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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

CHRISTINE MCKELLAR, Plaintiff and Appellant, v. CEDARS-SINAI MEDICAL CENTER, Defendant and Respondent.	B285462 (Los Angeles County Super. Ct. No. BC628993)

APPEAL from a judgment of the Superior Court of Los Angeles County, Barbara M. Scheper, Judge. Affirmed.

Law Offices of Robert Ozeran and Robert E. Ozeran; Jeffrey Lewis for Plaintiff and Appellant.

Carothers DiSante & Freudenberger, Dawn M. Irizarry, Robin E. Largent, and Denisha McKenzie for Defendant and Respondent.

Cedars-Sinai Medical Center (Cedars-Sinai) terminated Christine McKellar's employment in April 2016. McKellar alleged in six causes of action that Cedars-Sinai retaliated against her for filing a workers' compensation claim and discriminated against her based on her claimed disability. Cedars-Sinai filed a motion for summary judgment, arguing, among other things, that it had a legitimate non-pretextual reason to terminate McKellar's employment. After sustaining objections to evidence McKellar submitted, the trial court granted the motion for summary judgment. McKellar appeals from the trial court's judgment entered based on the order granting Cedars-Sinai's motion, but not from the trial court's rulings on Cedars-Sinai's objections to her summary judgment evidence. Because we agree that McKellar has presented no triable issue of any material fact, we affirm.

BACKGROUND

McKellar began her 16-year employment with Cedars-Sinai in 2000. Her last day of work at Cedars-Sinai was January 6, 2016.

On January 11, 2016, Dr. Stephanie Koven sent a letter about McKellar "to whom it may concern" requesting "[f]or medical reasons, please excuse the above named employee from work" January 11 to January 25, 2016. The note said that McKellar could return to work on January 25, and also said "[i]f you need additional information, please feel free to contact our office."

A second note followed on January 25 from a different provider, Gayle K. Windman, Ph.D. The preprinted "RETURN TO WORK AND DISABILITY FORM" named McKellar. Beside the preprinted words "[t]he Above-Captioned Patient is under my

care for," appeared the handwritten words "emotional stress complications." The dates 1/25/16 to 2/8/16 were handwritten next to the preprinted words "[r]equires a medical leave of absence from."

Windman sent a virtually identical note on February 4, 2016, except the dates were 2/4/16 to 5/4/16. Dr. Thomas Curtis (in the same office as Windman) followed up with another form on April 21, 2016 for the dates 4/21/16 to 7/21/16. This time, the care was listed as for "EMOTIONAL STRESS COMP."

Because none of the notes sent on McKellar's behalf contained sufficient information to satisfy Cedars-Sinai's leave policies, Cedars-Sinai sent McKellar a series of letters detailing the specific information it needed from her to process her request for leave. On January 26, 2016, Cedars-Sinai sent McKellar a letter regarding "Notice of Incomplete or Insufficient Documentation" explaining that Cedars-Sinai had received a request for a leave of absence, but that it was "**incomplete**," the specific reason it was incomplete—"The certification does not support the definition of a Serious Health Condition as outlined under the Family Medical Leave Act of 1993"—and explaining that McKellar's "leave cannot be certified without this information." The letter noted that "[f]ailure to provide documentation as required and noted above will result in leave denial," and enclosed a "Leave of Absence Check List," and various other information to facilitate McKellar's leave request.

On February 1, 2016, Cedars-Sinai sent McKellar a "Return to Work Reminder for Christine McKellar" detailing what she needed to do to prepare for her expected February 8 return to work or to request further leave. On February 9, presumably after it received Windman's February 4 form,

Cedars-Sinai sent McKellar another letter (substantially identical to the January 26 letter) explaining that her request for continued leave was "**incomplete**" and detailing the information Cedars-Sinai needed to process the leave request.

On February 18, 2016, Cedars-Sinai sent McKellar a letter denying her leave request and explaining how McKellar could provide more information "[i]f this denial is due to lack of or incomplete documentation . . . ." On March 21, Cedars-Sinai again wrote to McKellar. Cedars-Sinai let McKellar know that it had attempted to reach her by telephone, but was unable to do so.[1] The letter requested that McKellar contact Cedars-Sinai—it gave her a variety of options for doing so, and offered her a variety of resources to assist with her leave issues—and again provided her with documents detailing Cedars-Sinai's leave of absence policies and how to comply with them.

On April 19, 2016, Cedars-Sinai sent McKellar a letter explaining that she had been "separated from employment with [Cedars-Sinai] effective April 20, 2016," and enclosing her final check. McKellar received all of Cedars-Sinai's letters, but never opened, read, or responded to any of them. McKellar requested no form of accommodation from Cedars-Sinai between her

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[1] The March 21 letter listed the telephone number Cedars-Sinai called attempting to reach McKellar. In the April 19, 2016 letter, Cedars-Sinai further explained that the number it called "did not accept voicemail messages, did not have a forwarding number, and appeared to be disconnected."

McKellar had changed her telephone number by March 4, 2016 because she "didn't want people from [Cedars-Sinai] calling." She never provided the new telephone number to her supervisors or to anyone in human resources.

cessation of work on January 6, 2016 and her termination on April 20.

McKellar filed a complaint on August 2, 2016, alleging six causes of action based on allegations that Cedars-Sinai discriminated and retaliated against her for filing a workers' compensation claim and based on her disability, and that Cedars-Sinai failed to provide a reasonable accommodation that would allow McKellar to perform the functions of her job. McKellar's causes of action were captioned as unlawful termination in violation of public policy, four Fair Employment and Housing Act (FEHA) causes of action, one each for disparate treatment, disparate impact, retaliation, and disability discrimination, and failure to accommodate and unlawful termination in violation of the Unruh Civil Rights Act.

Cedars-Sinai filed a motion for summary judgment or summary adjudication in April 2017 for a hearing in June 2017. At a June 27, 2017 hearing, the trial court granted Cedars-Sinai's motion for summary judgment. The trial court entered judgment for Cedars-Sinai on August 14, 2017. McKellar filed a timely notice of appeal.

DISCUSSION

A. Applicable Law

1. Summary Judgment

"Code of Civil Procedure section 437c, subdivision (c) provides that summary judgment is properly granted when there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. [Citation.] As applicable here, moving defendants can meet their burden by demonstrating that 'a cause of action has no merit,' which they can do by showing that '[o]ne or more elements of the cause of action cannot

be separately established . . . .' [Citations.] Once defendants meet this burden, the burden shifts to plaintiff to show the existence of a triable issue of material fact. [Citation.]

"On appeal '[w]e review a grant of summary judgment de novo; we must decide independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law. . . .' [Citation.] Put another way, we exercise our independent judgment, and decide whether undisputed facts have been established that negate plaintiff's claims." (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 253.) "We accept as true the facts alleged in the evidence of the party opposing summary judgment and the reasonable inferences that can be drawn from them. [Citation.] However, to defeat the motion for summary judgment, the plaintiff must show ' "specific facts," ' and cannot rely upon the allegations of the pleadings." (*Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 805 (*Horn*).)

2. Employment Discrimination

"As with actions under federal anti-discrimination legislation, a plaintiff alleging discriminatory termination under California's antidiscrimination statutory scheme must be able to survive the burden-shifting analysis set forth by the Supreme Court in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802-804 (*McDonnell Douglas*)." (*Horn*, *supra*, 72 Cal.App.4th at pp. 805-806.) "Under the three-part test developed in *McDonnell Douglas* . . . : '(1) The complaint must establish a prima facie case of discrimination; (2) the employer must offer a legitimate reason for his actions; (3) the complainant must prove that this reason was a pretext to mask an illegal motive.' " (*Morgan v. Regents of University of Cal.* (2000) 88 Cal.App.4th 52, 68.)

B. McKellar's Evidence

Cedars-Sinai objected in the trial court to certain evidence McKellar relied on to oppose Cedars-Sinai's motion for summary judgment. The trial court sustained certain of those objections. Cedars-Sinai previously moved to augment the record to include the trial court's rulings on the objections; we granted that motion. McKellar did not appeal the trial court's evidentiary rulings. "As a result, any issues concerning the correctness of the trial court's evidentiary rulings have been waived. [Citations.] We therefore consider all such evidence to have been properly excluded." (*Lopez v. Baca* (2002) 98 Cal.App.4th 1008, 1014-1015.)

On May 31, 2018, Cedars-Sinai filed a motion to strike certain portions of McKellar's opening and reply briefs based on discussions of evidence the trial court excluded. As we have not incorporated the excluded evidence into our background or considered it in our review of the trial court's judgment, we deny the motion to strike portions of McKellar's briefs.

C. The trial court correctly granted summary judgment

1. Unruh Civil Rights Act Failure to Accommodate and Unlawful Termination

"[T]he Unruh Civil Rights Act has no application to employment discrimination." (*Rojo v. Kliger* (1990) 52 Cal.3d 65, 77.) Summary adjudication of McKellar's Unruh Civil Rights Act cause of action was properly granted.

2. FEHA and Unlawful Termination in Violation of Public Policy Causes of Action

McKellar's opening brief raised one issue: McKellar raised a triable issue of material fact about Cedars-Sinai's reasons for terminating McKellar. McKellar's brief, then, necessarily implicates only the third part of the *McDonnell Douglas* test:

whether Cedars-Sinai's stated legitimate reason for terminating McKellar was pretext to mask an illegal motive.

To avoid summary judgment based on her proffered theory, McKellar needed to produce admissible evidence in the trial court that the decisions leading to McKellar's termination were made on the basis of her disability or workers' compensation claim. "[T]here must be evidence supporting a rational inference that *intentional discrimination, on grounds prohibited by the statute, was the true cause* of the employer's actions." (*Guz v. Bechtel Nat. Inc.* (2000) 24 Cal.4th 317, 360-361.)

McKellar's argument is based almost entirely on evidence the trial court ruled inadmissible. The remaining evidence McKellar relies on is that Cedars-Sinai sent five letters to a post office box. The necessary implication is that Cedars-Sinai should have attempted to contact McKellar some other way. The record, however, establishes that Cedars-Sinai *did* attempt to contact McKellar by telephone. McKellar had changed her telephone number because, *she said*, she did not want anyone at Cedars-Sinai to be able to contact her.

There is no evidence that Cedars-Sinai had other contact information for McKellar. And Cedars-Sinai had no obligation to reach out to someone *other* than its employee to determine whether that employee intended to comply with the company's leave policy. McKellar's argument assumes that McKellar could unilaterally require Cedars-Sinai to engage in the FEHA "interactive process" to determine effective reasonable accommodations with a representative McKellar designated without notifying Cedars-Sinai. That assumption is incorrect for a variety of reasons. (Cf. *Claudio v. Regents of the University of California* (2005) 134 Cal.App.4th 224, 228.)

Additionally, Cedars-Sinai's obligation to participate in an interactive process with McKellar is triggered by a request for reasonable accommodation. (Gov. Code, § 12940, subd. (n).) Both parties' separate statements of undisputed material fact establish that McKellar never made such a request. Here, she argues that "[t]he implication of a return date to employment is a request for accommodation." McKellar cites no authority for that proposition. And we decline to require employers to speculate about how they can accommodate employees who have failed to communicate about that employee's special needs. (See *Featherstone v. Southern California Permanente Medical Group* (2017) 10 Cal.App.5th 1150, 1169.)

More broadly, however, is that none of McKellar's suggestions offer any explanation about why Cedars-Sinai's proffered legitimate non-discriminatory reason for terminating McKellar were pretextual. McKellar's arguments, while critical of Cedars-Sinai's operations, do not suggest that the reason Cedars-Sinai gave for terminating McKellar was false. Without evidence of pretext, McKellar has failed to carry her burden to avoid summary judgment.

DISPOSITION

The judgment is affirmed. Cedars-Sinai is awarded costs on appeal.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, P. J. BENDIX, J.