Filed 12/20/16 Allen v. Goodwill Industries CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

MONIQUE ALLEN, Plaintiff and Appellant, v. GOODWILL INDUSTRIES OF SOUTHERN CALIFORNIA, Defendant and Respondent.	B265282 (Los Angeles County Super. Ct. No. BC527068)

APPEAL from an order of the Superior Court of Los Angeles County, Richard E. Rico, Judge. Affirmed in part and reversed in part.

Rose, Klein & Marias, Jennifer Ostertag; The Arkin Law Firm, Sharon J. Arkin; Law Offices of Gary C. Eto, Gary C. Eto for Plaintiff and Appellant.

Ford & Harrison, Lyne A. Richardson and Catherine L. Hazany for Defendant and Respondent.

Plaintiff Monique Allen, who suffers migraines, sued her former employer, Goodwill Industries of Southern California, under the Fair Employment and Housing Act. (Gov. Code, § 12900 et seq.; FEHA),[1] the California Family Rights Act, (§ 12945.2; CFRA), and the Family Medical Leave Act (29 U.S.C. § 2601; FMLA), alleging Goodwill terminated her employment because she was disabled, failed to reasonably accommodate her medical condition, failed to engage in a good faith, interactive process to identify a reasonable accommodation, and retaliated against her because she sought an accommodation. Goodwill moved for summary judgment or adjudication, asserting plaintiff received reasonable accommodations but was discharged because her job performance was poor. The court granted the motion and entered judgment in Goodwill's favor, and Allen appeals.

We conclude triable issues exist as to whether Goodwill discriminated against and failed to accommodate Allen due to its animus against disabled workers, and as to whether it discharged her in retaliation for having taken medical leave. However, we conclude no triable issues exist as to whether Goodwill retaliated against Allen because she sought a disability accommodation. Accordingly, we affirm the judgment in part and reverse it in part.

BACKGROUND

I. Allen's Employment

Goodwill receives referrals from such entities as the California Department of Rehabilitation to provide job placement services to individuals who, for example, are deaf or hard of

[1] Undesignated statutory references will be to the Government Code.

hearing. Allen began working for Goodwill in 2008, and in June 2011 became an employment services specialist under the supervision of Jacqueline Guevara, finding jobs for deaf and hard-of-hearing individuals. Allen worked out of Goodwill's offices in Victorville and San Bernardino, communicating with her clients by text and email and through apps on her company-supplied smart phone. Her duties sometimes required that she be out of the office to attend meetings with prospective employers.

In October 2011, Allen suffered a brain injury that caused her to experience debilitating migraines. To alleviate them, she would have a soft drink and crackers, take a walk, and sometimes go to the emergency room or a doctor appointment for outpatient procedures such as Botox injections. Guevara informally accommodated Allen's needs and gave her positive performance reviews.

In October 2012, Department of Rehabilitation representatives, including Kathy Bates-Polster, met with Allen and Guevara to discuss complaints about Goodwill's services, including lack of placement numbers, delayed responses to the department's referrals, and lack of communication by Allen. One specific complaint was that clients dropping in on Allen unannounced would sometimes discover she was not in the office. At the meeting, Allen and Guevara produced emails showing their communication efforts were diligent, and breakdowns in communication resulted not because Goodwill personnel were inaccessible but because contact information given by the department was sometimes incomplete. Allen explained that because she worked at two different offices, a person appearing unannounced at one might discover she happened to be in the

other office that day. One of the department's representatives disbelieved Goodwill's explanations about incomplete contact information, calling them "lies." The department also complained Allen was unable to communicate in American Sign Language, but a department expert who assessed her signing found her to be proficient.

In November 2012, Alaina Bigger replaced Guevara as Allen's supervisor in the Victorville office, and Angela Gardner became the coordinator in charge of both the San Bernardino and Victorville offices.

On November 1, Allen was hospitalized and failed without notice to appear for work. Goodwill thereafter executed the first of its progressive disciplinary steps by requiring that she provide a physician's explanation of her condition and advising her in written "employee performance counseling" that she was required to call in each day she was sick unless she was on a prearranged medical leave of absence. Allen thereafter obtained a physician's note explaining she suffered hemiplegic migraines with intermittent flares. She gave the note first to Guevara but later, when informed Bigger was her new supervisor, to Bigger, and requested of Bigger that Goodwill provide a reasonable accommodation for her condition. When Allen attempted to tell Bigger what accommodations she needed, for example that she be allowed to dim the lights in her office and have soda and crackers on hand, Bigger told her to wait until a special accommodations meeting was held with Elsie Rodriguez, a human resources officer, where Allen's issues would be addressed. In the meantime, Bigger told Allen she was not allowed to leave the

building even if taking a walk would alleviate nausea caused by a migraine.[2]

On December 4, 2012, Allen suffered side effects from a Botox injection, including vision impairment, and was hospitalized for a week, after which her physician authorized her return to work on December 10 "without restrictions."

On December 18, 2012, Goodwill executed the first step of its disciplinary policy regarding Allen's work performance, informing her she had placed only five individuals in jobs for the year 2012, far short of the company's goal of 18 placements. Allen informed Guevara orally and in writing that the goal of 18 placements was impossible because Goodwill did not have that many clients in 2012, as the Department of Rehabilitation made only seven referrals that year. Allen had placed five of them in jobs, the sixth had been offered a job but declined to accept it, and the seventh was due to attend an interview soon.

In December 2012, Goodwill instituted companywide cost saving measures that resulted in Allen losing her laptop and smart phone (with its communication apps), which adversely impacted her communications with deaf clients, who did not speak on the phone but communicated through apps, text messages and email. When Allen asked Bigger how she was

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[2] Allen testified, "[I]t just seemed as though it was a lot of pressure on me all of a sudden. You know, with the doctor's appointments, and with, you know, my work or—if I had to maybe go get a 7-Up because I had nausea spells. And it was like, 'You can't leave this building.' And I'm just like, 'But I'm sick. I'm going to start throwing up in here.' Because I would go through waves of nausea. And so sometimes I would take the nausea medicine, but if it didn't work, I would have to get a 7-Up or something like that."

supposed to communicate with clients, Bigger told her to "figure it out."

On January 25, 2013, Bigger met with Kathy Bates-Polster, the Department of Rehabilitations representative who had expressed concerns about Allen at the October 2012 meeting. Bates-Polster again expressed several concerns about Allen. She said it was difficult to bring them directly to Allen because she reacted defensively when challenged, and some clients avoided her because of her "mood" and complained about her lack of communication. Bates-Polster said one client complained Allen was unhelpful with her (the client's) resume, and Allen did not understand the deaf and hard-of-hearing culture, was overly picky about which clients she helped, could not effectively communicate with clients because her sign language skills were deficient, and was not trusted by the clients. Bates-Polster suggested that other Goodwill employees be assigned to communicate with clients and assist with placements currently assigned to Allen.

Goodwill terminated Allen's employment on January 30, 2013, citing poor job performance, numerous client complaints, and "dissatisfied funders." No accommodation meeting was ever held.

II. Evidence of Discriminatory Animus

Allen was replaced by two individuals, both of whom were required by Goodwill to have smart phones. Arlene Moreno, another employment services specialist who had at some point failed to place 18 clients in jobs in 2011, was not discharged but instead reassigned.

In Allen's last month of employment she trained David Walls for the position of employment services specialist. In

support of Allen's opposition to summary judgment, Walls declared she was effective in performing her various duties and was highly regarded by clients, vendors, and counselors. She could not possibly have met the purported goal of placing 18 individuals in jobs in 2012, he stated, because Goodwill did not have that many referrals that year. After Allen was discharged, Walls attended a meeting with Gardner and Bigger during which, as Walls declared, Gardner and Bigger "both stated words to the effect that they had to get rid of [Allen] because she . . . had to take time off of work for her injury, time off for doctors appointments and time off when she would call in sick."

Guevara, who had supervised Allen through October 2012, testified that she knew of no cause for Allen to be discharged.

III. Procedural History

Allen filed her complaint in the superior court in November 2013, alleging causes of action for disability discrimination, retaliation, failure to prevent discrimination, denial of a reasonable accommodation, failure to engage in an interactive accommodation process, wrongful termination in violation of public policy, and discrimination and retaliation for having taken medical leave.

Goodwill moved for summary judgment or adjudication, arguing Allen was discharged because her job performance was poor, not because she was disabled, and her retaliation claims failed because she engaged in no protected activity and there was no link between any such activity and her discharge. Goodwill did not dispute that Allen had a medical condition or disability and suffered an adverse employment action. It objected on hearsay grounds to Walls's statement that Bigger and Gardner

had said "words to the effect" that Allen was discharged due to her medical condition.

The court sustained Goodwill's objection, granted its motion for summary judgment, and entered judgment against Allen. She now appeals.

DISCUSSION

I. Standard of Review

In ruling on a defense motion for summary judgment, the trial court must determine whether the motion presents material facts sufficient to establish that one or more of the elements of the claim cannot be proved, or that there is a complete defense to the cause of action. (Code Civ. Proc., § 437c, subds. (c), (o)(1) & (o)(2).) If the defendant's motion makes such a prima facie showing, the plaintiff's opposition must demonstrate the existence of one or more disputed issues of material fact as to the cause of action or defense. (Code Civ. Proc., § 437c, subd. (p)(2).) Unless triable issues of material fact exist, no trial is required and the defendant is entitled to judgment on that claim as a matter of law.

On appeal, we apply an independent standard of review to determine whether a trial is required—whether the evidence favoring and opposing the summary judgment motion would support a reasonable trier of fact's determination in the plaintiff's favor on the cause of action or defense. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) In doing so we view the evidence in the light most favorable to the party opposing summary judgment. (*Id.* at p. 843; *Alexander v. Codemasters Group Limited* (2002) 104 Cal.App.4th 129, 139.) We accept as true the facts shown by the evidence offered in opposition to summary judgment and the reasonable inferences that can be

drawn from them. (*Spitzer v. Good Guys, Inc*. (2000) 80 Cal.App.4th 1376, 1385-1386.)

II. FEHA Discrimination and Summary Judgment

A. Discrimination

FEHA makes it "an unlawful employment practice" to discriminate against a person "in terms, conditions, or privileges of employment" based upon physical disability. (§ 12940, subd. (a).) "Physical disability" includes, as pertinent here, any disorder or condition that affects a neurological system and makes working difficult. (§ 12926, subd. (m).)

Because direct evidence of an unlawful discrimination is seldom available, courts use a system of shifting burdens to aid in the presentation and resolution of such claims at trial. (*Guz v. Bechtel National, Inc*. (2000) 24 Cal.4th 317, 354 (*Guz*); *Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1005 (*Hersant*).) To establish a prima facie case of physical disability discrimination under FEHA, the employee must demonstrate that although she is disabled, she is qualified to do the job, she was subjected to an adverse employment action, and "some other circumstance suggests a discriminatory motive." (*Guz*, *supra*, at p. 355; accord *Faust v. California Portland Cement Co*. (2007) 150 Cal.App.4th 864, 886.) To establish that she is qualified, the employee must show she can perform the essential functions of the job with or without reasonable accommodation. (*Green v. State of California* (2007) 42 Cal.4th 254, 260-261.) If the plaintiff establishes a prima facie case, a presumption of discrimination arises. (*Ibid*.)

The employer may rebut the presumption by producing admissible evidence that it discharged the employee for a legitimate nondiscriminatory reason. (*Guz*, *supra*, 24 Cal.4th at

pp. 355-356; *Deschene v. Pinole Point Steel Co.* (1999) 76 Cal.App.4th 33, 44.) If it does so, the burden shifts back to the employee to produce substantial evidence that the employer's justification for its decision is either untrue or pretextual or that the employer acted with discriminatory animus. (*Guz*, at p. 356; *Hersant*, *supra*, 57 Cal.App.4th 997 at pp. 1004-1005.)

These respective burdens of establishing discrimination are altered in a summary judgment motion. A defendant employer moving for summary judgment on a FEHA cause of action has the initial burden of "presenting evidence that *either* negates an element of the employee's prima facie case, or establishes a legitimate nondiscriminatory reason for taking the adverse employment action against the employee." (*Swanson v. Morongo Unified School Dist.* (2014) 232 Cal.App.4th 954, 966 (*Swanson*).) A legitimate reason is one that is "*facially unrelated to prohibited bias*, and which, if true, would thus preclude a finding *of discrimination*." (*Guz*, *supra*, 24 Cal.4th at p. 358.) Making this showing is "'not an onerous burden [citation], and is generally met by presenting admissible evidence showing the defendant's reason for its employment decision [citation].'" (*Swanson*, *supra*, 232 Cal.App.4th at p. 965.)

When the employer satisfies its initial burden with evidence that negates the plaintiff's prima facie case or establishes a legitimate nondiscriminatory reason for the discharge, the burden shifts to the employee to offer substantial evidence that the employer's stated reasons are "'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.'" (*Swanson*, *supra*, 232 Cal.App.4th at p. 966.)

To satisfy this burden, the employee may not "simply deny the credibility of the employer's witnesses or . . . speculate as to discriminatory motive." (*Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 862.) Nor is it enough to show that the employer's reasons were unsound, wrong, or mistaken; "[w]hat the employee has brought is not an action for general unfairness but for age discrimination." (*Hersant*, *supra*, 57 Cal.App.4th at p. 1005.) Rather, the employee "'must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder *could* rationally find them "unworthy of credence," [citation], and hence infer "that the employer did not act for the [the asserted] non-discriminatory reasons." [Citations.]'" (*Ibid*.) If, "considering the employer's innocent explanation for its actions, the evidence as a whole is insufficient to permit a rational inference that the employer's actual motive was discriminatory," the employer is entitled to summary judgment. (*Guz*, *supra*, 24 Cal.4th at p. 361.)

But "evidence that the employer's claimed reason is *false*—such as that it conflicts with other evidence, or appears to have been contrived after the fact—will tend to suggest that the employer seeks to conceal the real reason for its actions, and this in turn may support an inference that the real reason was unlawful." (*Mamou v. Trendwest Resorts, Inc*. (2008) 165 Cal.App.4th 686, 715.)

B. Summary Judgment was Improper

In its motion for summary judgment, Goodwill did not attempt to negate Allen's prima facie case of disability discrimination, but asserted only that it had legitimate, nondiscriminatory reasons for its decision: Allen was discharged

because her work performance was unsatisfactory and Goodwill had received complaints about her from the Department of Rehabilitations. These reasons are "facially unrelated to prohibited bias," and, if true, would "preclude a finding of discrimination." (*Guz*, *supra*, 24 Cal.4th at p. 358, italics omitted.) Goodwill offered Gardner's and Bigger's declarations and deposition testimony describing its legitimate reasons, which sufficed to shift the burden to Allen to present substantial evidence that the stated reasons were untrue or pretextual or that Goodwill acted with discriminatory animus.

Allen offered Walls's declaration and Guevara's deposition testimony to the effect that she performed her duties effectively and was well regarded. Allen herself testified at deposition (and Walls confirmed) that Goodwill's performance goal of 18 job placements in 2012 was never realistic nor one upon which Goodwill actually relied. Guevara and Allen further testified that the concerns expressed to Bigger in January 2013 by Bates-Polster were not then current, as they had been addressed and resolved at the meeting held in October 2012.

Finally, Walls, as noted above, declared that Gardner and Bigger "both stated words to the effect that they had to get rid of [Allen] because she . . . had to take time off of work for her injury, time off for doctors appointments and time off when she would call in sick."

Goodwill objected to this statement on hearsay grounds, which objection the trial court sustained, finding that Walls failed to "set forth the specific statements made by [the supervisors]; rather, he provide[d] his opinion of the conversation he purportedly overheard and thus [it was] not an exception to

the hearsay rule. Because there is no declaration of a party, the declaration is not admissible as a party admission."

Plaintiff challenges this ruling, which we review for abuse of discretion. (See *Garrett v. Howmedica Osteonics Corp*. (2013) 214 Cal.App.4th 173, 181.) We conclude the ruling is unsound.

"'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) Hearsay is inadmissible unless an exception applies. (*Id*. at subd. (b).) A declaration is hearsay, but the Code of Civil Procedure makes a declaration admissible in support of or opposition to a motion for summary judgment so long it is made on personal knowledge by a competent affiant and sets forth admissible evidence. (Code Civ. Proc., § 437c, subds. (b) & (d); see Evid. Code, § 1201 [multiple hearsay is admissible if each statement falls within a hearsay exception].) "Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity . . . ." (Evid. Code, § 1220; see also § 1224 [where a party's liability depends on its agent's breach of duty, the party admission exception extends to admissions made by the agent].)

Here, Walls declared Gardner and Bigger stated "words to the effect" that Goodwill discharged Allen because of her disability. Gardner's and Bigger's statements as relayed by Walls were admissible as party admissions. (Evid. Code, §§ 1220, 1224.) Walls was not required to relate the statements verbatim—a summary or paraphrase will suffice. (*People v. Mayfield* (1997) 14 Cal.4th 668, 764, overruled on another ground by *People v. Scott* (2015) 61 Cal.4th 363, 390, fn. 2 ["a summary

or paraphrase of a defendant's statements" is "sufficient to satisfy the hearsay exception for party admissions"].) Whether Walls's summary was accurate—i.e., whether Gardner's and Bigger's "words to the effect" were sufficiently similar to their actual words to prove discrimination—goes to the weight of his declaration, not its admissibility.

Goodwill argues only "significant" evidence suffices to defeat summary judgment in an employment discrimination case. The demarcation line between significant and insignificant evidence is sometimes elusive, but we are confident Walls's evidence regarding Gardner's and Bigger's statements signifies. He was a Goodwill supervisor in a meeting with two other supervisors, and nothing in the record suggests the conversation was so inaccessible or complex as to exceeded his ability to paraphrase it accurately.

A reasonable trier of fact could conclude from Allen's evidence that Goodwill's putative reasons for discharging Allen were pretextual. Therefore, based on our independent review of the record, the evidence as a whole permits a rational inference that a substantial motivating factor in Goodwill's discharge of Allen was discriminatory. (*Guz*, *supra*, 24 Cal.4th at pp. 360-361; *Reeves v. Sanderson Plumbing Prods*. (2000) 530 U.S. 133, 147.) Plaintiff's causes of action for disability discrimination therefore survive summary judgment.

III. Failure to Accommodate or Engage in an Interactive Process

FEHA makes it unlawful for an employer "to fail to make reasonable accommodation for the known physical . . . disability of an applicant or employee" except where the employer demonstrates that an accommodation would "produce undue

hardship . . . to its operation." (§ 12940, subd. (m).) A reasonable accommodation is any "'modification or adjustment to the workplace that enables the employee to perform the essential functions of the job held or desired.'" (*Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1010.)

Reasonable accommodations may include "[j]ob restructuring, part-time or modified work schedules, reassignment to a vacant position, . . . and other similar accommodations for individuals with disabilities." (§ 12926, subd. (p).) FEHA "does not obligate an employer to choose the best accommodation or the specific accommodation a disabled employee or applicant seeks. [Citation.] It requires only that the accommodation chosen be 'reasonable.' (§ 12940, subds. (a) & (m).)" (*Raine v. City of Burbank* (2006) 135 Cal.App.4th 1215, 1222-1223.) If the employee "cannot be accommodated in his or her existing position and the requested accommodation is reassignment, an employer must make affirmative efforts to determine whether a position is available. [Citation.] A reassignment, however, is not required if 'there is no vacant position for which the employee is qualified.'" (*Id.* at p. 1223.)

"'Two principles underlie a cause of action for failure to provide a reasonable accommodation. First, the employee must request an accommodation. [Citation.] Second, the parties must engage in an interactive process regarding the requested accommodation and, if the process fails, responsibility for the failure rests with the party who failed to participate in good faith. [Citation.]'" (*Avila v. Continental Airlines, Inc.* (2008) 165 Cal.App.4th 1237, 1252.) "Generally, '"[t]he employee bears the burden of giving the employer notice of the disability. [Citation.] This notice then triggers the employer's burden to take 'positive

steps' to accommodate the employee's limitations. . . . [¶] . . . The employee, of course, retains a duty to cooperate with the employer's efforts by explaining [his or] her disability and qualifications. [Citation.] Reasonable accommodation thus envisions an exchange between employer and employee where each seeks and shares information to achieve the best match between the [employee's] capabilities and available positions." [Citation.]'" (*Raine v. City of Burbank*, *supra*, 135 Cal.App.4th at p. 1222.)

"While a claim of failure to accommodate [under subdivision (m)] is independent of a cause of action for failure to engage in an interactive dialogue [under subdivision (n)], each necessarily implicates the other." (*Gelfo v. Lockheed Martin Corp*. (2006) 140 Cal.App.4th 34, 54.) "Although it is the employee's burden to initiate the process, no magic words are necessary, and the obligation arises once the employer becomes aware of the need to consider an accommodation. 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." (*Id*. at p. 62, fn. 22.)

In opposition to Goodwill's motion for summary judgment, Allen presented her own testimony and Bigger's email to Rodriguez to the effect that she requested an accommodation, including that she be allowed to leave the building when suffering a migraine. She also presented evidence, her own

deposition testimony and that of Moreno, that Bigger refused to permit her to leave the building.

Goodwill argues no evidence indicates Allen specifically asked that she be permitted to take walks when suffering migraines. That is true. But when Allen attempted to tell Bigger some of the accommodations she needed, Bigger told her to wait until a meeting was held with Rodriguez, which never occurred. An employer that refuses to discuss accommodations cannot later complain that specific accommodations were not requested.

Goodwill argues that the only indication it had regarding Allen's need to take a walk was that she needed to leave her desk to obtain soda and crackers, which Goodwill permitted her to keep at her desk, thus obviating the need for the walk. The argument is without merit. First, the evidence about the extent of the walk Allen needed was ambiguous at best. Although Moreno testified Allen told her she needed to get up from her desk to obtain soda and crackers, Allen herself testified she needed longer walks for other reasons. In any event, whether it was a reasonable accommodation for Goodwill to permit Allen to keep soda and crackers at her desk while at the same time prohibiting her from leaving the building should she need to obtain more is a factual matter on which reasonable minds can differ. "'Ordinarily, the reasonableness of an accommodation is an issue for the jury.'" (*Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 954.) A reasonable fact finder could determine on this record that Goodwill's restriction was unreasonable.

Goodwill argues that because Allen's physician cleared her to work "without restrictions," she did not need to take walks as a matter of law. The argument is meritless. A physician's release

to work "without restriction" establishes only that at the time the employee was released, she had no physical condition that limited a major life activity. But Allen presented evidence that she continued thereafter to have headaches necessitating the accommodations she sought. A jury would not have to disbelieve the physician to credit Allen and conclude the release was nondispositive.

We conclude triable issues exist as to Allen's cause of action for failure to accommodate.

The same is true as to Allen's cause of action for failure to participate in an interactive process to determine what a reasonable accommodation would entail. FEHA makes it unlawful for an employer "to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical . . . disability . . . ." (§ 12940, subd. (n).) To prevail on a cause of action for failure to engage in the interactive process, "an employee must identify a reasonable accommodation that would have been available at the time the interactive process should have occurred." (*Scotch v. Art Institute of California*, *supra*, 173 Cal.App.4th at p. 1018.)

Allen presented evidence that when she asked Bigger for an accommodation in early November 2012, Bigger cut her off and told her to wait until they could meet with Rodriguez, which did not occur in the remaining three months of her employment. This evidence raises a triable issue as to whether Goodwill's efforts were timely and in good faith.

Goodwill argues FEHA, which does not require any particular sort of interactive process, permits the exact process

Allen received—she met with Bigger. But given the evidence that Bigger did not permit Allen to identify the accommodations she sought, a reasonable trier of fact could find the meeting with Bigger failed to satisfy the good faith criterion.

A. Retaliation

In her second and eleventh causes of action, Allen alleged she suffered retaliation merely for requesting an accommodation. FEHA makes it unlawful "[f]or any employer . . . to discharge . . . or otherwise discriminate against any person because the person has opposed any practices forbidden under this part . . . ." (§ 12940, subd. (h).) To state a claim of retaliation under FEHA, a plaintiff must 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).) The question here is whether Allen's request in 2012 for an accommodation qualifies as a "protected activity" within the meaning of section 12940, subdivision (h).

In *Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal.App.4th 635, we held that a mere request for accommodation cannot support a retaliation claim because an employee making such a request has not "opposed" any employer practice "forbidden under" FEHA. (*Id.* at pp. 653-654.) As of January 1, 2016, that holding is no longer good law, because effective that date the Legislature amended section 12940 by adding paragraph (4) to subdivision (l), which makes it unlawful "[f]or an employer or other entity covered by this part to, in addition to the employee protections provided pursuant to subdivision (h), retaliate or otherwise discriminate against a

person for requesting accommodation under this subdivision, regardless of whether the request was granted." But the amendment operates prospectively only (*Moore v. Regents of University of California* (2016) 248 Cal.App.4th 216, 247), and we continue to be of the opinion that before 2016, an employee's mere request for an accommodation was not protected activity.

The trial court therefore properly granted summary adjudication as to Allen's retaliation claims.

IV. Wrongful Termination in Violation of Public Policy; Failure to Prevent Discrimination

Because summary adjudication must be reversed as to Allen's causes of action for disability discrimination, failure to accommodate, and failure to engage in an interactive process, so too must it be reversed as to her causes of action for wrongful termination in violation of public policy and failure to prevent discrimination. (*Stevenson v. Superior Court (Huntington Memorial Hospital)* (1997) 16 Cal.4th 880, 885 [termination in violation of FEHA meets the elements of a claim for termination in violation of public policy]; *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 288 [discrimination establishes failure to prevent discrimination].)

V. Discrimination and Retaliation for Taking Medical Leave

The same reasoning applies to Allen's third through sixth causes of action, in which she alleges Goodwill discriminated and retaliated against her because she took medical leave, in violation of the CFRA and FMLA. Those acts generally make it "an unlawful employment practice for an employer of 50 or more persons to refuse to grant a request by an employee to take up to 12 workweeks in any 12-month period for family care and

medical leave. [Citation.] By prohibiting 'employment discrimination based upon family and medical leave, the CFRA strengthens the FEHA's general goal of preventing the deleterious effects of employment discrimination, and also furthers the CFRA's specific goal of promoting stability and economic security in California families.'" (*Faust v. California Portland Cement Co.*, *supra*, 150 Cal.App.4th at p. 878.)

Goodwill argues these causes of action fail for the same reasons Allen's discrimination causes of action fail. Conversely, they survive because Allen's causes of action for discrimination survive.

DISPOSITION

The judgment is reversed as to all but plaintiff's second and eleventh causes of action for retaliation under FEHA, as to which the judgment is affirmed. Plaintiff is to recover her costs on appeal.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, P. J.

LUI, J.