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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

KARLA GARCIA-LAVERENTZ, Plaintiff and Appellant, v. SEDGWICK CLAIMS MANAGEMENT SERVICES, INC., Defendant and Respondent.	B267176 (Los Angeles County Super. Ct. No. BC485324)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gail Feuer, Judge. Affirmed.

Livingston Bakhtiar, Ebby S. Bakhtiar; Shegerian & Associates and Carney R. Shegerian for Plaintiff and Appellant.

Wilson Turner Kosmo, Robin A. Wofford, Lois M. Kosch and Katherine M. McCray for Defendant and Respondent.

* * * * * *

Plaintiff Karla Garcia-Laverentz filed a complaint against her employer Sedgwick Claims Management Services, Inc. (Sedgwick), alleging myriad disability-related claims under the California Fair Employment and Housing Act (Gov. Code, § 12900 et seq.; FEHA) and other laws. In a thorough and reasoned order, the trial court granted summary judgment to Sedgwick, concluding the undisputed evidence showed (1) Sedgwick never subjected plaintiff to the adverse employment action of termination; (2) it engaged plaintiff in a good faith interactive process to accommodate her disability; and (3) it provided reasonable accommodations for her disability. We have carefully reviewed the parties' lengthy briefs and voluminous record. We reach the same conclusions and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Sedgwick provides workers' compensation and disability claims administration and related services to large employers throughout the United States. Sedgwick's predecessor hired plaintiff in 2005. At the time of the events in this case, she was a senior claims examiner reporting to supervisor Vicki Cromer.

Plaintiff suffered from depression and anxiety, which she controlled with medication. She also suffered from asthmatic bronchitis. Between January and April 2010, she experienced two bouts of bronchitis, missing a week of work in January and another week between March 15 and 22, 2010. After each bout, plaintiff returned to work without any medical restrictions.

When she returned to work on March 22, 2010, she e-mailed Cromer expressing her belief she was getting sick from others in the office. In response, Cromer invited her to present information on bronchitis at the next department meeting and asked for a list of ill individuals to speak to them or their supervisors. She also permitted plaintiff to e-mail her coworkers about the transmission

of bronchitis and took other measures to ensure a clean environment.

Plaintiff e-mailed Cromer on March 23, 2010, raising the possibility of maintenance cleaning the air ducts in the office. Cromer spoke to maintenance and to her husband, who worked with health inspectors, and concluded cleaning the air ducts would not help, which she conveyed to plaintiff. On March 24, 2010, plaintiff e-mailed Cromer again, demanding a healthy work environment and raising the prospect of filing a workers' compensation claim.

Shortly after, on March 26, 2010, plaintiff went off work for three weeks due to another bronchitis attack. She e-mailed Cromer to complain again about her work environment. While out, plaintiff filed a workers' compensation claim on March 30, 2010, alleging an unhealthy work environment because Sedgwick allowed employees to come into work while ill.

The next day, plaintiff faxed a letter to Carolyn Bradford in Sedgwick's workers' compensation department complaining again about air quality and attaching her communications with Cromer on the issue. Bradford forwarded the fax to Dina Pelmore, a manager in Sedgwick's risk services division. Pelmore wrote the following in an e-mail to Bradford, colleague resources manager Claudia Walker, and vice president of colleague resources Christine Korotko:[1] "Hi Ladies. This just came in the system today. I believe it important for you to see where this case is going—and that is 'not away'. [¶] Certainly the work comp arena is not the appropriate forum for all of her complaints. The WC file will deal with the medical and indemnity issues raised in the claim, but that is as far

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[1] Colleague resources is Sedgwick's equivalent of human resources.

as it goes. I don't believe that additional statements are necessary to corroborate her medical status, however, if we don't take **some**, we may end up in litigation based upon her impression that she has not been taken seriously. Carolyn [Bradford], I'll leave that in your capable hands. To head off any future question, has the organization made any special accommodation for any other employee with this type of complaint? [¶] Unfortunately, there appears to be much more damage control that needs to be accomplished at the local office level. Is there anyone that can meet with her and management to help her understand where the line is drawn? [¶] Hope she is not stirring up the rest of the troops. . . ." At her deposition, Pelmore explained that last line referred to her concern that plaintiff's complaints might alienate her coworkers.

While out on leave, plaintiff learned she was pregnant, so her doctor took her off of her psychotropic and other medications. She notified Cromer on April 14, 2010, she would return to work on Monday, April 19, 2010. On Friday, April 16, 2010, at 2:45 p.m., plaintiff e-mailed a note to Cromer and Bradford from her doctor, which requested plaintiff be allowed to stay away from ill employees and for the first time requested Sedgwick "change the location of her desk such that it is away from any heater or air conditioning vents."

Plaintiff returned to work on April 19, 2010. Neither Cromer nor Walker had seen the doctor's note requesting accommodations until that morning. According to plaintiff, when she arrived, she sat at her desk but became uncomfortable because an air conditioning vent was directly above her. She called Bradford, who told her to sit elsewhere until Cromer arrived in the office. Plaintiff identified two desks that fit her restrictions, one currently occupied by an employee named LaDonna (hereafter LaDonna's desk) and another formerly occupied by an employee named Erika (hereafter

Erika's desk). She said she "simply want[ed] a work space in an area where there is no vent." She also identified a desk formerly occupied by an employee named Larry (hereafter Larry's old desk), which had a vent "at the entrance of the cubicle, but will not directly blow on me because it is 3-4 steps away from the computer area, which is where I am located the majority of the time anyway. This would be better than my current cubicle."

Cromer did not immediately move plaintiff to Erika's desk because it was in another manager's unit and an immediate move was "logistically impossible." She did not immediately move plaintiff to LaDonna's desk because LaDonna was out of the office that Monday and Tuesday. Although Cromer had authority to move LaDonna's desk, Cromer thought it unwise to go through the personal things of an employee as part of a move while she was out of the office. By the afternoon, plaintiff was temporarily relocated to Larry's old desk. She e-mailed Cromer stating the change was "good" because "I am completely *AWAY* from the vent, and people too." Cromer understood this to mean the desk complied with plaintiff's restrictions, although she also understood the move to be temporary until one of the other desks was available.

Two days later plaintiff e-mailed Walker and Bradford claiming Larry's old desk was the only option she had been given, but it was better than her old desk "because the vent is situated at the entrance of the cubicle, which is 3-4 feet away, and away from my work area, so it is not blowing on me. [¶] On the other hand, this corner is more suitable because I am away from everyone; No one has a reason to come back here, so I am not exposed to people who are sick, plus the vent is away from me. [¶] I would prefer to stay here than return to my old desk." She also said Cromer told her she was waiting for building maintenance to adjust the vent

over her old desk so she could return to it, which plaintiff found "stressful." She asked to be permanently placed at Larry's old desk.

On April 20, 2010, Sedgwick retained engineers to conduct an air quality study, which did not uncover any dangerous air contaminants.

Plaintiff experienced another attack of bronchitis, and on April 26, 2010, she e-mailed Cromer a doctor's note placing her on leave until May 17, 2010. In anticipation of plaintiff's return, Cromer moved her things to plaintiff's preferred location at Erica's desk on May 15, 2010.

Plaintiff never returned to the office after that. On May 18, 2010, Sedgwick received a note from plaintiff's doctor extending her leave to June 28, 2010, and directing Sedgwick not to contact her due to increased stress.

Sedgwick approved plaintiff's application for short-term disability benefits on June 7, 2010, extending them through June 25, 2010, the Friday before her estimated return date of June 28, 2010. Sedgwick also sent plaintiff a letter dated June 7, 2010 (the June 7 letter), to update her on her "leave status under the Family Medical Leave Act (FMLA) and California Family Rights Act (CFRA)." The letter indicated her last day of eligible leave "will be May 27, 2010" (although the date on the letter was after that date). It continued: "If you return to work on or before this date, you will be returned to your previously held position. [¶] For business reasons related to workflow and workload within the office, if you do not return to work on or before May 28, 2010, we must inform you that we may be unable to hold your position. [¶] The fact that your FMLA has exhausted does not in any way affect your eligibility for Short-Term, Long-Term Disability or Workers Compensation benefits provided you continue to qualify for these

benefits based on medical evidence presented and the prevailing regulations and plan documents."

On the last day of her scheduled leave—June 25, 2010—plaintiff submitted another medical note to disability specialist Mindy Holt, who was responsible for evaluating employees for short-term disability (STD) benefits.[2] The note extended plaintiff's leave to August 9, 2010, and indicated she needed to be off all medications and "avoid all stressors, paper work + computer use + phones."

For STD purposes, Holt determined this note was not supported by the required objective findings, so she contacted plaintiff's doctor twice without a response and eventually requested an opinion from a physician advisor (PA), who also contacted plaintiff's doctor without a response. The PA concluded plaintiff's restrictions allowed her to work from home. Holt advised plaintiff in a July 6, 2010 letter her STD benefits were denied starting on June 26, 2010, due to lack of medical support.

For privacy reasons Holt did not share the June 25, 2010 note or any other doctor's note with anyone in colleague resources or Cromer. But she e-mailed Cromer, Walker, and Korotko on July 1, 2010, explaining the PA review had been completed and the doctor concluded plaintiff could work from home. Holt said she left a message with plaintiff's doctor to see if he would consider releasing her to work from home. Korotko left a telephone message for plaintiff on July 6, 2010, to discuss an available telecommuting position. Plaintiff left a return telephone message for Korotko, saying her doctor had not released her to work in any capacity. Korotko sent her a letter on July 13, 2010, confirming the

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[2] Holt was not responsible for evaluating leaves of absence for any other reason or under any other laws.

telecommuting offer and requesting plaintiff inform her if she could return to work as a telecommuter. Plaintiff left another voice message for Korotko on July 15, 2010, reiterating that she was not released to work and claiming Sedgwick was harassing her. She also sent letters to Sedgwick on July 15 and 16, 2010, challenging the denial of her STD benefits and outlining her complaints.

On July 28, 2010, Korotko sent plaintiff a letter (the July 28 letter) advising her, "for business reasons related to workflow and workload within the office, we are unable to hold your current position. Since we have been unable to resolve the issue of whether your doctor's release allows you to work from home, and you have not expressed any interest in working on the University of California account, we will go ahead and fill that position as well. [¶] The fact that your FMLA time is exhausted does not in any way affect your eligibility for short term, long term disability or Workers Compensation benefits provided you qualify for these benefits based on medical evidence presented and the prevailing regulations and plan documents." Plaintiff sent a detailed response to this letter on July 29, 2010.

As we will explain in more detail below, plaintiff testified that she believed by this point Sedgwick had terminated her employment, as shown by the June 7 letter and later the July 28 letter. Nonetheless, plaintiff's doctor continued to submit successive notes to Holt setting return dates of September 24, 2010, December 27, 2010, and January 17, 2011, although again, she never returned to work. Nor did she ever tell Sedgwick she could return. In fact, she had no contact with Sedgwick from late July 2010 until she moved to Fresno in October 2011. While she was on leave, Cromer did not fill her position, but reassigned her case files. Korotko testified at her deposition that if plaintiff

wanted to come back to work, Sedgwick would place her in an available senior claims examiner position.

Plaintiff's operative first amended complaint (FAC) alleged claims against Sedgwick and Cromer for (1) disability discrimination, (2) pregnancy discrimination, (3) failure to engage in the interactive process, (4) failure to accommodate, (5) harassment, (6) failure to prevent discrimination, (7) retaliation, (8) wrongful discharge, (9) intentional infliction of emotional distress, and (10) unfair business practices. Plaintiff eventually dismissed her harassment and intentional infliction of emotional distress claims and all claims against Cromer.

Sedgwick moved for summary judgment, which the trial court granted. In a detailed order, the trial court concluded the undisputed evidence demonstrated plaintiff did not suffer the adverse employment action of termination as she argued, and Sedgwick reasonably accommodated her disability and engaged in the good faith interactive process. Those holdings were dispositive of all of plaintiff's claims. The trial court entered judgment for Sedgwick and plaintiff appealed.

DISCUSSION

1. Legal Standard

"A court shall grant a motion for summary judgment if all the papers show there is no triable issues as to any material fact and the moving party is entitled to a judgment as a matter of law. (Cod Civ. Proc., § 437c, subd. (c).) As the party moving for summary judgment, the employer in a FEHA action has the burden of establishing either (1) one or more elements of the employee's cause of action cannot be established, or (2) a complete affirmative defense to the cause of action exists. (Code Civ. Proc., § 437c, subds. (*o*)(1), (2), (p)(2).) To demonstrate the elements of a cause of action cannot be established, the employer may show the employee

does not possess evidence needed to support a prima facie case and also cannot reasonably obtain the needed evidence. [Citation.] The employer may also, but need not, present evidence conclusively negating an element of the cause of action. [Citation.] Once the employer has met its initial burden, the burden shifts to the employee to produce evidence showing a triable issue of material fact. (Code Civ. Proc., § 437c, subd. (p)(2).)" (*Nealy v. City of Santa Monica* (2015) 234 Cal.App.4th 359, 370 (*Nealy*).)

We review the grant of summary judgment de novo and must independently determine whether triable issues of material fact exist. (*Nealy, supra*, 234 Cal.App.4th at p. 370.) We resolve any evidentiary doubts or ambiguities in favor of the nonmoving party. (*Id.* at p. 371.)

When reviewing summary judgment in an employment discrimination case, we apply a burden-shifting framework: we determine first whether the defendant has presented "evidence that *either* negates an element of the employee's prima facie case, or establishes a legitimate nondiscriminatory reason for taking the adverse employment action against the employee," and if so, whether the plaintiff has offered " 'substantial evidence that the employer's stated nondiscriminatory reason for the adverse action was untrue or pretextual, or evidence the employer acted with a discriminatory animus, or a combination of the two, such that a reasonable trier of fact could conclude the employer engaged in intentional discrimination.' " (*Swanson v. Morongo Unified School Dist.* (2014) 232 Cal.App.4th 954, 966 (*Swanson*).) As we will explain, Sedgwick negated plaintiff's prima facie case and plaintiff

has failed to raise a disputed issue of fact to rebut that showing, so our analysis ends there.[3]

2. Considering Sedgwick's Reply Evidence

Plaintiff contends the trial court erred in considering additional evidence submitted by Sedgwick as part of its reply to the summary judgment motion. According to plaintiff's objection in the trial court,[4] that evidence consisted of a reply declaration from Sedgwick's counsel Christina Tapia and 11 exhibits, 10 of which were excerpts from depositions taken in this case, and one of which was an e-mail Sedgwick produced during discovery. The trial court did not expressly rule on plaintiff's objection, but cited two of those excerpts in its order granting summary judgment. In those excerpts, Korotko and Walker testified that if plaintiff had notified Sedgwick she was able to return to work, it would have placed her in the same senior claims examiner position, although not with the same accounts.

According to the authority cited by plaintiff, "[w]hether to consider evidence not referenced in the moving party's separate statement rests with the sound discretion of the trial court, and we review the decision to consider or not consider this evidence for an

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[3] Plaintiff argues the trial court applied the wrong legal standard in ruling on the motion for summary judgment. We have reviewed the trial court's carefully reasoned order and find no indication the trial court misunderstood the parties' burdens or applied the wrong legal standards. Even if the court had, we review the court's judgment, not its rationale. (*Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 457.)

[4] We reject Sedgwick's contention plaintiff waived her objection by failing to adequately identify the objectionable material and state the ground for the objection. Plaintiff did both in her submission to the trial court.

abuse of that discretion." (*San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 316 (*San Diego Watercrafts*) [disagreeing with other cases precluding a trial court from considering new evidence in reply].) That discretion may be informed by due process interests of " 'inform[ing] the opposing party of the evidence to be disputed to defeat the motion.' " (*Ibid.*) Applying those principles to the facts before it, the court in *San Diego Watercrafts* concluded a declaration adding *new* facts in reply should have been disregarded. (*Ibid.*)

For most of the exhibits Sedgwick submitted with its reply, any potential error was harmless because plaintiff has not pointed to any place in the record where the trial court actually relied on that evidence to grant summary judgment. For the two exhibits the trial court did cite, the court acted within its discretion in considering them. It was not truly *new* evidence like in *San Diego Watercrafts*; it was testimony taken at depositions presumably conducted by plaintiff. Also, as we discuss below, plaintiff used her opposition to expand her theory of adverse employment action beyond what she alleged in the FAC and during discovery, so we cannot say it was unreasonable to allow Sedgwick to submit additional evidence from the discovery process to rebut those theories. Had plaintiff been truly concerned about this newly submitted evidence, she could have sought permission to respond to it. Even now, she raises only a technical procedural objection and has not suggested how she might have negated this evidence if given the opportunity. (Cf. *Weiss v. Chevron , U.S.A., Inc.* (1988) 204 Cal.App.3d 1094, 1099 [faulting plaintiff for failing to offer evidence to rebut new evidence in reply when given the opportunity and instead relying on a "technical procedural objection"].)

3. Adverse Employment Action

To establish a prima facie case of disability and pregnancy discrimination, retaliation, and wrongful discharge, a plaintiff must show she suffered an adverse employment action. (See, e.g., *Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 713.) That means a " 'substantial adverse change in the terms and conditions of the plaintiff's employment.' " (*Jones v. Department of Corrections & Rehabilitation* (2007) 152 Cal.App.4th 1367, 1380.) An adverse action "is not limited to 'ultimate' employment acts, such as hiring, firing, demotion or failure to promote, but also includes the entire spectrum of employment actions that are reasonably likely to adversely and materially affect an employee's job performance or opportunity for career advancement." (*Ibid.*)

Throughout this litigation, plaintiff's theory of adverse employment action has been a moving target. First, in her prelitigation complaint filed with the Department of Fair Employment and Housing (DFEH), in the FAC, and during discovery, she claimed she was terminated on May 27, 2010, as shown by the June 7 letter. In opposition to summary judgment, she expanded that theory to argue she was terminated when she received the July 28 letter indicating her position would be filled for business reasons. Now, for the first time in her opening brief on appeal, she further argues she suffered an adverse employment action *short of termination* when Sedgwick indicated in the July 28 letter it intended to fill her position. And in her reply brief, she argues the "retaliation" she allegedly faced for exercising her rights constituted an adverse employment action.

We find she waived the last two theories because she raised them for the first time on appeal. (*DiCola v. White Brothers Performance Products, Inc.* (2008) 158 Cal.App.4th 666, 676 ["Though this court is bound to determine whether defendants met

their threshold summary judgment burden independently from the moving and opposing papers, we are not obliged to consider arguments or theories, including assertions as to deficiencies in defendants' evidence, that were not advanced by plaintiffs in the trial court."].) Thus, we will focus on her arguments that she was actually terminated either on May 27, 2010, as shown by the June 7 letter or on July 28, 2010, as shown by the July 28 letter.[5] As we will explain, Sedgwick's undisputed evidence demonstrated she was *not* terminated at any time, and she failed to carry her burden to raise a triable issue of fact to show otherwise.

In her declaration opposing summary judgment, plaintiff expressed her subjective belief the June 7 letter, and later the July 28 letter, indicated she had been terminated. Her belief alone is not enough to defeat summary judgment. (*King v. United Parcel Service, Inc.* (2007) 152 Cal.App.4th 426, 433 (*King*) [a plaintiff's "subjective beliefs in an employment discrimination case do not create a genuine issue of fact; nor do uncorroborated and self-serving declarations"].)[6] Her belief was also inconsistent with all the contemporaneous evidence offered by Sedgwick.

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[5] We decline to find plaintiff waived her argument that the July 28 letter demonstrated her termination. While she did not allege that theory in her complaint or raise it during discovery, she raised it in opposition summary judgment and the trial court addressed it on the merits.

[6] Plaintiff offered evidence her retirement plan administrator informed her in 2011 that Sedgwick listed her as "terminated." Sedgwick objected to this evidence as hearsay, and the trial court sustained the objection. That ruling was correct insofar as plaintiff offered this statement to prove she was terminated. Plaintiff contends the trial court nonetheless erred because this statement was admissible to show "the impact the information had on [her] state of mind." Because her subjective belief that she was

First, the June 7 letter by its terms did not suggest she was terminated; it simply informed her she had exhausted her FMLA leave, and if she did not return to work by the date stated, "we must inform you that we *may* be unable to hold your position." (Italics added.) Nor did plaintiff understand it to amount to termination at that time. She testified in her workers' compensation case 11 days later on June 18, 2010, that she was "currently employed" with Sedgwick. She also received STD benefits until June 25, 2010, which were only available to employees. Sedgwick also offered her a telecommuting position in July 2010, which was entirely inconsistent with terminating her employment more than a month earlier. And in all of her calls and letters to Sedgwick in July 2010, she never once suggested she had been terminated.

The July 28 letter similarly contained no language terminating plaintiff; it merely advised her that Sedgwick was filling her current position for business reasons. And again, the contemporaneous evidence showed plaintiff did not understand the letter to have terminated her employment. She never mentioned anything about termination in her responsive letter on July 29, 2010. She later applied for other benefits in response to a December 3, 2010 letter from United Healthcare stating her "employer" had advised she may be eligible for long-term disability benefits. Likewise, she applied for a job with the City of Fresno, which informed her a background check revealed she was still employed by Sedgwick and was "currently on a leave of absence." And perhaps most importantly, her belief she was terminated was

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terminated cannot defeat summary judgment, limiting this statement solely to show her state of mind could not have precluded summary judgment.

incompatible with her doctor's notes that continually set successive return-to-work dates through January 2011.[7]

Nor did Sedgwick ever treat her as terminated. In an April 2011 e-mail, a Sedgwick employee indicated plaintiff "has not been terminated." Similarly, Korotko testified Sedgwick had a "form" termination letter that was not used with plaintiff and Korotko would have had to authorize any termination, which she did not. If plaintiff had been terminated, she would have received a final paycheck and would not have continued to receive several benefits, including short- and long-term disability and life insurance. And finally, Korotko testified plaintiff would have been placed in her same position if she returned to work.

Plaintiff suggests a jury might reasonably infer she was terminated when Sedgwick no longer contacted her after July 2010. In her view, "Had [she] still been an employee, [Sedgwick], under its own policy, would have promptly engaged her in the interactive process to find out if she needed any accommodations after being notified of her return to work date." The trial court rejected this contention, as do we. The undisputed evidence shows Sedgwick declined to contact plaintiff after July 2010 because *plaintiff requested* Sedgwick stop contacting her, claiming Sedgwick's letters and calls were harassing. During that same time, her doctor submitted successive notes indicating she planned to return to work no later than January 17, 2011. As the trial court explained, "she should have appeared at work on her return date of January 17,

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[7] Plaintiff claimed in her declaration in the trial court that her doctor sent these notes for the purpose of her workers' compensation case. But the documents belie that claim—they were addressed to Holt, who administered plaintiff's STD benefit, and they identified the "Sedgwick Short Term Disability Plan" at the top of each one.

2011 (per the December 6, 2010 medical letter) or contacted Sedgwick . . . to say she was ready to work or to request an accommodation to work." To hold otherwise would place Sedgwick to an impossible bind—either contact plaintiff against her express wishes or abide by her request and open itself to the argument plaintiff asserts here. Again, to quote the trial court, "On the undisputed facts, it is not reasonable that [plaintiff] would continue to submit medical notes, tell Sedgwick not to contact her, not contact anyone at Sedgwick, then claim that Sedgwick discriminated against her by terminating her." Thus, no reasonable jury could infer from Sedgwick's failure to contact her after July 2010 that Sedgwick had terminated her employment.

Summary judgment on plaintiff's discrimination, retaliation, and wrongful termination claims was proper.

4. Pregnancy Disability Leave Law

At the hearing on the summary judgment motion, plaintiff for the first time raised a claim under the Pregnancy Disability Leave Law (PDLL), which provides that "an employee disabled by pregnancy is entitled to up to four months of disability leave, regardless of any hardship to her employer." (*Sanchez v. Swissport, Inc.* (2013) 213 Cal.App.4th 1331, 1338 (*Sanchez*); see Gov. Code, § 12945, subd. (a).) The trial court refused to consider this claim because it was not pled in the FAC or briefed on the motion for summary judgment. We also decline to consider it.

" 'A defendant moving for summary judgment need address only the issues raised by the complaint; the plaintiff cannot bring up new, unpleaded issues in his or her opposing papers.' [Citations.] In assessing whether the issues raised by plaintiff in opposing summary judgment are encompassed by the controlling pleading, we generally construe the pleading broadly [citation]; but the pleading must allege the essential facts ' " 'with reasonable

precision and with particularity sufficient to acquaint a defendant with the nature, source and extent of [the] cause of action.' " ' " (*Soria v. Univision Radio Los Angeles, Inc.* (2016) 5 Cal.App.5th 570, 585 (*Soria*).) A plaintiff's failure to amend the complaint prior to summary judgment to assert new theories forfeits the right to pursue them to defeat summary judgment. (See *Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244, 1254.)

Plaintiff failed to cite or even mention the PDLL in the FAC, and we reject her argument it was contained within her citation to "*Government Code* § 12940, et seq." for her claims of pregnancy and disability discrimination. While the "provisions of the PDLL are contained within the broader provisions of the FEHA," it is a separate claim with separate legal and factual requirements that *augment* the discrimination provisions of the FEHA. (*Sanchez, supra,* 213 Cal.App.4th at pp. 1337-1338.) As noted, the crux of a claim under the PDLL is an employer's failure to provide an employee disabled by pregnancy four months of leave, regardless of hardship. Plaintiff did not allege those facts, and her general allegations that she was discriminated against because she was pregnant and disabled did not provide fair notice of a separate claim under the PDLL.[8] (See *Soria, supra*, 5 Cal.App.5th at p. 587, fn. 6 [noting difference between alleging a violation of a single "primary right" on alternative factual grounds and "distinct causes of action" for "discrimination based on separate protected characteristics (for example, race and age) or claims of employer liability for different actions (for example, harassment and retaliation)"].)

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[8] In light of this conclusion, we need not address Sedgwick's alternative argument that plaintiff failed to exhaust her administrative remedies by failing to include her PDLL claim in her DFEH complaint.

5. Reasonable Accommodation

The FEHA requires an employer to make reasonable accommodation for an employee's known disability unless doing so would produce undue hardship to the employer's operation. (Gov. Code, § 12940, subd. (m); *Nealy, supra*, 234 Cal.App.4th at p. 373.) "A reasonable accommodation is a modification or adjustment to the work environment that enables the employee to perform the essential functions of the job he or she holds or desires." (*Nealy, supra*, at p. 373.) "Reasonable accommodations include '[j]ob restructuring, part-time or modified work schedules, *reassignment to a vacant position,* . . . and other similar accommodations for individuals with disabilities.' " (*Swanson, supra,* 232 Cal.App.4th at p. 969.) The duty to accommodate a disabled employee is continuing and not exhausted by a single effort. (*Ibid.*)

"Generally, ' "[t]he employee bears the burden of giving the employer notice of the disability. [Citation.] This notice then triggers the employer's burden to take 'positive steps' to accommodate the employee's limitations. . . . [¶] . . . The employee, of course, retains a duty to cooperate with the employer's efforts by explaining [his or] her disability and qualifications. [Citation.] Reasonable accommodation thus envisions an exchange between the employer and employee where each seeks and shares information to achieve the best match between the employer's capabilities and available positions." ' " (*Raine v. City of Burbank* (2006) 135 Cal.App.4th 1215, 1222.) "Although the question of reasonable accommodation is ordinarily a question of fact [citation], when the undisputed evidence leads to only one conclusion as to the reasonableness of the accommodation sought, summary judgment is proper." (*Id.* at p. 1227, fn. 11.)

The trial court concluded plaintiff failed to raise a triable issue of fact over the reasonableness of two accommodations

provided by Sedgwick: (1) granting plaintiff medical leaves of absence; and (2) moving her desk away from vents in the office. On appeal, plaintiff does not challenge the trial court's holding that her leaves of absence were reasonable accommodations. Nor could she do so successfully. "[A] finite leave can be a reasonable accommodation under FEHA, provided it is likely that at the end of the leave, the employee would be able to perform his or her duties." (*Hanson v. Lucky Stores, Inc.* (1999) 74 Cal.App.4th 215, 226 (*Hanson*); see *Wilson v. County of Orange* (2009) 169 Cal.App.4th 1185, 1193-1194 (*Wilson*).) The undisputed evidence demonstrated Sedgwick granted every leave plaintiff requested, starting in January and March 2010 and extending to the present, given Sedgwick never terminated her employment at any time and was prepared to give her the same position when she returned to work. (See *Hanson, supra*, at p. 227 [seven months of additional leave after expiration of medical leave was reasonable accommodation].)

As for her desk assignment when she returned to work in April 2010, we agree with the trial court the undisputed evidence showed Sedgwick reasonably accommodated her bronchitis restrictions. Plaintiff first notified Sedgwick of the need to move her desk away from vents on Friday afternoon before she was scheduled to return to work on the following Monday. It was undisputed neither Cromer nor Walker saw this note until Monday morning. While true plaintiff had to sit at her then-current desk when she first arrived on that Monday, she called Bradford, who told her to sit elsewhere until Cromer arrived in the office. By the afternoon, she had relocated to Larry's old desk. It was not her first choice, but in an e-mail she sent to Cromer that day, she acknowledged the placement was temporary and, most importantly, "good" because "I am completely *AWAY* from the vent, and people too." Cromer also understood this move was a temporary

accommodation that complied with her restrictions. Further, Cromer testified that a move to plaintiff's preferred location—Erika's desk—was "logistically impossible," and a move to plaintiff's second preferred location—LaDonna's desk—would have entailed going through that employee's items and moving her while she was out of the office. Two days later plaintiff reaffirmed that Larry's old desk was an adequate solution because it was away from other people and three to four feet away from a vent. She even asked to be placed there permanently, fearing she might be returned to her old desk.[9]

Plaintiff attempts to downplay the e-mails she sent by claiming she found Larry's old desk to be better than her former desk, not that it complied with her restrictions. Her contemporaneous e-mails speak for themselves, however, and none of them indicate she felt Larry's old desk failed to comply with her restrictions. The fact that she requested to be located there *permanently* further belies any argument that it was not a reasonable accommodation. In any case, she was only at Larry's old desk for a short time before she went out on leave again, and while she was gone, she was moved to Erika's desk, her preferred accommodation.

Plaintiff also mischaracterizes Korotko's deposition testimony to argue Korotko acknowledged Larry's old desk did not comply with her restrictions. When asked if having a vent nearby complied with plaintiff's restrictions, Korotko said, "Maybe yes, maybe no.

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[9] Plaintiff emphasizes that Cromer indicated she would move plaintiff back to her former desk once the vent was adjusted, which gave her "anxiety because I perceived it to be malicious in nature." But the undisputed facts show she was never moved back to her old desk, so this does not create a dispute of fact whether she was reasonably accommodated.

Because it's an interactive process. And if [plaintiff] was agreeing that 'Okay. Well, this desk is fine. It's not blowing on me. This is what my doctor wants. I can stay here,' then we would have said, 'Okay. If this is okay with you, then this is where you can stay.' [¶] But if she said, 'No, it's still blowing on me. What we've done is not working,' then we would have moved her." When asked if she had been presented with the same facts would she have placed plaintiff at Erika's desk or Larry's old desk, she responded she would have placed her at Erika's desk, but added, "Maybe at Larry's [old desk] on a temporary basis until we could get everybody moved." She said sending plaintiff home might have also been an option, but she "would have been working with [plaintiff]. And if that was one of the options that we came up with, then she would have—and she agreed to that. You know, she wanted to work. So I'm sure they were—we were trying to find a place for her to work. Because she wanted to." Far from showing Korotko believed Larry's old desk was not a reasonable accommodation, this testimony shows other options may have been available had plaintiff not indicated Larry's old desk was suitable for her restrictions.

Plaintiff also argues reassigning her to Erika's desk after plaintiff went on leave demonstrated Larry's old desk was inadequate for her restrictions. Not so. Both Larry's old desk and Erika's desk could have been reasonable accommodations because they were situated away from vents. Plaintiff merely preferred one over the other. "[A]n employer is not required to choose the best accommodation or the specific accommodation the employee seeks. Instead, ' " 'the employer providing the accommodation has the ultimate discretion to choose between effective accommodations, and may choose the less expensive accommodation or the accommodation that is easier for it to provide.' [Citation.] . . . [A]n employee cannot make his employer provide a specific

accommodation if another reasonable accommodation is instead provided." ' " (*Wilson, supra*, 169 Cal.App.4th at p. 1194.) Given the logistical challenges with moving plaintiff to either of her preferred desks and her statements that Larry's old desk complied with her restrictions, it was not unreasonable to place plaintiff at that desk temporarily until her preferred choice of desk could be secured, which happened a month later.

Finally, plaintiff points to her bronchitis relapse as proof her temporary assignment to Larry's old desk was unreasonable. Other than her own speculation, she offered no evidence to show her proximity to the vent while at Larry's old desk actually *caused* her relapse. Indeed, Sedgwick commissioned an air quality study on April 20, 2010, which uncovered no contaminants. In any case, plaintiff's relapse does not show Larry's old desk was an unreasonable accommodation *at the time she relocated there*. Even she believed it was sufficiently away from the vents. If hypothetically her relapse meant she was still too close to a vent, Sedgwick remedied that by assigning her to her preferred location before she was scheduled to return a month later.

The undisputed evidence shows Sedgwick reasonably accommodated plaintiff's restrictions as a matter of law and she has failed to raise a disputed issue of fact. Summary judgment on this claim was proper.

6. Interactive Process

" 'Under FEHA, an employer must engage in a good faith interactive process with the disabled employee to explore the alternatives to accommodate the disability.' " (*Nealy, supra*, 234 Cal.App.4th at p. 379; see Gov. Code, § 12940, subd. (n).) In her briefs on appeal, plaintiff has lumped her interactive process claim in with her arguments addressing reasonable accommodations, even though it is a separate claim. (*Wilson, supra*, 169 Cal.App.4th

at p. 1193.) Nonetheless, the goal of the interactive process requirement is "to determine effective reasonable accommodations." (Gov. Code, § 12940, subd. (n); see *Jensen, supra*, 85 Cal.App.4th at p. 261 [noting " '[t]he interactive process requires communication and good-faith exploration of possible accommodations between the employers and individual employees' with the goal of 'identify[ing] an accommodation that allows the employee to perform the job effectively' "].)

As we concluded above, the parties reached the goal of finding reasonable accommodation for plaintiff not once, but *twice*. She was permitted to sit at Larry's old desk at least temporarily, which both parties believed complied with her doctor's restriction to be away from the vents, and then moved her to her preferred location while she was out on leave. Even if hypothetically her proximity to the vent at Larry's old desk contributed to her relapse, Sedgwick did exactly what the interactive process envisions—it moved her to her preferred location in anticipation of her return. By reasonably accommodating plaintiff twice, Sedgwick satisfied its obligations to engage her in the interactive process. (*Wilson, supra*, 169 Cal.App.4th at p. 1195 [finding employer engaged in interactive process because employee got "exactly what she wanted—albeit after a series of temporary accommodations"]; *Hanson, supra*, 74 Cal.App.4th at p. 229 ["We see no reason why this employer should be subjected to liability for failing to engage in the interactive process where the employee was reasonably accommodated *not once but twice* . . . ."]; see *Watkins v. Ameripride Services* (9th Cir. 2004) 375 F.3d 821, 829, fn. 5 ["The fact that Ameripride reasonably accommodated Watkins' disability forecloses his allegation that Ameripride failed to engage in the interactive process."].) Summary judgment on this claim was proper.

7. Other Accommodation/Interactive Process Arguments

In her opening brief, plaintiff alludes to a contention that Sedgwick failed to engage her in the interactive process during her leave in March 2010 for her bronchitis episode. She expands on this argument in her reply brief. To the extent this contention was not adequately addressed in her opening brief, we find it forfeited. (*Foster v. Britton* (2015) 242 Cal.App.4th 920, 928, fn. 6 [points not adequately raised are forfeited]; *Moore v. Shaw* (2004) 116 Cal.App.4th 182, 200, fn. 10 (*Moore*) [points raised first in reply brief are forfeited].) In any case, it fails on the merits. During the March 2010 period she told Cromer she felt the environment was unhealthy, and Cromer worked with her to address those concerns. Beyond those complaints, she identified no restrictions or limitations needing an accommodation that would have triggered Sedgwick's duties under the FEHA. (See *King, supra*, 152 Cal.App.4th at p. 443 [employee must provide employer with " 'a concise list of restrictions which must be met to accommodate the employee' " and " 'a specific request for a necessary accommodation' "].)

For the first time in her reply brief, plaintiff also argues Sedgwick failed to engage in the interactive process and accommodate her when it learned she planned to return to work on January 17, 2011. Again, this contention is forfeited for her failure to raise it earlier. (*Moore, supra*, 116 Cal.App.4th at p. 200, fn. 10.) And again, this contention fails on the merits because she identified no restrictions and requested no accommodations when she returned. She claims the December 27, 2010 doctor's note extending her leave to January 17, 2011, "provided enough information indicating a potential need for accommodations." It did not. It only indicated she needed "complete rest" for eight weeks to "*completely* recover from surgery" (italics added) and gave the

estimated return to work date of January 17, 2011. It said nothing about restrictions or accommodations. (See *King, supra*, 152 Cal.App.4th at p. 443.)

8. Remaining Claims

Summary judgment was proper on plaintiff's remaining claims of failure to prevent discrimination and unfair business practices because they depended on the viability of her other claims, as she acknowledges. Further, because plaintiff has no remaining claims, Sedgwick's challenge to her request for punitive damages is moot.

DISPOSITION

The judgment is affirmed. Respondent shall recover costs on appeal.

FLIER, Acting P. J.

WE CONCUR:

GRIMES, J.

SORTINO, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.