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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 THREE

YVONNE HERNANDEZ, Plaintiff and Appellant, v. PACIFIC BELL TELEPHONE COMPANY, Defendant and Respondent.	B260109 (Los Angeles County Super. Ct. No. BC507337)

APPEAL from a judgment of the Superior Court of Los Angeles County, Steven J. Kleifield, Judge. Affirmed.

The Mirroknian Law Firm, Reza Mirroknian and Peter A. Javanmardi for Plaintiff and Appellant.

Miller Law Group, Joseph P. Mascovich and Holly R. Lake for Defendant and Respondent.

Plaintiff and appellant Yvonne Hernandez worked for defendant and respondent Pacific Bell Telephone Company dba AT&T California (Pacific Bell). After Hernandez, who has a disability, took repeated, often prolonged, leaves of absence from work, Pacific Bell fired her. Hernandez sued Pacific Bell for, among others things, disability discrimination under the Fair Employment and Housing Act (the FEHA, Gov. Code, § 12900 et seq.)[1] The trial court granted Pacific Bell's motion for summary judgment. Hernandez appeals. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual background

A. *Hernandez's work history at Pacific Bell*

Hernandez began working for Pacific Bell in October 1998 as a service representative at its Pasadena call center. A service representative sells products and handles customer requests, inquiries and complaints. Although the precise nature of Hernandez's disability is unclear, that she has a disability is undisputed and, according to her, she suffers from "mental health issues" and orthopedic issues regarding her upper and lower back and carpal tunnel syndrome.

Throughout her employment, Hernandez took various forms of leave, including leave under the Family Medical Leave Act (FMLA) and/or its state counterpart, the California Family Rights Act (CFRA, § 12945.2). Between 2000 and 2010, Hernandez received approximately 3,657 hours of leave under the

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

FMLA/CFRA or, stated otherwise, about 457 hours per year of leave in eligible years, as follows:[2]

- 2000: 400 hours (or 10 weeks)[3]
- 2001: 464 hours
- 2002: 480 hours
- 2003: she was ineligible for FMLA/CFRA leave.
- 2004: 419 hours[4]
- 2005: 480 hours
- 2006: 480 hours
- 2007: 454 hours
- 2008/2009: she was ineligible for FMLA/CFRA leave.
- 2010: 480 hours[5]
- 2011: she was ineligible for FMLA/CFRA leave.

Aside from leave under the FMLA/CFRA, Pacific Bell provides Company Initiated Leave (CIL), which is an "unpaid leave of absence to cover periods of absence due to disability for Employees who are not eligible for company disability benefits

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[2] To be eligible for leave under the FMLA/CFRA one must have worked 1,250 hours in the 12-month period before the date preceding the requested leave. (*Faust v. California Portland Cement Co.* (2007) 150 Cal.App.4th 864, 879, fn. 6.)

[3] This appears to have been pregnancy-related.

[4] She took leave under the FMLA from September 20 to October 12, 2004 for a tummy tuck and breast augmentation. It appears leave was extended to November 8, 2004.

[5] She took leave under the FMLA from March 25-30; April 17 and 20-21; April 26-May 3; May 12-18, 24-28; June 4-10, 14-24, 25-30; July 1-2, 10, 13-16; July 29-August 4; August 6-13, 25-26, and 30-31; and September 3-8.

and have been absent from work for over 30 consecutive days after the initial determination of benefit eligibility." CIL lasts one day to six months, and may be extended, although not normally beyond 12 months. Job reinstatement is not guaranteed after CIL.

In the years Hernandez was ineligible for leave under the FMLA/CFRA, Pacific Bell granted CIL to her. In 2003, she was granted CIL for two months, from May 9-July 7. In 2008, she reported off work on August 21 and was granted CIL for nine months, from August 28, 2008-May 27, 2009. When Pacific Bell informed Hernandez that CIL would not be extended beyond May 27, it asked her to complete a Work Capacities Checklist (WCCL) to help determine whether "to proceed with a priority job search." To "assist the employee . . . in working," the form asked whether she could perform delineated activities. It listed various accommodations and asked whether they were needed. If Hernandez did not return the WCCL, she was to return to work on May 28. If she did neither, then she would be fired. Hernandez submitted a doctor's note stating she could return to work for four hours per day, which she did, on May 29 until September 1, 2009, when she returned to work full-time.

B. *Hernandez's performance*

In about June 19, 2009, Hernandez was counseled about being excessively tardy to work. A month later, in July, she was warned she would be suspended for one day for continuing to have excessive tardies. She was tardy again and therefore suspended for one day on October 8, 2009 and warned that if her attendance didn't improve she could receive a two-day suspension.

On March 4, 2010, she was counseled about her failure to meet service representative standards, because she "did not me[e]t on 3 calls." When she continued not to meet standards regarding her average handle time and CRIFT (a metric derived from satisfaction surveys), Hernandez had an "initial discussion" with a sales coach leader about how she could improve. Her performance didn't improve, and, in May 2010, she was warned of a one-day suspension and received a "does not meet" rating for performance and for attendance. Because she continued not to meet service representative standards (specifically, her average handle time), she was suspended without pay on September 30.[6] That same day, she was given a dismissal warning because she wasn't meeting attendance standards: she had "unprotected absences" on September 9, 20-25, and 27-29.[7] When asked what could be done to help Hernandez avoid incurring unprotected absences, she said she was waiting for her new chair and that she was having an issue with the blinds due to her sensitivity to light. She could not identify a reasonable accommodation that might otherwise help her, even though Nena Williams, her center support supervisor, reminded her that a reduced work schedule might be available.

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[6] Hernandez argues that Bertha Villarreal, a sales coach at the Pasadena call center testified that Hernandez's performance was "excellent." The deposition testimony Hernandez cites, however, merely states that she was "engaged" and receptive to coaching and wasn't breaking safety guidelines.

[7] As of September 30, 2010, the September 20-25 and 27-29 absences were pending workers' compensation approval.

Because Hernandez was absent October 11, 12, 23 and 26, an "investigatory meeting" regarding possible dismissal was held on October 28, 2010. On November 4, 2010, Hernandez was suspended for two days and given a dismissal warning for failing to meet service representative standards relating to average handle time and customer rules.

C. *Hernandez takes leave in November 2010-2011 and is fired*

In November 2010, Hernandez began experiencing stress, anxiety, panic attacks and dry mouth. Dr. Perry Maloff, a psychiatrist, placed her off work on approximately November 10. She received short term disability benefits from approximately November 16 to December 6, 2010 but was denied disability thereafter.

Pacific Bell therefore granted her CIL from December 7, 2010 through January 13, 2011 and extended it monthly to May 9, 2011. Pacific Bell informed Hernandez of these extensions by letters. As to the final extension to May 9, Pacific Bell sent her a letter dated April 18, 2011. Unlike the prior extension letters, this one informed Hernandez that CIL was extended to May 9 but "that if your treating physician continues to disable you and you remain unable to perform the essential functions of your job, your CIL will not be extended beyond May 9, 2011. Therefore: If you are incapable of performing the essential functions of your job, either with or without a reasonable accommodation, you may be eligible for a priority job search. I urge you to discuss this issue with your treating physician in order to evaluate whether a job search would be appropriate." The letter instructed Hernandez to have her physician complete and return the enclosed WCCL by

May 10, 2011 "so that we can determine whether to proceed with a priority job search." Alternatively, Hernandez was to report to work on May 10. If she did not return to work or failed to return the WCCL, her employment would be terminated effective May 10.

Hernandez received the April 18, 2011 letter but overlooked or did not "notice" the second page informing her there would be no further extensions of CIL and directing her either to return a completed WCCL or return to work on May 10. She read only the first page because she assumed the remainder of the letter was the same as prior letters. According to Hernandez, the letter did not include the three-page WCCL.[8] In any event, she did not return a completed WCCL and did not return to work on May 10. Instead, on or about May 6, she forwarded to Pacific Bell a letter from Dr. Maloff stating she was "temporarily totally disabled and on medical leave until approximately June 9, 2011 at which time the disability will be re-evaluated."

On May 11, she received a letter informing her she was fired, effective May 10.[9] Hernandez immediately called Gail Ross, who had signed the termination letter, and asked for her job back. Ross told her it was too late to return the form.

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[8] A copy of the letter produced in discovery did not have the WCCL attached but another copy did.

[9] "Due to the fact that you did not return to work on May 10, 2011, ready, willing and able to perform your job as a Service Representative, your employment . . . has been terminated . . . ."

II. Procedural background

A. *Hernandez sues for disability discrimination*

Hernandez sued Pacific Bell for (1) disability discrimination (§ 12940, subd. (a)), (2) failure to engage in a timely and good faith interactive process (§ 12940, subd. (n)), (3) failure to provide reasonable accommodation (§ 12940, subd. (m)), (4) retaliation (§§ 12940, subd. (h), 12945.2), (5) failure to prevent discrimination and retaliation (§ 12940, subd. (k)), (6) wrongful termination in violation of public policy, and (7) intentional infliction of emotional distress. The complaint prayed for punitive damages.

B. *Pacific Bell moves for summary judgment*

Pacific Bell moved for summary judgment or, alternatively, summary adjudication. Pacific Bell argued that Hernandez's first, second and third causes of action failed because she was not a "qualified individual"; namely, she could not perform an essential function of her job—regular and reliable attendance—with or without reasonable accommodation. Pacific Bell submitted declarations and employment records detailing Hernandez's absences from work. Pacific Bell also had a legitimate reason for firing Hernandez, i.e., her failure either to return to work after leave or to return the WCCL. Pacific Bell also engaged in a good faith interactive process by, for example, giving her extensive leaves of absence. As to the fourth cause of action for retaliation, Hernandez did not engage in any protected activity, and she admitted she never told anyone at Pacific Bell that she believed she was being discriminated or retaliated against. Because Hernandez could not establish the first through fourth causes of action, her remaining causes of action also failed.

Moreover, Hernandez's intentional infliction of emotional distress claim was preempted by worker's compensation law, and, in any event, the claim was predicated on her supervisors' routine, work-related communications which, as a matter of law, were not extreme or outrageous. Similarly, there was no evidence any Pacific Bell employee treated Hernandez with oppression, fraud or malice. And none of the individuals involved in firing Hernandez were directors, officers or managing agents.

C. *Hernandez's opposition*

In her opposition, Hernandez argued that there were triable issues of material fact. She was, for example, a qualified person who could perform the essential functions of her job, because she did regularly and reliably attend work. Pacific Bell should have given her one more month of CIL to accommodate her disability, which, she believed, would have allowed her to return to work. Pacific Bell didn't engage in the interactive process because it failed to enclose the WCCL in the April 18, 2011 letter, never met with her face to face, and called her only once during her final leave. Pacific Bell retaliated against her for seeking workers' compensation benefits, leave under the FMLA/CFRA, and a reasonable accommodation.

Hernandez submitted "me too" evidence (declarations from other fired Pacific Bell employees and their civil complaints) showing that Pacific Bell fired other disabled employees. Emilio Sandoval, a premises technician, worked for Pacific Bell from March 2008 until he was fired in July 2011. He was on a leave of absence for a disability when he was fired. Other than that leave, which lasted about six months, Pacific Bell never offered him an accommodation, even though he submitted a

WCCL. He dealt with Laurie Miskel, who was involved in Hernandez's termination.

Wanda Long, a systems technician, worked for Pacific Bell from 1993 to 2011. She was on leave due to a disability for seven to eight months. Long did get to the " 'job search' phase" but was never offered another job despite being qualified for some. She dealt with Gail Ross. Pacific Bell fired her and told the California Employment Development Department that she abandoned her job. Long believed that Pacific Bell had a corporate initiative to get rid of disabled employees by refusing to extend their leaves of absences and refusing to accommodate them in other positions.

Patricia Mangum was a service representative in the Pasadena call center. She began working for Pacific Bell in 2000. She took two to three months off in 2010 for a hysterectomy. She got attendance write ups during the time she was off. Later, toward the end of her employment, she took time off in about January 2011 to have a cyst removed from her breast. She was denied leave under the FMLA because she hadn't worked enough hours to be eligible. She believes she was fired because of her disability and for taking time off.

D. *Pacific Bell's reply*

In reply, Pacific Bell submitted additional deposition testimony from Ross and from Williams showing, for example, that Pacific Bell considered leave given to accommodate a disability as protected. And, to show that Hernandez would not have returned to work even if she'd been granted another month of CIL in 2011, Pacific Bell submitted a note from Dr. Maloff indicating that 20 months after being fired Hernandez was examined, on February 22, 2013, and instructed to "remain off

work and continue treatment" and stating that the patient "remains T.T.D." The trial court sustained Hernandez's objection to this evidence because it was submitted in the reply papers.

E. *Trial court's ruling*

The trial court found that Pacific Bell established that Hernandez failed to meet her prima facie case of disability discrimination, because she presented no evidence she was a qualified individual. Although Hernandez believed she could have returned to work had CIL been extended one more month, she remained disabled for 20 more months. Further, she could not demonstrate regular and reliable attendance. Pacific Bell also had a legitimate nondiscriminatory reason for firing her: she failed to return to work in May 2011 and failed to return the WCCL.

The court similarly found that there was no triable issue of material fact as to the interactive process cause of action. From the first time Hernandez reported a work injury, Pacific Bell consistently interacted with her and provided accommodations. Hernandez, however, failed to respond adequately to the April 18, 2011 letter. Any breakdown in the process was therefore attributable to her and not actionable.

Hernandez failed to refute evidence she was not retaliated against. She failed to allege any protected activity she engaged in and, in any event, Pacific Bell established legitimate, nonretaliatory reasons for firing her but Hernandez didn't establish the reasons were pretextual.

The conduct Hernandez alleged that Pacific Bell employees engaged in—frequently asking about her sales goals, getting the cold shoulder when she returned from leaves, asking for unrealistic goals, and being asked about her frequent bathroom

breaks—was not extreme or outrageous conduct as a matter of law. Similarly, there was no evidence of fraud, oppression or malice. And none of the individuals involved were directors, officers or managing agents.

The court sustained Pacific Bell's objections to Hernandez's "me too" evidence, finding that the "declarants were not similarly situated—they worked different jobs, in differ[ent] locations, and for different supervisors. The evidence is insufficient of any 'illegal practices' or that plaintiff was obligated to provide at least six months of CIL leave."

Judgment was entered in Pacific Bell's favor.

DISCUSSION

I. Standard of review and burdens in employment discrimination cases

The FEHA makes it an unlawful employment practice to discharge a person from employment or to discriminate against the person because of physical or mental disability or medical condition. (§ 12940, subd. (a).)[10] California adopted the three-stage burden-shifting test established by the United States Supreme Court for trying discrimination claims. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354.) In the first stage, the plaintiff bears the burden to establish a prima face case of discrimination, i.e., that he or she (1) suffered from a disability, (2) could perform the essential duties of the job with or without reasonable accommodations, and (3) was subjected to an adverse employment action because of the disability. (*Ibid.*; *Wills v.*

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[10] In interpreting the FEHA, we can look to its federal counterpart, the Americans with Disabilities Act (ADA). (*Green v. State of California* (2007) 42 Cal.4th 254, 260-264.)

Superior Court (2011) 195 Cal.App.4th 143, 159-160; *Sandell v. Taylor-Listug, Inc.* (2010) 188 Cal.App.4th 297, 310.) If the plaintiff meets this burden, " ' "the burden shifts to the defendant to [articulate a] legitimate nondiscriminatory reason for its employment decision." ' " (*Arteaga v. Brink's, Inc.* (2008) 163 Cal.App.4th 327, 342-343 (*Arteaga*); see also *Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1005 (*Scotch*).) If the defendant presents evidence showing a legitimate, nondiscriminatory reason, the burden again shifts to the plaintiff to establish the reasons offered by the defendant were false, creating an inference that those reasons served as a pretext for discrimination. (*Arteaga*, at p. 343.)

A defendant's summary judgment motion " 'slightly modifies the order of these [*McDonnell Douglas*] showings.' " (*Scotch*, *supra*, 173 Cal.App.4th at p. 1005.) The employer has the initial burden to either (1) negate an essential element of the plaintiff's prima face case or (2) establish a legitimate, nondiscriminatory reason for terminating her. (*Ibid.*; *Arteaga*, *supra*, 163 Cal.App.4th at p. 344.) "[T]o avoid summary judgment [once the employer makes the foregoing showing], an employee claiming discrimination must offer substantial evidence that the employer's stated nondiscriminatory reason for the adverse action was untrue or pretextual, or evidence the employer acted with a discriminatory animus, or a combination of the two, such that a reasonable trier of fact could conclude the employer engaged in intentional discrimination." (*Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1004-1005; *Scotch*, at p. 1005.)

We review the trial court's decision to grant summary judgment de novo. We are not bound by the trial court's stated rationale but independently determine whether the record supports the trial court's conclusion that the plaintiff's discrimination claim failed as a matter of law. (*Scotch*, *supra*, 173 Cal.App.4th at p. 1003; see also *Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1348; Code Civ. Proc., § 437c, subd. (c).) "In determining if the papers show that there is no triable issue as to any material fact, the court shall consider all of the evidence set forth in the papers, except the evidence to which objections have been made and sustained by the court . . . ." (§ 437c, subd. (c); see also *Guz v. Bechtel National, Inc.*, *supra*, 24 Cal.4th at p. 334.)

II. Disability discrimination

A prima facie case of disability discrimination under the FEHA is established by evidence that an employee (1) suffered from a disability, (2) is a qualified individual who can perform the essential duties of the job with or without reasonable accommodation, and (3) was subjected to an adverse employment action because of the disability. (*Sandell v. Taylor-Listug, Inc.*, *supra*, 188 Cal.App.4th at p. 310; *Faust v. California Portland Cement Co.*, *supra*, 150 Cal.App.4th at p. 886; *Green v. State of California*, *supra*, 42 Cal.4th at p. 260.) In moving for summary judgment, the employer has the burden of production in establishing what job functions are essential. (*Samper v. Providence St. Vincent Medical Center* (9th Cir. 2012) 675 F.3d 1233 (*Samper*).)

In moving for summary judgment, Pacific Bell argued that Hernandez couldn't establish a prima facie case that she was a qualified individual because she did not have regular and reliable attendance, which was an essential function of her job. Pacific

Bell pointed to its written attendance policy describing "regular and reliable attendance" as "an essential function of every position" and "a condition of employment" and to Hernandez's admission that the nature of her work required her to be at work to perform her job.[11] (Cf. *Samper*, *supra*, 675 F.3d at p. 1238 [hospital's detailed evidence why a NICU nurse's on-site regular attendance is essential job function].) Pacific Bell then detailed her absences throughout the years. Between January 1, 2006 and May 11, 2011, for example, Hernandez was absent approximately 704 days, or 57 percent of her shifts, excluding holidays, vacation and personal days. In the years immediately preceding her termination, she was not at work approximately 250 days in 2009 and 2010.[12] She did not work at all in 2011.

From this evidence, Pacific Bell makes this basic point: a person who is not at work is simply not performing *any* job function, much less an essential one. There is wide support for this point. Numerous cases have found that generally "attendance is a requirement of a job." (*Waggoner v. Olin Corp.* (7th Cir. 1999) 169 F.3d 481, 483; see also *Spangler v. Federal Home Loan Bank of Des Moines* (8th Cir. 2002) 278 F.3d 847, 850; *E.E.O.C. v. Yellow Freight System, Inc.* (7th Cir. 2001) 253 F.3d 943, 948-949; *Samper*, *supra*, 675 F.3d at p. 1237 & cases cited therein.) "The rather common-sense idea is that if one is not able to be at work, one cannot be a qualified individual." (*Waggoner*, at p. 482.)

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[11] "Q. So in the nature of the work that you did you needed to be at work to perform your job, correct? A. Correct."

[12] Hernandez did not dispute these facts except to say they were immaterial.

Hernandez responds that regular and reliable attendance was not an essential function of her job. For this notion, she relies on *Humphrey v. Memorial Hospitals Ass'n* (9th Cir. 2001) 239 F.3d 1128, 1138 (*Humphrey*), a case the Ninth Circuit itself later acknowledged was "unusual." (*Samper*, *supra*, 675 F.3d at p. 1239.) In *Humphrey*, a medical transcriptionist suffered from an obsessive compulsive disorder that prevented her from getting to work, either at all or on time. Her employer denied her request to work from home, something other transcriptionists did. In reaching its conclusion that working from home might be a reasonable accommodation, *Humphrey* observed that excessive or unscheduled absences may prevent an employee from performing essential functions of her job and thereby render her not otherwise qualified for purposes of the ADA but "*regular and predictable attendance is not per se an essential function of all jobs*." (*Humphrey*, at p. 1135, fn. 11, italics added.)

Hernandez latches onto that emphasized language to support the idea that one can be wholly absent from work and yet still perform the job's essential functions. The Ninth Circuit decried such an interpretation of its decision: "Our observation that regular attendance is not necessary for all jobs is hardly remarkable when *on-site presence* is not required for all jobs." (*Samper*, *supra*, 675 F.3d at p. 1239.) Except in the unusual case where an employee can perform all work related duties *at home*, an employee who doesn't come to work cannot perform any of his job functions, essential or otherwise. (*Ibid.*; *Jovanovic v. In-Sink-Erator Div. Emerson Electric* (7th Cir. 2000) 201 F.3d 894, 899.) Stated otherwise, attendance at work, meaning being on-site, is an essential function of a job, except in those situations where the job can be performed off-site.

Having established that attendance is generally an essential job function, the next issue is whether Hernandez could perform the job with or without accommodation. Hernandez argues that the reasonable accommodation that would have allowed her to perform her job was one more month of CIL.[13] The FEHA, however, did not obligate Pacific Bell to give Hernandez another month of CIL. (See *Nowak v. St. Rita High School* (7th Cir. 1998) 142 F.3d 999, 1004 [ADA does not require employers to accommodate an employee suffering from prolonged illness by allowing indefinite leave of absence].) Rather, "the leave accommodation is qualified." (*Hanson v. Lucky Stores, Inc.* (1999) 74 Cal.App.4th 215, 226 (*Hanson*).) A finite leave can be a reasonable accommodation under the FEHA, provided it is likely that at the end of the leave, the employee will be able to perform his or her duties. (*Ibid.*; see also Cal. Code Regs., tit. 2, § 11068, subd. (c); *Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 263; *Kimbro v. Atlantic Richfield Co.* (9th Cir. 1989) 889 F.2d 869, 879 & fn. 10 [that a leave accommodation has been attempted and was unsuccessful might indicate another leave would not be necessary].)

Pacific Bell established that Hernandez historically took long leaves of absence, none of which resulted in an improvement in her ability to be at work with any regularity or reliability. In the years leading up to her termination, she had been granted CIL for approximately nine months, from August 28, 2008-

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[13] We address Hernandez's contention that Pacific Bell's "lack of communication" precluded discussion of "other potential accommodations" such as working from home that would have allowed her to return to work in connection with her cause of action concerning the interactive process.

May 27, 2009, returning on a modified work schedule of four hours per day. In 2010, she took 480 hours of leave under the FMLA from March through September 2010. After a last leave in September 2010, she continued to miss work. She missed work on September 9, 20-25, and 27-29 and October 11, 12, and 23. She was back on leave in November 2010, and Pacific Bell granted her CIL in December 2010 and extended it to May 9, 2011, for a total of five months. Pacific Bell, however, determined that CIL should not be extended further and so informed Hernandez in the April 18, 2011 letter. This holistic view of Hernandez's attendance shows that her leave was becoming "infinite." Where, as here, repeated, and sometimes prolonged, leaves of absence have not successfully returned the employee to work, further leave is not a reasonable accommodation. (*Hanson*, *supra*, 74 Cal.App.4th at p. 226; *Kimbro v. Atlantic Richfield Co.*, *supra*, 889 F.2d at p. 879, fn. 10; *Jovanovic v. In-Sink-Erator Div. Emerson Electric*, *supra*, 201 F.3d at p. 899 & fn. 9 [open-ended schedule that would allow employee to come and go as he pleased not a reasonable accommodation].)

Hernandez failed to raise a triable issue of material fact as to whether she could perform her job with the accommodation of one more month of leave. First, the only evidence that Hernandez needed just one more month of leave was her self-serving declaration. (*King v. United Parcel Service, Inc.* (2007) 152 Cal.App.4th 426, 433 [plaintiff's subjective beliefs in employment discrimination case do not create a genuine issue of fact; nor do uncorroborated and self-serving declarations]; see Code Civ. Proc., § 437c, subd. (p)(2).) She did not, for example, submit evidence from her psychiatrist that she could have returned to work after one more month of leave.

Second, although Hernandez argues that Pacific Bell customarily granted six months of CIL, that is inaccurate. The written policy states that CIL lasts "[o]ne day to six months, ([which] may be extended) [although] not normally [beyond] 12 months." The length of CIL was therefore discretionary. But even if it was customary for Pacific Bell to grant six months of CIL, it was not obligatory under the FEHA. Pacific Bell had already given Hernandez at least three lengthy leaves under its CIL program: two months in 2003, nine months spanning 2008 to 2009, and five months, from December 2010 to May 2011.

Third, Hernandez contends she met Pacific Bell's attendance policy, notwithstanding her excessive absenteeism, because the policy provides that employees will be at work every scheduled day, on time, unless absent for a reason allowed, for example, as approved leave or by law.[14] Hernandez therefore argues that she met the attendance policy because her absences were approved. But, as we have said, that Pacific Bell was giving her CIL as a reasonable accommodation does not obviate that it wasn't working, i.e., she was not able to return to work with regular and reliable attendance.

Fourth, Hernandez argues that her sporadic presence at work is irrelevant because she was not fired for attendance problems. Rather, she was fired because she failed to return the WCCL or return to work. Hernandez conflates the ultimate reason for her termination with whether she was a qualified individual who could perform the essential functions of her job.

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[14] Pacific Bell was unable in discovery to expand on the written policy.

Her attendance is certainly relevant to whether she could perform her job.

Finally, Hernandez argues that the trial court relied on evidence, to which it had sustained her objection, to conclude she was not a qualified individual. Pacific Bell's reply papers included Dr. Maloff's note indicating he'd examined Hernandez in February 2013, almost two years after she'd been fired. He instructed her to remain off work and stated she "remains T.T.D." The court did refer to the evidence in its ruling.[15] Even assuming the evidence was inadmissible and that the court relied on it, our conclusion does not change. As the court noted, based on her "overall attendance record," she could not raise a triable issue of material fact "that she could demonstrate regular and reliable attendance."[16]

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[15] The court said, "Although she states that she 'believes' she could have returned to work if [leave] had been extended for another month, her medical records indicate that she remained disabled for at least 20 more months following her termination." As Hernandez points out, the note does not conclusively show that she didn't work at all in the 20 months after Pacific Bell fired her.

[16] For these same reasons, we conclude that the trial court properly adjudicated Hernandez's third cause of action for failure to provide a reasonable accommodation, i.e., "one more month of leave." Although one month of leave is not indefinite or infinite leave, this case is not one month of leave. It is about months and months of leave, not just the 2011 leave.

III. Failure to engage in the interactive process

The FEHA requires the employer to engage in a timely, good faith, interactive process with the employee to identify reasonable accommodations, if any, that will enable the employee to perform the job. (§ 12940, subd. (n); see also Cal. Code Regs., tit. 2, § 11069; *Scotch*, *supra*, 173 Cal.App.4th at p. 1012; *Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 61-62 (*Gelfo*).) The interactive process, however, imposes burdens on both the employer and the employee. (*Scotch*, at p. 1012.) Both parties are obliged to keep communication open and to undertake reasonable, good faith efforts to communicate concerns and information. (*Id.* at p. 1013; *Humphrey*, *supra*, 239 F.3d at p. 1138.)

Hernandez maintains that the whole of her work history is irrelevant to determine whether Pacific Bell engaged in the interactive process. But it is relevant. Her undisputed history shows that from almost the beginning of Hernandez's employment, Pacific Bell interacted with her and provided numerous accommodations.[17] Specifically, beginning in 2000, Hernandez took leaves of absence under the FMLA/CFRA in every year she was eligible for such leave. In the years she was ineligible for such leave (2003, 2008, 2009, 2011), she was granted CIL. After returning from nine months of CIL in 2009, Pacific Bell further accommodated her by modifying her schedule to four hours per day. In September 2010, just before her final leave, Hernandez was asked if there were any reasonable

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[17] The accommodations included ones not facially related to her mental disability. In 2001, her workstation was modified after she made an ergonomic request. Additional ergonomic modifications were made in 2003 and 2004.

accommodations the department could provide to enable her to work. Hernandez said there was nothing but that if she thought of anything she'd let Williams know. Williams reminded Hernandez that a reduced work schedule was an option. Hernandez instead proceeded to take her final leave, which began in approximately late November 2010.

Even if we followed Hernandez's suggestion and focused solely on that last leave, Pacific Bell still met its burden of showing that it engaged in good faith in the interactive process. Throughout that last leave, the parties interacted. In response to Hernandez's monthly doctor's notes, Pacific Bell granted her CIL in December 2010 and extended it to May 9, 2011. Pacific Bell's April 18, 2011 letter was similarly a continuation of the interactive process and an attempt to ascertain, what, if any, reasonable accommodation could return Hernandez to work. The letter, in addition to informing Hernandez that CIL would not be extended beyond May 9, advised her that if she was "incapable of performing the essential functions of your job, either with or without a reasonable accommodation," she "may be eligible for a priority job search." She was instructed to return a completed WCCL "so that we can determine whether to proceed with a priority job search." Otherwise, she should report to work. If she neither returned the WCCL nor reported to work, she would be fired.

Hernandez had received a similar letter and request to complete a WCCL in connection with her prior leave in 2009. She responded with a doctor's note stating she could return to work for four hours per day. This time, however, instead of responding to the letter, Hernandez unreasonably ignored it, or at least the

second page of the letter which included these instructions. In doing so, she failed to engage in the interactive process.

Hernandez argues that there is a triable issue because whether the WCCL was included in the letter is disputed. But it is not a material dispute. The letter—which Hernandez admits she failed to read—clearly referenced the WCCL. Had Hernandez read the letter, she would have realized the form was missing and, presumably, contacted Pacific Bell. Thus, any breakdown in the interactive process must be attributed to her, not to Pacific Bell. (See, e.g., *Gelfo*, *supra*, 140 Cal.App.4th at p. 62, fn. 22 ["Each party must participate in good faith, undertake reasonable efforts to communicate its concerns, and make available to the other information which is available, or more accessible, to one party. Liability hinges on the objective circumstances surrounding the parties' breakdown in communication, and responsibility for the breakdown lies with the party who fails to participate in good faith."]; *Jensen v. Wells Fargo Bank*, *supra*, 85 Cal.App.4th at p. 263 [employer can prevail on summary judgment if it shows it did everything in its power to find a reasonable accommodation but the process broke down because the employee failed to engage in discussions in good faith].)

Nor did Hernandez comply with the April 18 letter by returning, in lieu of a completed WCCL, Dr. Maloff's note, which, like the ones before it, repeated that Hernandez was "temporarily totally disabled and on medical leave until approximately June 9, 2011 at which time the disability will be re-evaluated." We will assume that Pacific Bell treated the note as some sort of response

to the WCCL.[18] Even so, the note merely asked for one more month of leave, which Pacific Bell had already told Hernandez in the April 18 letter was not an option. She therefore asked for what she had been told could not be given, i.e., what appeared to be infinite leave. (*Hanson*, *supra*, 74 Cal.App.4th at pp. 226-227 [" 'Reasonable accommodation does not require the employer to wait indefinitely for an employee's medical condition to be corrected.' "].) The note was completely nonresponsive to Pacific Bell's request for information about her disability and what reasonable accommodations (other than additional leave) might be provided to return Hernandez to work. That information was in Hernandez's, not Pacific Bell's, control.

Hernandez suggests that, in any event, it was unnecessary for her to fill out the WCCL. She argues that the form concerns employees who have work restrictions, which she did not then have. Rather, per her doctor's note, she could not work *at all* and needed one more month off, "so there was no need to fill out the WCCL at that time." Not only do we disagree that her inability to work at all obviated her need to engage in the interactive process, but this constitutes an admission that working from home was *not* an accommodation. Although Hernandez faults

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[18] In opposition to the summary judgment motion, Hernandez produced an email exchange between Laurie Miskel and Nena Williams. Miskel noted that Dr. Maloff's note "is in response to a 16a letter which is due tomorrow." Miskel wanted to know whether the leave could be accommodated or whether they should move forward with "her separation." Williams told Miskel to proceed with the separation. The trial court sustained Pacific Bell's objection to the email exchange. Because we have assumed that Pacific Bell considered the note, we need not address whether the objection was properly sustained.

Pacific Bell for not suggesting working from home as a reasonable accommodation, she admits that the *only* accommodation acceptable to her was leave. By unilaterally deciding another leave was the only reasonable accommodation and failing to return the WCCL, Hernandez is responsible for the breakdown in the interactive process.

Finally, Hernandez faults Pacific Bell for not calling or meeting with her face to face either during her final leave or upon receiving Dr. Maloff's note. Given the long history of the interactive process between Pacific Bell and Hernandez and her failure to respond appropriately to the April 18 letter, we cannot find that the FEHA required anything more of Pacific Bell.

IV. Retaliation

Hernandez alleged she was retaliated against for taking leave under the CFRA, requesting a reasonable accommodation, and filing a workers' compensation claim. Pacific Bell established that there is no triable issue of material fact as to this cause of action.

To establish a prima facie case for retaliation under the CFRA, a plaintiff must show (1) the defendant-employer was covered by the CFRA, (2) the plaintiff-employee was eligible to take leave under the CFRA, (3) the plaintiff exercised her right to take leave for a qualifying CFRA purpose, and (4) the plaintiff suffered an adverse employment action because of her exercise of her right to CFRA leave. (*Faust v. California Portland Cement Co.*, *supra*, 150 Cal.App.4th at p. 885; *Dudley v. Department of Transportation* (2001) 90 Cal.App.4th 255, 261.) A retaliation claim under the FEHA requires a plaintiff to show (1) she engaged in a protected activity, (2) she was subjected to an adverse employment action, and (3) there is a causal link

between the protected activity and the adverse employment action. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042; § 12940, subd. (h) [unlawful to discharge or otherwise discriminate against a person because the person "has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part"].) For both types of retaliation claims, if the employee establishes a prima facie case, then the employer must offer a legitimate, nonretaliatory reason for the adverse employment action. (*Faust*, at p. 885.) If the employer does so, then the burden shifts back to the employee to prove intentional retaliation. (*Ibid.*)

Hernandez first claims she was fired because she took leave under the CFRA. She took 400 hours or more of protected leave under the CFRA (or the FMLA) in every year she was eligible, beginning in 2000. Her last such leave was in 2010, when she took leave days from March through September. (See fn. 5, *ante*.) Throughout 2010, she was subject to various disciplinary proceedings regarding her failure to meet performance and attendance standards. She was then fired in May 2011, while on CIL.

Based on this evidence, Hernandez was subject to adverse employment consequences in close proximity to the time she took leave under the CFRA. Such close "proximity in time of an adverse action to an employee's resistance or opposition to unlawful conduct is often strong evidence of a retaliatory motive." (*Taylor v. City of Los Angeles Dept. of Water & Power* (2006) 144 Cal.App.4th 1216, 1235, overruled on other grounds in *Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1162-1163.) "But temporal proximity alone is not sufficient

to raise a triable issue as to pretext once the employer has offered evidence of a legitimate, nondiscriminatory reason for the termination." (*Arteaga*, *supra*, 163 Cal.App.4th at p. 353.)

Pacific Bell offered such a legitimate, nondiscriminatory reason for firing Hernandez: she did not respond properly to the April 18, 2011 letter. That letter informed her CIL would not be continued and either to return a completed WCCL or be at work on May 10. Hernandez ignored the second page of that letter and returned, instead of a completed WCCL, Dr. Maloff's note saying she remained temporarily totally disabled until June, when she would be reevaluated. As we have said, Hernandez therefore did not comply with the April 18 letter. This provided Pacific Bell with a legitimate, nondiscriminatory reason for firing her.

Hernandez responds that this reason was pretextual. First, she disputes that the letter enclosed the three-page WCCL form. We have already assumed there is a triable issue as to that fact, albeit an immaterial one. The letter expressly referenced the WCCL. Pacific Bell therefore was not trying to "hide the ball" that Hernandez needed to fill out a WCCL. Second, Hernandez contends that Pacific Bell treated Dr. Maloff's note as a WCCL but terminated her nonetheless. The note, however, did not contain the detailed information asked for in the WCCL. But, to the extent Pacific Bell treated the note as a substitute for the WCCL, the note merely asked that CIL be extended, which Pacific Bell had informed Hernandez would not be done. Stated otherwise, Dr. Maloff's note informed Pacific Bell that the sole accommodation Hernandez needed was at least one more month of CIL. But that accommodation was no longer tenable.

Next, Hernandez argues that Pacific Bell engaged in illegal corporate practices by docking her for "any absence that was not FMLA, *approved* workers' compensation, or pregnancy related." Therefore, an employee ineligible for leave under the FMLA/CFRA but needing time off as an accommodation would be "docked." She cited selective portions of deposition testimony suggesting that Pacific Bell employees thought that aside from leave under the FMLA, workers' compensation or pregnancy leave, any other absence was not considered protected.[19]

Pacific Bell's written policy, however, states: "Regular and reliable attendance is an essential function of every position and is a condition of employment. Therefore, AT&T West expects and requires that employees will be at work every scheduled day, on time, unless absent for a reason allowed by the applicable collective bargaining agreements, the Paid Time Off Policy for management employees, *an approved leave of absence, or the law*." (Italics added.) There is simply no evidence that Pacific Bell deviated from this policy with respect to Hernandez or "docked" her (it is unclear what Hernandez means by this) for taking protected leave. Rather, the undisputed evidence is that from 2000 to 2011, she took the maximum or almost the maximum amount of leave allowed under the FMLA/CFRA every

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[19] Ross also testified that protected leave could include leave given as an accommodation. The trial court sustained plaintiff's objection to that testimony, presumably because it was submitted with Pacific Bell's reply papers. Whether to consider evidence not referenced in the moving party's separate statement rests in the trial court's sound discretion. (*San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308; *Weiss v. Chevron, U.S.A., Inc.* (1988) 204 Cal.App.3d 1094, 1097-1099.)

year she was eligible (2000, 2001, 2002, 2004, 2005, 2006, 2007, 2010). In the years she was ineligible for leave under those programs (2003, 2008, 2009, 2011), she was granted CIL to accommodate her disability. If by "docked" Hernandez means that Pacific Bell could not consider these protected leaves in its decision whether to *further* accommodate her, that is incorrect. The FEHA may require an employer to give leave as a reasonable accommodation but it is not required to give infinite or open ended leave. (*Hanson*, *supra*, 74 Cal.App.4th at pp. 226-227.)

Finally, Hernandez argues that her "me too" evidence, to which the trial court sustained an objection, establishes that she was discriminated against because of her disability. (*Johnson v. United Cerebral Palsy/Spastic Children's Foundation* (2009) 173 Cal.App.4th 740, 744, fn. 2.) "Me too" evidence may be relevant and admissible in discrimination cases. (*Id.* at p. 747; *Pantoja v. Anton* (2011) 198 Cal.App.4th 87, 115.) In *Johnson*, to support her claim she was fired because she was pregnant, the plaintiff submitted declarations from three employees who worked at the same facility, had the same supervisors, and were fired after it was revealed they were pregnant. (*Johnson*, at p. 761.) *Johnson* found that the declarations were admissible because they presented factual scenarios similar to the one presented by the plaintiff, and the probative value of the declarations clearly outweighed any prejudice to the defendant. (*Id.* at p. 767; accord *McCoy v. Pacific Maritime Assn.* (2013) 216 Cal.App.4th 283, 296-298; *Sprint/United Management Co. v. Mendelsohn* (2008) 552 U.S. 379, 388 [admissibility of such evidence is inherently fact intensive].)

Regardless of whether the trial court here abused its discretion by excluding the "me too" evidence, it did not raise a triable issue of material fact. Hernandez's situation was unlike Sandoval's, Long's and Mangum's. Unlike those employees, Hernandez had a significant history of taking leave and of being accommodated, on multiple occasions and over a long period of time. Those accommodations included three long-term leaves under CIL. Unlike at least Sandoval and Long, Hernandez did not return the WCCL, and her failure to do so, as we have said, was a legitimate, nondiscriminatory ground for termination.

No triable issue of material fact exists as to Hernandez's other two retaliatory claims, which were based on her request for a reasonable accommodation and on filing workers' compensation claims. First, there is no evidence that she was retaliated against because she requested one more month of CIL. (§ 12940, subd. (m)(2).) She was informed in the April 18, 2011 letter—*before* she requested that additional month of leave—that further leave would not be extended and that she was facing possible termination. In any event, her request for what she claims was just one month of leave was not reasonable under the FEHA.

Second, Hernandez alludes to retaliation based on filing a workers' compensation claim but fails to cite to the record and to make any argument regarding that claim or otherwise to establish, in the face of Pacific Bell's legitimate, nondiscriminatory reason for firing her, a causal link between the claims and retaliation.[20] Any retaliation claim based on a workers' compensation claim is forfeited. (See generally *Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785 [contentions waived when there is failure to support them with reasoned argument and citations to authority].)

V. Hernandez's remaining causes of action

Largely for the reasons we have set forth, no triable issue of material fact exists as to Hernandez's remaining causes of action and as to her demand for punitive damages. Specifically, Hernandez's fifth cause of action for failure to prevent discrimination and retaliation and sixth cause of action for wrongful termination in violation of public policy are based on the same factual allegations and legal theories supporting her statutory claims. Therefore, they rise or fall with her causes of action for violation of the FEHA and retaliation. (*Hanson*, *supra*, 74 Cal.App.4th at p. 229 [where plaintiff's "FEHA claim fails, his claim for wrongful termination in violation of public policy fails"].) Hernandez concedes this.

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[20] The record, which she fails to cite in connection with this claim, shows that she filed, for example, workers' compensation claims in 1999 because an odor (spoiled potato salad) in the office made her nauseous; in October 2002 for headaches and injuries to her "back, shoulders, bilateral upper extremities, bilateral hands, and other parts of her body"; and in October 2003 because a spider bit her.

Hernandez does not address her intentional infliction of emotional distress cause of action. Any issue regarding it is therefore forfeited. (*Badie v. Bank of America*, *supra*, 67 Cal.App.4th at pp. 784-785.) In any event, she does not cite to or allege any conduct that is extreme or outrageous. (See generally *Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 Cal.3d 148, 160 ["actions which are a normal part of the employment relationship, such as demotions, promotions, criticism of work practices, and frictions in negotiations as to grievances," are not extreme and outrageous to the extent they are outside the workers' compensation law].)

Likewise, given that Hernandez's substantive claims fail, her request for punitive damages was also properly adjudicated. (See *Coleman v. Gulf Ins. Group* (1986) 41 Cal.3d 782, 789, fn. 2 [punitive damage claim cannot stand where substantive claims fail]; *Mother Cobb's Chicken T., Inc. v. Fox* (1937) 10 Cal.2d 203, 205.)

DISPOSITION

The judgment is affirmed. Defendant and respondent to recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, Acting P. J.

We concur:

LAVIN, J.

STRATTON, 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.