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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

FRANCES ARCHIBOLD, Plaintiff and Appellant, v. TIME WARNER CABLE INC., Defendant and Respondent.	B277336 (Los Angeles County Super. Ct. No. BC 562477)

APPEAL from the judgment of the Superior Court of Los Angeles County, Allan J. Goodman, Judge. Affirmed.

Doumanian & Associates, Nancy P. Doumanian, and Ankineh Zadoorian for Plaintiff and Appellant.

Hill, Farrer & Burrill, James A. Bowles and Casey L. Morris for Defendant and Respondent.

Plaintiff and appellant Frances Archibold worked as a customer service agent for defendant and respondent Time Warner Cable Inc. (TWC) until 2013, when the company terminated her employment. TWC alleged that Archibold had violated company policy by falsifying customer satisfaction surveys. Archibold filed a complaint alleging disability discrimination under the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.)[1] and wrongful termination. She claimed that TWC's explanation for her termination was a pretext, and that the company fired her because of her recurrent medical leaves and need for accommodation for several medical conditions. The trial court granted summary judgment in favor of TWC, and Archibold appeals from the judgment. We affirm.

FACTS AND PROCEEDINGS BELOW

Archibold began working as a customer service agent for TWC in 1998, a position she held for the next 15 years. In this job, Archibold received payments from customers, issued and returned cable equipment, and dealt with other customer service issues. On four occasions between 2009 and 2012, she took medical or family leave. These were: (1) in 2009, approximately one week of family leave in order to care for her ill father; (2) later in 2009, approximately one month of leave to address her depression and anxiety; (3) in 2011, approximately one month leave for sciatica; and (4) in 2012, approximately one month of leave to deal with her type 2 diabetes. In addition to these conditions, Archibold was diagnosed in 2009 with Meniere's disorder, a condition that causes episodes of vertigo. In 2010, Archibold's doctor wrote a letter stating that Archibold had Meniere's disorder, and asking to "[p]lease extend to her any courtesy necessary."

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[1] Unless otherwise specified, subsequent statutory references are to the Government Code.

According to Archibold, when she returned from her leave of absence to address her depression, she requested that her job duties be changed so that she would no longer have to deal with customers, but would instead only handle payments and equipment returns. When she returned from her next leave, to address her sciatica, Archibold claims she asked her supervisor to be allowed to take more breaks. When she returned from her final leave, to treat her diabetes, Archibold again requested more breaks, and to handle payments rather than to deal with customers. In each case, Archibold claimed that her supervisor agreed to look into her requests, but never got back to her, and Archibold did not bring the matter to human resources or anyone else in management. Archibold testified that she handled her health issues on the job by taking more and longer breaks than were authorized. Although no one gave her permission to do so, she was never disciplined for taking breaks, and she was able to fulfill her job responsibilities in this manner.

A few days after returning to work from her first leave in 2009, a manager gave her a verbal warning because her cash drawer was $30 short. A few weeks later, a manager gave her a written warning because her cash drawer was $950 out of balance, and she had failed to follow proper cash handling procedures. In 2012, Archibold left the door of the safe in the office's cash room open overnight, and a manager issued her a "Final Written Warning."

In 2013, TWC performed an audit that suggested that some employees had been falsifying customer satisfaction surveys. Customers were able to respond to surveys either online or at computer kiosks located at TWC service centers. Each customer service agent was required to receive at least five survey responses per month, and employees received bonuses and pay increases if they were highly rated. The audit revealed that, in the case of Archibold and 97 other employees, several survey responses had been entered in quick succession, only one or

two minutes apart from one another. The company reasoned that it was unlikely that different customers would enter survey responses for the same employee virtually at the same time, and suspected that the employees were entering false survey responses themselves.

As part of its investigation into the questionable survey results, TWC interviewed Archibold. She admitted filling in the survey responses herself, but claimed that she had not falsified data. According to Archibold, the computer kiosk where customers at her location could submit surveys was frequently broken. At these times, Archibold would print out a copy of the survey for the customer to fill in. The customer would then hand the completed survey back to her, and Archibold would transcribe the survey results into a computer. She would then shred the customer's hard copy of the survey. Archibold claimed she was not aware of any company policy forbidding her from doing what she did.

Upon completion of the investigation, TWC concluded that 92 of the 98 employees, including Archibold, had acted improperly. Of this number, 53 employees with no prior disciplinary record received a written warning. In addition, 20 employees who already had a written warning on their file received a final warning. Archibold and 18 other employees who had already received final warnings were terminated.

In November 2014, Archibold filed a complaint alleging disability discrimination, wrongful termination, and intentional infliction of emotional distress. In 2016, TWC filed a motion for summary judgment, which the trial court granted.

DISCUSSION

Archibold contends that the trial court erred by granting summary judgment in favor of TWC because triable issues of material fact exist as to four of her causes of action: (1) her claim of disability discrimination pursuant to section 12940, subdivision (a); (2) her claim of disability discrimination

for failure to provide reasonable accommodation pursuant to section 12940, subdivision (m); (3) her claim of disability discrimination for failure to engage in interactive process, pursuant to section 12940, subdivision (n); and (4) her claim of wrongful termination in violation of public policy. We find no merit in Archibold's arguments, and we affirm.

I. Standard of Review

Summary judgment is proper when there are no triable issues of material fact and the moving party is entitled to judgment as a matter of law. (*Nealy v. City of Santa Monica* (2015) 234 Cal.App.4th 359, 370; *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*); Code Civ. Proc., § 437c, subd. (c).) A defendant moving for summary judgment bears an initial burden of showing that one or more elements of the plaintiff's cause of action cannot be established or that there is a complete defense to that cause of action. (*Nealy v. City of Santa Monica*, *supra*, 234 Cal.App.4th at p. 370; *Aguilar*, *supra*, 25 Cal.4th at p. 849.) If the defendant meets this burden, the plaintiff has the burden to demonstrate one or more triable issues of material fact as to the cause of action or defense. (*Ibid.*) A triable issue of material fact exists "if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Id.* at p. 850.)

In reviewing summary judgment, "[w]e review the trial court's decision de novo, liberally construing the evidence in support of the party opposing summary judgment and resolving doubts concerning the evidence in favor of that party." (*State of California v. Allstate Ins. Co.* (2009) 45 Cal.4th 1008, 1017-1018.)

II. Disability Discrimination under Section 12940, Subdivision (a)

Section 12940, subdivision (a) forbids employers from "discharg[ing] [a] person from employment . . . , or . . . discriminat[ing] against the person in compensation or in terms, conditions, or privileges of employment" on the basis of physical disability, among other factors. Archibold contends that she established triable issues of material fact regarding her cause of action under this subdivision, and that the trial court erred by granting summary judgment in favor of TWC. We disagree.

In cases alleging employment discrimination under FEHA, California courts have adopted the three-stage test established in federal courts. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354 (*Guz*).) The first stage "places on the plaintiff the initial burden to establish a prima facie case of discrimination." (*Ibid.*) This stage requires the plaintiff "to show: (1) he suffers from a disability; (2) he is otherwise qualified to do his job; and, (3) he was subjected to adverse employment action because of his disability." (*Faust v. California Portland Cement Co.* (2007) 150 Cal.App.4th 864, 886.) Although "the plaintiff's prima facie burden is 'not onerous' [citation], he must at least show ' "actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were 'based on a [prohibited] discriminatory criterion.' " ' " (*Guz*, *supra*, 24 Cal.4th at p. 355.)

If the plaintiff can meet this burden, "a presumption of discrimination arises." (*Guz*, *supra*, 24 Cal.4th at p. 355.) At this second stage, "the burden shifts to the employer to rebut the presumption by producing admissible evidence, sufficient to 'raise[] a genuine issue of fact' and to 'justify a judgment for the [employer],' that its action was taken for a legitimate, nondiscriminatory reason. (*Id.* at pp. 355–356.) An employer need not show that its reason for terminating the plaintiff was correct or fair: " '[T]he factual dispute at issue is whether

discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent.' " (*Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1005.)

If the defendant can satisfy this burden, "the presumption of discrimination disappears," and the analysis moves to the third stage. (*Guz*, *supra*, 24 Cal.4th at p. 356.) At this point, "[t]he plaintiff must . . . have the opportunity to attack the employer's proffered reasons as pretexts for discrimination, or to offer any other evidence of discriminatory motive. [Citations.] In an appropriate case, evidence of dishonest reasons, considered together with the elements of the prima facie case, may permit a finding of prohibited bias. [Citations.] The ultimate burden of persuasion on the issue of actual discrimination remains with the plaintiff." (*Ibid.*)

We assume for the sake of argument that Archibold met her burden at the first step and established a prima facie case of discrimination by TWC in terminating her. Furthermore, TWC met its burden in the second stage to produce evidence to raise a genuine issue of fact "that its action was taken for a legitimate, nondiscriminatory reason." (*Guz*, *supra*, 24 Cal.4th at pp. 355-356.) Archibold does not deny that TWC terminated her, along with 18 other employees, after an investigation into falsified customer satisfaction surveys. Archibold admitted that she, rather than customers, submitted the responses into the computer system.

Thus, we focus our analysis primarily on the third stage of the inquiry: whether Archibold produced sufficient evidence to create a triable question of material fact regarding whether TWC's cited reasons for terminating Archibold were a pretext for discrimination. This requires Archibold to produce evidence " 'that there was a "causal connection" between the employee's protected status and the adverse employment decision.' " (*Los Angeles County Office of the Dist. Attorney v. Civil Service Com.* (1997) 55 Cal.App.4th 187, 201, quoting *Mixon v. Fair*

Employment & Housing Com. (1987) 192 Cal.App.3d 1306, 1319.) Archibold has failed to do so. She has produced no evidence to counter TWC's claim that it conducted its employee audit in a neutral manner, flagging employees whose customer surveys were entered into the system only one or two minutes apart. Furthermore, all available evidence indicates that TWC disciplined its employees not on the basis of their disabilities, but according to a fixed formula based on the number of prior warnings those employees had received. Archibold has produced no evidence that her prior disciplinary actions were imposed unfairly, and she admitted leaving the door to the safe unlocked overnight, the act that led the company to issue her a final written warning. Additionally, Archibold testified in her deposition that she had a good relationship with her supervisor, and did not believe her supervisor would wish to cause her harm. Finally, there was a gap of more than a year between Archibold's most recent medical leave and her termination. The delay between Archibold's final medical leave and her termination is sufficiently long to dispel the inference that TWC was motivated by discrimination. (See *Kennedy v. Schoenberg, Fisher & Newman, Ltd.* (7th Cir. 1998) 140 F.3d 716, 724 [concluding that a comment "made at least five months before plaintiff's termination . . . was not temporally related to her discharge"]; see also *Trop v. Sony Pictures Entertainment, Inc.* (2005) 129 Cal.App.4th 1133, 1148.)

Archibold contends that TWC's justification for terminating her was a sham because TWC has no evidence that she falsified any customer surveys, and she denies having done so. She notes that a TWC director of human resources wrote that, if Archibold's claims were true, then her behavior was "different" from that of other employees who fabricated customer surveys entirely. The director of human resources went on to suggest that TWC investigate further to determine whether Archibold's claims were true, a step the company ultimately did not take. But all

of this is beside the point. Archibold admitted that she entered the customer surveys into the computer system, and TWC could reasonably conclude that her behavior was improper. Even if it is true that Archibold only transcribed survey results, the customers' knowledge that Archibold would receive and read the surveys could skew the results in her favor, allowing her to receive higher bonus payments than she was entitled to.

TWC's decision to terminate her may have been harsh or unfair, but FEHA " ' "is not a shield against harsh treatment at the workplace." . . . Nor does the statute require the employer to have good cause for its decisions. The employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason. . . . "While an employer's judgment or course of action may seem poor or erroneous to outsiders, the relevant question is . . . whether the given reason was a pretext for illegal discrimination. The employer's stated legitimate reason . . . does not have to be a reason that the judge or jurors would act on or approve." ' " (*Arteaga v. Brink's, Inc.* (2008) 163 Cal.App.4th 327, 344.) Without some evidence beyond mere conjecture connecting TWC's decision to terminate Archibold to her disability, Archibold has failed to create a triable question of material fact that TWC's reasoning was pretextual.

III. Failure to Provide Reasonable Accommodation

Section 12940, subdivision (m)(1) requires employers "to make reasonable accommodation for the known physical or mental disability of an applicant or employee." In order to maintain a cause of action against an employer for failure to make a reasonable accommodation, an employee must demonstrate the following: "(1) the employee suffered a disability, (2) the employee could perform the essential functions of the job with reasonable accommodation, and (3) the employer failed to reasonably accommodate the employee's disability." (*Nealy v. City of Santa Monica*, *supra*, 234 Cal.App.4th at p. 373.)

Archibold contends that she provided sufficient evidence to create a triable question of material fact on her claim that TWC failed to accommodate her disability. We are not persuaded.

Archibold's claim fails because, to the extent she needed accommodation to perform the essential functions of her job, there is no evidence that TWC failed to provide it. The company never denied her medical leave when she requested it. By Archibold's own testimony, she was able to fulfill her responsibilities on the job by taking extra breaks during the workday when she felt dizzy or had blurred vision. Although her managers did not expressly authorize these accommodations, no one complained or disciplined her for taking them. Archibold has presented no additional evidence regarding what accommodations would be medically necessary to do her job, apart from a note from her doctor requesting that the company "extend to her any courtesy necessary" to address her Meniere's disease. The note provided no guidance as to how TWC could assist Archibold in doing her job.

Archibold also argues that TWC failed to accommodate her because her managers refused her request to place her in a position where she did not need to deal with customers or handle cash. But "FEHA does not obligate the employer to accommodate the employee by excusing him or her from the performance of essential functions." (*Nealy v. City of Santa Monica*, *supra*, 234 Cal.App.4th at p. 375.) FEHA defines "essential functions" as "the fundamental job duties of the employment position the individual with a disability holds or desires." (§ 12926, subd. (f).) Archibold described her job functions as follows: "[W]e could take some phone calls that came in. . . . [M]ainly it was customers coming in, and we would take their payments, either open a work order for installation or disconnect, issue equipment, take in equipment; and by the end of the day, we would have to batch out our payments. If there was any complaints with [a] customer, handle that." At another point she admitted that her "whole

job [was] to be [at her workstation] to help customers." It is difficult to imagine that an employee could perform the essential functions of a "customer service professional" without interacting with customers.

IV. Failure to Engage in Interactive Process

Archibold contends that the trial court erred by granting summary judgment because she created a triable issue of material fact on her claim that TWC failed to engage in an interactive process regarding accommodating her disabilities. Under section 12940, subdivision (n), an employer must "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 or mental disability or known medical condition." In order to succeed on a cause of action for failure to engage in an 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* (2009) 173 Cal.App.4th 986, 1018.)

The only accommodations Archibold has identified are more breaks and changes in her job duties so that she would no longer have to deal with customers or handle cash. As we have already seen, she took additional breaks when necessary, and did not face criticism or discipline for having done so. And Archibold has failed to explain how her need to avoid interacting with customers and handling cash is compatible with the essential functions of her position as a customer service agent. For these reasons, her interactive process claim fails.

V. Wrongful Termination in Violation of Public Policy

Archibold contends that the trial court erred in granting summary judgment because there was a triable issue of material fact with respect to her claim that she was wrongfully terminated in violation of public policy. She makes the same arguments regarding this point as in her claim of disability discrimination pursuant to section 12940, subdivision (a). For the same reasons that we rejected her claims on that issue (see Discussion, part II *ante*, at p. 6), we reject them here as well.

DISPOSITION

The judgment of the trial court is affirmed. Respondent is awarded its costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

BENDIX, J.*

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