she take FMLA leave. In response, Henkel sent her information the next day regarding her FMLA/CFRA rights and directing her to submit a claim to Liberty Mutual for an eligibility determination.

On September 29, 2015, Barrus submitted a claim to Liberty Mutual. After Barrus provided additional information, Liberty Mutual retroactively approved FMLA/CFRA leave to Barrus back to September 14, 2014—the day Barrus first took off

work. Thereafter, Liberty Mutual denied Barrus's STD claim for the period after September 30, 2015. Despite this denial, Liberty Mutual authorized Barrus to remain on leave for 12 weeks—the full period required under FMLA/CFRA. Barrus was advised that her leave would be exhausted as of December 4, 2015.

On November 2, 2015, Barrus submitted another note from her doctor extending her absence by one month, to December 7, 2015. Thompson responded by notifying Barrus of some of her benefits and compensation and reminding her to send her doctor's notes to Liberty Mutual. In addition, Liberty Mutual sent Barrus reminders that her FMLA/CFRA leave would be exhausted as of December 4, 2015. Barrus was warned that a failure to return to work "may be considered a resignation of your employment status."

On November 30, 2015, Barrus submitted a note from her doctor, this time extending her absence until January 12, 2016, which Henkel granted.

In December 2015, after Barrus had exhausted her FMLA/CFRA leave, she first requested an accommodation because of an alleged mental disability. In response, Henkel permitted Barrus to remain on unpaid leave until January 12, 2016. Accommodations were not discussed because Barrus was still on leave and had not been released by her doctor to return to work. Thompson informed Barrus that upon her return to work, "we can discuss the accommodations that you have requested."

Barrus did not return to work on January 12, 2016. On January 7, 2016, she submitted another note from her physician requesting that her absence be extended until March 1, 2016. Not only was Barrus never released to work by her physician in any capacity, her physician never provided a definite release

date. Rather, each follow-up visit was only to evaluate when Barrus might be able to return to work. As late as September 2016, Barrus's physician had still not released her to work.

Henkel did not approve additional leave after January 12, 2016, based on Liberty Mutual's prior determination that there was insufficient support for Barrus's continued absence after September 30, 2015. Thereafter, Gilbride and Thompson decided to implement the previous decision to terminate Barrus, even without an in-person meeting.

Barrus was terminated on January 20, 2016, because of her history of unacceptable work performance, that Liberty Mutual had denied her disability claim after September 30, 2015, that Barrus had exhausted all available leave as of December 4, 2015, and that no further leave had been approved after January 12, 2016. The decision to terminate Barrus was, therefore, based on factors unrelated to her alleged disability, any protected characteristics, or her exercise of any rights.

Barrus filed a complaint against Henkel on September 2, 2016. In that pleading, Barrus alleged that Henkel's termination of her violated the Fair Employment and Housing Act (FEHA)'s prohibition of disability discrimination. Specifically, Barrus alleged that Henkel was on notice of her major clinical depression, anxiety, panic attacks and psychomotor retardation. And, she alleged that Henkel terminated her because she was a person with a disability. As alleged in the complaint, at all times, plaintiff was able to perform the essential functions of her job. Barrus also alleged a FEHA violation based on Henkel's alleged failure to accommodate her disability, its failure to engage in the interactive process, and retaliation for her requesting a reasonable accommodation. Barrus also alleged a separate cause

of action for Henkel's failure to prevent discrimination and retaliation. Barrus's complaint also alleged that Henkel violated CFRA and that she suffered a wrongful termination in violation of public policy.

As part of the discovery process, depositions were taken, including plaintiff, Gilbride and Thompson, and in response to written discovery, Henkel responded to Barrus's interrogatories, requests for production and document requests, all of which were accompanied by a single verification signed by Thompson.

Henkel moved for summary judgment. Henkel presented admissible evidence that described this sequence of events and argued that it was entitled to summary judgment because either one of the prima facie elements of certain of Barrus's causes of action was missing, or because its termination of the plaintiff was based on legitimate, nondiscriminatory reasons.

Specifically, Henkel produced admissible evidence that its decision-makers did not know that Barrus was disabled when it initially decided to terminate her employment in September 2015. Barrus's discrimination claim under the FEHA cannot be made based on a disability that was unknown to the employer. (*Brundage v. Hahn* (1997) 57 Cal.App.4th 228, 236.)

Henkel also argued that Barrus cannot assert a FEHA disability discrimination claim because she could not establish that she was otherwise qualified to do her job. An employee who cannot work is not "qualified." (*Green v. State of California* (2007) 42 Cal.4th 254, 263). As Barrus's physician's own notes established, Barrus was completely unable to work and was never released to return to work. Accordingly, she could not establish a prima facie element of her disability discrimination claim.

Henkel also provided admissible evidence from the relevant decision-makers that their decision to terminate Barrus was made in September 2015—before she had even called in sick. And, these individuals stated that the sole reason for her termination at that time was Barrus's deficiencies in performing her job. In January 2016, when the termination decision was ultimately implemented, there were additional reasons to implement the original termination decision—including the fact that Liberty Mutual denied Barrus's disability claim after September 30, 2015, that Barrus had exhausted all of her leave as of December 4, 2015, and that Henkel would not approve further leave after January 12, 2016.

Henkel also moved for summary judgment on Barrus's accommodation and interactive process causes of action. Henkel's admissible evidence established that before going out sick on September 14, 2015, Barrus had not told her employer about her disability or even a specific medical condition that would have then triggered Henkel's duty to accommodate or engage in the interactive process. The first time that Barrus requested an accommodation from Henkel was in December 2015, after her FMLA/CFRA leave was exhausted, and while she was still on leave and unable to work. In that circumstance, there would be no possible accommodation other than extended time off. And, as shown by admissible evidence, Henkel did afford that accommodation to Barrus—allowing her to remain on leave for more than one additional month before finally implementing its earlier decision to terminate her employment.

Henkel also argued that there was no triable issue on Barrus's retaliation claim as the reasons for her termination were poor job performance and plaintiff could not produce specific,

substantial evidence of pretext. Henkel also asserted that Barrus's CFRA cause of action failed because Barrus could not show that she had notified her employer that she needed time off from work because of a serious health condition. Moreover, Barrus was granted retroactive leave and was never denied any of the leave provided under these laws. Further, Henkel argued that there was no evidence showing that Barrus had been terminated in retaliation for asserting her CFRA rights. The uncontroverted evidence here shows that Henkel had decided to terminate plaintiff for performance deficiencies, but deferred the implementation of that decision until Barrus returned to work. After providing Barrus the leave to which she was legally entitled—and then some—she was terminated without a face-to-face meeting. That Barrus had been allowed to take CFRA leave in the intervening period cannot support a reasonable inference that she was being terminated for having done so.

Finally, Henkel argued that there was no evidence in the record that it had failed to prevent discrimination or retaliation as it had not discriminated or retaliated against Barrus in the first instance. Henkel also argued that the plaintiff's related wrongful termination in violation of public policy claim fails because the undisputed facts establish that she was terminated for legitimate employment-performance reasons and not for any policy embodied in FEHA or any other statute.

In opposition to Henkel's motion, Barrus submitted several exhibits as attachments to the declaration of Barrus's attorney, Allen Felahy.[1] As to these materials, some appear to have been

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[1] Felahy authenticated portions of the transcript of her deposition, portions of the deposition transcripts of Gilbride and Thompson, and excerpts of a Statement Under Oath taken from

Kathy Alaama, a coworker of Barrus, and a declaration by Karen Lawton, a former Henkel employee and coworker of Barrus. He also authenticated a Schwarzkopf new hire checklist from 2002; a Henkel in process performance report from 2014; employment authorizations from Schwarzkopf from 2009 and 2010; an almost illegible handwritten note that appears to be from a doctor's office from 2015; one page of a Henkel Termination Notification Form dated September 15, 2015; a 2012 e-mail from the National Director of Education for Henkel congratulating her on the new position; a 2012 Henkel in process performance assessment; a 2013 Henkel in process development form; one page of the Individual Performance Plan dated January 27, 2014—March 27, 2014; an EDD Notice to Employer of a Disability Insurance Claim Filed dated October 23, 2015; an e-mail dated September 15, 2015, asking a Henkel employee to process payout vacation and vacation buyout, with check to be cut on that same date; a Henkel Manual Check Request Form, dated September 2015, for Karyn Barrus; an e-mail that Barrus sent to Gilbride and Thompson on September 21, 2015, asking to confirm the number of sick and vacation days that she had left and informing them that she was seeing her doctor again and apologizing for the inconvenience that her "absents" for the past week has caused; another e-mail from Barrus to Gilbride and Thompson sent later on September 21, 2015, stating the same things, but requesting confirmation that her e-mail had been received; a partial e-mail chain instructing Barrus how to contact Liberty Mutual, Henkel's disability/leave administrator, on November 5, 2015; a November 5, 2015 e-mail from Barrus to two senior HR managers at Henkel alleging wrongful termination from the Company's payroll while medically disabled; a September 21, 2015 partial document from Henkel's HR Direct system to Tracy Reed and an e-mail from Reed to US-HNA Payroll Management Center dated October 7, 2015; a November 18, 2015 letter from Henkel responding to Barrus's earlier e-mail, without attachments; an e-mail from Thompson to Barrus dated December 10, 2015; a

produced by Henkel as part of a verified response to plaintiff's discovery requests.

Barrus also submitted a declaration, which similarly authenticated a large collection of documents. She attached and authenticated letters that she received from Liberty Mutual and Met Life; a September 22, 2015 COBRA enrollment notice; and a partially copied Henkel paycheck dated October 2, 2015.

Based on this evidence, Barrus argued that summary judgment was inappropriate given the disputed evidence creating triable issues on all of her claims. In summary, Barrus argued that her evidence showed that Henkel knew about her mental health disability before September 14, 2015. Barrus also noted that immediately after she called in sick, Henkel terminated her. Barrus also pointed to evidence that she claimed showed that Henkel retaliated against her by refusing to pay for her health benefits. And, Barrus complained that despite her repeated requests prior to and throughout her leave, Henkel refused to accommodate her disability.[2]

In reply, Henkel directly challenged Barrus's violation of procedural and evidentiary rules, including, inter alia, the taking

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January 14, 2016 e-mail from Barrus to Thompson, with an attached note from John R. Moeller, M.D.; a letter dated January 20, 2016, from Thompson to Barrus; another version of Barrus's e-mail of November 5, 2015; a partial e-mail string from Barrus to an unknown recipient, including a forwarded message dated November 30, 2015, from Barrus to Thompson; and a Henkel HR Request Form dated September 15, 2015.

[2] Barrus also objected to certain aspects of the evidence submitted by Henkel in its opening brief. The trial court ruled on those objections and those rulings are not challenged on appeal.

of a deposition of a former Henkel employee without notice to the defendants. Henkel objected to the "dozens of exhibits" attached to counsel's declaration as lacking in foundation and unauthenticated. Henkel also objected to the perceptions of other employees, such as Alaama and Lawton, as to Barrus's performance as irrelevant and incapable of providing a genuine issue as to whether plaintiff was meeting her employer's expectations. Noting that Barrus had failed to controvert the fact that Henkel's decision-makers were not aware of the claimed mental disability before their initial decision to terminate her had been made, plaintiff's claim for disability discrimination could not proceed to trial. In addition, Henkel filed written objections to the declaration of Barrus's attorney.[3]

On March 2, 2018, the trial court heard the motion for summary judgment and, after ruling on plaintiff's evidentiary objections, granted Henkel's motion. The trial judge announced the decision from the bench and expressly declined to rule on Henkel's objections to Barrus's evidence.

A timely appeal followed.

DISCUSSION

A. Standard of Review

In exercising appellate jurisdiction over an order granting summary judgment in a discrimination case, such as this one, we review the matter de novo, granting no particular deference to the trial court ruling, in order to determine independently whether the defendants were entitled to judgment as a matter of law. (*Romero v. American President Lines Ltd.* (1995) 38

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[3] Barrus filed a written response to Henkel's evidentiary objections.

Cal.App.4th 1199, 1203.) As part of that appellate review, this court reviews the trial court's evidentiary rulings on summary judgment for abuse of discretion. (*Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 851.) In order to determine whether a triable issue was raised or dispelled, this court must disregard any evidence to which a sound objection was made, but must consider any evidence to which no objection or an unsound objection was made. (*Id.* at p. 853, citing *Reid v. Google* (2010) 50 Cal.4th 512, 534.) In addition, once a party bears the initial burden of demonstrating an entitlement to judgment as a matter of law, the opposing party may not defeat summary judgment by attempting to generate a factual dispute as to immaterial issues. (*Romero,* at p. 1203.) The presence of a factual dispute will not defeat a motion for summary judgment unless the fact in dispute is a material one. (*Ibid.*)

B. Rulings on Henkel's Evidentiary Objections

In this case, Henkel asserted written evidentiary objections to much of the evidence submitted by Barrus in opposition to the motion for summary judgment. Barrus filed a written response to Henkel's objections. In the trial court's oral ruling, the judge expressly declined to rule on those objections.[4]

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[4] Barrus also objects that the trial court did not address her fourth and sixth causes of action and seeks reversal on that ground. A review of the court's oral ruling fails to support Barrus's contention. The fourth and sixth causes of action were discussed as part of the court's overarching conclusion that Henkel presented sufficient and undisputed evidence of legitimate reasons for Barrus's termination and that Barrus had failed to present sufficient evidence of pretext. Even if such an omission had occurred, however, it would not be a basis for

Citing a 2004 decision in *Vineyard Springs Estates, LLC v. Superior Court,* 120 Cal.App.4th 633, 642-643, Barrus argues that the trial court's failure to rule on Henkel's evidentiary objections operates as a waiver on appeal. That is not the current state of the law in California. As the California Supreme Court held in *Reid v. Google*, *supra*, 50 Cal.4th 512, 531-532, the failure by a trial court to rule upon evidentiary objections does not waive those issues on appeal. Rather, when, as is the case here, a party has expressly invited the Court of Appeal to address its evidentiary objections that were not ruled upon by a trial court, the court must do so. (*Id.* at pp. 534-535.) It is to those objections that we now turn.

Henkel objected to a number of exhibits that were submitted as attachments to the declaration of Barrus's attorney.[5] Henkel objected on the ground that plaintiff's counsel lacked personal knowledge of the documents and, therefore, could not authenticate them or lay a foundation for their admission. Further, without a factual basis for an exception, these documents were inadmissible hearsay. Henkel also objected to exhibit 7, the Kathy Alaama deposition. As to this exhibit, Henkel objected that under Code of Civil Procedure section 2025.620, a deposition can be used only when the party against whom the deposition is used "was present or represented at the taking of the deposition," or had notice of the deposition and did not appear. In the case of Ms. Alaama, Henkel did not receive

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reversal. It is the validity of the ruling which is reviewable and not the reasons therefor. (*Santa Barbara Pistachio Ranch v. Chowchilla Water Dist.* (2001) 88 Cal.App.4th 439, 448.)

[5] These are exhibits 9-14, 16-19, 21, 23-25, 30, 34-35, 37-43.

any notice of this deposition and, therefore, Barrus could not use it to oppose the summary judgment motion.

These objections are well-taken and we sustain them. Plaintiff's counsel has no personal knowledge regarding the documents attached to his declaration. He cannot authenticate them, nor can he lay an adequate factual foundation for their admission as business records. (See Evid. Code, §§ 1400, 702.) And, under Evidence Code section 1271, for a business record to not be made inadmissible by the hearsay rule, a custodian or other qualified witness must testify to its identity and the mode of its preparation. (Evid. Code, § 1271, subd. (c).) Barrus's counsel provides no such testimony. Rather, he simply asserts that because they were produced by Henkel as part of its verified responses to his discovery request, they are authentic and admissible.

There is no California authority for the notion that producing a document as part of a verified discovery response renders it admissible for all purposes. In fact, the law is directly to the contrary.[6] It is well-settled that in opposition to a motion for summary judgment, evidence must be presented by a person through which the exhibits could be admitted into evidence. (*Perry v. Bakewell Hawthorne, LLC* (2017) 2 Cal.5th 536, 543 [a party may not raise a triable issue of fact at summary judgment

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6 Plaintiff cites *Orr v. Bank of America, NT & SA* (9th Cir. 2002) 285 F.3d 764, 777, fn. 20, and *U.S. v. Cinergy Corp*. (S.D.Ind. 2007) 495 F.Supp.2d 909, 914, for the proposition that all documents produced by a party in discovery are deemed authentic when offered by the party's opponent. As expressly noted in *Orr*, in a diversity action such as this one, the federal rules of evidence apply. (*Orr*, at p. 772.)

by relying on evidence that will not be admissible at trial].) An attorney may not authenticate or lay a foundation for a document of which he is neither the author nor the recipient. (See *Sanchez v. Hillerich & Bradsby Co.* (2002) 104 Cal.App.4th 703, 720.) That counsel has obtained the documents in discovery is insufficient. (*Tri-State Mfg. Co. v. Superior Court* (1964) 224 Cal.App.2d 442, 443-445.)

Further, Barrus cannot rely on a deposition transcript of Kathy Alaama where the testimony was taken without prior notice to opposing counsel. In fact, Barrus did not even contest Henkel's objection to the Alaama deposition.[7]

Accordingly, Henkel's objections to Barrus exhibits 7, 9-14, 16-19, 21, 23-25, 30, 34-35, 37-43 are sustained and these exhibits will not be considered.

C. Summary Judgment Was Properly Granted

Henkel is entitled to summary judgment if it presents admissible evidence that one of the prima facie elements of plaintiff's causes of action is missing, or that an adverse employment action was based on a legitimate business reason. (*Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 203.)

Barrus's disability discrimination claims fail on two independent grounds. First, the uncontroverted evidence establishes that Henkel did not know of Barrus's disability when

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[7] Although the court declined to rule on the admissibility of the Alaama "deposition," it did note that it was not properly noticed and was, therefore, hearsay.

the decision to terminate her was made.[8] To prove a FEHA claim, an employee must show that the employer had knowledge of the disability when the adverse employment decision was made. (*Brundage v. Hahn, supra,* 57 Cal.App.4th at p. 236.) Vague or conclusory statements revealing an unspecified and unidentified incapacity are not sufficient to put an employer on notice of its obligations under FEHA. (*Avila v. Continental Airlines, Inc.* (2008) 165 Cal.App.4th 1237, 1249.) In the context of mental disabilities, which may have less evident manifestations, employees have been required to apprise their employer specifically as to the nature of the impairment. (See *Miller v. National Casualty Co.* (8th Cir. 1995) 61 F.3d 627, 629 [before an employer is required to make an accommodation under the ADA, the employer must have knowledge that a limitation exists].)

That Barrus did not notify Henkel of her medical condition as a disability before the September 2015 termination decision further precludes her FEHA claims regarding reasonable accommodation or interactive process. FEHA provides that it is unlawful for an employer to fail to make reasonable

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[8] It is uncontroverted that Gilbride decided to terminate plaintiff in early September 2015—before September 14, 2015—due to the recurrence of Barrus's work performance problems. Gilbride flew to California to meet Barrus in person on September 14, 2015, to convey the termination decision. There is no competent evidence in the record to support Barrus's claim that somehow the termination decision was made *after* the planned termination meeting. That Barrus's absence from Henkel delayed the implementation of that decision by several months does not support an inference that an irrevocable decision to terminate her had not already been made.

accommodation of a known physical or mental disability of an applicant or employee. (Gov. Code, § 12490, subd. (m).) This necessarily requires knowledge of the disability by the employer, and a request for an accommodation by the employee.[9] (*Avila v. Continental Airlines, Inc., supra*, 165 Cal.App.4th at p. 1252; *Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 954.)

The uncontroverted evidence is that Henkel did not know Barrus was disabled before deciding to terminate her because of her poor performance. As of September 14, 2015, when the decision to terminate Barrus was made, Henkel did not know or suspect that Barrus suffered from an alleged mental disability of severe depression, anxiety with panic attacks, and psychomotor retardation—the disability alleged here. Without any knowledge of the existence of this disability, Henkel could not have taken the action to terminate Barrus because of that.

Although Henkel's implementation of its September 2015 termination decision was postponed until January 2016 in order to afford Barrus a face-to-face meeting to discuss the decision, the company had made a clear and final decision to terminate her in

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[9] As for the post-September 2015 period, Henkel did accommodate Barrus the only way it could while she was off work, i.e., by allowing her to remain on leave for more than one additional month into late January 2016, after she had exhausted all of her sick, vacation and CFRA leave as of December 4, 2015. Despite those extensions, Barrus's physician opined that she was still not able to return to work until, at least, March 2016. Reasonable accommodation does not require an employer to wait indefinitely for a medical condition to be corrected. (*Rogers v. International Marine Terminals, Inc.* (5th Cir. 1996) 87 F.3d 755, 759-760.)

early September—long before it was aware of Barrus's alleged disability.

A second separate basis supporting the grant of summary judgment is that plaintiff was not a qualified individual for purposes of disability discrimination and reasonable accommodation. (*Green v. State of California, supra,* 42 Cal.4th at p. 263 [A disability discrimination plaintiff bears the burden of proving that she was a qualified individual, i.e., that she could perform the essential functions of her job with or without reasonable accommodation.]; Gov. Code, § 12940, subd. (a)(2).) In this case, when plaintiff's discharge was finally accomplished in January 2016, she still had not been cleared by her doctor to return to work. An employee, such as Barrus, who cannot work according to her treating physician, may be discharged as regular attendance at work is an essential job function for most jobs. (*Pettus v. Cole* (1996) 49 Cal.App.4th 402, 462-463.)

Barrus's ongoing inability to return to work also precludes her claim against Henkel for failing to engage in the interactive process. Barrus was unable to return to work throughout the relevant period. An employee's ability to perform the essential functions of a job is a prerequisite to the interactive process. (*Nadaf-Rahrov v. Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 977.)

Even if Barrus could overcome these glaring deficiencies in her disability discrimination claims, Henkel presents uncontroverted evidence that the adverse employment action was unrelated to any discriminatory animus. (*McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802.) The original September 2015 decision, Barrus's exhaustion of all leave without providing any date by which she would be well enough to return to work,

and the decision to extend no further leave after January 12, 2016, were all based on legitimate, nondiscriminatory grounds. In the face of this defense, Barrus has failed to submit admissible evidence of pretext.

Barrus's own perceptions of the quality of her workplace performance do not establish pretext. (*Horn v. Cushman & Wakefield Western* (1999) 72 Cal.App.4th 798, 816; *King v. Rumsfeld* (4th Cir. 2003) 328 F.3d 145, 149 [King's own testimony cannot establish a genuine issue as to whether he was meeting the employer's expectations].) Nor are the opinions of Karen Lawton, a coworker, sufficient to withstand summary judgment. (*Horn*, at p. 816.) It is the perception of the decision-maker that is relevant—not the plaintiff's self-assessment, or that of a coworker. (*King*, at p. 149; *Bradley v. Harcourt, Brace and Co.* (9th Cir. 1996) 104 F.3d 267, 270.) The analysis of pretext focuses only on the decision- maker—which in this case was Gilbride. Gilbride provided a declaration and consistent deposition testimony—which is unrefuted—that she observed Barrus's performance declining again in 2015, despite having expressly warned Barrus in 2014 that such a decline would be an immediate ground for her termination. It was these performance deficiencies that provided the basis for Gilbride's decision to terminate Barrus.[10]

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[10] A lack of documentation noting Barrus's varied performance problems does not create a triable issue of fact on pretext. Barrus provides no evidence that Henkel's HR policies required documentation of an employee's performance problems. And, although Barrus opines that more documentation should exist and that Gilbride ought to be found not credible, these contentions do not raise a genuine issue of material fact.

Barrus also fails to present a triable issue of material fact on her retaliation claims. A claim of retaliation requires Barrus to prove that " 'engaging in the protected activity was one of the reasons for [her] firing and that but for such activity, [she] would not have been fired.' " (*Villiarimo v. Aloha Island Air, Inc.* (9th Cir. 2002) 281 F.3d 1054, 1064-1065.) As discussed previously, Barrus provides no such evidence. As the uncontroverted evidence demonstrates, Barrus never disclosed a disability or requested an accommodation before Henkel made its decision to terminate her. Moreover, the uncontested evidence establishes that both Henkel's original September 2015 termination decision, which it deferred to allow Barrus to exercise sick and other leave, and its final January 2016 implementation of that decision were based entirely on factors unrelated to Barrus's exercise of any rights.

Barrus is also unable to adduce a triable issue of fact regarding her claim of a violation of the CFRA. CFRA makes it unlawful for an employer to refuse to grant an employee's request

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(*Arteaga v. Brink's, Inc.* (2008) 163 Cal.App.4th 327, 343 [" ' "[I]t is not enough . . . to disbelieve the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination." ' "].) Nor does Gilbride's one-time expression of frustration in relation to Barrus's back and neck pain, "what's wrong with you? You know you're ADD," create a triable issue of material fact. There is no evidence that Gilbride actually perceived Barrus to have ADD; it is simply an expressive response to Barrus's apparent lack of focus. Moreover, even if one were to accept the statement literally, it would not establish that Henkel knew of the mental condition upon which plaintiff asserts disability discrimination. Barrus does not contend that she has ADD or that this was the source of her disability discrimination claim.

for unpaid leave to care for a serious health condition. (Gov. Code, § 12945.2, subds. (a), (c)(2)(A).) An employer also may not retaliate by terminating an employee because of her exercise of this right. (Gov. Code, § 12945.2, subd. (*l*)(1).)

In this case, Barrus is unable to demonstrate that she suffered an adverse employment action because she took her full statutory CFRA leave. An employee with pre-existing performance issues, who is on CFRA leave, has no greater right to continued performance than any other employee. (*Neisendorf v. Levi Strauss & Co.* (2006) 143 Cal.App.4th 509, 517-519.) CFRA's reinstatement rights apply only when an employee returns to work or before the expiration of the 12-week protected leave. (*Rogers v. County of Los Angeles* (2011) 198 Cal.App.4th 480, 489.) Here, Barrus remained on leave after the expiration of her 12-week CFRA leave and remained unable to return to work. An employer does not violate the law when it terminates an employee who is unable to return to work at the conclusion of the 12-week protected period. (See *Neisendorf,* at p. 520; *Spangler v. Federal Home Loan Bank of Des Moines* (8th Cir. 2002) 278 F.3d 847, 851.) In this case, Barrus was unable to return to work after exhausting all of her leave and, along with her performance issues, was lawfully terminated.

Finally, summary judgment is appropriate in favor of Henkel on Barrus's remaining causes of action. Barrus has adduced no admissible evidence in support of her claim that Henkel failed to prevent discrimination or retaliation. As discussed above, Barrus has not established a triable issue that Henkel discriminated and/or retaliated against her. Accordingly, she is similarly unable to adduce a genuine dispute on the collateral claims that Henkel failed to prevent or remedy such

conduct. (*Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 284.) In addition, Barrus has failed to present competent evidence to create a triable issue with regard to her wrongful termination claim. Given that the undisputed facts fail to support Barrus's claim of discrimination or retaliation, her tethered cause of action for wrongful termination fails as well. (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1256.)

DISPOSITION

As summary judgment was properly granted on Barrus's entire complaint, the judgment is affirmed. Henkel shall recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

JONES, J.*

We concur:

EGERTON, Acting P.J. DHANIDINA, J.

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