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CARLA FOWLER

IN THE SUPERIOR COURT OF CALIFORNIA

SACRAMENTO COUNTY SUPERIOR COURT - UNLIMITED CIVIL JURISDICTION

CARLA FOWLER,

Plaintiff,

vs.

STATE OF CALIFORNIA DEPARTMENT OF HEALTHCARE SERVICES, et al.

Defendants.

CASE NO.: 34-2010-00090773

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT/SUMMARY ADJUDICATION

Date: September 21, 2012
Department: 53
Time: 9:00
Judge: 54
Trial Date: None

I. INTRODUCTION

The Defendants terminated Plaintiff's employment, while she was on a continuing disability leave, well known and documented by the Defendants. The Defendants' motion is without merit. They have had ample notice of Plaintiff's injury and resulting disability, her need for accommodations, her continuing pain and resulting need to extend her disability leave, and in fact at one point the Defendants accommodate Plaintiff. Plaintiff did everything she could to keep the Defendants informed of her medical

condition and her need for extended medical leave as an accommodation. Instead of participating in a good faith interactive process to provide Plaintiff with reasonable, effective accommodations as required by law and allowing her to return back to work after completing her medical leave, the Defendants chose to fire Plaintiff for allegedly failing to provide the required medical documentation to support her absence during a few specific days. In actuality, the Defendants gave Plaintiff a run-around, rejecting her two doctor's disability notes because those notes weren't good enough for them, and terminating Plaintiff for allegedly being AWOL, when they knew exactly why Plaintiff was not reporting to work.

The Defendants' AWOL policy is not a free pass to violate FEHA disability laws, and should not allow them to escape liability for terminating Plaintiff who they regarded as a disabled worker within the meaning of FEHA since March 2008. The Defendants' AWOL policy further does not absolve them of their duties to engage in interactive process and provide reasonable accommodations to Plaintiff.

II. FACTUAL BACKGROUND

Most facts are undisputed. Plaintiff was employed by the Defendants as a Word Processor since around January 1, 2007. *Decl. of Fowler* §2. Approximately 85% of her duties were typing. In March 2008, Plaintiff was diagnosed with a repetitive motion injury in her right hand. From March 25, 2008 until about April 2, 2009, the Defendants accommodated Plaintiff, as per her doctor's instructions, by modifying Plaintiff's duties to minimize the time she spent typing. *Decl. of Folwer* §3.

On April 2, 2009, the Defendants advised Plaintiff that they could no longer accommodate her, and placed Plaintiff on paid disability leave. *Decl. of Fowler* §6.

On May 20, 2009, Plaintiff was released to work by her doctor with the restriction of not typing more than 4 - 6 hours per day. Plaintiff reported back to work on May 26, 2009. *Decl. of Fowler* §7 & §9.

On May 29, 2009, due to unbearable pain in her right hand, Plaintiff was forced to leave work and report back to her doctor. *Dec. of Fowler* §10.

On June 3, 2009, Plaintiff told her supervisor Okasaki that Plaintiff was unable to work due other pain in the injured hand. *Decl. of Fowler* §12. Plaintiff also faxed a letter to her supervisor informing the Defendants that she saw a doctor on May 29, 2009, and that Plaintiff will have to be off work pending her doctor's recommendation. *Decl. of Fowler* §13.

On June 5, 2009, Plaintiff's primary care physician took Plaintiff off work, recommending in his note that Plaintiff be retrained or placed on disability. Plaintiff submitted that note to her supervisor on June 8, 2009. *Decl. of Fowler* §14. In response, the Defendants advised Plaintiff that the note was insufficient, because it did not cover specifically the reasons for Plaintiff's absence from work between June 1, 2009 and June 5, 2009. *Decl. of Fowler* §15. The Defendants did not offer Plaintiff any retraining. *Decl. of Fowler* §19.

On June 10, 2009, per Defendants' orders, Plaintiff went back to her physician and obtained a new note, which covered all of Plaintiff's absences from June 1, 2009 through August 2009. *Decl. of Fowler* §16. When Plaintiff submitted the new form to the Defendants, they advised her that she has already been deemed AWOL and that they will be processing Plaintiff's "resignation." *Id.*

On June 17, 2009, the Defendants terminated Plaintiff's employment for allegedly

being AWOL from June 1, 2009 through June 5, 2009. *Decl. of Fowler* §17.

On September 30, 2009, Plaintiff had a hearing in front of the Department of Personnel Administration, at which it was found that Plaintiff had valid reasons for her absence. Decl. of Fowler §20.

III. ARGUMENT

A. The Standard for Granting Summary Judgment

"Summary judgment is a drastic remedy that is to be used sparingly, and any doubts about the propriety of summary judgment are to be resolved in favor of the opposing party. *Walrath v. Sprinkel*, 99 Cal.App.4th 1237, 1240 (2002). Summary judgment may not be granted unless there is no triable issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *Aguilar v. Atlantic Richfield Co.*, 25 Cal.4th 826, 843 (2001). The moving party "bears the burden of persuasion that there is no triable issue of material fact, and that [they are] entitled to summary judgment as a matter of law." *Id.* at 850. Further, the court must view the evidence and all reasonable inferences in the light most favorable to the non-moving party. *Id.* at 856. The affidavits of the moving party are strictly construed and those of his opponent liberally construed, and doubts as to the propriety of summary judgment should be resolved against granting the motion. *Flait v. North American Watch Corp.* 3 Cal.App.4th 467, 472 (1992). And, all inferences arising from the evidence must be construed liberally in the plaintiff's favor. *Binder v. Aetna life Insurance Co.* 75 Cal.App.4th 832, 838 (1999). In an employment case, summary judgment is inappropriate if there are conflicting inferences reasonably deductible from the facts. *Garcia v. Rockwell Int'l Corp.*, 187 Cal.App.3d 1556, 1563 (1986). Employment case issues, such as intent and motive are "not determinable on paper, and as such, are rarely

appropriate for disposition on summary judgment." *Nazir v. United Airlines, Inc.* 178 Cal.App.4th 243, 286 (2009). Guided by these principles, the Court should deny the Defendants' Motion for Summary Judgment or Adjudication of Issues in its entirety as Plaintiff raises a number of triable issues of material fact, as shown below.

B. The Defendants were well aware of Plaintiff's continuing disability.

Prior to terminating Plaintiff, the Defendants saw Plaintiff's Kaiser form stating that Plaintiff was placed on modified duties between March 25, 2008 and May 21, 2009 and that Plaintiff had restrictions and limitations. **AMF-10**. Prior to terminating Plaintiff, the Defendants also new that Plaintiff had permanent work restrictions of no typing or writing for more than 4-6 hours a day. **AMF-12**. Prior to terminating Plaintiff, the Defendants saw a letter from Plaintiff that was transmitted to the Defendants on June 4, 2009, where Plaintiff stated that she continued to be off work due to exacerbated condition and that she is waiting to her from her doctor who she saw on May 29, 2009. **AMF-14**. The Defendants also saw one medical note from plaintiff that recommend that Plaintiff be either placed on disability or retrained. **AMF-15**. No retraining was ever offered, even though the Defendants admitted that they knew that retraining or job restructuring is one type of a reasonable accommodation that may be provided. **AMF-16**. Before being terminated, Plaintiff provided another form, date June 10, 2009, in which Plaintiff's doctor specifically recommended that Plaintiff be on disability between June 1, 2009 and August 1, 2009. **AMF-17/18**. At the time of terminating Plaintiff, the Defendants knew that Plaintiff was suffering from ongoing medical condition related to her hand and that Plaintiff still had a restriction relate to her hand injury. **AMF-21**.

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C. The Defendants failed to engage in interactive process, and failed to reasonably accommodate Plaintiff when they disregarded her medical notes reflecting Plaintiff's need for additional disability leave, and instead terminated her employment.

The interactive process is at the heart of FEHA's process and essential to accomplishing its goals. It is the primary vehicle for identifying and achieving effective adjustments which allow disabled employees to continue working without placing and "undue burden" on employers. When an employer is aware of an employee's disability, the employer's interest is not in assessing whether the individual's impairment may legally be considered an "actual disability". Rather, the focus on the interactive process centers on employee-employer relationships so that capable employees can remain employed if their medical problems can be accommodated. *Gelfo v Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 61-62.Once an employer becomes aware of the need for accommodation, that employer has a mandatory obligation to engage in interactive process with the employee to identify appropriate reasonable accommodations. *Humphrey v. Memorial Hosp. Ass'n*, 239 F.3d 1128, 1137 (9th Cir. 2001). The interactive process for finding a reasonable accommodation may be triggered by the employer's recognition of the need for such accommodation, even if the employee does not specifically make the request. *Brown v Lucky Stores*, 246 F.3d 1182, 1188 (9th Cir. 2001). The interactive process requires communication and good-faith exploration of possible accommodations between employers and individual employees, and neither side can delay or obstruct the process. *Barnett v. U.S. Air.*, 228 F.3d 1105, 1114-5 (9th Cir. 2000).

The duty to accommodate is a continuing duty and is not exhausted by one effort. *McAlindin v County of San Diego*, 192 F.3d 1226, 1237 (9th Cir. 2000). The employer's responsibility to engage in an interactive process does not stop simply because an

employer took some steps, as a later break-down in that process is also grounds for liability. *Nadaf-Rahrov v. Neiman Marcus Group, Inc.*, 166 Cal.App.4th 952, 985-986 (2008). Where a leave of absence would reasonably accommodate an employee's disability and permit him, upon his return, to perform the essential functions of the job, that employee is otherwise qualified under the ADA. *Nunes v Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1247 (9th Cir. 1999). Even an extended medical leave, or an extension of an existing leave period, may be a reasonable accommodation if it does not pose an undue hardship on the employer. See 42 U.S.C. § 12111(9), (10); *Norris v. Allied-Sysco Food Servs., Inc.*, 948 F.Supp. 1418, 1438 (N.D.Cal.1996). It is not required that an employee show that a leave of absence is certain or even likely to be successful to prove that it is a reasonable accommodation. *Kimbro v. Atlantic Richfield Co.*, 889 F.2d 869 (9th Cir. 1990, Cert. Denied). As long as an available reasonable accommodation could have plausibly enabled a handicapped employee to adequately perform his job, an employer is liable for failing to attempt that accommodation. *Id.* at 879. Holding a job open for a disabled employee who needs time to recuperate or heal is in itself a form of reasonable accommodation and may be all that is required where it appears likely that the employee will be able to return to an existing position at some time in the foreseeable future. *Jensen v. Wells Fargo Bank*, 85 Cal.App.4th 245, 263 (2000). The appropriate reasonable accommodation is best determined through a **flexible**, interactive process that involves both the employer and the employee with disability. *Bultemeyer v. Fort Wayne Community Schools* (1996) 100 F.3d 1281, 1285-6 [emphasis added]; *Barnett v U.S. Air, Inc.* (2000) 228 F.3d 1105, 1112 (overruled on other grounds).

The *Sargent v. Litton Systems*, Inc., supra, 841 F.Supp. 956 (1994) case is

remarkably similar to the present case. There, the employer handed the disabled Plaintiff a leave of absence form and provided her with five sick leave days, instructing her to see her doctor as soon as possible to determine her ability to work and any limitations *Id.* at 959. After Plaintiff did not return to work and allegedly failed to explain her absences for five additional days beyond the granted sick leave, the Defendant terminated Plaintiff's employment, interpreting her absence as voluntary job abandonment. *Id.* at 960. Plaintiff testified that she was unable to provide the required medical paperwork as quickly as the Defendants expected her to due to her aggravated physical condition, which resulted in her delayed visit to the doctor, and due to the fact that upon receipt of Plaintiff's medical form from her doctor, the Defendant sent it back to Plaintiff, telling her that her doctor had neglected to fill in some necessary parts of the form, including sections which asked for disability dates and when Plaintiff would be able to return to work. *Id.* In denying the Defendant's summary judgment, the Northern District noted that neither the law nor caselaw support such a rigid interpretation of FEHA. The law and its regulations make clear that the term "reasonable accommodation" is to be interpreted *flexibly* [emphasis added]. The regulations provide a non-exhaustive list of accommodations that includes not only making premises accessible but also "[j]ob restructuring, assignment or transfer, [and] part-time or modified work schedules...." Cal.Code Reg. § 7293.9. The law and the regulations clearly contemplate not only that employers remove obstacles that are in the way of the progress of the disabled, but that they actively re-structure their way of doing business in order to accommodate the needs of their disabled employees. *Id.* at 961.

Like in *Sargent*, here the Defendants rigidly followed their AWOL policies, disregarding their broad duties to continue engaging in interactive process and

accommodate Plaintiff's disability that they knew of. Instead of considering Plaintiff's circumstances – her history of being disabled, requesting and receiving accommodations her two medical notes that reflect her need for additional medical leave, and Plaintiff's own phone calls and e-mails advising the Defendants of her exacerbating condition, the Defendants chose to terminate Plaintiff's employment, blindly following their AWOL rules, while disregarding their obligations under FEHA. Further, there is no evidence that the Defendants were unable for some reason to allow Plaintiff to have that additional medical leave through August 1, 2009.

D. Plaintiff never resigned and her alleged "resignation" was actual termination because she never intended to quit or resign and because the Defendants had discretion whether to invoke AWOL.

The Defendants claim that Plaintiff has "voluntarily resigned." *Defendant's P&A 3:6.* However, It is undisputed that Plaintiff never communicated to the Defendant orally or in writing that she intended to quit or resign from her employment with the Defendants. ***AMF-23***. The fact that the Defendants "deemed" Plaintiff's alleged unexcused absences as resignation does not change the fact that they are the one who made the decision to discharge Plaintiff from her employment.

Although the AWOL statute defines an unauthorized absence of five consecutive working days as an "automatic resignation," the decision whether to invoke the statute's resignation provision rests with the state. Therefore, the absence without leave become an automatic or constructive resignation only if the state decided to invoke the statute. *Coleman v Dept. of Personnel Administration* (1991) 52 Cal.3d 1112, 1117. Even though the AWOL statute doesn't grant such discretion to the state, in practice, the state does exercise discretion in determining whether or not to invoke the statute. *Id.* at 1118.

Here, the Defendants – the State – chose to invoke AWOL statute even though they knew and regarded Plaintiff as disabled individual and were in the midst of working with her to accommodate her disability and disability leave.

E. Plaintiff was never actually "absent without leave" as the DPA's finding that she had valid reasons for absence are binding on this court, and because she kept the Defendant continuously informed about the reasons for her absence.

The findings of an administrative agency in a adverse action hearing against a public employee are binding in a subsequent discrimination claim under FEHA. *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 72. Hear, the Dept. of Personnel Administration has already determined that Plaintiff had valid reasons for her absence. *Decl. of Fowler* §20, Exhibit J. Further, at all times, Plaintiff's medical leave was approved by her doctor. She provided at least two medical notes in which her doctors placed her on disability, covering all dates of her absence from work – specifically from June 1, 2009 through August 1, 2009. *Decl. of Fowler* §§15-16. The Defendants had no reason to deem Plaintiff as absent without leave after receiving that documentation. It would be absurd to deem an employee absent without leave when that employee timely requested an extension to her disability leave. The Defendant's characterization of Plaintiff's leave as unexcused is disingenuous. Plaintiff was on extended leave in connection with her recognized, well documented disability. The Defendants arbitrarily decided that Plaintiff's medical documentation regarding her absences was insufficient and terminated her employment.

F. Plaintiff was subjected to adverse employment action

The Defendants' claim that Plaintiff was not subjected to adverse employment action is puzzling. The definition of adverse employment action within the meaning of FEHA is far more broad than the Defendants'. In *Yanowitz v L'Oreal USA, Inc*, 36 Cal.4th

1028 (2005) the California Supreme Court held that the definition of the "adverse employment action" is to be interpreted broadly, and whether the conduct is actionable depends on a particular course of conduct and the unique circumstances of the affected employee. FEHA protects not only against ultimate employment actions such as termination or demotion, but also the entire spectrum of employment actions are reasonable likely to adversely and materially affect an employee's job performance or opportunities for career advancement. In *Yanowitz*, the Court held that unwarranted criticism, soliciting negative feedback and refusing to provide resources to Plaintiff, where Plaintiff wasn't even terminated and was not losing any income, were sufficient to constitute adverse employment actions. In the present case, the Defendants separated Plaintiff from her employment and from State Service, depriving her not only of her monthly wages but also affecting her retirement benefits. ***AMF-46***. Here, the consequences to Plaintiff are surely more severe than those suffered by the plaintiff in *Yanowitz* and therefore definitely constitute adverse employment action. The fact that Plaintiff has reinstatement rights does not change the fact that her separation was an adverse employment action.

IV. CONCLUSION

For all of the above reasons, the Defendants' Motion for Summary Judgment or for Adjudication should be denied in its entirety.

RESPECTFULLY SUBMITTED,

Dated: September 6, 2012

Arkady Itkin
Attorney for Plaintiff
CARLA FOWLER