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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION TWO

LISA BLOW,

Plaintiff and Appellant,

v.

SONY PICTURES ENTERTAINMENT,  
INC., et al.,

Defendants and Respondents.

B255446

(Los Angeles County  
Super. Ct. No. BC494536)

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

Law Offices of Gene Ramos and Gene M. Ramos for Plaintiff and Appellant.

Manatt, Phelps & Phillips, Sandra R. King and Benjamin G. Shatz for Defendants and Respondents.

Plaintiff and appellant Lisa Blow (plaintiff) appeals from the summary judgment entered in favor of defendants and respondents Sony Pictures Entertainment Inc. (SPE), Columbia Pictures Industries, Inc. (Columbia Pictures), and Studio Payroll Services, Inc. (collectively, defendants) in her action for wrongful termination, retaliation, disability discrimination, failure to accommodate, failure to engage in the interactive process, age discrimination, and violation of the California Family Rights Act (Gov. Code, § 12945.2) (CFRA).<sup>1</sup> We affirm the judgment.

### **BACKGROUND**

Plaintiff worked as an accounting clerk in a corporate travel and expense management department.<sup>2</sup> Her job consisted of processing and auditing expense reports, and included typing, using a computer mouse, and using a calculator during an eight-hour work day. Approximately 90 percent of plaintiff's job duties were computer-related. Plaintiff's job also required her to write for two to three hours daily, lift boxes weighing 15 to 20 pounds, and on occasion, to grasp objects.

On August 9, 2011, plaintiff left work early because of pain in her right elbow and arm. On August 15, 2011, she visited a medical doctor, who faxed to defendants a release/restriction report placing plaintiff on total temporary disability leave and restricting her from returning to work until at least August 23, 2011. Plaintiff notified Heather Carter (Carter), an SPE executive director of human resources, of her need for a leave of absence. SPE then sent plaintiff a letter outlining her rights under the Family and Medical Leave Act and the CFRA.

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<sup>1</sup> Plaintiff does not challenge on appeal the summary adjudication of her age discrimination or CFRA causes of action. All other statutory references are to the Government Code unless otherwise indicated.

<sup>2</sup> Plaintiff contends she was employed by Studio Payroll Services whereas defendants claim she was employed by Columbia Pictures. The trial court found a triable issue of fact existed as to the identity of plaintiff's employer but concluded that the issue was immaterial to the grant of summary judgment. We agree with that conclusion.

Plaintiff saw her doctor again on August 22, 2011, and on August 29, 2011, and the doctor extended plaintiff's disability leave, first to August 30, 2011, and then to September 6, 2011. On September 8, 2011, plaintiff's doctor extended her disability leave for a third time, to September 28, 2011.

Plaintiff thereafter began seeing another doctor, who extended her disability leave to November 1, 2011. The new doctor then twice extended plaintiff's disability leave, first to January 1, 2012, and then to February 15, 2012.

Plaintiff's doctor approved her return to work on February 15, 2012, with restrictions that precluded her from lifting more than 10 pounds; from repetitive use of her right hand for writing, grasping, torqueing, pulling or pushing; and from doing computer work for more than two hours a day for the next three months.

In February 2012, Carter scheduled a meeting with plaintiff to discuss her work restrictions and return to work. At the meeting, attended by plaintiff, Carter, and two other executives, plaintiff was asked what duties she felt she could perform if she returned to work. Plaintiff responded that she could do light typing and possibly answer phones. At the time, plaintiff understood that her doctor had restricted her to a maximum of two hours of typing per day, in addition to restrictions on her lifting and grasping, writing, and pulling. At the end of the meeting, Carter told plaintiff that she would review plaintiff's medical restrictions and get back to her.

On March 1, 2012, plaintiff saw yet another doctor, who placed her on total temporary disability leave through April 7, 2012, subsequently extended to April 22, 2012. The new doctor authorized plaintiff to return to work on April 23, 2012, "part time 5 hrs/day" at her regular job. The work authorization further stated that plaintiff "must be provided with [an] ergonomically-sound work station."

In March 2012, plaintiff spoke by telephone with Carter, who told plaintiff to review available job listings on the company website to see if there were any positions she believed she could perform. Plaintiff learned in March 2012 of a receptionist position at Sony Digital Audio Disc Corporation (DADC), a separate company from each of the defendants. The SPE human resources group had no control over filling positions

at DADC. Plaintiff sent her resume for the DADC position to a recruiter who was not affiliated with any of the defendants.

From April to May 2012, plaintiff began communicating directly with a senior vice president in SPE's human resources group, Joan Willeford, about possible positions. Willeford agreed to look into the status of plaintiff's application for the DADC position, learned that the DADC position had been filled, and notified plaintiff of that fact.

In April 2012, plaintiff noticed an open receptionist position on the SPE website and contacted SPE recruiter Tuyet Lu to discuss it. Within the next week, Lu interviewed plaintiff for the position. During the interview, Lu informed plaintiff that the position was full-time, from 1:00 p.m. to 10:00 p.m. The position was ultimately filled by the temporary worker who had been covering the job.

On May 15, 2012, Willeford sent plaintiff an email confirming that her doctor had authorized her to return to work with the restriction that she could not work more than five hours a day at her regular job. Willeford's email further stated: "You have indicated that as most of that time would be working on the computer it would not be something that you could do. When you see your doctor on Monday, you will need him to specify on an updated note what your return to work restrictions are (such as how many hours per day you could work, what type of work you can do during those hours, and how long the restriction would be in place for). We can then discuss together and determine whether or not it is feasible for you to return to your position, what types of other positions you could look into based on those restrictions and what the options are based on all of that." Plaintiff in her deposition confirmed the accuracy of Willeford's email communication and her description of plaintiff's work restrictions.

Defendants' applicable leave policy generally provided for leaves of absence up to six-months. During the period of time that plaintiff was on disability leave, defendants covered her job duties by using temporary workers.

On May 21, 2012, plaintiff's doctor issued an updated return to work authorization with the following work restrictions: "Part-time 5 hrs/day," "Limit typing, mouse or writing greater than 45 minutes per hour," and "no lifting over 5 lbs." Willeford

reviewed these restrictions with plaintiff's department head, Michael Hernandez, and they concluded that, after using temporary workers for approximately eight months to cover plaintiff's job duties, they would fill plaintiff's position. Willeford thereafter notified plaintiff that her position would be filled as of May 25, 2012, but that her leave of absence would be extended until June 25, 2012, to allow her additional time to find another position. Willeford looked for positions to accommodate plaintiff's restrictions in May and June but could not find any. Plaintiff's employment was terminated effective June 26, 2012. At no time prior to June 25, 2012, did plaintiff provide defendants with any medical note stating that she could work more than five hours a day or that her medical restrictions had changed in any way.

On July 11, 2012, after her employment was terminated, plaintiff sent a fax to Willeford asking for her old position back and enclosing a doctor's note dated June 21, 2012, removing the five-hour per day part-time work restriction. Willeford responded in writing and informed plaintiff that Willeford would be happy to continue working with plaintiff and have her application reviewed for any current openings. Plaintiff did not respond to Willeford's letter, nor did she thereafter initiate contact with defendants about job openings.

### **The instant lawsuit**

After obtaining a right-to-sue letter from the Department of Fair Employment and Housing, plaintiff filed the instant lawsuit in October 2012. Defendants answered, and the parties engaged in discovery in 2013. In June 2013, defendants filed a motion for summary judgment which was originally set to be heard in August. Defendants continued the hearing to September to allow plaintiff's counsel additional time to prepare an opposition.

In August 2013, plaintiff filed an ex parte application to continue the summary judgment hearing for an additional 60 days, and to continue the trial and discovery cutoff dates, claiming that she needed additional time to obtain facts to oppose the motion. Defendants opposed the continuance request on the grounds that significant discovery had already been undertaken, the summary judgment motion was premised almost

entirely on plaintiff's own testimony, and the extension request appeared to be a form of tactical delay. The trial court denied plaintiff's request without prejudice, explaining that plaintiff could bring another continuance request that complied with the statutory requirement of making a factual showing that "facts essential to justify opposition may exist but cannot, for reasons stated, then be presented." (Code Civ. Proc., § 437c, subd. (h).)

On the day of the summary judgment hearing, plaintiff filed another request to continue the hearing, as well as a peremptory challenge to the trial judge. The trial court continued the matter to late September 2013 and subsequently granted the peremptory challenge and vacated the hearing date. The case was then transferred to a new department.

In November 2013, the day before the initial status conference in the new department, plaintiff gave notice of her intent to move ex parte to reopen discovery and to file an amended complaint. At the status conference, the trial court denied the ex parte motion and set the hearing on the summary judgment motion to December.

Two days later, plaintiff filed a motion to reopen discovery and to amend her complaint to allege joint liability among the defendants, to enlarge her disparate impact theory, and to add more specific allegations for her disability discrimination and failure to accommodate claims. The trial court denied the motion, noting that plaintiff had failed to comply with court rules regarding amending the complaint and presented no justification for her disparate impact theory or for reopening discovery.

At the December 18, 2013 hearing on the motion for summary judgment, the trial court issued a tentative ruling granting the motion, which was adopted as the final ruling at the conclusion of hearing. Judgment was entered in defendants' favor, and this appeal followed.

## **DISCUSSION**

### **I. Standard of review**

Summary judgment is granted when a moving party establishes the right to entry of judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) "The purpose of the

law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute. [Citation.]" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).)

A defendant moving for summary judgment bears the initial burden of proving that there is no merit to a cause of action by showing that one or more elements of the cause of action cannot be established or that there is a complete defense to that cause of action. (Code Civ. Proc., § 437c, subd. (p)(2); *Cucuzza v. City of Santa Clara* (2002) 104 Cal.App.4th 1031, 1037.) Once the defendant has made such a showing, the burden shifts to the plaintiff to show that a triable issue of one or more material facts exists as to that cause of action or as to a defense to the cause of action. (*Aguilar, supra*, 25 Cal.4th at p. 849.) If the plaintiff does not make such a showing, summary judgment in favor of the defendant is appropriate. In order to obtain a summary judgment, "all that the defendant need do is to show that the plaintiff cannot establish at least one element of the cause of action . . . . [T]he defendant need not himself conclusively negate any such element . . . ." (*Id.* at p. 853, fn. omitted.)

On appeal from a summary judgment, an appellate court makes "an independent assessment of the correctness of the trial court's ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law. [Citations.]" (*Iverson v. Muroc Unified School Dist.* (1995) 32 Cal.App.4th 218, 222.)

## **II. Disability discrimination**

The Fair Employment and Housing Act (§ 12940 et seq.) (FEHA) prohibits discrimination based on an employee's physical disability. Under FEHA, it is unlawful for an employer to bar or to discharge a person from employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment because of the person's physical disability or medical condition. (§ 12940, subd. (a).)

A plaintiff asserting a FEHA disability discrimination claim bears the burden of establishing that "he or she (1) suffered from a disability, or was regarded as suffering

from a disability; (2) could perform the essential duties of the job with or without reasonable accommodations, and (3) was subjected to an adverse employment action because of the disability or perceived disability. [Citation.]” (*Sandell v. Taylor-Listug, Inc.* (2010) 188 Cal.App.4th 297, 310.)

An employer seeking summary judgment in a FEHA discrimination case meets its burden by showing that one or more elements of a prima facie case is lacking, or that legitimate, nondiscriminatory reasons existed for the adverse employment action.

“‘[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*. [Citations.]” (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 358 (*Guz*).)

Following such showing by the employer, the burden again shifts to the employee to demonstrate that the reasons for termination are a pretext and that the employer acted with a discriminatory motive. (*Guz, supra*, 24 Cal.4th at pp. 354-356.) To do so, the employee must present “‘substantial responsive evidence’ that the employer’s showing was untrue or pretextual. [Citation.]” (*Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718, 1735 (*Martin*).) An employee may raise a triable issue of fact regarding pretext by presenting evidence of implausibilities, inconsistencies, or contradictions in an employer’s proffered reason, or with direct evidence of a discriminatory motive. (*Guz, supra*, at pp. 356, 363.) To raise a triable issue of fact, however, the employee’s evidence must do more than present a “weak suspicion” that discrimination was a likely basis for the termination. (*Id.* at pp. 369-370.) “[A]n employer is entitled to summary judgment if, considering the employer’s innocent explanation for its actions, the evidence as a whole is insufficient to permit a rational inference that the employer’s actual motive was discriminatory.” (*Id.* at p. 361, fn. omitted.)

***A. Defendants presented a legitimate business reason for terminating plaintiff’s employment***

Defendants met their burden of showing that they had legitimate business reasons for terminating plaintiff’s employment -- plaintiff was unable to perform her job duties



and no alternative positions were available to accommodate her work restrictions. Plaintiff's job required her to work an eight-hour day, during which 90 percent of her time was spent doing computer-related tasks such as typing or using a computer mouse. After more than eight months of disability leave, plaintiff remained medically restricted in April 2012 to part-time work of five hours a day. In May 2012, plaintiff confirmed that the work restrictions imposed by her doctor in her April 23, 2012 return to work authorization limited her to a five-hour work day. Plaintiff also told defendants that because most of that five-hour work day would be spent working on a computer, it was not something she could do.

Plaintiff's doctor issued a revised work authorization on May 21, 2012, that continued the five-hour work day restriction and limited the time plaintiff could spend typing, writing, or using a computer mouse to no more than 45 minutes per hour. Willeford and plaintiff's department head reviewed the revised work restrictions, and the two of them decided to fill plaintiff's position in light of plaintiff's work limitations and the fact that the department had been using temporary workers for approximately eight months. At no time prior to termination of plaintiff's employment on June 26, 2012, did plaintiff provide defendants with any medical note stating that she could work more than five hours per day or that her medical restrictions had been changed in any way.

In light of the foregoing undisputed evidence, defendants met their burden of showing a legitimate business reason for terminating plaintiff's employment.

***B. No triable issue of material fact***

Because defendants met their burden of establishing a legitimate business reason for terminating plaintiff's employment, the burden shifted to plaintiff to present evidence raising a triable issue of material fact that she was able to perform the essential duties of her job or that the stated reasons for her termination were pretextual. (*Guz, supra*, 24 Cal.4th at pp. 354-356; *Martin, supra*, 29 Cal.App.4th at p. 1735.)

Plaintiff contends triable issues of material fact exist as to whether she could, with reasonable accommodation, perform the essential duties of her job. Plaintiff further contends triable issues exist as to whether her job required eight hours of typing a day

and whether the May 21, 2012 doctor note authorizing her return to work limited her to a five-hour work day rather than five hours of typing per day. She claims the trial court erred by misinterpreting the work restrictions specified in her May 21, 2012 doctor's note, by overruling evidentiary objections made during her deposition when she testified that her job required at least eight hours a day of typing, and by disregarding other evidence showing that her job did not require eight hours of typing per day.

### **1. Essential job duties and plaintiff's ability to perform those duties**

Plaintiff contends the trial court erred by interpreting the May 21, 2012 doctor's note returning her to work as limiting her to a five-hour work day rather than five hours of typing during an eight-hour work day. The trial court's interpretation of the work restriction is consistent with plaintiff's own interpretation in her communications with defendants and in her deposition testimony.

Plaintiff confirmed with defendants that an identical five-hour work restriction imposed by her doctor in an April 23, 2012 return to work authorization limited her to part-time work of five hours a day. Plaintiff also testified during her deposition that she understood the May 21, 2012 doctor's note to mean that she "could only work part-time five hours a day" and that she could type, write, and use a computer mouse for only 45 minutes each hour during that five-hour day. Plaintiff's subsequent declaration, submitted in opposition to the summary judgment motion, that the May 21, 2012 doctor note limited her to five hours of typing per day rather than a five-hour work day, is insufficient to raise a triable issue regarding the work restrictions. (*Benavidez v. San Jose Police Dept.* (1999) 71 Cal.App.4th 853, 861-862 [declaration submitted in opposition to summary judgment that contradicts prior discovery responses raises no triable issue of fact].)

Plaintiff claims she submitted "competent evidence of a written job description" of her position that raises a triable issue as to whether the position required eight hours of typing a day. Putting aside the issue as to whether that document -- an email containing a job requisition for a "Clerk Accounting III" position "pending approval" -- constitutes "competent evidence of a written job description" of plaintiff's position, it does not

contradict plaintiff's testimony that approximately 90 percent of her job duties were computer-related tasks such as typing and using a computer mouse. The email accordingly raises no triable issue regarding the essential functions of plaintiff's job.

Plaintiff next contends the trial court erred by disregarding other portions of her deposition in which she testified that she spent only "five to six hours" typing during a "normal work day." That testimony raises no triable issue regarding the essential duties of plaintiff's job. (*Thompson v. Williams* (1989) 211 Cal.App.3d 566, 573 ["[A] party cannot rely on contradictions in his own testimony to create a triable issue of fact".]) Plaintiff's testimony also raises no triable issue as to whether she was capable of performing her job duties. Even assuming that plaintiff's job required her to type only five to six hours during a normal eight-hour work day, there was undisputed evidence that plaintiff's doctor limited her to a five-hour work day and that he further restricted the amount of time plaintiff could spend typing or using the computer during that abbreviated work day to no more than 45 minutes per hour -- a maximum of 3.75 hours per day. Plaintiff's testimony accordingly raises no triable issue of material fact.

Plaintiff cites testimony from other witnesses, including her replacement, as evidence that her position as an accounting clerk did not require her to type continuously throughout the day. Michelle Jones-Chambers, who replaced plaintiff, testified that although she types about seven hours a day, it is not "non-stop just for seven hours straight" but includes stopping, "handling the mouse" and "clicking different screens." That testimony raises no triable issue as to whether plaintiff was able to perform the essential functions of her job, given her medical restrictions limiting her to a five-hour work day that included no more than 45 minutes of typing and computer use per hour.

## **2. Alleged evidentiary error**

Plaintiff contends the trial court abused its discretion by overruling objections made by her counsel during her deposition to questions about her job duties. Plaintiff presents no argument or authority, however, to support that contention. She therefore fails to meet her burden on appeal of affirmatively challenging the trial court's evidentiary ruling and demonstrating the trial court's error. (*Roe v. McDonald's Corp.*

(2005) 129 Cal.App.4th 1107, 1114.) The issue is therefore forfeited. (*Salas v. Department of Transportation* (2011) 198 Cal.App.4th 1058, 1074.)

***C. No evidence of pretext***

Plaintiff argues that defendants “could not have reasonably believed” that an essential function of plaintiff’s job was to type for eight hours a day and that they accordingly could not assert that plaintiff was unable to perform her job. In support of this argument, plaintiff presented evidence that her job duties included other tasks such as reading; talking on the telephone and writing reports that did not require significant computer use; a purported written job description of her position that lists no typing requirement; and deposition testimony by the director of the expense management department that accounting clerks were required to process three reports per hour.

Plaintiff’s proffered evidence fails to raise a triable issue regarding pretext. That plaintiff’s job may have required less than eight hours of typing a day and included other non-computer related duties does not demonstrate any implausibility, inconsistency, or contradiction in defendants’ stated reason for terminating her employment -- plaintiff’s admitted inability to return to work given her medical restrictions and the amount of time she typically spent using a computer during her work day.

Plaintiff claims that defendants could not reasonably have believed that a medical restriction limiting her to a five-hour work day precluded her from returning to her position as an accounting clerk because they helped her apply for other full-time positions. Defendants’ assistance to plaintiff in applying for other full-time jobs, premised on the assumption that plaintiff’s condition would eventually improve, is not evidence of pretext or a discriminatory motive, nor is it inconsistent with defendants’ stated reason for terminating plaintiff’s employment -- plaintiff’s admitted inability to return to work given her medical work restrictions.

Plaintiff next contends that defendants’ assertion that no alternative jobs were available for her is “unworthy of credence” and “suspect.” She offers no evidence to support this contention, however, other than defendants’ repeated encouragement that plaintiff review SPE’s website for other available positions. That evidence establishes

nothing but plaintiff's "weak suspicion" of a discriminatory animus and is insufficient to raise a triable issue of fact. (*Guz, supra*, 24 Cal.4th at pp. 369-370.)

Finally, plaintiff argues that defendants' leave policy is discriminatory because it requires an employee to be "100 percent healed" before returning to work. Defendants claim this argument was never presented to the trial court and is waived on appeal. Plaintiff does not dispute this claim. The argument is therefore waived. (*Kolani v. Gluska* (1998) 64 Cal.App.4th 402, 412 ["Generally, failure to raise an issue or argument in the trial court *waives* the point on appeal"].)

Defendants met their burden of showing a legitimate business reason for terminating plaintiff's employment. (*Guz, supra*, 24 Cal.4th at pp. 354-356.) Plaintiff failed to sustain her burden of presenting "substantial responsive evidence" that defendants' showing was untrue or pretextual. (*Martin, supra*, 29 Cal.App.4th at p. 1735.) The trial court accordingly did not err by summarily adjudicating her claim for disability discrimination.

### **III. Failure to accommodate**

FEHA provides that it is an unfair employment practice for an employer "to fail to make reasonable accommodation for the known physical or mental disability of an . . . employee" unless the accommodation would cause "undue hardship" to the employer. (§ 12940, subd. (m).) Under FEHA, a reasonable accommodation is any ""modification or adjustment to the workplace that enables the employee to perform the essential functions of the job held or desired." [Citation.]" (*Swanson v. Morongo Unified School Dist.* (2014) 232 Cal.App.4th 954, 968-969.) FEHA includes as examples of reasonable accommodation, "[j]ob restructuring, part-time or modified work schedules, reassignment to a vacant position, . . . and other similar accommodations for individuals with disabilities." (§ 12926, subd. (p)(2).)

The elements of a failure to accommodate claim are "(1) the plaintiff has a disability under the FEHA, (2) the plaintiff is qualified to perform the essential functions of the position, and (3) the employer failed to reasonably accommodate the plaintiff's disability. [Citation.]" (*Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986,

1009-1010 (*Scotch*).) The plaintiff employee bears the burden of showing that he or she was able to do the job with a reasonable accommodation (*Green v. State of California* (2007) 42 Cal.4th 254, 262), as well as the burden of establishing the availability of a reasonable accommodation (*Nadaf-Rahrov v. Nieman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 984).

An employer can prevail on summary judgment on a claim of failure to reasonably accommodate by establishing through undisputed facts that “there simply was no vacant position within the employer’s organization for which the disabled employee was qualified and which the disabled employee was capable of performing with or without accommodation.” (*Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 263 (*Jensen*)).<sup>3</sup>

Defendants have met that burden here. The undisputed evidence shows that plaintiff’s medical restrictions prevented her from performing her job as an accounting clerk, even on a part-time basis. The evidence also showed that defendants tried to find other positions for plaintiff but were unable to find anything given plaintiff’s work restrictions. The burden then shifted to plaintiff to produce evidence showing a triable issue of material fact. She failed to do so. The trial court accordingly did not err in granting summary judgment on this cause of action.

#### **IV. Failure to engage in the interactive process**

FEHA requires an employer who receives “a request for reasonable accommodation by an employee . . . with a known . . . disability” “to engage in a timely, good faith, interactive process with the employee.” (§ 12940, subd. (n).) “The “interactive process” required by . . . FEHA is an informal process with the employee or the employee’s representative, to attempt to identify a reasonable accommodation that

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<sup>3</sup> An employer can also prevail on summary judgment on a claim for failure to reasonably accommodate by establishing that a reasonable accommodation was offered to the employee and refused, or that the employer did everything in its power to find a reasonable accommodation, but the interactive process failed because the employee failed to engage in discussions in good faith. (*Jensen, supra*, 85 Cal.App.4th at p. 263.)

will enable the employee to perform the job effectively. [Citation.] . . .’ [Citation.]” (*Scotch, supra*, 173 Cal.App.4th at p. 1013.)

The evidence shows that defendants engaged in the interactive process with plaintiff. When plaintiff’s doctor first authorized her to return to work with restrictions in February 2012, Carter scheduled a meeting with plaintiff. At that meeting, attended by plaintiff, Carter, and two finance directors, plaintiff was asked what duties she felt able to perform at that time. At the conclusion of the meeting, Carter told plaintiff that she would review plaintiff’s medical restrictions and would get back to her. Carter followed up with plaintiff in March 2012, encouraging her to review available job listings on the company website to see if there were any positions she believed she was capable of doing. Thereafter, Willeford began communicating directly with plaintiff about possible positions. Willeford assisted plaintiff in applying for a position at DADC, a company separate from each of the defendants, communicated with plaintiff about her medical restrictions, and looked for positions to accommodate plaintiff’s restrictions but could find none.

Plaintiff presents no evidence that raises a triable issue regarding defendants’ alleged failure to engage in the interactive process. Instead, she argues that defendants placed the burden on her to find available positions rather than taking affirmative steps to find a position for her. The evidence is to the contrary. The trial court did not err by summarily adjudicating this claim in defendants’ favor.

## **V. Retaliation**

To establish a prima facie case of retaliation in violation of FEHA, a plaintiff must show that he or she engaged in a protected activity, that the employer subjected the employee to an adverse employment action, and that a causal link exists between the protected activity and the adverse action. (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 614.) A causal link may be established with evidence demonstrating that the employer was aware of the protected activity and the adverse action followed within a relatively short time. (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 69.)

Once a prima facie case has been established, the burden shifts to the employer to offer a legitimate nonretaliatory explanation for its conduct. If the employer offers a legitimate, nonretaliatory reason, the burden then shifts back to the plaintiff to show that the employer's proffered explanation is merely a pretext for retaliation. (*Flait v. North American Watch Corp.* (1992) 3 Cal.App.4th 467, 476.)

Plaintiff argues that her attempts to return to her work with accommodation for her medical restrictions was protected activity, that she engaged in protected activity up until the time her employment was terminated, and that the close proximity between her protected activity and termination establishes the requisite causal nexus for her retaliation cause of action.

Plaintiff fails to establish the requisite causal nexus between her protected activity and the termination of her employment. The evidence shows that defendants granted plaintiff 10 months of disability leave -- more than that required under the CFRA or defendants' own leave policy -- and that they attempted to locate a position for plaintiff that would accommodate her medical restrictions. There is no evidence that plaintiff's employment was terminated for taking disability leave or for seeking accommodation for her medical restrictions. The trial court did not err by summarily adjudicating this claim in defendants' favor.

## **VI. Wrongful termination in violation of public policy**

Plaintiff's only argument with respect to her claim for wrongful termination in violation of public policy is that the existence of triable issues preclude summary adjudication of this claim as well as her other causes of action. Plaintiff's failure to present evidence raising a triable issue with respect to her other causes of action makes summary adjudication of this claim proper as well. The trial court did not err by doing so.

## **VII. Alleged procedural errors**

Plaintiff contends the trial court erred by denying her request to continue the summary judgment motion, her request for further discovery, and her request to amend her complaint.



***A. Continuance and request for additional discovery***

Code of Civil Procedure section 437c, subdivision (h) provides: “If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication or both that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, or order a continuance to permit affidavits to be obtained or discovery to be had or may make any other order as may be just.”

A declaration to support a request for continuance under section 473c, subdivision (h) must show: “(1) the facts to be obtained are essential to opposing the motion; (2) there is reason to believe such facts may exist; and (3) the reasons why additional time is needed to obtain these facts. [Citations.]” (*Wachs v. Curry* (1993) 13 Cal.App.4th 616, 623.) “It is not sufficient under the statute merely to indicate further discovery or investigation is contemplated. The statute makes it a condition that the party moving for a continuance show ‘facts essential to justify opposition may exist.’” (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 548.)

Plaintiff argues that the declaration of her attorney satisfied the statutory requirements for a continuance. In that declaration, plaintiff’s attorney states that a continuance is necessary so that plaintiff can seek to depose certain employees who “may have information” on available jobs for which plaintiff may have been qualified. Plaintiff’s counsel further states in his declaration that plaintiff seeks to depose two former co-workers whose “testimony is now more material” because they are no longer employed by defendants.

Plaintiff’s counsel’s declaration fails to explain why the discovery sought is necessary to oppose summary judgment. Based on this deficiency alone, the trial court’s denial of the request for a continuance was not an abuse of discretion. (See *Waisbren v. Peppercorn Productions, Inc.* (1995) 41 Cal.App.4th 246, disapproved on another ground in *San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 315.) The declaration also fails to identify the specific facts to be obtained and the reasons to believe that such facts might exist.

Finally, the declaration fails to explain why the discovery sought could not have been obtained earlier. Plaintiff commenced the instant action in October 2012. The summary judgment motion was filed in June 2013 and after a continuance and several delays that amounted to de facto continuances, was not heard until December 2013.

As Division Five of this court noted in *Cooksey v. Alexakis* (2004) 123 Cal.App.4th 246 (*Cooksey*), there is a split of authority as to whether lack of diligence by the party seeking a continuance may be a basis for denying an application under Code of Civil Procedure section 473c, subdivision (h). After examining the cases on both sides, the court concluded: “We agree with the majority of courts holding that lack of diligence may be a ground for denying a request for a continuance of a summary judgment motion hearing. Although the statute does not expressly mention diligence, it does require a party seeking a continuance to declare why ‘facts essential to justify opposition . . . cannot, for *reasons stated, then* be presented’ [citation], and courts have long required such declarations to be made in good faith. [Citations.] There must be a justifiable reason why the essential facts cannot be presented. An inappropriate delay in seeking to obtain the facts may not be a valid reason why the facts cannot then be presented. The statute itself authorizes the imposition of sanctions for declarations presented in bad faith or solely for purposes of delay. [Citation.] A good faith showing that further discovery is needed to oppose summary judgment requires some justification for why such discovery could not have been completed sooner.” (*Cooksey*, at p. 257.)

We agree with the court in *Cooksey* and the majority of appellate courts and conclude that lack of diligence in conducting discovery may justify the denial of a continuance of a summary judgment motion. In the instant case, plaintiff’s counsel’s declaration does not address the delay in seeking the discovery purportedly necessary to oppose defendants’ summary judgment motion. The trial court’s denial of the request for a continuance and for additional discovery was not an abuse of discretion.

***B. Leave to amend***

Plaintiff contends the trial court abused its discretion by denying her leave to amend the complaint to add a “joint employer” theory of liability. She claims to have

been unaware, until defendants filed their motion for summary judgment, that they were asserting that Columbia Studios, and not any of the other defendants, was plaintiff's employer. That argument is unavailing, however, as defendants in their answer specifically denied that either Studio Payroll Services or SPE was plaintiff's employer. The alleged error, in any event, is harmless. Which of the various defendants actually employed plaintiff is immaterial to the summary adjudication of plaintiff's claims.

**DISPOSITION**

The judgment is affirmed. Defendants are awarded their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

\_\_\_\_\_, J.  
CHAVEZ

We concur:

\_\_\_\_\_, Acting P. J.  
ASHMANN-GERST

\_\_\_\_\_, J.  
HOFFSTADT