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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

JULIANNE McMURTRY, Plaintiff and Appellant, v. MOUNT SAINT MARY'S COLLEGE, Defendant and Respondent.	B276095 (Los Angeles County Super. Ct. No. BC567867)

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

Hurwitz, Orihuela & Hayes, Douglas B. Hayes, for Plaintiff and Appellant.

Andrews, Lagasse, Branch & Bell, Jennifer S. Branch and Shauna L. Sinnott, for Defendant and Respondent.

Plaintiff and appellant Julianne McMurtry (plaintiff) sued her former employer, defendant and respondent Mount Saint Mary's College (the college), after the college declined to renew her annual teaching contract. Plaintiff alleges the college discriminated against her because she was pregnant and suffered from a mental disability; she further alleges the college retaliated against her because she took a medical leave of absence and complained of mistreatment upon her return. The college asserts it did not renew plaintiff's contract because of performance issues, many of which plaintiff did not dispute. The trial court granted summary judgment for the college. We consider whether the court relied on erroneous evidentiary rulings in deciding the motion and whether a trial was necessary to decide whether the college was motivated by discriminatory or retaliatory intent when it took adverse action against plaintiff.

I. BACKGROUND

A. Factual History

In 2006, the college hired plaintiff, an alumna, to teach as an adjunct professor in its sociology department. Plaintiff had a congenial relationship with four of her department colleagues; they referred to themselves collectively as the "circle of trust." Sande Harte (Harte) was the department chair and had known plaintiff since she was a student at the college. Pam Haldeman (Haldeman), the previous department chair, had mentored plaintiff and served as her advisor when plaintiff was an undergraduate. Plaintiff was also close to the other two of the four colleagues, professors Amanda Romero (Romero) and Michelle Melendres (Melendres).

Two years after she started teaching at the college, plaintiff became an 80 percent full-time equivalent (FTE) employee under annual contracts that required her to teach seven classes over the fall and spring semesters and to assume certain additional responsibilities like advising students and serving on faculty committees.[1] Plaintiff also took on "overload" teaching assignments, some of which took place over the summer. Plaintiff taught both live (face-to-face) and online courses.

Plaintiff's first few years teaching were not marked by any significant performance issues. In 2008, students in the "Weekend College" program voted plaintiff "faculty of the year" for her department.

When plaintiff became pregnant in the 2009-2010 school year, Harte noticed she had some "issues during that year of times being late for class, sometimes being late to get grades done . . . ." Harte said she "tolerated" these issues because plaintiff had a "high-risk pregnancy" and "a lot on [her] plate outside of work." Harte offered plaintiff the choice to teach live or online classes during the 2010 spring semester (when she was due), and plaintiff chose to teach online. The college granted plaintiff the only accommodation she sought during her pregnancy—a closer parking spot. Plaintiff gave birth to a son in April 2010.

Harte noticed increasing issues with plaintiff's work performance in the 2011-2012 school year. Harte believed plaintiff cancelled between five and ten classes that year but did

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[1] Plaintiff understood 80 percent FTE employment to entitle her to "full benefits and full rights" while teaching 80 percent of a full course load for 80 percent of a full-time salary.

not document the cancellations. Harte also estimated that she received six to ten complaints about plaintiff from students over the course of that year, mostly stating plaintiff was difficult to reach or otherwise not responsive. Melendres said plaintiff occasionally asked her in the fall of 2011 to notify plaintiff's classes she was running late, and those requests became more frequent in 2012. Melendres also said plaintiff variously asked her and Romero to "cover" the beginning of plaintiff's classes on account of her lateness from time to time. Harte was aware plaintiff had made these requests to Melendres and Romero.

Plaintiff's father-in-law suffered a massive stroke in early 2012. That spring, Harte received reports of plaintiff cancelling class, arriving late, not being prepared, not holding office hours, and being unresponsive to students' e-mails. Harte said "these issues began to accumulate and began to be enough" to cause Harte to advise plaintiff she "really need[ed] to focus on [her] work," "to get grades in in a timely fashion," and "to answer e-mails." Harte told plaintiff she knew it was "a hard time, but we depend on you here." Plaintiff said she cancelled class just once in order to tend to her father-in-law and that she cancelled class "no more than five" times during the entire time the college employed her.

Plaintiff taught summer classes in 2012, and Harte received numerous e-mails from students and staff complaining about plaintiff's unresponsiveness, failure to post assignments or grades, and failure to fulfill other work-related responsibilities.[2] In renewing plaintiff's contract for the fall semester, Harte asked

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[2] Harte said she counted 29 e-mail complaints from plaintiff's students in the summer of 2012.

her if she was "capable of coming to campus and putting in at least three days a week on campus and being present and completing the school year without issues?" Plaintiff told Harte she was.

Plaintiff was having marital problems in 2012, and she also suffered from depression. That summer, she discussed some of her marital issues with Harte, Haldeman, Melendres, and Romero. Haldeman was concerned for plaintiff and referred her to a divorce attorney.

In September 2012, plaintiff provided the college with a note from her psychiatrist stating she was receiving regular "psychotherapy and medication management" under his care. Plaintiff told Melendres and Romero she had to give the note to human resources "so she wouldn't get fired." Akosua Amporful (Amporful), the college's assistant director of human resources, met with plaintiff to discuss the note. Plaintiff told Amporful she "was experiencing some depression and anxiety, and . . . having some marital issues." Plaintiff also gave Harte a copy of the note. Harte told plaintiff she was glad plaintiff was "doing this" and asked whether her doctor had prescribed Prozac.

During the fall semester, students complained to Romero that plaintiff was unavailable, was consistently late to class and unprepared to teach, cancelled class, did not provide challenging work, did not provide syllabi or return or grade their work, and talked about her marital problems and cried during class. Romero told Harte about these issues and also revealed she had filled in as the teacher for one of plaintiff's classes. Plaintiff asked Romero to fill in for other classes as well, but Romero declined because she was unable to do so.

At the end of September, plaintiff scheduled a meeting with Harte, Haldeman, Melendres, and Romero because she was "feeling incredibly distraught . . . and overwhelmed." Plaintiff told them she was proceeding with a divorce, and she conveyed details about her marital problems, which included graphic sexual threats. Harte suggested a leave of absence might be in order and plaintiff should move her classes online for a week in the meantime to provide her some relief while she gained control over her situation. That night, Melendres learned plaintiff had been having an extramarital affair.

The following morning, Harte sent the following e-mail to the provost of the college, Eleanor Siebert (Siebert): "Hello, I have a question about [plaintiff's] contract. This semester [plaintiff] is teaching 6 courses . . . . Currently she is having major health issues, along with some other personal challenges and she is having a difficult time meeting her obligations. We have that part under control in the department, so this semester will be covered. My question is, since she has taught 6 classes by the end of this semester, is it possible that I wouldn't have to give her any courses in the spring? I would be happy if that is possible. Let me know what you think."

Later that day, plaintiff's husband forced her to move out of their home. Melendres and Romero helped plaintiff move out, and Romero learned of plaintiff's affair. Melendres and Romero told Harte and Haldeman what happened and expressed concern about plaintiff's well-being.

Siebert (the college provost) told Harte plaintiff would need to teach nine units (typically three courses) in the spring to fulfill the terms of her contract. Harte responded she would "make

them online courses, so [plaintiff could] work from home if her health ke[pt] her from coming to campus."

Several days after her meeting with Harte, Haldeman, Romero, and Melendres, plaintiff sent them an e-mail with the subject line "Update." Plaintiff said she planned to meet with her divorce attorney and he had already given her some advice. Haldeman sent a response implying that plaintiff was lying about having spoken to the attorney. Haldeman's reply stated she "d[id]n't know what to believe anymore" and plaintiff's "[u]pdates" did not "work for [her] anymore because conflicting statements are made." Haldeman told plaintiff to "take care of [her]self and communicate with [Harte] regarding work, but with regard to [her] personal situation," Haldeman thought plaintiff should rely on friends and family outside of work. Haldeman also requested that plaintiff stop scheduling work "'meetings'" to update them on her personal affairs.[3] Plaintiff had no further contact with Haldeman after receiving her e-mail.

A few days later, Harte sent plaintiff an e-mail stating "everyone in the department [was] deeply concerned about [her] well-being and happiness." Harte said they understood plaintiff's "life situation [was] incredibly complicated right now . . . and that [she was] under a great deal of stress." Harte then addressed

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[3] Haldeman said she sent the e-mail because she "did not feel it was appropriate for [p]laintiff to share such intimate information" and "wanted to reset [their] professional boundaries." Romero said Haldeman was upset because the department had given plaintiff time off to meet with the attorney earlier, plaintiff had told them she already met the attorney, and yet plaintiff's e-mail indicated she had not done so.

some concerns with plaintiff's performance. She said some of plaintiff's students complained that plaintiff failed to post any assignments online, as she had pledged to do for that week. Harte also discovered plaintiff had recorded few or in some cases no grades in her classes despite it being the seventh week of the term. Harte told plaintiff their "performance as professors reflect[ed] on the department" and the school as a whole and her students "expect[ed]" and "deserve[d]" high standards. Harte also noted plaintiff had not been complying with her commitment to be on campus three days a week and other members of the department had been covering for plaintiff's absences and unpreparedness.

Harte's email to plaintiff additionally stated it would be "hard for [the department] to lose a member of [their] team—especially one that ha[d] been an important and reliable part of it." Harte said they could "probably get [plaintiff] a leave of absence" if needed, but she was not sure whether the leave would be paid. Harte explained she was "really stuck in a bad place because somehow we have to successfully complete your classes for your students, and it doesn't seem as though you will be able to do it." Harte asked plaintiff to call and share her "thoughts on this topic."

On October 5, 2013, the day after Harte sent the e-mail, plaintiff requested a leave of absence on the recommendation of her psychiatrist.[4] Harte, Melendres, Romero, and other faculty took over plaintiff's classes. Harte said the class she took over

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[4] Plaintiff said she began her leave within a day. The college officially approved a leave with a start date of October 15, 2012, and a return date of December 6, 2012.

from plaintiff "had no syllabus posted or distributed, had no grading entered for exams or assignments[,] and had no lessons posted." Other faculty reported similar issues with the classes they took over from plaintiff. Harte looked further into the status of plaintiff's classes and found "minimal grading," "missing assignments," and "no rubrics posted so students knew what they needed to do to obtain specific grades."

Several days after requesting leave, plaintiff went to campus "because [she] was unsure about the status of [her] medical leave" and wanted to say goodbye to students. Plaintiff went into one of her classes, and Harte heard this caused her students to become "confused and upset." In an email with another member of the sociology department who had taken over one of plaintiff's classes, Harte stated: "[Y]esterday was yet another trip. I hope that is the end of it. I'm going to take her name off [the college] email, and get her removed from [the school's online course management system] as well."

Harte sent an e-mail to Siebert a couple weeks later, stating plaintiff was planning to contact Siebert "to discuss what she is calling a medical leave of absence—that based on her doctor's statements[,] she should be able to come back and pick up her classes in the spring . . . ." Harte told Siebert she had "explained [to plaintiff] that it wasn't simply that she got ill and needed time to recuperate. I said that she was relieved of her classes not only because of health, but also because she had failed to meet her contract requirements (no syllabus, no grades, unreturned papers, lack of assignments, etc.). I also told [plaintiff] that I had no confidence that [plaintiff] could perform as a reliable instructor in the spring, that she could deliver a

quality classroom experience, especially since she had given me this same guarantee in the fall."

Siebert forwarded Harte's e-mail to the college's director of HR, Susan Lusk (Lusk), and asked whether the fact that plaintiff had "not been able to uphold the terms of [her] contract" would "nullif[y] the contract" and allow the college not "to honor the spring 2013 portion." When Siebert later discussed the matter with Lusk, they concluded plaintiff's contract had not been effectively nullified.

Melendres said she chose "to kind of distance" herself from plaintiff around this time "because [she] was feeling extremely overwhelmed . . . ." Melendres was already handling an overloaded teaching schedule when she had to assume some of plaintiff's teaching responsibilities, and being pulled into plaintiff's personal situation left her feeling "awkwardly involved and very uncomfortable . . . ." Melendres felt "exhausted" from "investing so much of [her] time and effort" into helping plaintiff, and she "started to feel really betrayed . . . ."[5]

Plaintiff became pregnant during her medical leave. On Thanksgiving, she met with Romero, who gave plaintiff all of her personal belongings from the office space plaintiff shared with other faculty. Plaintiff was upset because the return of her belongings indicated "[t]hat people . . . didn't want [her] there."

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[5] Plaintiff's sister informed Melendres that plaintiff had been using Melendres as an alibi for "'at least six months, maybe even a year'" to cover up her affair.

She told Romero she was pregnant. Plaintiff and Romero communicated with each other just once after that day.[6]

In December, plaintiff told Amporful (the assistant HR director) her doctor was extending her leave until early January 2013 and that she was pregnant. Plaintiff was aware she was scheduled to teach online classes in the spring. When she expressed concern that her office belongings had been returned to her, Amporful responded that plaintiff had not been terminated and her belongings should not have been packed up. Amporful sent Lusk an e-mail about her conversation with plaintiff and wrote: "I will have to send [Harte] a message that the leave has been extended. Oh boy."

After learning about the extension of plaintiff's leave, Harte sent Siebert an e-mail expressing concern about not knowing if, or when, plaintiff would return, and how to staff the department's courses under the circumstances. Harte said she lacked faculty coverage for plaintiff's courses if she did not return. She said she "want[ed] to be fair and legal in all respects, but [she] also want[ed] to know what [her] options as Chair [we]re." Harte said she did not want to renew plaintiff's contract for the following school year "[a]fter now documenting several teaching-quality issues that have been ongoing . . . ." Siebert forwarded Harte's e-mail to Lusk, noting "the dilemma of medical

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[6] Romero said she no longer considered herself friends with plaintiff because of how "things transpired"—particularly, plaintiff's "continuous lying" and Romero's later discovery that plaintiff would "say[ ] she was with [Romero] . . . when she was with this other person . . . ." Romero also found it "very clear that the times [plaintiff] was late and not coming to class, she was at the [other man's] house."

leaves that don't coincide with semesters" and asking if HR could "determine with any degree of certainty whether or not [plaintiff would] return in time to teach spring classes . . . ." Siebert also stated that "[f]or the student[s'] sakes," she might "need to authorize [part-time] instructors [and] relieve [plaintiff] from teaching—[and] cover her contract if needed." Siebert asked Lusk if there was "anything illegal" about that alternative, noting it would "certainly [be] costly."

On the first Friday of January 2013, plaintiff confirmed she would return to work the following Monday, when classes were scheduled to begin. In approving her return, plaintiff's doctor recommended that her "job duties [be] limited to educational instruction only, and no more than 3 courses . . . ." The doctor's note did not make any recommendation on whether plaintiff's classes be live or online.

The college "agreed to accommodate [plaintiff's] limited job duties of teaching no more than 3 courses for the spring semester," and Amporful notified the payroll department of plaintiff's return. Based on her doctor's recommendation, plaintiff asked Harte if there was a place she could meet face-to-face with her students. Harte replied she "would look for desk space" for plaintiff and that her "corner of [her previous shared office space] was needed for the faculty member who replaced [her] in [one of plaintiff's classes]." Harte told plaintiff the department had to "hire another adjunct" when she went on leave. A couple days later, Harte told plaintiff she still had access to the office space she had been previously using and books belonging to plaintiff remained in the office.

Plaintiff had difficulty accessing her e-mail and the college's online course management system when she returned

from leave.[7] She also failed to receive her first paycheck for the semester, which would have been distributed February 1, 2013.

On February 8, 2013, plaintiff sent an e-mail to Amporful, copying Harte, Siebert, and others. Plaintiff wrote that when she inquired into her failure to receive a paycheck, she was told a note had been placed on her payroll account implying she would not be returning after taking a leave of absence. Plaintiff also said she was told her contract needed to be "'recalculate[d],'" which was "an improper change of contract terms" that resulted in a "significant salary reduction" and "violate[d] the FMLA, CFRA, EEOC, ADA [and] additional State and Federal disability laws." Plaintiff added that she was "currently in [her] second trimester of a high risk pregnancy" and "[t]he uncertainty of being able to financially provide for [her] family [wa]s causing additional stress and anxiety." She attached to the e-mail a doctor's note that stated she was being treated by a specialist for a high-risk pregnancy. The note did not describe what made plaintiff's pregnancy high risk and did not note any physical limitations or recommend any accommodations.

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[7] The person who oversaw the college's network services stated in a declaration that plaintiff was locked out of her e-mail account because her password—which was required to be reset from an on-campus location every 90 days—had expired during her leave. Plaintiff's e-mail then failed to work when her password was reset because her e-mail inbox was full. Plaintiff admitted she had had frequent problems with her e-mail account and the online course management system before she went on leave. Plaintiff said she regained access to the online course system the "first night or the next morning" and to her e-mail account "probably the second or third day."

Three days later, plaintiff met with Siebert, who explained why plaintiff's take-home pay had changed. When plaintiff asked Siebert whether her contract would be renewed for the fall, Siebert told her: "You're a smart girl you can find a job somewhere else."

Plaintiff then met with HR director Lusk, who told plaintiff, "it sounds like [you're] threatening to sue us." Plaintiff responded she "just want[ed] a resolution, and [she] want[ed] to know if [she was] coming back in the fall." Lusk said contracts were not issued until July and plaintiff's return would be up to the department chair. Plaintiff told Lusk she felt she was being discriminated against for taking leave because her colleagues shunned her and she did not receive a paycheck when she returned. Lusk responded that it was "always a rough start when someone comes back from leave" and referred to her own experience returning after surgery. Plaintiff told Lusk she "felt [her] department was being really mean to [her]," and Lusk "said she would look into it."

That semester, Harte received several e-mails from plaintiff's students complaining that plaintiff's online assignments were not accessible when they were supposed to be, plaintiff was unresponsive to their attempts to reach her, and plaintiff was not posting grades for their completed work. Plaintiff also failed to submit grades for students from past semesters who had completed their courses after initially being given grades of "incomplete."

In May 2013, Harte recommended to Siebert that the college not renew plaintiff's contract for the following school year. Siebert reviewed plaintiff's student evaluations for the past two to four years and found them to be "pretty positive." Siebert also

asked Harte "for a list of the issues that had been uncovered" regarding plaintiff's performance. Siebert could not recall all of the items in the document Harte sent her but remembered references to "[s]yllabi, grades not being posted," and "[t]hings not being on the course learning . . . management system . . . ." Siebert concluded "students were generally favorable" toward plaintiff but she showed "some serious performance issues in terms of meeting faculty responsibilities." Siebert determined "there were substantial perform[ance] issues that did not coincide with [plaintiff's] medical leave" and concluded Harte was not obligated to renew plaintiff's contract for the fall. Siebert said if she "had been [plaintiff's] department chair, [she] would not have rehired [plaintiff] on the basis of what [she] encountered."

Plaintiff went into preterm labor on May 3 and was placed on bedrest. She did not inform anyone at the college of her situation but assumed they knew because her "doctor filled out a disability form . . . ." Plaintiff's academic responsibilities for the school year ended on May 8; she gave birth at the end of June 2013; and she was on disability leave from May 3 to August 20, 2013. Plaintiff was able to perform her job duties during 2013 and did not ask for any additional time off. That August, she received a letter stating her employment was terminated effective August 31, 2013.

B. Procedural History

On May 1, 2014, plaintiff filed a complaint with the Department of Fair Employment and Housing (DFEH), requesting a "right to sue" letter based on allegations the college unlawfully discriminated and retaliated against her. Plaintiff sued the college in December 2014. She alleged 11 causes of

action: (1) pregnancy discrimination in violation of the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.); (2) retaliation in violation of FEHA; (3) interference with and failure to provide pregnancy leave and accommodations in violation of FEHA; (4) disability discrimination in violation of FEHA; (5) perceived disability discrimination in violation of FEHA; (6) failure to accommodate a disability as required by FEHA; (7) failure to engage in the interactive process as required by FEHA; (8) retaliation in violation of the Moore-Brown-Roberti Family Rights Act, commonly referred to as the California Family Rights Act (CFRA) (Gov. Code, §§ 12945.2, 19702.3); (9) failure to prevent discrimination in violation of FEHA; (10) wrongful termination in violation of public policy; and (11) declaratory relief.

The college moved for summary judgment, or summary adjudication in the alternative. The college contended the only adverse employment action plaintiff could challenge based on the filing date of her DFEH complaint was the nonrenewal of her contract, and the college asserted it took that action for legitimate, nondiscriminatory reasons—namely, because plaintiff "had significant and prolonged performance issues" that included failing to respond to communications from her students and colleagues, cancelling or arriving late to class, failing to post or grade assignments, and sharing intimate details about her personal life in class. The college contended plaintiff could not show its explanation was pretextual. The college also maintained it had granted all of the leave and accommodations plaintiff requested or otherwise required for her pregnancy and mental disability.

Plaintiff opposed the college's summary judgment motion. She contended she could challenge acts preceding the nonrenewal of her contract pursuant to the continuing violations doctrine, and in her view, those acts showed a motivation to discriminate and retaliate. According to plaintiff, the college abruptly changed how it treated her once she took a leave of absence for her disability: Harte and Siebert sought to terminate her contract; her colleagues shunned her; she received no paycheck, had no office, and lacked access to the college's computer network systems when she returned from leave; and the college did not investigate her complaints of discrimination and retaliation. Plaintiff contended Harte began critiquing her performance only after she took leave, which was evidence of pretext. She also posited that to the extent her performance suffered in 2012, it was attributable to her disability and therefore not a legitimate explanation for the college's actions against her. Plaintiff additionally maintained there were triable issues with respect to her accommodations and interactive process claims.

The trial court granted the college's summary judgment motion. The court observed that plaintiff admitted a number of material facts were undisputed, including the following: during the summer and fall of 2012, students complained that plaintiff did not respond to their e-mails, consistently arrived late to class, cancelled class, was unprepared to teach, did not provide challenging material, did not grade students' work, did not hold office hours, and talked about personal issues in class; when plaintiff returned from medical leave, she did not request to teach live classes as an accommodation; no one commented on plaintiff's pregnancy or told her she could not take additional time off; plaintiff was able to perform her job duties while

pregnant; and plaintiff did not request any accommodation for her pregnancy.[8]

With respect to plaintiff's discrimination and retaliation claims, the trial court determined a trier of fact could find that acts preceding the nonrenewal of plaintiff's contract were part of a "continuing violation" of adverse employment actions. The court accordingly addressed, item by item, plaintiff's examples of allegedly discriminatory and retaliatory statements and conduct. The court concluded the examples, when viewed in context, were not evidence a jury could rely on to find the college's asserted reasons for its actions were pretextual or the college was otherwise motivated by discrimination or retaliation. The court further found there was "no basis [for plaintiff] to claim that her poor work performance was the result of her disability since there [was] no medical basis to make this determination."

With respect to plaintiff's claims concerning the denial of accommodations, interference with accommodations and leave, and failure to engage in the interactive process, the trial court likewise determined the college was entitled to judgment as a matter of law. The court reasoned that because plaintiff did not request—and admitted she did not need—any accommodation for her pregnancy, and because the college granted the accommodation sought by plaintiff with respect to her mental disability—i.e., to limit her work to teaching three courses—plaintiff could not prove the college failed to provide

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[8] Plaintiff objected to the admission of some of these statements of fact, despite also admitting they were "undisputed." The trial court overruled plaintiff's objections to facts she did not dispute, an issue we address *post*.

accommodations, interfered with her right to seek accommodations, or failed to engage in the interactive process. The court concluded plaintiff's remaining causes of action necessarily failed because they were derivative of her unsuccessful discrimination and retaliation causes of action.

II. DISCUSSION

The FEHA protects employees from acts of discrimination based on protected status and from acts of retaliation based on protected conduct. The law does not protect employees from acts by their employers that are not based on reasons proscribed by law. In this case, plaintiff developed significant performance issues in 2012—many of which she did not dispute—that justified the college's decision not to renew her contract for the subsequent school year. The fact that some of plaintiff's deficiencies were uncovered when her colleagues took over her classes after she took a medical leave of absence does not suffice to establish a triable issue of fact as to whether the college discriminated or retaliated against her because of her disability or her leave of absence. The record shows the college scrupulously observed its legal obligations, and while plaintiff may have found the college's actions personally hurtful in light of her close relationship with her colleagues and the institution, a factfinder could not rationally conclude the college's actions were unlawfully motivated.

A. Pertinent Antidiscrimination Laws

FEHA implements a "fundamental" public policy "'that promotes the right to seek and hold employment free of prejudice . . . .'" (*Harris v. City of Santa Monica* (2013) 56 Cal.4th

203, 223, citation omitted (*Harris*).) The statute generally prohibits employers from refusing to hire, terminating, or otherwise discriminating against an employee "in compensation or in terms, conditions, or privileges of employment," on the basis of attributes specified in the statute, which include physical and mental disability. (Gov. Code, § 12940, subd. (a).) FEHA protects employees from discrimination not only on the basis of actual physical or mental disability but also because of disabilities the employer perceives the employee to have. (Gov. Code, §§ 12926, subds. (j)(4)–(5) & (m)(4)–(5), 12926.1, subds. (b) & (d); *Moore v. Regents of University of California* (2016) 248 Cal.App.4th 216, 237, fn. 4 (*Moore*).)

FEHA requires employers "to make reasonable accommodation for the known physical or mental disability of an . . . employee." (Gov. Code, § 12940, subd. (m)(1).) And the statute further requires employers "to engage in a timely, good faith, interactive process with the employee . . . to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee . . . with a known physical or mental disability or known medical condition." (Gov. Code, § 12940, subd. (n).)

If an employee is "disabled by pregnancy, childbirth, or a related medical condition," the FEHA requires the employer to provide, and not interfere with the employee's attempt to seek, leave for "a reasonable period of time not to exceed four months . . . ." (Gov. Code, § 12945, subd. (a)(1), (4).) Employers must further provide, and not interfere with an employee's attempt to seek, reasonable accommodation "for a condition related to pregnancy, childbirth, or a related medical condition, if

the employee so requests, with the advice of the employee's health care provider." (Gov. Code, § 12945, subd. (a)(3)(A), (4).)

The FEHA also imposes liability on employers who retaliate "against any person because the person has opposed any practices forbidden under [the FEHA]" or because the person requested accommodation under the FEHA. (Gov. Code, § 12940, subds. (h) & (m)(2).) In order to constitute retaliation, the employer's action against the employee must "materially affect the terms and conditions of employment." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1051, fn. 9 (*Yanowitz*).) Failing "to take all reasonable steps necessary to prevent discrimination" is also prohibited. (Gov. Code, § 12940, subd. (k).)

CFRA, California's analogue to the federal Family and Medical Leave Act of 1993 (29 U.S.C. §§ 2601–2654), requires employers of a certain size to permit an employee who has completed 1,250 hours of service in the previous 12 months to take up to 12 weeks of unpaid, job-protected leave in order to attend to the health of the employee or the employee's family member. (Gov. Code, § 12945.2.) The statute prohibits employers from retaliating against an employee because the employee sought or took a CFRA leave of absence. (Gov. Code, § 12945.2, subd. (t); Cal. Code Regs., tit. 2, § 11094, subd. (b).)

B. Summary Judgment Law and the Standard of Review

A defendant seeking summary judgment must show "that one or more elements of the [plaintiff's] cause of action . . . cannot be established, or that there is a complete defense to the cause of action. Once the defendant . . . has met that burden, the burden shifts to the plaintiff . . . to show that a triable issue of one or

more material facts exists . . . ." (Code Civ. Proc., § 437c, subd. (p)(2).) A trial court must grant a defendant's summary judgment motion "'if all the papers submitted show' that 'there is no triable issue as to any material fact' (*id.*, § 437c, subd. (c))—that is, there is no issue requiring a trial as to any fact that is necessary under the pleadings and, ultimately the law [citations]—and that the 'moving party is entitled to a judgment as a matter of law' (Code Civ. Proc., § 437c, subd. (c))." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).)

A defendant employer may seek summary judgment on an employee's discrimination (or retaliation) claim by presenting "competent, admissible evidence" that the defendant took action against the plaintiff for a legitimate, nondiscriminatory reason.[9] (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 357 (*Guz*); *Light v. Department of Parks & Recreation* (2017) 14 Cal.App.5th 75, 91, 93 (*Light*).) Absent direct evidence of discrimination, the plaintiff can defeat summary judgment "by pointing to evidence which . . . raises a rational inference that intentional discrimination occurred." (*Guz*, *supra*, at p. 357; see also *Light*, *supra*, at p. 94.) Evidence that the employer's proffered reasons for an adverse employment action were not true or pretextual, or evidence showing the employer acted with a discriminatory (or retaliatory) animus, or both, presents a triable issue precluding summary judgment if that evidence ""'would permit a reasonable trier of fact to conclude the employer intentionally

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[9] "'[L]egitimate' reasons [citation] in this context are reasons that are facially unrelated to prohibited bias, and which, if true, would thus preclude a finding of discrimination." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 358, italics omitted.)

discriminated.'"" (*Moore*, *supra*, 248 Cal.App.4th at p. 238, citation omitted; see also *Light*, *supra*, at p. 94 [employee "must offer evidence sufficient to allow a trier of fact to find either the [employer's] stated reasons were pretextual or the circumstances '"as a whole support[ ] a reasoned inference that the challenged action was the product of discriminatory or retaliatory animus"'"]; *Kelly v. Stamps.com Inc.* (2005) 135 Cal.App.4th 1088, 1098 [employee must identify evidence permitting "a trier of fact to find by a preponderance that intentional discrimination occurred"].)

We review a grant of summary judgment de novo, "considering all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports." (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.) Like the trial court, we view the evidence and the inferences "reasonably drawn therefrom" in the light most favorable to the party opposing summary judgment. (*Aguilar*, *supra*, 25 Cal.4th at p. 843.) Summary judgment is improper "'when the facts are susceptible [to] more than one reasonable inference . . . .' [Citation.]" (*Soria v. Univision Radio Los Angeles, Inc.* (2016) 5 Cal.App.5th 570, 583 (*Soria*).)

C. The Trial Court's Evidentiary Rulings Were Proper or Have Negligible Impact on the Summary Judgment Analysis

Plaintiff and the college each objected to documents the other offered in support of their respective positions on the viability of plaintiff's claims. We are not persuaded by plaintiff's contention that some of the trial court's evidentiary rulings

amounted to prejudicial error. With respect to those issues that might have assisted plaintiff in overcoming summary judgment had the court decided the other way, we conclude the trial court ruled properly. The other challenged rulings concern evidence that has too little probative value to make a difference in the summary judgment analysis.

Plaintiff objected on hearsay and foundation grounds to three facts in the college's separate statement that plaintiff otherwise admitted were "undisputed": statements that students complained to Harte that plaintiff arrived late to class, was unprepared, and talked about personal issues in class. The trial court overruled these objections because plaintiff admitted the facts were undisputed. Plaintiff contends that whether she disputed the facts or not is beside the point; the court was precluded from considering them if they were not admissible.

The trial court did not err in overruling plaintiff's objections.[10] (*People v. Fruits* (2016) 247 Cal.App.4th 188, 205 ["We will affirm the trial court's evidentiary ruling if it is correct on any theory of law applicable to the case, even if for reasons different than those expressly stated by the trial court"].) Harte's deposition testimony provided an adequate foundation for the

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[10] Our Supreme Court has not resolved the standard of review that applies to evidentiary rulings made in connection with a summary judgment decision. (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 535 [finding no need to "decide generally whether a trial court's rulings on evidentiary objections based on papers alone in summary judgment proceedings are reviewed for abuse of discretion or reviewed de novo"].) The difference between the two standards has no effect on our determinations regarding the rulings plaintiff challenges.

statements at issue, which were not offered to prove the truth of the students' complaints but rather for their effect on the listener and to show how they informed the actions Harte subsequently took with respect to plaintiff.[11] (*People v. Livingston* (2012) 53 Cal.4th 1145, 1162 [statement is not hearsay if ""offered to prove that the statement imparted certain information to the hearer and that the hearer, believing such information to be true, acted in conformity with that belief"" because ""it is the hearer's reaction to the statement that is the relevant fact sought to be proved, not the truth of the matter asserted in the statement""]; see also *Central H. Imp. Co. v. Memorial Parks.* (1940) 40 Cal.App.2d 591, 609 ["When the good faith of a party is in question, the information upon which he acted, whether true or false" is not excludable as hearsay].)

Plaintiff also challenges the trial court's evidentiary rulings concerning how the college treated other faculty. She objected to the college's proffered statement of fact that it granted tenure to Romero after she returned from her own pregnancy leave. The trial court overruled plaintiff's objection because she admitted the fact was "undisputed." Plaintiff's contention that the trial court was obligated to exclude this statement on relevance grounds is unpersuasive. (Cf. *Sprint/United Mgmt. Co. v. Mendelsohn* (2008) 552 U.S. 379, 388 [evidence of how an employer treated similarly situated employees is not per se admissible or inadmissible to show discrimination under federal

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[11] The exclusion of these statements would not have made a difference in any event because plaintiff admitted, without objection, that students made the same complaints to Romero, and Romero testified she told Harte what the students told her.

law but should be evaluated for relevance and probative value on an individual basis]; *Spulak v. K Mart Corp.* (10th Cir. 1990) 894 F.2d 1150, 1156 ["As a general rule, the testimony of other employees about their treatment by the defendant is relevant to the issue of the employer's discriminatory intent"].)

The college objected to statements in a declaration by Michele Dumont (Dumont), which plaintiff offered as "me too" evidence to show the college retaliated against her. Dumont was a professor in the college's philosophy department who contended she was mistreated for taking a medical leave of absence. Dumont claimed the college did not want her to return from leave mid-semester and that it failed to pay her "properly" for her sick leave when she returned.

Plaintiff contends one of Dumont's statements was improperly excluded under the secondary evidence rule and other statements should not have been excluded because they involved pay issues relevant to plaintiff's situation. There is no need to address the substance of these rulings because even if the statements had been admitted, distinctions between Dumont's situation and plaintiff's renders the probative value of Dumont's statements quite weak, indeed, weak enough that we can confidently say they would not impact the summary judgment calculus.

Plaintiff also challenges the trial court's decision to sustain two of the college's hearsay objections to statements plaintiff offered to show the college intended to terminate her contract while she was on leave and that plaintiff's colleagues were instructed not to talk about her. The trial court sustained, first, the college's objection to a statement in plaintiff's declaration that she was told "the payroll department had a notation on my

account erroneously stating that I was 'never coming back,' rather than indicating my temporary medical leave." The court also sustained, second, an objection to a statement in a declaration by one of plaintiff's students, who said she "asked a few other professors what was going on with [plaintiff] and [the student] was generally told that they were not allowed to talk about her." These are both classic hearsay statements and were properly excluded on that basis.

The trial court also sustained, on speculation grounds, the college's objection to a statement in plaintiff's declaration that she "learned through this case" that Harte had begun reviewing plaintiff's performance only after plaintiff went on medical leave. Even if this statement had been admitted, it would not have altered the summary judgment analysis because the record included substantive evidence showing when and to what extent Harte investigated plaintiff's performance and that substantive evidence was far more probative than plaintiff's subjective characterization of the evidence.

D. The College Was Entitled to Summary Judgment

1. Actual and perceived disability discrimination[12]

To survive summary adjudication of her discrimination causes of action, plaintiff was obligated to point to evidence from which a factfinder could reasonably find the college more likely than not took an adverse employment action against her because

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[12] Plaintiff does not challenge the trial court's ruling on her pregnancy discrimination cause of action.

she had, or was perceived to have, a mental disability.[13] (*Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1006 (*Scotch*).) Plaintiff has not done so.

Plaintiff contends the following items in the record, when considered together, present a triable issue as to whether the college acted with a discriminatory motive: statements by Harte and Siebert seeking to prevent plaintiff from teaching once she returned from leave; acts showing the college did not want plaintiff to return to campus in the spring; statements by Harte, Siebert, and others referring negatively to plaintiff's leave; Harte's failure to document performance deficiencies by plaintiff prior to her disability; plaintiff's colleagues' ostracism of her; and problems plaintiff encountered with payroll and network services when she returned from leave.[14] Considering the college's

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[13] The college argues, as it did in its summary judgment motion, that the only adverse employment action we should consider in reviewing plaintiff's claims is the college's decision not to renew her contract. We proceed, instead, as the trial court did, i.e., on the understanding that a jury could rationally conclude adverse actions preceding plaintiff's termination were sufficiently related to her termination to be considered collectively. (See *Yanowitz*, *supra*, 36 Cal.4th at pp. 1055-1058.)

[14] Plaintiff avers the statements made by Harte, Siebert, and others constitute "direct evidence" the college discriminated against her, which renders the burden-shifting analysis used in cases of circumstantial evidence unnecessary. (*Green v. State of California* (2007) 42 Cal.4th 254, 275; see also *Wallace v. County of Stanislaus* (2016) 245 Cal.App.4th 109, 123 ["The three-stage framework and the many principles adopted to guide its application do not apply in discrimination cases where . . . the plaintiff presents direct evidence of the employer's motivation for

"innocent explanation for its actions, the evidence as a whole is insufficient to permit a rational inference that the [college's] actual motive was discriminatory." (*Guz*, *supra*, 24 Cal.4th at p. 361, fn. omitted.)

Statements by Harte and Siebert regarding plaintiff's contract do not show an intention to discriminate against her because of a mental disability. Harte's e-mail asking whether she needed to give plaintiff any courses in the spring demonstrates Harte was trying to help plaintiff by arguing plaintiff had fulfilled—and could therefore be paid for—her entire year's contract without needing to teach any second-semester classes. Harte's decision to assign plaintiff online classes also shows solicitude for, not discrimination on account of, plaintiff's mental condition. Indeed, read in full and in context of the larger conversation about plaintiff's workload, Harte's decision to give her online classes reflects an attempt to make plaintiff's life easier in the spring semester. (In the past, plaintiff viewed the ability to teach online during a difficult time as a benefit.) Plaintiff's supposition that Harte assigned her online classes *this time* because she wanted to "keep [plaintiff] off of campus" reflects nothing more than a subjective belief that is unsupported by the record. (*Featherstone v. Southern California Permanente Medical Group* (2017) 10 Cal.App.5th 1150, 1159 ["The

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the adverse employment action"].) Plaintiff's contention is mistaken. The fact that evidence comes in the form of "a direct quote" does not make it "direct evidence." Because none of the statements relied upon by plaintiff prove discriminatory intent "without inference or presumption," none constitutes direct evidence. (*Trop v. Sony Pictures Entertainment, Inc.* (2005) 129 Cal.App.4th 1133, 1145.)

employee's 'subjective beliefs in an employment discrimination case do not create a genuine issue of fact"'] (*Featherstone*).)

Plaintiff fails to make out a prima facie case that the college's attribution of its actions to her performance deficiencies was pretextual. "Generally in cases involving affirmative adverse employment actions, pretext may be demonstrated by showing "'the proffered reason had no basis in fact, the proffered reason did not actually motivate the [adverse action], or, the proffered reason was insufficient to motivate [the adverse action].'" [Citations.]" (*Soria*, *supra*, 5 Cal.App.5th at p. 594; see also *Scotch*, *supra*, 173 Cal.App.4th at p. 1007 [to establish pretext, the "employee must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the reasons offered by the employer for the employment decision that a reasonable trier of fact could rationally find the reasons not credible, and thereby infer the employer did not act for the stated nondiscriminatory purpose"].)

The record shows Harte noticed significant problems with plaintiff's performance in early 2012 and began looking more deeply into plaintiff's performance that fall because complaints about plaintiff increased over the course of the year and Harte personally noticed significant deficiencies when plaintiff stopped teaching and Harte and others were compelled to take over her classes. Contrary to plaintiff's contention, Harte did address performance concerns with plaintiff prior to the beginning of the fall 2012 semester, i.e., prior to any disclosure of her disability. The fact that Harte did not document many performance problems with plaintiff prior to 2012 does not show pretext; it shows at most that plaintiff did not demonstrate significant issues before that time. Furthermore, the fact that some of

plaintiff's students found her to be an engaging professor does not dispel the undisputed fact that many others complained about her performance—and that Harte's investigation substantiated those complaints. Siebert's statements about not fulfilling the terms of plaintiff's spring 2013 contract are based on the performance issues disclosed by Harte. Together, the statements of Siebert and Harte evince no causal relationship between plaintiff's disability and their reservations about retaining her as a faculty member.

The record does show that Harte and Siebert were concerned plaintiff might return in the middle, rather than at the start of, the spring semester. But their statements on that issue do not manifest any animus toward plaintiff on account of her disability. All they could be relied on to show, instead, is concern with how the college would staff classes students expected and needed to take. Amporful's "[o]h boy" statement about needing to tell Harte plaintiff was extending her leave does not reasonably show discriminatory animus; it shows she was worried the news would be upsetting to Harte (which it was) because it would make more work for Harte. When a dean at the college wrote an e-mail to Harte on the first day of the spring 2013 semester, expressing concern that one of plaintiff's classes had not been set up with a syllabus and assignments, Harte responded that she had just recently learned plaintiff was returning from leave, she had not been allowed to contact plaintiff while she was on leave, and she had been "required by law to hold the classes for [plaintiff] which were in her contract." Contrary to plaintiff's contention, Harte's "required by law" statement, when viewed in context, does not show discriminatory animus. It simply provides

an explanation for why the preparation for plaintiff's class was not further along.

The record evidence includes examples of plaintiff's colleagues distancing themselves from her after she took medical leave, but the record does not support an inference that their conduct was motivated by discrimination. Notably, plaintiff's colleagues were nothing but supportive after she informed them of her disability in early September. Plaintiff acknowledged Harte showed compassion when plaintiff told her she was seeing a psychiatrist, when plaintiff sought to temporarily move her fall classes online, and when Harte suggested she might take a leave of absence. Plaintiff also admitted she never heard Harte make any derogatory statements about someone for taking leave on account of a mental disability. Harte was told by HR they could not disturb plaintiff while she was on medical leave, and she relayed that information to the rest of the department. Melendres and Romero pulled away from plaintiff only after learning she had been lying to them about her personal situation. Haldeman also pulled back only after concluding plaintiff had lied and overstepped professional boundaries.[15] Furthermore, and regardless of the reasons that Melendres, Romero, and Haldeman stopped talking to plaintiff, there is no evidence these individuals participated in any adverse employment decisions. "[T]heir bitterness or mistreatment [of her], if any, is not material to whether plaintiff was terminated because [of her

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[15] Haldeman was particularly "uncomfortable" with plaintiff's graphic allegations of sexual abuse in her marriage, and there was evidence Haldeman had herself experienced abuse.

disability]." (*King v. United Parcel Service, Inc.* (2007) 152 Cal.App.4th 426, 434 (*King*).)

Nor do other documents in the record tend to show the college's actions were motivated by discrimination. The problems plaintiff encountered with her network access upon returning from leave were obviously due to technical issues unrelated to any ill will. Plaintiff's failure to receive her initial paycheck was promptly remedied, and the explanation plaintiff claims to have received was properly excluded as hearsay. The alteration to plaintiff's monthly pay is adequately explained in the record, and plaintiff did not claim otherwise when she opposed defendants' motion for summary judgment.

Other evidence proffered by plaintiff is simply too weak to permit a jury to find discriminatory intent in light of the evidence supporting the college's explanation for its actions. (*Guz*, *supra*, 24 Cal.4th at p. 362, fn. 25 [employee's circumstantial evidence is insufficient where, "even if fully credited and technically sufficient to establish a prima facie case, [it] raises, at most, a weak inference of prohibited bias"]; *Featherstone*, *supra*, 10 Cal.App.5th at p. 1159 ["The stronger the employer's showing of a legitimate, nondiscriminatory reason, the stronger the plaintiff's evidence must be in order to create a reasonable inference of a discriminatory motive"].) The inference of bias from Harte's "yesterday was yet another trip" e-mail is too tenuous, without more in the record, to create a jury issue on plaintiff's discrimination claim. The "trip" reference is ambiguous, and Harte's indication she would curtail contact between plaintiff and students is more reasonably explained by plaintiff's leave status than as an attempt to ostracize plaintiff because of her disability. Plaintiff disputed whether the college had good reason "to give

her whole desk away" when other faculty took over her classes during her leave, but plaintiff's subjective belief that other faculty did not need the space does not present a triable issue. (*Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 862 [where the employer provides a legitimate, nondiscriminatory reason for its action, "[i]t is not sufficient for an employee to make a bare prima facie showing or to simply deny the credibility of the employer's witnesses or to speculate as to discriminatory motive" in order to survive summary judgment].)[16]

2. Failure to accommodate and engage in the interactive process

a. mental disability

To prove a failure to accommodate claim under FEHA, the plaintiff must show (1) he or she had a disability as defined by FEHA, (2) the plaintiff could perform the essential functions of the job, and (3) the plaintiff's employer failed to reasonably accommodate his or her disability. (*Scotch*, *supra*, 173 Cal.App.4th at pp. 1009-1010.) FEHA provides employees a separate, but related, cause of action if the employer fails to

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[16] Plaintiff also contends Harte's discriminatory state of mind is shown by an e-mail in which Haldeman recommended that Harte "might want to save" a voicemail plaintiff sent a colleague—which the colleague forwarded to Harte and Haldeman. As plaintiff acknowledges, the voicemail is benign. She congratulates the colleague on finishing the semester and says she can be reached at her parents' phone number, which she provides. It would be pure speculation to impute any discriminatory motive to Haldeman's statement about saving the voicemail.

engage in an interactive process to determine a reasonable accommodation for the plaintiff's disability. (*Moore*, *supra*, 248 Cal.App.4th at p. 242 ["While a claim of failure to accommodate is independent of a cause of action for failure to engage in an interactive dialogue, each necessarily implicates the other"].) In order to trigger an employer's duty to provide a reasonable accommodation, the employee must first request an accommodation. (*Ibid*.) The parties must then participate in a good faith interactive process regarding the requested accommodation. (*Ibid*.)

Plaintiff contends the college failed to engage in the interactive process and failed to provide reasonable accommodation for her mental disability on two occasions: in early September 2012, when she provided the college her psychiatrist's note, and in January 2013, when she returned to teaching pursuant to limitations that same doctor recommended.

An employer only has a duty to provide reasonable accommodation, and to engage in an interactive process to determine an accommodation, when the employer "becomes aware of the need to consider an accommodation." (*Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 62, fn. 22; see also *Soria*, *supra*, 5 Cal.App.5th at p. 598 ["Once an employer is aware of a disability, it has an 'affirmative duty' to make reasonable accommodations for the employee"]; *Scotch*, *supra*, 173 Cal.App.4th at p. 1013 ["The employee must initiate the [interactive] process unless the disability and resulting limitations are obvious"]; *Nadaf-Rahrov v. Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 983 [employee may sue for failure to accommodate "[w]here a necessary accommodation is obvious, where the employee requests a specific and available

reasonable accommodation that the employer fails to provide, or where an employer participates in a good faith interactive process and identifies a reasonable accommodation but fails to provide it"].) An employee need not "speak any 'magic words' in order to effectively request an accommodation under the [FEHA]," but neither can the employee """"expect the employer to read his mind and know he secretly wanted a particular accommodation and sue the employer for not providing it."""" (*Soria*, *supra*, at p. 598, citation omitted.)

Plaintiff fails to establish a triable issue of material fact regarding her claims that the college failed to accommodate her mental disability or engage in an interactive process because the college provided her reasonable accommodations, and engaged in the interactive process, to the extent it was aware of her mental disability and its resulting limitations. When plaintiff brought her disability to the college's attention in September 2012, she did not request any accommodation. Nor was the need to provide one obvious to the college—or even plaintiff herself. When asked at her deposition if there was "any type of accommodation that [plaintiff] needed from the university to perform [her] job" at that time, plaintiff responded, "[n]ot that I know of."

Once plaintiff actually raised the need for an accommodation—at the meeting with Harte, Haldeman, Romero, and Melendres later that month—the parties engaged in a good faith effort to determine reasonable accommodations and the college promptly granted them, allowing plaintiff first to move her classes online and, when that proved insufficient, to take a leave of absence. In December 2012, the college extended plaintiff's leave upon her request. When plaintiff returned to teaching in January 2013, her psychiatrist recommended she be

limited to teaching three courses. The college complied with the requested recommendation and was not made aware, by plaintiff or otherwise, that further accommodations were necessary.

b. pregnancy disability

Plaintiff contends the trial court erred by granting judgment for the college on her claim that it failed to provide reasonable accommodation for her pregnancy and interfered with her right to seek pregnancy disability leave.

The Pregnancy Disability Leave Law (PDLL), which is part of FEHA, requires employers to provide leave to an employee who is "disabled by pregnancy, childbirth, or a related medical condition . . . ." (Gov. Code, § 12945, subd. (a)(1).) The statute also requires employers to provide reasonable accommodation "for a condition related to pregnancy, childbirth, or a related medical condition, if the employee so requests, with the advice of the employee's health care provider." (Gov. Code, § 12945, subd. (a)(3)(A).) Employers may not interfere with an employee's attempt to seek leave or reasonable accommodation provided under the statute. (Gov. Code, § 12945, subd. (a)(4).) In addition to the PDLL, the general FEHA provisions set forth at Government Code section 12940 also apply to an employee who has a disability caused by pregnancy. (Gov. Code, § 12945, subd. (a); *Sanchez v. Swissport, Inc.* (2013) 213 Cal.App.4th 1331, 1337-1338.)

Plaintiff's evidence did not require a jury determination of her claims concerning pregnancy accommodation and leave. It is undisputed plaintiff (1) did not request accommodation for her pregnancy, (2) was able to perform all of her job duties during her pregnancy, (3) took pregnancy disability leave in May 2013, and

(4) did not ask for leave before that time. In order for the college to have a duty to engage in an interactive process, and to provide reasonable accommodation, the college would need to be aware that plaintiff's pregnancy limited "a major life activity" or made her "unable . . . to perform any one or more of the essential functions of her job or to perform any of these functions without undue risk to herself, to her pregnancy's successful completion, or to other persons." (Gov. Code, § 12926, subd. (m), Cal. Code Regs., tit. 2, § 11035, subd. (f).) Informing the college that she was being treated for a high-risk pregnancy, without more, did not constitute a request for pregnancy disability leave or for an accommodation of "a condition related to pregnancy . . . with the advice of the employee's health care provider."[17] (*Gonzales v. Marriott Int'l, Inc.* (C.D. Cal. 2015) 142 F.Supp.3d 961, 969 [stating elements of PDLL failure-to-accommodate claim]; Cal. Code Regs., tit. 2, § 11035, subds. (d), (f) & (s).)

3. Retaliation claims

To prove retaliation in violation of FEHA, the plaintiff must establish "(1) he or she engaged in a 'protected activity,' (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer's action." (*Yanowitz*, *supra*, 36 Cal.4th

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[17] Plaintiff also contends the college violated the PDLL by failing to advise her of her right to request pregnancy disability leave and accommodation, as required by California Code of Regulations, title 2, section 11049. Plaintiff did not raise this contention in her complaint or in her opposition to summary judgment. Thus, we decline to consider it. (*Cafferkey v. City and County of San Francisco* (2015) 236 Cal.App.4th 858, 872.)

at p. 1042.) An employee who exercises a right to take leave under CFRA may separately sue for retaliation on the basis of taking CFRA leave. (*Bareno v. San Diego Community College Dist.* (2017) 7 Cal.App.5th 546, 560 [citing elements of CFRA retaliation claim]; Cal. Code Regs., tit. 2, § 11094, subds. (b) & (e).) While close temporal proximity between protected activity and an adverse employment action may be sufficient to support a prima facie claim of retaliation, temporal proximity alone is insufficient to show that an employer's asserted reason for the adverse action was pretextual. (*Arteaga v. Brink's, Inc.* (2008) 163 Cal.App.4th 327, 353-354, 357.)

The parties do not dispute that plaintiff took a CFRA-protected medical leave of absence in October 2012 and made complaints in February 2013 that constitute protected activity under FEHA. At issue is whether plaintiff could show at trial, based on the record before the trial court at summary judgment, that the college declined to renew her contract, or took other adverse employment actions against her, because of her protected conduct. We conclude she could not.

Plaintiff contends that much of the same evidence supporting her disability discrimination claims also shows the college retaliated against her for taking leave. For instance, she points to statements by Harte and Siebert manifesting disfavor toward mid-semester returns from leave, which we considered in our discussion of plaintiff's disability claims, *ante*. Because, however, plaintiff did not actually return from leave mid-semester, she cannot show a causal link between the concerns raised by Harte and Siebert and their decision not to renew her contract. To be sure, plaintiff's colleagues were inconvenienced by her mid-semester departure in fall 2012, but nothing in the

record suggests the college took adverse action against plaintiff because of those inconveniences. Indeed, Harte was the one who proposed plaintiff might take a leave of absence in the first place, and the record offers no indication Harte did so for any reason other than concern for plaintiff.

Discussions between Harte and Siebert about complying with plaintiff's contract in the spring initially evinced concern for plaintiff's health and later, once Harte ascertained the extent of plaintiff's workplace deficiencies, to concern plaintiff could not adequately fulfill her job requirements. Plaintiff contends Harte did not begin investigating plaintiff's performance until she took leave and that that fact raises an inference of retaliatory intent. The record does not support plaintiff's contention. While it is correct that Harte looked into plaintiff's performance after she went out on leave, the record also shows Harte examined plaintiff's performance before she requested leave.

Plaintiff also fails to adduce or point to evidence that would reasonably permit a finding that college engaged in a "retaliatory course of conduct" (*Yanowitz*, *supra*, 36 Cal.4th at p. 1058) preceding the nonrenewal of her contract because she chose to take leave. In our discussion of plaintiff's discrimination claims, we concluded that evidence regarding the removal of plaintiff's belongings from her shared office space and plaintiff's problems with payroll and network access upon returning from leave did not suggest any causal link to discriminatory animus. Here, too, plaintiff fails to raise an inference that those incidents were motivated by retaliation. Plaintiff's payroll and network issues were promptly resolved, or explained, and plaintiff points to no evidence, other than when the incidents occurred, linking those issues to retaliation. The fact that the college removed plaintiff's

belongings from her shared office space while she was on leave, replaced by other faculty, and scheduled to teach online in the following semester is simply not sufficient to create a triable issue on plaintiff's CFRA retaliation claim. Under the circumstances, these events were no more than "mere inconveniences" or "commonplace indignities typical of the workplace" that do not show retaliation. (*Yanowitz*, *supra*, 36 Cal.4th at p. 1060.)

Plaintiff's FEHA retaliation claim, based on her February 8, 2013, complaint, also fails for lack of evidence showing retaliatory intent. Any causal link between plaintiff's complaint and the college's nonrenewal of her contract is negated, or severely diminished, by the fact that Harte expressed a desire not to renew plaintiff's contract for performance issues two months before plaintiff made her complaint.

The record also belies plaintiff's contention that the college failed to investigate her complaint. Plaintiff's letter expressed concern that she had not received her first paycheck, the payroll department believed her employment was terminated, and her pay was being decreased. Lusk and Siebert each met with plaintiff to address those concerns. It is unclear whether Lusk followed up, as she told plaintiff she would, into whether plaintiff's department was "being really mean" to her, but even assuming Lusk did not, that failure does not suffice to show retaliatory animus considering the overall investigation of plaintiff's concerns. (*Yanowitz*, *supra*, 36 Cal.4th at p. 1047 ["complaints about personal grievances or vague or conclusory remarks that fail to put an employer on notice as to what conduct it should investigate will not suffice to establish protected conduct"].)

Nor do one-off remarks by Lusk and Siebert during their meetings with plaintiff evince a retaliatory motive. Lusk's observation that plaintiff's letter appeared to threaten a lawsuit is insufficient to imply any retaliatory intent, especially considering Lusk had no role in whether or not plaintiff's contract would be renewed. (See *King*, *supra*, 152 Cal.App.4th at p. 434.) Siebert's statement that plaintiff could find a job elsewhere, in response to plaintiff's concern about returning in the fall, does not reasonably imply the college chose not to renew plaintiff's contract because she made a complaint.

4. Wrongful termination

The college did not terminate plaintiff. It declined to enter into a new contract with her upon the expiration of her contract for the 2012-2013 school year. There is no cause of action for "tortious nonrenewal of an employment contract in violation of public policy." (*Motevalli v. Los Angeles Unified School Dist.* (2004) 122 Cal.App.4th 97, 102; see also *Touchstone Television Productions v. Superior Court* (2012) 208 Cal.App.4th 676, 678 ["A cause of action for wrongful termination in violation of public policy does not lie if an employer decides simply not to exercise an option to renew a contract" because "[i]n that instance, there is no termination of employment but, instead, an expiration of a fixed-term contract"].) Furthermore, because plaintiff's wrongful termination claim, as pleaded in her complaint, is based on violations of FEHA and the California Constitution's prohibition against pregnancy discrimination, the determinations of those claims in the college's favor prevents plaintiff from recovering for wrongful termination.

5. Failure to prevent discrimination; declaratory relief

Because we conclude plaintiff failed to establish any genuine issues of material fact that could reasonably support a decision in her favor on her FEHA discrimination and retaliation causes of action, her claim that the college violated FEHA by failing to prevent discrimination necessarily fails. (*Featherstone*, *supra*, 10 Cal.App.5th at p. 1166.) Likewise, our determination that plaintiff's other claims lack merit precludes the need for a trial on her claim for declaratory relief.

DISPOSITION

The judgment is affirmed. Mount Saint Mary's College shall recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, J.

We concur:

KRIEGLER, Acting P.J.

KIM, 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.