

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

BRITTA BURKE,	)	
	)	2:09-cv-01920-GEB-GGH
Plaintiff,	)	
	)	
v.	)	<u>ORDER GRANTING DEFENDANT</u>
	)	<u>STARBUCKS' MOTION FOR SUMMARY</u>
STARBUCKS COFFEE COMPANY, DOES	)	<u>JUDGMENT</u>
1-10	)	
	)	
Defendants.	)	
_____	)	

Defendant Starbucks Coffee Company ("Starbucks") moves for summary judgment on all claims in Plaintiff Britta Burke's ("Burke") Complaint.

**I. Legal Standard**

A party seeking summary judgment "initially bears the burden of proving the absence of a genuine issue of material fact." In re Oracle Corp. Sec. Litig., --- F.3d ----, 2010 WL 4608794 at \*5 (9th Cir. 2010). If this burden is satisfied, "the non-moving party must come forth with evidence from which a jury could reasonably render a verdict in the non-moving party's favor." Id. "Where disputed issues of material fact exist, . . . [a]ll reasonable inferences must be drawn in favor of the non-moving party." Bryan v. McPherson, 608 F.3d 614, 619 (9th Cir. 2010) (citations omitted).

1 Further, under Local Rule 260: "Each motion for summary  
2 judgment . . . shall be accompanied by a 'Statement of Undisputed Facts'  
3 that . . . enumerate[s] discretely each of the specific material facts  
4 relied upon in support of the motion." L.R. 260(a). This statement is  
5 required to be supported by citations to "the particular portions of any  
6 pleading, affidavit, deposition, interrogatory answer, admission, or  
7 other document relied upon to establish that fact." Id. Local Rule 260  
8 also prescribes:

9 Any party opposing a motion for summary judgment or  
10 summary adjudication shall reproduce the itemized  
11 facts in the Statement of Undisputed Facts and  
12 admit those facts that are undisputed and deny  
13 those that are disputed, including with each denial  
14 a citation to the particular portions of any  
15 pleading, affidavit, deposition, interrogatory  
16 answer, admission, or other document relied upon in  
17 support of that denial. The opposing party may also  
18 file a concise 'Statement of Disputed Facts,' and  
19 the source thereof in the record, of all additional  
20 material facts as to which there is a genuine issue  
21 precluding summary judgment or adjudication.

22 L.R. 260(b).

23 If the nonmovant does not "specifically . . . [controvert duly  
24 supported] facts identified in the [movant's] statement of undisputed  
25 facts," the nonmovant "is deemed to have admitted the validity of the  
26 facts contained in the [movant's] statement." Beard v. Banks, 548 U.S.  
27 521, 527 (2006)) (finding that a party opposing summary judgment who  
28 "fail[s] [to] specifically challenge the facts identified in the [moving  
party's] statement of undisputed facts . . . is deemed to have admitted  
the validity of [those] facts . . . .").

## 29 **II. Uncontroverted Facts, Plaintiff's Claims, and Procedural History**

30 "Burke was involved in a [non employment-related] car accident  
31 at around 12:30 a.m. on October 28, 2008." (Separate Statement of  
32 Undisputed Facts in Supp. of Defendant Starbucks Corporation's Mot. for

1 Summ. J. or, in the Alternative, Partial Summ. J. ("Def.'s SUF") ¶ 14.)  
2 At the time of the car accident, Burke was employed as a Barista at a  
3 Starbucks location in Sacramento, California. Id. ¶ 3. Burke reported  
4 for her scheduled shift at Starbucks on October 31, 2008. Id. ¶ 30.  
5 During this shift, Burke informed a supervisor that "she was hit by a  
6 drunk driver, totaled her car, had pain in her back and legs, and that  
7 she was on the right medication and could go into work." Id. ¶ 27. Burke  
8 also told her coworkers she might not be "as fast as them." (Dep. of  
9 Britta Burke ("Burke Depo") 80:14-15.) Burke fully completed her shift  
10 on October 31, 2008, and also fully completed her work shifts on  
11 November 1, 2008, and November 2, 2008. Id. ¶ 30. The three work shifts  
12 "total[ed] over 17 hours." Id.

13 "Burke was scheduled to work from 2:45 p.m. until 10:15 p.m.  
14 on November 3, 2008. She did not report to work on that day [;and, she]  
15 did not inform Starbucks, prior to or during her shift, that she would  
16 not be reporting to work." Id. ¶ 43. Two of Burke's supervisors called  
17 Burke on November 3, 2008, "regarding her failure to show up for her  
18 shift" and left messages asking Burke to return their calls. Id. ¶¶ 44-  
19 45. "Burke never responded." Id. One of the supervisors also called  
20 Burke on November 4, 2008, and left a message asking Burke "to call him  
21 and let him know if she intended to report to her November 5, 7, 8, and  
22 9 shifts." Id. ¶ 46. The supervisor "also stated that he would assign  
23 these shifts to other [employees] and leave [Burke] off the schedule for  
24 the coming week . . . if he did not hear from [Burke] on the same day."  
25 Id. The supervisor "did not hear from Burke. Therefore, he found  
26 coverage for Burke's November 5, 7, 8, and 9 shifts. He also did not  
27 assign Burke to any shifts for the week starting November 10, 2008  
28

1 . . . . Burke did not report to work on November 5, 7, 8, or 9, 2008."  
2 Id. Burke was terminated on November 11, 2008 "for violating Starbucks  
3 Attendance and Punctuality Policy and abandoning her job." Id. ¶ 47.

4 Burke alleges in her Complaint that Starbucks violated  
5 California's Fair Employment and Housing Act ("FEHA") by failing to  
6 engage her in an interactive process concerning injuries she received in  
7 the automobile accident; failing to provide her a reasonable  
8 accommodation concerning those injuries; discriminating against her  
9 because of a disability resulting from those injuries; and retaliating  
10 against her because of her requests to engage in an interactive process  
11 and because she requested a reasonable accommodation. Burke also alleges  
12 a Whistleblower Retaliation claim under California Labor Code section  
13 1102.5(b), and a claim for intentional infliction of emotional distress.

14 Burke also alleged a FEHA medical condition discrimination  
15 claim, which she abandoned in her opposition brief to Starbucks' summary  
16 judgment motion; therefore, this claim is dismissed.

### 17 **III. Discussion**

#### 18 **A. FEHA Claims**

19 Starbucks argues it is entitled to summary judgment on Burke's  
20 FEHA claims since each claim is premised on Starbucks' knowing that  
21 Burke had a disability, and the uncontroverted facts show that Starbucks  
22 did not know Burke had a disability.

23 FEHA proscribes "an employer's intentionally discriminatory  
24 act against an employee because of . . . [the employee's] disability .  
25 . . ." Scotch v. Art Inst. of California-Orange Cnty., Inc., 173 Cal.  
26 App. 4th 986, 1002 (2009). "An employee cannot demand clairvoyance of  
27 [her] employer." King v. United Parcel Serv., Inc., 152 Cal. App. 4th  
28 426, 443, (2007). "It is an employee's responsibility to understand his

1 or her own physical or mental condition well enough to present the  
2 employer at the earliest opportunity with a concise list of restrictions  
3 which must be met to accommodate the employee." Jensen v. Wells Fargo  
4 Bank, 85 Cal. App. 4th 245, 266 (2000). "While knowledge of the  
5 disability can be inferred from the circumstances, knowledge will only  
6 be imputed to the employer when the fact of disability is the only  
7 reasonable interpretation of the known facts. Vague or conclusory  
8 statements revealing an unspecified incapacity are not sufficient to put  
9 an employer on notice of its obligations under [FEHA]." Brundage v.  
10 Hahn, 57 Cal. App. 4th 228, 237 (1997) (citation and quotations  
11 omitted).

12 Starbucks presents the following statement of undisputed facts  
13 in support of its position that Burke did not have a known disability:  
14 Burke stated she had pain in her back and legs but could work if she was  
15 on the right medication, and Burke worked three consecutive shifts in  
16 full after the accident. (Def.'s SUF ¶¶ 27, 30.) Starbucks argues there  
17 is no evidence that Burke provided further details of her injuries, or  
18 told her supervisors that her injuries prevented her from performing  
19 employment duties.

20 Burke argues she made it "abundantly clear to [a supervisor]  
21 that she was injured from a head-on auto collision, that she was  
22 experiencing pain in her neck, back, legs, and dizziness and light-  
23 headedness, that she would need to be 'moving more slowly' at work and  
24 that she would be unable to engage in more strenuous activities such as  
25 move [sic] tables, chairs, and umbrellas." (Separate Statement in Opp.  
26 to Mot. for Summ. J./Adjudication ("Pl.'s SUF") ¶ 28.) Burke relies on  
27 the following portions of her deposition testimony as support for her  
28 arguments that she told a supervisor about her disability:

1 Q. What did you tell [your supervisor]?  
2 A. The same thing about the car accident.

3 Q. So you told him that your car was totaled?  
4 A. Yes.

5 Q. You told him that you were hit by a drunk  
6 driver?  
7 A. Yes.

8 Q. You told him that you had pain in your back  
9 and your legs?  
10 A. Yes.

11 Q. That you were on the right medication and  
12 could still come into work?  
13 A. Yes.

14 Q. What else did you tell him?  
15 A. I think that was it; that sums it up.

16 Q. What was [the supervisor's] response?  
17 A. The same as [another supervisor's], worried,  
18 concern, supportive, understanding.

19 . . . .

20 Q. Did you personally tell each of [your  
21 coworkers at Starbucks] that you were in a car  
22 accident?  
23 A. Yeah.

24 Q. Did you -- what did you tell them?  
25 A. Well, I explained I was in a car accident;  
26 hence, you know, I'm working the best I can  
27 under these circumstances, letting my team  
28 know what to expect.

Q. What did you tell them what to expect? [sic]  
A. That I was injured so if I wasn't as fast as  
them to understand. Or manager or just -- for  
the same reason if someone is sick, you have  
to let everyone know.

Q. Did anybody complain about you not working --  
strike that. Did you think during those three  
shifts that you were not working as fast as  
you normally worked?  
A. Did anyone complain or did I know?

Q. Did you think that you were not working as  
fast as you normally were?  
A. Yes

Q. How much slower were you?

1 A. Just a little bit slower. I mean, it's not --  
2 you stand in front of -- you know, but  
3 standing for long periods of times gets tough  
4 when you're in an accident.

5 Q. So what did you do?

6 A. So I -- I went through it. I worked through  
7 the pain.

8 Q. Were there any tasks that you normally before  
9 the accident you could do [sic], but after the  
10 accident you could not do while you were  
11 working at Starbucks during those three  
12 shifts?

13 A. Yeah.

14 Q. What were they?

15 A. Like bringing in the furniture from outside,  
16 the tables and chairs.

17 Q. What else?

18 A. Umbrellas. Heavy Umbrellas. That was about it.  
19 Anything heavy lifting or strenuous, they just  
20 wouldn't let me do it.

21 Q. Who wouldn't let you do?

22 A. My co-workers.

23 Q. Do you remember who wouldn't let you do those?

24 A. No, it would have just been anybody that I  
25 worked with.

26 (Burke Depo. 78:4-20, 80:6-81:23.)

27 This deposition testimony does not support Burke's arguments  
28 that she told a supervisor she was unable to move certain furniture, or  
had other work limitations. Instead, this testimony supports Starbucks'  
factual position that Burke only mentioned that she had pain in her back  
and legs. Therefore, Burke has not presented evidence from which it  
could reasonably be inferred that Starbucks knew or should have known  
that Burke suffered from a physical and/or mental condition that made  
work difficult for her. See Arteaga, 163 Cal. App. 4th at 347 (finding  
"a reasonable employer would conclude that [plaintiff's] pain was not  
disabling" when plaintiff did not describe the "kind of pain" or "degree  
of pain" he experienced); Avila, 165 Cal. App. 4th at 1249 ("Informing

1 [the employer] merely that plaintiff had been hospitalized was not  
2 sufficient to put [the employer] on notice that plaintiff was suffering  
3 from a qualifying disability.”). For the stated reasons, Starbucks’  
4 summary judgment motion on Burke’s FEHA claims alleging that Starbucks  
5 failed to engage in an interactive process with her, failed to provide  
6 her with a reasonable accommodation, and subjected her to disability  
7 discrimination is granted.

8 Starbucks also argues it is entitled to summary judgment on  
9 Burke’s FEHA unlawful retaliation claim. Burke alleges in her Complaint  
10 that Starbucks retaliated against her because of her following protected  
11 activity: “requesting a reasonable amount of time to recover from the  
12 injuries she sustained in the collision with the drunk driver;”  
13 attempting “to engage in the interactive process with Starbucks”; and,  
14 “ask[ing] [Starbucks] for a reasonable accommodation.” (Pl.’s Compl. ¶  
15 32.) Burke also argued at the hearing on the motion that she suffered a  
16 retaliatory adverse employment action when Starbucks terminated her for  
17 working on a date she was not scheduled to work.

18 Starbucks argues it terminated Burke’s employment based on a  
19 legitimate, nonretaliatory reason and cites the following statement of  
20 undisputed facts as support for its argument: Burke was scheduled to  
21 work on November 3, 2008, but did not report that day or inform  
22 Starbucks that she would not be reporting. (Def.’s SUF ¶ 43.) Burke’s  
23 supervisors called her on November 3 and 4, 2008, and left messages  
24 regarding her failure to show up for her shift. *Id.* ¶¶ 44-46. When  
25 Burke’s supervisor, Adrian Sanchez (“SM Sanchez”), called Burke and  
26 again left her a message on November 4, 2008,

27 SM Sanchez stated that Burke had missed her shift  
28 the day before and [he] asked her to call him and  
let him know if she intended to report to her  
November 5, 7, 8, and 9 shifts. SM Sanchez also

1 stated that he would assign these shifts to other  
2 partners and leave her off the schedule for the  
3 coming week (week of November 10) if he did not  
4 hear from her on the same day. SM Sanchez did not  
5 hear from Burke. Therefore, he found coverage for  
6 Burke's November 5, 7, 8, and 9 shifts. Having not  
7 heard back from Burke, SM Sanchez consulted with  
8 district manager Nancy Beal and submitted an  
9 electronic partner action notice ("EPAN") to  
10 terminate Burke's employment for violating  
11 Starbucks Attendance and Punctuality Policy and  
12 abandoning her job. SM Sanchez forward-dated  
13 [Burke's] official termination date to November 11,  
14 2008 in Starbucks EPAN system to allow time for  
15 Burke's final check to arrive at the store and for  
16 him to inform Burke of her termination.

17 Id. ¶¶ 46,47.

18 Burke counters these facts with her following statement of  
19 undisputed facts: "[Burke] called the café and spoke with an employee,  
20 who told her she was not scheduled to work on the 3rd. Instead, she was  
21 written up for a 'no call/no show' for a purported shift on November  
22 4th. However, Ms. Burke had called in and confirmed she was not  
23 scheduled to work that day either." (Pl.'s SUF ¶ 43.) Further, Burke  
24 states in her statement of undisputed facts: "No Starbucks management  
25 personnel called Ms. Burke from November 3rd through November 11th and  
26 leave any messages [sic] because if they had, Ms. Burke's parents would  
27 have given her the messages." Id. ¶ 44. Burke argues her following  
28 deposition testimony supports her factual assertions in her statement of  
undisputed facts:

Q. Do you remember if you were scheduled to work on the 4th?  
A: That would have been the day that was a no call/no show.

Q. What do you mean?  
A. The 4th was the day that I called and they told me I did  
not work, which I obviously did work or apparently, and  
they told me I didn't.

Q. Did you work on the 4th?  
A. No.

. . . .

1 Q. Did you check any time before the 3rd, for example, in  
2 November 3rd, whether or not you had to work on November  
3 3rd?

4 A. Did I check with -- yes.

5 Q. When did you call?

6 A. I don't remember.

7 Q. Who did you talk to?

8 A. I don't remember.

9 . . . .

10 Q. How do you know [phone messages] would have been given to  
11 you [by Burke's parents]?

12 A. Because they would have. They would have told me if  
13 Starbucks called.

14 (Burke Depo. 89:16-25, 93:22-94:4, 126:10-13.)

15 Burke also testified during her deposition that "it is  
16 possible" her parents received voicemails and did not inform her, and  
17 also that she did not "know for sure" whether anyone from Starbucks  
18 called her on November 3 or 4, 2008, because she did not personally  
19 check to see if any voicemail messages were left. Id. 126:14-24.

20 Burke's deposition testimony does not support Burke's  
21 statements of undisputed facts, and fails to controvert Starbucks' facts  
22 showing that Burke failed to report to work as scheduled on November 3,  
23 2008, and that Burke's supervisors called Burke and left messages  
24 concerning this failure. Therefore, Starbucks has shown it had a  
25 legitimate, nonretaliatory reason for terminating Burke, and Starbucks'  
26 motion for summary judgment is granted on Burke's FEHA retaliation  
27 claim. See Yanowitz v. L'Oreal USA, Inc., 36 Cal. 4th 1028, 1042 (2005)  
28 ("If the employer produces a legitimate reason for the adverse  
employment action, the presumption of retaliation drops out of the  
picture, and the burden shifts back to the employee to prove intentional  
retaliation.") (quotation omitted).

1 **B. Whistleblower Retaliation**

2 Starbucks also seeks summary judgment on Burke's Whistleblower  
3 Retaliation claim. Burke alleges this claim under California Labor Code  
4 section 1102.5(b). This claim is based on Burke's allegation that she  
5 opposed Starbucks' action of taking her "off the schedule for the entire  
6 month . . . ." (Pl.'s Compl. ¶¶ 35, 36.) However, Starbucks has shown  
7 Burke was taken off the schedule because she failed to report to work  
8 when scheduled to work. Therefore, Starbucks' summary judgment motion on  
9 Burke's Whistleblower claim is granted.

10 **C. Intentional Infliction of Emotional Distress**

11 Starbucks also seeks summary judgment on Burke's intentional  
12 infliction of emotional distress ("IIED") claim. Burke alleges this  
13 claim is based on the allegations in her other claims on which Starbucks  
14 has been granted summary judgment. Since there is no evidence supporting  
15 the elements of an IIED claim, Starbucks' summary judgment motion on  
16 this claim is granted.

17 Burke also alleges a seventh claim for attorney's fees and  
18 costs. This claim is dismissed since it is dependent on Burke prevailing  
19 on claims on which summary judgment has been granted in favor of  
20 Starbucks.

21 **IV. Conclusion**

22 For the stated reasons, Starbucks' motion for summary judgment  
23 is granted. Judgment shall be entered in favor of Defendant.

24 Dated: December 9, 2010

25  
26   
27 \_\_\_\_\_  
GARLAND E. BURRELL, JR.  
United States District Judge