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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

FRANCINE KENT, Plaintiff and Appellant, v. CITY OF SANTA MONICA, Defendant and Respondent.	B261570 (Los Angeles County Super. Ct. No. BC492033)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michelle R. Rosenblatt, Judge. Affirmed.

Law Offices of Stephen A. Ebner and Stephen A. Ebner; Law Offices of C. Stephen Love and C. Stephen Love for Plaintiff and Appellant.

Marsha Jones Moutrie, City Attorney, Karen S. Duryea, Deputy City Attorney, and Carol Ann Rohr, Deputy City Attorney, for Defendant and Respondent.

Plaintiff and appellant Francine Kent (plaintiff) injured her arm while working as a Traffic Services Officer for the City of Santa Monica (City or defendant), and the City accommodated her injury in various respects over the course of nearly two years. Plaintiff's acupuncturist concluded her injury was permanent and stationary and required fixed work restrictions, and the City determined she could not resume her previous position effectively. Plaintiff then saw a new physician who declared she could return to her job without restriction, and the City offered to reinstate her approximately three months later, after reconciling what it believed were conflicting opinions as to the state of her injury. Plaintiff sued the City for violating the Fair Employment and Housing Act (FEHA) (Gov. Code,[1] § 12900 et seq.), contending the delay in returning her to duty to reconcile the work restriction opinions was mere pretext for disability discrimination and retaliation for requesting accommodations. The trial court granted summary judgment to the City on all of plaintiff's claims, and we consider whether a material issue of fact exists on the question of whether the City's reason for the three-month delay in reinstating her—the desire to resolve the apparently conflicting opinions of the acupuncturist and the physician—was pretextual.

I. BACKGROUND

A. Facts

Plaintiff began working for the City in 2001. Her job as a Traffic Services Officer included enforcing parking laws, issuing citations, and directing traffic. Plaintiff worked four 10-hour shifts per week, with traffic control accounting for anywhere from less than five to as much as 100 percent of each shift, depending on the day and particular needs.[2]

In July 2010, plaintiff strained her right arm while performing traffic control. Plaintiff was right-handed, and when the pain had not subsided more than a week later,

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[1] Undesignated statutory references that follow are to the Government Code.

[2] Plaintiff said traffic control consisted of "ensuring no gridlock through an intersection, stopping traffic, starting traffic, motioning for people to turn, turn around, signaling with a whistle, raising your hand for them to stop, [and] stopping pedestrians."

she reported the injury to the City, sought treatment, and filed a workers' compensation claim. After her physician, Peter Mikhail (Mikhail), cleared her to work with restrictions, the City assigned plaintiff to "light duty," which consisted of her regular duties as a Traffic Services Officer minus traffic control. Plaintiff remained on light duty until July 11, 2011, pursuant to a series of agreements in which she acknowledged such assignments did "not normally exceed a maximum of 180 days, contingent upon approval at intervals not to exceed 45 days, and [did] not confer entitlement to a permanently modified position."

Through the end of 2010, Mikhail recommended plaintiff limit the use of her right upper arm, which meant no traffic control, no lifting objects more than five pounds, and no pushing or pulling. When Mikhail evaluated plaintiff in early 2011, he continued to restrict her from performing traffic control duties. While seeing Mikhail, plaintiff eventually came to disagree with the course of medical treatment he recommended, which involved receiving cortisone injections from an orthopedic specialist. With the City's approval, plaintiff opted to be treated by an acupuncturist instead.[3] Because plaintiff decided to forgo his recommended course of treatment, Mikhail told Reyes in March 2011 that he could do nothing more for her but he would not change his recommended work restrictions or release her from his care because of malpractice concerns. Reyes informed plaintiff the City disagreed with Mikhail's findings and was therefore requesting she be evaluated by a Panel Qualified Medical Evaluator.[4] Reyes

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[3] Caesar Reyes (Reyes), a Workers' Compensation Claims Examiner in the City's Risk Management Division, noted that when he authorized plaintiff to see an acupuncturist, he told her acupuncturists could not determine disability under the Labor Code. (Lab. Code, § 3209.3, subd. (e).) Reyes testified in his deposition that he believed the prohibition was limited to workers' compensation law, however, and that acupuncturists could issue opinions relating to "permanent and stationary" injury status relevant to employers' accommodations decisions.

[4] According to a declaration of City Workers' Compensation Administrator David Bomberger (Bomberger), when there is an impasse or dispute concerning an employee's medical condition, "the workers' compensation remedy" is to seek a second medical opinion from a Panel Qualified Medical Evaluator.

told plaintiff she could select an acupuncturist if she desired, and plaintiff chose licensed acupuncturist Abel Kwan (Kwan), who was not a medical doctor but held a Ph.D. Plaintiff explained she chose an acupuncturist as her Panel Qualified Medical Evaluator because she was currently "being treated by an acupuncturist and seemed to be getting better . . . ."

In April 2011, City representatives met with plaintiff to discuss workplace accommodations, which was City practice when an employee had been working on a temporary assignment for more than six months. At the meeting, which was facilitated by Rachel Shaw (Shaw), a third-party consultant on interactive process matters for the City, plaintiff agreed with her current work restrictions and acknowledged the City would not be able to keep her on light duty status permanently.

After evaluating plaintiff at the end of June, acupuncturist Kwan reported the condition of her right arm was "permanent and stationary" but that her left elbow continued to need and respond to treatment.[5] He said she could work so long as she refrained from frequently bending or straightening her elbows, lifting heavy items, using a keyboard or mouse for long durations, and performing any traffic control for "a period of time." Kwan suggested reevaluating her elbows after she had abstained from traffic control for three months. Around the time the City received Kwan's report, Jay Trisler (Trisler), a lieutenant in the City's Traffic Division, asked Reyes if "they [could] advise [plaintiff] not to go back to work since she's been on modified duty since she return[ed] to work on 8/16/2010." Reyes relayed Trisler's query along with Kwan's medical opinion to Shaw, who responded that, based on her reading of plaintiff's most recent medical reports, plaintiff's condition might be worsening, with her left elbow now suffering from overcompensating for the right.

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[5] Bomberger explains that "permanent and stationary," along with the synonymous phrase "maximum medical improvement," means the employee's condition "is not getting better or worse but has plateaued with their medical treatment." He asserts these terms do not constitute disability ratings under workers' compensation law.

On July 11, 2011, the scheduled end date of plaintiff's light duty assignment, her supervisor, Margarita Verduzco, told her the City could no longer accommodate her in that position. A week later, Shaw told plaintiff the City was looking for an alternative assignment for her in another department. Six weeks later, the City notified plaintiff it had arranged an assignment for her, but plaintiff declined the offer because she had sprained her ankle in a non-work-related accident and could not fulfill the job duties. After plaintiff provided proof her ankle was healed, the City offered her an alternative assignment in another division, where plaintiff worked until May 25, 2012.

In December 2011, Kwan issued a report stating plaintiff could perform her "usual and customary duties" subject to the following permanent and stationary work limitations: she should avoid frequently bending and straightening her elbows, lifting heavy items, or using a keyboard or mouse for more than 45 minutes at a time. She could resume traffic control "with shorter time and lighter duties." Kwan later clarified that plaintiff could perform traffic control from one-third to one-half of a 10-hour shift, with breaks.

The City scheduled another accommodations meeting in May 2012,[6] which plaintiff attended with a union representative who was also an attorney. At the meeting, plaintiff expressed concern about performing traffic control because it required repetitive arm movements, which could be extensive depending on traffic volume. She and her union representative discussed with the City whether modifications to the traffic control function could be implemented, such as guaranteeing breaks or requiring her to direct traffic only in emergencies. In Trisler's view, the unpredictable nature of traffic control work made it impossible to guarantee a five-hour shift, timely breaks, or "emergency" shifts only. He emphasized that traffic control was an essential component of plaintiff's

[6] According to Human Resources Analyst Stephanie Swofford (Swofford), who oversaw the City's accommodations process, once an employee was given permanent work restrictions, the City scheduled a meeting to determine whether it could reasonably accommodate the employee's restrictions in his or her permanent position. In addition, the modified assignment in which plaintiff was then working had been scheduled to end on April 28.

job and Traffic Services Officers needed to be able to perform that aspect whenever needed, citing a recent emergency power outage as an example of the job's unforeseeable demands.

City Human Resources Manager Michael Earl told plaintiff that completely eliminating an essential function of her job was not a reasonable accommodation. Because an accommodation was unavailable in plaintiff's current department in light of her work restrictions, she was provided a list of open positions in other departments and told she could be placed in one, as a reasonable accommodation, so long as she met the minimum qualifications, the job functions were medically appropriate, and the position did not constitute a promotion. Notes taken at the meeting indicate plaintiff was told the City would begin to process her disability retirement and medical separation if it ultimately was unable to place her in an available position as a reasonable accommodation. For so long as plaintiff "continue[d] to be an employee of the [City]," however, she could "request reasonable accommodation into any position that [might] come available" with plaintiff being "solely responsible for reviewing the vacancies that arise . . . ." According to plaintiff, she left the meeting believing she would be terminated if she did not accept, or was not qualified for, one of the open, non-promotional positions mentioned in the meeting.

On May 23, Amanda Elek-Truman, a City Human Resources employee who coordinated injured employees' returns to work, informed plaintiff her modified duty assignment would end two days later. Swofford told plaintiff that same day a Staff Assistant III position was available and likely to be filled soon. Plaintiff met the minimum qualifications for the position, completed an application for it, and scheduled to take a typing test, which was a prerequisite.

At the end of May, the City sent plaintiff a letter asking her to notify the City if she was interested in "any other positions that become available while [plaintiff was] still employed. . . ." The letter further stated that, "[u]ntil such time that [plaintiff was] either placed in an alternate position, disability or service retire[d] from employment, resign[ed]

from [her] position as a Traffic Services Officer, or [was] medically separated," the City would place her on a "medical leave of absence as a form of reasonable accommodation."

After receiving the letter, plaintiff cancelled the Staff Assistant III typing test on the advice of her attorney.[7] That same day, plaintiff's attorney sent a letter to the City's Director of Human Resources, Donna Peter (Peter), explaining plaintiff had retained counsel because of "potential clams of employment discrimination" against the City, including failing to accommodate and "unlawfully tak[ing] her off work based on her disability and/or perceived disability status."

Later in June 2012, in coordination with the City's Risk Management Division, plaintiff saw an orthopedic surgeon, Mark Ganjianpour (Ganjianpour), who opined plaintiff could "return to regular work without restrictions." In late June and again in mid-July, plaintiff contacted her supervisors and asked to be reinstated now that Ganjianpour had released her to return without restrictions.

Believing Ganjianpour's opinion was inconsistent with acupuncturist Kwan's earlier report recommending restrictions on duties plaintiff could perform, outside counsel handling workers' compensation issues for the City sent a letter to Kwan on July 27, asking him to "issue a supplemental report and address whether or not in [his] opinion [plaintiff] should be able to return to work with absolutely no work restrictions . . . ." In sending the letter, counsel copied both Reyes in the City's Risk Management Division and a workers' compensation attorney retained by plaintiff.[8] On August 8, 2012, City Human Resources Director Peter wrote plaintiff's counsel, informing him plaintiff's most

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[7] After declining to proceed with the Staff Assistant III position, plaintiff did not recall looking for other positions with the City and never contacted anyone in Human Resources about other possible positions. Swofford stated that even after plaintiff withdrew from consideration for the Staff III position, Swofford continued to scan possible job opportunities for her.

[8] Reyes did not later recall receiving the letter and suggested he might have overlooked it because it related to plaintiff's accommodations and return to work, matters he did not handle.

recent medical report contradicted earlier findings and the City was therefore waiting for a new report from Kwan before taking further action.

Without copying any City employees, Kwan responded on August 3, 2012, to the City's outside workers' compensation counsel's request for a supplemental report on whether plaintiff could return to work with no restrictions. Kwan stated that his report and recommendations of December 2011 were "based on [plaintiff's] condition at the time," and he deferred to her new treating physician's opinion of her then-current "condition as well as her ability to perform her duties at full capacity . . . ." Outside counsel did not forward the supplemental report to Reyes until October 1; when outside counsel did so, she included a note that she "just noticed that the [Panel Qualified Medical Evaluator] issued this letter in response to my request for a supplemental. I don't know why he did not copy you . . . but here it is." Reyes forwarded Kwan's supplemental report to other City personnel the very next day. Peter testified in her deposition that she would have waited six to eight weeks before following up to determine whether Kwan had responded to the City's request for clarification because, in her experience, it could take that long or longer for medical providers to respond to such requests.

By the time the City's outside counsel notified Reyes of Kwan's report, plaintiff had already filed her suit against the City. Her complaint, filed September 12, 2012, asserted causes of action under FEHA for disability discrimination and retaliation, among other claims. Plaintiff alleged the City improperly used Kwan's opinion, entitled to no weight because he was not a medical doctor, to manufacture a conflict in the evidence; unduly delayed her return to work on more than one occasion; and subjected her to policies that disparately affected disabled workers, including a "fully healed" policy and the imposition of medical leave as form of accommodation.

A City official contacted plaintiff's attorney on October 9 and told him the City wanted to reinstate plaintiff to her position as a Traffic Services Officer now that the conflicting medical opinions had been reconciled. On October 31, plaintiff's attorney informed the City plaintiff would reject the City's offer "because of the potential of a

hostile environment that could follow her return to work, as well as [plaintiff's] reasonable belief that retaliation could very likely occur upon returning." Plaintiff reconsidered, however, and eventually returned to her job as a Traffic Services Officer.

B. Defendant's Motion for Summary Judgment

Although plaintiff returned to work, she continued to prosecute her lawsuit against the City. The City brought a motion for summary judgment arguing plaintiff could not prove discrimination or retaliation because the City did not subject her to adverse employment actions, because the City made decisions regarding plaintiff's employment for legitimate reasons, and because plaintiff could adduce no evidence suggesting discriminatory or retaliatory intent. The City contended it had properly considered Kwan's work restrictions opinion and sought to resolve Kwan's opinion with Ganjianpour's before reinstating her.

In opposition, plaintiff argued there were material issues of fact necessitating a trial. Plaintiff contended a factfinder could infer the City's proffered reason for the three-month delay in reinstating her, the need to reconcile the Kwan and Ganjianpour opinions, was mere pretext for discrimination and retaliation because: (1) Trisler asked a question in July 2011 about whether he could advise plaintiff not to return to work, (2) the City relied on Kwan's opinions even though he was not a physician qualified to determine disability, and (3) City policies and procedures "fostered an atmosphere where so many things could and did go wrong."

At the summary judgment hearing, the parties focused on the period of time between when the City discontinued plaintiff's modified assignment at the end of May 2012 and when it asked her to return to work in October of that same year. Plaintiff argued the City had a duty to tell her the reason for the delay, i.e., clarification of conflicting medical reports, rather than let her "languish" without pay during that time, and she further argued a jury could find the delay constituted discrimination. In response, the City asserted the delay could not be attributed to impermissible animus because it was undisputed relevant City personnel had no actual knowledge the conflicting medical

opinions had been reconciled earlier. The City also argued plaintiff wrongly suggested she had not been told the reason why she was not immediately reinstated when cleared for duty by Ganjianpour. The City pointed to the July 27 letter from outside counsel asking Kwan for clarification, which was copied to one of plaintiff's attorneys, and an instance in early August in which the City informed another of plaintiff's attorneys that it was seeking to resolve conflicts in plaintiff's medical reports. As to plaintiff's argument that asking Kwan for a supplemental report was evidence of pretext because his opinion was insufficient to create a conflict in the first place, the City responded Kwan was prohibited only from determining disability for the purpose of providing workers' compensation payments. Acupuncturists were legally permitted to assess disability or impairment for the purpose of determining work restrictions.

The trial court found no triable issues with respect to any of plaintiff's claims and granted summary judgment for the City. As to plaintiff's discrimination cause of action, the court ruled the City established legitimate, nondiscriminatory reasons for delaying plaintiff's return to work.[9] In the face of the City's proffered reasons for its decisions, the evidence did not reveal any material disputes of fact that could suggest pretext. The court found the City was justified in making accommodation decisions based on the opinions of plaintiff's acupuncturist because plaintiff chose Kwan as her qualified medical evaluator and he was an authorized health care provider for purposes of FEHA. The court further ruled the City was justified in seeking to reconcile Kwan's opinion with Ganjianpour's. With respect to plaintiff's retaliation claim, the court concluded she could not establish a prima facie case because the City did not take any adverse employment action against her.

II. DISCUSSION

The resolution of plaintiff's appeal turns on whether a reasonable trier of fact could find that the City's conduct between the end of May 2012, when it discontinued

[9] The City assumed plaintiff could state a prima facie case for disability discrimination and the court proceeded under the same assumption.

plaintiff's modified duty assignment, and October, when it offered to reinstate her, was discriminatory or retaliatory. We conclude the trial court correctly granted summary judgment for the City because the evidence submitted in connection with summary judgment cannot reasonably support an inference that discriminatory or retaliatory animus motivated the City's conduct. The City properly relied on acupuncturist Kwan's opinions, both in determining appropriate accommodations for plaintiff and in seeking to resolve the conflict between Kwan and Ganjianpour, and there is no evidence that would permit a factfinder to conclude the City purposefully delayed plaintiff's return to work after the conflicting medical opinions were reconciled. In the face of the City's legitimate reasons for its decisions, plaintiff can point to no material dispute of fact requiring trial.

A. Standard of Review

A party is entitled to summary judgment where "all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) A moving defendant succeeds by demonstrating that the plaintiff cannot establish one or more elements of the plaintiff's cause of action (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853 (*Aguilar*)), either because "the plaintiff 'has not established, and cannot reasonably expect to establish, a prima facie case . . . .' [Citation.]" (*Miller v. Dept. of Corrections* (2005) 36 Cal.4th 446, 460) or because the defendant has conclusively negated an essential element of plaintiff's claim (*Aguilar*, 25 Cal.4th at p. 854).

If the employee in a FEHA discrimination or retaliation action establishes a prima facie case, the employer may seek to obtain summary judgment by showing it took adverse employment action against the employee for legitimate reasons "that would permit a trier of fact to find, more likely than not, that [such reasons] were the basis for the [adverse action]. [Citations.]" (*Kelly v. Stamps.com Inc.* (2005) 135 Cal.App.4th 1088, 1097-1098; see also *Guz v. Bechtel Nat., Inc.* (2000) 24 Cal.4th 317, 355-356

(*Guz*).) The employee can defeat the employer's showing by pointing to or submitting evidence that would permit a trier of fact to find the employer's reason was pretextual or motivated by discriminatory or retaliatory intent. (*Id*. at p. 356.) The employee carries the ultimate burden of persuasion on the issue of discrimination. (*Ibid*.)

We review a grant of summary judgment de novo, considering the evidence and drawing reasonable inferences in the light most favorable to the opposing party. (*DeJung v. Superior Court* (2008) 169 Cal.App.4th 533, 549.)

B. Analysis

1. Plaintiff's disability discrimination claim

FEHA prohibits employers from discriminating against an employee "in compensation or in terms, conditions, or privileges of employment" based on the employee's physical or mental disability, among other attributes. (§ 12940, subd. (a).) An employee establishes a prima facie case of disability discrimination upon a showing that he or she (1) suffered from, or was seen to suffer from, a disability, (2) was subjected to an adverse employment action on account of that disability, and (3) could perform the essential functions of the job with or without reasonable accommodations. (*Sandell v. Taylor-Listug, Inc.* (2010) 188 Cal.App.4th 297, 310.)

Here, plaintiff claims there was a material dispute of fact as to whether the City discriminated against her on account of disability when it failed to reinstate her—or to inform plaintiff of its reason for the delay—after Ganjianpour cleared her to return without restrictions. We see no triable issues. Assuming plaintiff established a prima facie case, the City offered a legitimate, non-discriminatory reason for its actions. Plaintiff failed to rebut the City's showing by pointing to evidence that would support a reasonable inference the City's reasons were a pretext for discrimination.

To start, the City properly relied on the opinion of plaintiff's chosen medical evaluator, licensed acupuncturist Kwan, in determining her accommodations status both before and after Ganjianpour issued his conflicting opinion. While acupuncturists are not authorized to determine disability for the purpose of an employee's entitlement to

payments under workers' compensation law (Lab. Code § 3209.3, subd. (e)), employers are not legally prohibited from relying on an acupuncturist's opinion in considering how to reasonably accommodate or reinstate an employee with a disability. To the contrary, the accommodations process under FEHA may be triggered by the findings of a licensed acupuncturist, who is a "health care provider" under the act. (See Cal. Code Regs., tit. 2, §§ 11065, subd. (i)(2), 11069, subd. (b).) Furthermore, the City asserted, without contradiction, that a medical provider's opinion an injury has reached "permanent and stationary" condition is not a disability rating under workers' compensation law. Thus, the City's conclusion it should reconcile the Kwan and Ganjianpour opinions before returning an employee to unrestricted duty does not lead to an inference of pretext. It is instead evidence of appropriate prudence. (See Cal. Code Regs., tit. 2, § 11069, subd. (c)(3) [employer may require second opinions from health care providers as part of interactive process].)

There is also no evidence from which a rational trier of fact could conclude the City discriminated against plaintiff based on the two-month period between when Kwan sent his August 2012 letter to the City's outside counsel and when counsel forwarded that letter to the City. First, plaintiff is simply incorrect when she states the City failed to inform her the reason for the delay because two of her attorneys were notified in late July and early August that the City was seeking to reconcile conflicting medical opinions issued by Kwan and Ganjianpour. Second, Reyes's failure to follow up, or to ask someone in Human Resources to follow up, on outside counsel's initial request for clarification from Kwan suggests is at most an oversight.[10] Whether or not Trisler informed anyone after receiving plaintiff's July request to be reinstated is of no consequence because other City personnel clearly learned about Ganjianpour's report through Trisler or otherwise around the time plaintiff contacted Trisler. Thus, there is no

[10] While the City's outside counsel may have served as its agent, there is no dispute the relevant decision-makers regarding plaintiff's work status were unaware of Kwan's supplemental report until October and there is no evidence their ignorance was deliberate. Consequently, pretext cannot be inferred from such lack of knowledge.

nexus between any motivation of Trisler and the City's actions regarding plaintiff's return to work.

Plaintiff's only remaining argument, as far as inferences of discrimination, is Trisler's question in July 2011—as relayed by Reyes—whether "they [could] advise [plaintiff] not to go back to work since she's been on modified duty since she return[ed] to work on 8/16/2010." That isolated statement is insufficient to establish a material dispute of fact requiring trial absent other evidence of pretext. (See *Guz*, *supra*, 24 Cal.4th at p. 362 [summary judgment for employer appropriate where, "given the strength of the employer's showing of innocent reasons, any countervailing circumstantial evidence of discriminatory motive, even if it may technically constitute a prima facie case, is too weak to raise a rational inference that discrimination occurred"].) At the time Trisler made the statement, plaintiff's assignment was scheduled to end in July and had far exceeded the 180-day cap that was customary for such temporary positions. As Trisler's statement shows, he was not the decision-maker when it came to plaintiff's job assignment. Nor did his statement "corroborate direct evidence of discrimination or gain significance in conjunction with other circumstantial evidence" so as to suggest discrimination considering the totality of evidence. (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 541.) Furthermore, plaintiff does not contend that Trisler's statement was connected to later discriminatory conduct by the City in support of an argument based on the continuing violation doctrine. Indeed, if anything, Trisler's statement undercuts an inference of discrimination because his statement was a request for guidance from employees more familiar with applicable rules or regulations.

2. Plaintiff's retaliation claim

Employers subject to FEHA may not "discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden [by the statute] or because the person has filed a complaint, testified, or assisted in any proceeding under this part." (§ 12940, subd. (h).) To prevail on a claim of retaliation, the employee must show "(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. [Citations.]" (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042 (*Yanowitz*).) Protected activity includes seeking advice from government agencies regarding employment discrimination, "participating in an activity perceived by the employer as opposition to discrimination," and participating in a legal proceeding relating to the employer's alleged violation of FEHA. (*Nealy v. City of Santa Monica* (2015) 234 Cal.App.4th 359, 380-381.) The Legislature recently clarified FEHA to specify that seeking accommodation for a known physical or mental disability is also a protected activity. (§ 12940, subd. (m)(2), added by Stats. 2015, ch. 122, § 1(a).)

The parties dispute whether plaintiff engaged in protected activity. Plaintiff contends she did so by seeking to remain at or return to work, but she does not specifically identify which particular actions should be deemed protected. We need not determine whether plaintiff engaged in protected activity when she initially sought accommodations or when she contacted the City in June and July of 2012 to ask for reinstatement because our review of the record persuades us the City demonstrated plaintiff cannot establish such requests were the cause of the adverse action complained of, namely the delay in reinstating her after Ganjianpour cleared her for duty.

For the reasons we discussed in the context of plaintiff's discrimination claim, the City's decisions during the summer of 2012 were based on legitimate reasons and plaintiff can point to no evidence suggesting those reasons were pretextual. First, when plaintiff contacted the City in the summer of 2012, she was still subject to Kwan's permanent work restrictions regarding traffic control. Thus, there was no justification to reinstate her as a Traffic Services Officer. Second, once the City learned of Ganjianpour's report, it appropriately sought to resolve the conflict with Kwan in order to facilitate plaintiff's return to work. Third, the City did not purposefully ignore or neglect a duty to learn of Kwan's letter of clarification. While the delay was certainly vexing for plaintiff, and while there may be a basis to infer greater diligence on the part of City employees might have returned plaintiff to work sooner, the record supports no

inferences on which a factfinder could conclude the City created or took advantage of the delay for a pretextual or discriminatory purpose.

DISPOSITION

The judgment is affirmed. The City is to recover its costs on appeal.

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BAKER, J.

We concur:

TURNER, P.J.

KRIEGLER, J.