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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

KAREN FRIEDMAN, Plaintiff and Appellant, v. FAIRFIELD RESIDENTIAL, LLC, et al., Defendants and Respondents.	B235208 (Los Angeles County Super. Ct. No. BC412575)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael C. Solner, Judge. Affirmed.

Eisenberg & Associates and Michael B. Eisenberg for Plaintiff and Appellant.

Ogletree, Deakins, Nash, Smoak & Stewart and Alexandra A. Bodnar for Defendants and Respondents.

Plaintiff and appellant Karen Friedman (Friedman) appeals from a summary judgment entered in favor of defendants and respondents Fairfield Residential, LLC, and Fairfield Properties, LLC (collectively Fairfield). We conclude that the trial court rightly determined that plaintiff failed to present a triable issue of fact on her disability claims. Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Fairfield Hires Friedman

Fairfield is a real estate operating company specializing in multi-family housing. Fairfield hired Friedman in April 2006 as an administrative assistant to Steve Kealer (Kealer) in its Marina Del Rey office.

Kealer worked as vice president of the condominium group. Because he traveled frequently and was out of the office more than he was in the office, he needed Friedman available and in the office when he was out to handle office tasks. In fact, many of Friedman's job duties, such as checking Kealer's e-mails and mail, printing documents for him, and managing office equipment, could only be performed while Friedman was physically in the office.[1]

Friedman's Attendance and Performance Were Poor

Despite Fairfield's attendance policy and Kealer's needs, Freidman's attendance and performance were unsatisfactory. For example, Kealer asked Friedman to print materials for him to bring to his Monday meetings in San Diego. Because she repeatedly failed to provide these materials on time, he told her that he would do it himself. As for her attendance, she missed 23 days of work between April and October 2007, and was out several times earlier in the year.

On October 3, 2007, Friedman was verbally counseled about her attendance. On November 7, 2007, Friedman received a final written warning for: (1) Numerous incidents of unscheduled absences dating back to April 2007, constituting failure to meet

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[1] Additionally, Fairfield's attendance policy provides that "punctual, regular attendance is a condition of continued employment" and "excessive unexcused absences and tardiness will not be tolerated."

company standards of performance and conduct; (2) Numerous days tardy; (3) Taking days off without properly coding them as personal time off (PTO), in violation of Fairfield's policies;[2] (4) A lack of judgment and a conflict of interest in setting up an online travel agency through which she intended to book work-related travel for Kealer and other employees; and (5) Work performance that was not up to standards and caused other members of the office to be forced to take on additional job duties.

In December 2007, Kealer informed Friedman that she had earned a bonus.

After the Warning, Friedman's Performance did not Improve

In February and March 2008, Jennifer Perley (Perley), Fairfield's human resources manager, and Kealer discussed Friedman's continued performance issues and poor attendance. She was absent on January 2 and February 12, 13, 18, 28, and 29, and she only worked a partial day on March 3. On March 4, 2008, Perley noticed that Friedman's timesheet for February 18 showed that she worked even though she did not. A few days later, Perley discovered more falsified time entries. Specifically, Friedman's timesheet for the week of February 26 through 29, which she approved herself, showed that she worked 8:00 a.m. to 5:00 p.m. every day that week when she had not; in fact, Friedman was out of the office entirely on February 28 and 29. It also showed that she had worked 8:00 a.m. to 5:00 p.m. on March 3, 2008, when she had not.

Fairfield Decides to Terminate Friedman's Employment

Because Friedman had already received a final written warning regarding her timesheets, on March 4, 2008, Perley determined that Friedman's employment with

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[2] According to Friedman, Fairfield's Marina Del Rey office had a casual atmosphere, which applied to keeping track of their time. Thus, Friedman and other employees, including Kealer, routinely worked through lunch, while putting down on their schedules that they had taken a lunch break. Friedman also worked every other Saturday, preparing documents for Kealer's Monday meetings in San Diego, and did not record this time on her timesheet. In fact, Kealer would routinely tell Friedman and other employees to record themselves as having worked regular hours rather than having their pay docked if they were unable to work. In other words, Friedman contends that she was simply following her supervisor's instruction to disregard Fairfield's policies regarding timesheets and hours.

Fairfield should be severed. Although it was not Fairfield's general practice to offer a severance package to employees who are terminated for cause, Kealer was sympathetic to personal issues that Friedman was facing and Fairfield decided to offer Friedman a severance package.

On March 17, 2008, Perley prepared Friedman's termination paperwork, including finalizing a severance agreement for her and preparing Kealer for the termination meeting to occur three days later. Friedman's employment with Fairfield was terminated for cause on March 20, 2008.[3]

Friedman's Back Injury and Fairfield's Accommodation of her Injury

Friedman had a back injury when she was hired in 2006. Kealer was aware of that back injury at the beginning of the employment relationship.

Throughout Friedman's employment, Fairfield made accommodations for her because of her injury. She ordered for herself a special executive chair in February 2006 that had a high back rather than the standard executive chair with a short back. The chair was an ergonomic chair. She was allowed to take time off for chiropractor appointments. When she reinjured her back in February 2008, Fairfield permitted her to stand at her computer as needed.

Moreover, as soon as Perley learned that Friedman's physician had instructed her to stay on bed rest for one week and that Friedman was not following that instruction, she contacted Friedman and told her to follow her physician's recommendation. Kealer echoed Perley's sentiment. In fact, Fairfield provided Friedman with PTO for this purpose on March 4, 5, and 7, and a floating holiday on March 6, 2008.

Fairfield's Decision not to Buy an Ergonomic Chair for Friedman

On March 10, 2008, Friedman's doctor cleared her to return to work. On the advice of her doctor, Friedman requested accommodations from Kealer, such as being

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[3] Friedman contends that Kealer offered changing reasons for Fairfield's decision to terminate her employment. First, Kealer told her that she had inaccurately submitted time. Later, Kealer told her that Fairfield was not doing well economically.

able to lie on her back, to change tasks periodically, and for an ergonomic chair. According to Friedman, Kealer was visibly angry with her requests.

On March 12, 2008, Friedman sent Perley an e-mail stating, "my doctor has suggested I purchase an ergonomic chair for the computer." On March 17, 2008, Friedman e-mailed Kealer, notifying him that she had a doctor's appointment for more tests on her back and that she would be available by telephone if he needed anything. Kealer forwarded this e-mail to Perley.[4] Friedman also sent an e-mail to human resources on March 19, 2008, stating that her doctor suggested that she get an ergonomic chair. Although she had previously been told that if there were a medical condition that needed to be accommodated, she needed to submit a doctor's note to human resources, she did not do so.

Even though all of the task chairs at Fairfield are ergonomic chairs (and, in fact, Friedman had already ordered herself a special executive chair), it is Fairfield's practice to provide employees with a more specialized ergonomic chair if they submit a doctor's note requesting such a chair. Had Fairfield not already decided to sever Friedman's employment relationship with the company, Perley would have followed Fairfield's standard procedure to request a doctor's note substantiating the medical need for an accommodation. But, the decision to sever Friedman's employment had already been made, before Friedman's e-mails. In fact, the termination paperwork had been created and the termination meeting had been scheduled before Friedman's March 19, 2008, e-mail.

The Lawsuit

On April 27, 2009, Friedman filed a complaint against Fairfield alleging two causes of action for disability discrimination. According to the second amended complaint, Fairfield discriminated against Friedman by failing to accommodate Friedman and failing to engage in an interactive process to find a reasonable accommodation for

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[4] Perley responded to Kealer 16 minutes later, informing him of her decision to terminate Friedman's employment; her e-mail provides: "I think Termination may be best at this point."

Friedman's disability. Friedman further alleged that Fairfield discriminated against her by terminating her employment because of her disability and request for an accommodation.

Fairfield's Successful Motion for Summary Judgment

Fairfield moved for summary judgment or, in the alternative, summary adjudication. First, it argued that because of her excessive absenteeism, Friedman was not a qualified person with a disability. Thus, Fairfield was entitled to judgment. Regarding the first cause of action (disability discrimination—failure to engage in the interactive process and failure to provide a reasonable accommodation), Fairfield claimed that it did engage in the interactive process and accommodated Friedman in numerous ways. As for Friedman's claim that Fairfield failed to respond to her request for an ergonomic chair, Fairfield asserted that Friedman never made such a request. Alternatively, Fairfield contended that her request was not reasonable and that an accommodation would have been futile. Regarding Friedman's second cause of action (disability discrimination arising out of her termination), Fairfield argued that it was entitled to judgment because Friedman could not establish discriminatory animus or motive. And, Fairfield had several legitimate business reasons for terminating Friedman's employment, including (1) Friedman's record of absenteeism and failing to perform the essential functions of her job; (2) Friedman's conflict of interest in setting up and using her own travel agency to book business travel; (3) Friedman's falsification of her timesheets, even after she received a final written warning; and (4) Fairfield's economic reasons.

Friedman opposed Fairfield's motion. She argued that she suffered a legally cognizable disability, namely her back problems. She further asserted that she requested a reasonable accommodation, but that Fairfield repeatedly refused to offer accommodations or enter into the interactive process with her. Finally, Friedman contended that the termination of her employment stemmed directly from her disability and requests for an accommodation. In so arguing, Friedman noted that Fairfield's reason for terminating her employment changed, evidencing Fairfield's lack of

truthfulness. And, each purported reason for the termination of her employment lacked credibility.

After entertaining oral argument, the trial court granted Fairfield's motion. With respect to the first cause of action, the trial court found that Fairfield accommodated Friedman in several respects during her employment and that it had no duty to engage in the interactive process or accommodate Friedman with an ergonomic chair because doing so would have been futile in light of Fairfield's prior decision to terminate Friedman's employment for legitimate business reasons. With respect to the second cause of action, the trial court determined that Fairfield was entitled to judgment because (1) Friedman had received a written warning about failing to properly code her days off as paid time off in violation of company policy; (2) After receiving the final written warning, Friedman falsified her timesheets; (3) Fairfield terminated Friedman's employment for, among other things, falsifying her timesheets; (4) Fairfield's reasons for terminating Friedman's employment were legitimate; and (5) Friedman failed to show that Fairfield had a discriminatory animus or motive towards her.

Judgment was entered and Friedman's timely appeal ensued.

DISCUSSION

I. *Standard of Review*

"A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) We review the trial court's decision de novo." (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.)

II. *Fair Employment and Housing Act (FEHA)*

FEHA outlaws several employment practices relating to physical disabilities. As relevant here, it is an unlawful employment practice:

(1) Because of a physical disability, "to refuse to hire or employ the person . . . or to bar or to discharge the person from employment . . . or to discriminate against the person in compensation or in terms, conditions, or privileges of employment." (Gov. Code, § 12940, subd. (a).) This provision does not prohibit the discharge of an employee

with a physical disability where the employee "is unable to perform his or her essential duties even with reasonable accommodations." (Gov. Code, § 12940, subd. (a)(1).)

(2) "[T]o fail to make reasonable accommodation for the known physical . . . disability of an applicant or employee," unless the accommodation is shown to produce undue hardship to the employer's operation. (Gov. Code, § 12940, subd. (m).)

(3) "[T]o fail 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 . . . disability." (Gov. Code, § 12940, subd. (n).)

To establish a prima facie case of physical disability discrimination under FEHA, the employee must demonstrate that she is disabled and otherwise qualified to do the job and was subjected to an adverse employment action because of such disability. (*King v. United Parcel Service, Inc.* (2007) 152 Cal.App.4th 426, 432–433, fn. 2.) If this burden is met, it is then incumbent on the employer to show it possessed a legitimate, nondiscriminatory reason for its employment decision. (*Deschene v. Pinole Point Steel Co.* (1999) 76 Cal.App.4th 33, 44.) When this showing is made, the burden shifts back to the employee to produce substantial evidence that the employer's given reason was either "untrue or pretextual" or that the employer acted with discriminatory animus in order to raise an inference of discrimination. (*Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1004–1005.)

"The elements of a failure to accommodate claim are similar to the elements of a . . . section 12940, subdivision (a) discrimination claim, but there are important differences. The plaintiff must, in both cases, establish that he or she suffers from a disability covered by FEHA and that he or she is a qualified individual. For purposes of [a failure to accommodate] claim, the plaintiff proves he or she is a qualified individual by establishing that he or she can perform the essential functions of the position to which reassignment is sought, rather than the essential functions of the existing position. [Citations.] More significantly, the third element [under a subdivision (a) claim] . . . establishing that an 'adverse employment action' was caused by the employee's

disability—is irrelevant to this type of claim. Under the express provisions of the FEHA, the employer's failure to reasonably accommodate a disabled individual is a violation of the statute in and of itself. [Citation.]" (*Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 246.)

"While a claim of failure to accommodate [under Government Code section 12940, subdivision (m)] is independent of a cause of action for failure to engage in an interactive dialogue [under Government Code section 12940, subdivision (n)], each necessarily implicates the other." (*Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 54 (*Gelfo*).) "'Two principles underlie a cause of action for failure to provide a reasonable accommodation. First, the employee must request an accommodation. [Citation.] Second, the parties must engage in an interactive process regarding the requested accommodation and, if the process fails, responsibility for the failure rests with the party who failed to participate in good faith. [Citation.]' [Citations.]" (*Avila v. Continental Airlines, Inc.* (2008) 165 Cal.App.4th 1237, 1252.) In other words, "'"[r]easonable accommodation thus envisions an exchange between employer and employee where each seeks and shares information to achieve the best match between the [employee's] capabilities and available positions." [Citation.]' [Citation.]" (*Raine v. City of Burbank* (2006) 135 Cal.App.4th 1215, 1222.)

III. *Friedman's First Cause of Action*

Friedman's first claim against Fairfield is based upon her theory that Fairfield failed to engage in the interactive process with her and provide her with a reasonable accommodation. In support, Friedman directs us to (1) her request to be on bed rest for one week; (2) her request to lie on her back and stretch during the day, and to be able to switch tasks periodically; and (3) her request for an ergonomic chair. Friedman's evidence does not create a triable issue of fact.

Regarding Friedman's request to be on bed rest for one week, it is undisputed that Fairfield instructed Friedman to follow her physician's orders and remain on bed rest until she was able to return to work. In fact, she admitted at her deposition that she was on bed rest for one week. And, she was given PTO for this exact purpose.

As for Friedman's request that she be allowed to lie on her back and stretch, as well as to be able to switch tasks periodically, again it is undisputed that she did so. Her own deposition testimony confirms that she sat for a while, or would stand and walk around, or would lie down as needed. While she complains that Kealer rolled his eyes and scowled at her, she cannot demonstrate that her need to lie down, stretch, and switch tasks was not accommodated.

Finally, with respect to Friedman's request for an ergonomic chair, we conclude that Fairfield was not required to engage in the interactive process because doing so would have been futile (*Swonke v. Sprint, Inc.* (N.D. Cal. 2004) 327 F.Supp.2d 1128, 1137); by the time Friedman sent her e-mail requests to Perley, Fairfield had already made the decision to terminate Friedman's employment. In other words, no reasonable accommodation existed as Friedman's employment relationship with Fairfield was already scheduled to be severed. (*Nadaf-Rahrov v. Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 980, 982.)

In urging us to reverse on this aspect of the trial court's judgment, Friedman cites *Gelfo, supra,* 140 Cal.App.4th at page 54 for the proposition that "courts have specifically rejected the idea that an employer is not obligated to engage in 'futile' discussions related to the interactive process." *Gelfo* stands for no such thing. At issue in *Gelfo* was the question of whether an employer was required to participate in the interactive process with an individual who is "'regarded as'" disabled, as opposed to an employee who is "'actually'" disabled. (*Id*. at p. 55.) In holding that employers were required to engage in the interactive process with persons regarded as disabled, the *Gelfo* court rejected the employer's futility argument. (*Ibid*.) *Gelfo* did not wholly reject the futility argument, and did not consider whether futility was a proper defense in circumstances such as those presented in the instant case.

IV. *Friedman's Second Cause of Action*

In her second cause of action, Friedman alleges that Fairfield terminated her employment because of her disability and her request for an accommodation. Even assuming, without deciding that Friedman had demonstrated these elements, it is

undisputed that Fairfield had at least two legitimate, nondiscriminatory reasons for her termination—Friedman falsified her timesheets even after being warned not to do so, and Fairfield was facing dire financial conditions. Thus, Fairfield was entitled to judgment unless Friedman demonstrated that Fairfield's stated reason was pretextual or Fairfield acted with a discriminatory animus. (*Hersant v. Department of Social Services*, *supra*, 57 Cal.App.4th at pp. 1004–1005.) She did not do so.

Citing *Washington v. Garrett* (9th Cir. 1994) 10 F.3d 1421, 1434, Friedman claims that Fairfield's stated reasons for her termination were pretextual because Fairfield changed its stated reason for her termination. "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." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 356 (*Guz*).) "Fundamentally different justifications for an employer's action . . . give rise to a genuine issue of fact with respect to pretext since they suggest the possibility that neither of the official reasons was the true reason." (*Washington v. Garrett*, *supra*, at p. 1434.) Shifting reasons alone, however, are insufficient to raise a triable issue that the proffered reasons were pretextual. "[A]n inference of intentional discrimination cannot be drawn solely from evidence, if any, that the company lied about its reasons. The pertinent statutes do not prohibit lying, they prohibit discrimination. [Citation.] Proof that the employer's proffered reasons are unworthy of credence may 'considerably assist' a circumstantial case of discrimination, because it suggests the employer had cause to hide its true reasons. [Citation.] Still, there must be evidence supporting a rational inference that *intentional discrimination, on grounds prohibited by the statute, was the true cause* of the employer's actions." (*Guz*, *supra*, 24 Cal.4th at pp. 360–361.)

Here, Friedman's evidence suggests only that Fairfield gave additional reasons rather than shifting reasons for her termination. (*Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 815 ["'shifting reasons'" means inconsistent reasons].) These reasons, as discussed below, remain undisputed—Fairfield "was not doing well" and Friedman falsified her timesheets. Thus, under the circumstances of this case,

Fairfield's reasons for terminating Friedman's employment cannot be deemed pretextual for discrimination.

Regarding Friedman's timesheets, it is undisputed that they did not accurately reflect the days and times she worked. The fact that Kealer's timesheets may have been inaccurate does not create a triable issue of fact regarding the accuracy of Friedman's timesheets. And, Perley's testimony does not support Friedman's assertion that Fairfield would have allowed her to return to work even after discovering the falsified timesheets. All Perley stated was that some people were slated for layoff months in advance, so it was possible for someone to work after a decision to lay that person off had been made.

It is also undisputed that Fairfield was not doing well at the time Friedman's employment was terminated, and its condominium group closed later in 2008. Again, Perley's deposition testimony does not support Friedman's claim that Fairfield's business reason for terminating her employment was false.

Finally, there is no evidence of discriminatory animus. Perley's March 17, 2008, e-mail to Kealer, stating that "[t]ermination may be best at this point," does not demonstrate discriminatory animus. Rather, the e-mail just confirms what Fairfield intended to do once it reached the decision, earlier in March, to sever Friedman's employment relationship with the company.

DISPOSITION

The judgment is affirmed. Fairfield is entitled to costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
CHAVEZ