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

|                          |   |                                      |
|--------------------------|---|--------------------------------------|
| SUJLA MAHARAJ,           | ) |                                      |
|                          | ) | 2:11-cv-00315-GEB-EFB                |
| Plaintiff,               | ) |                                      |
|                          | ) |                                      |
| v.                       | ) | <u>ORDER GRANTING AND DENYING IN</u> |
|                          | ) | <u>PART DEFENDANT'S MOTION FOR</u>   |
| CALIFORNIA BANK & TRUST, | ) | <u>SUMMARY JUDGMENT</u>              |
|                          | ) |                                      |
| Defendant.               | ) |                                      |
| _____                    | ) |                                      |

Defendant moves for summary judgment, or in the alternative, partial summary judgment on each of Plaintiff's claims. Plaintiff alleges in her Complaint federal and state employment claims under the Americans with Disabilities Act ("ADA"), California's Fair Employment and Housing Act ("FEHA"), the Family and Medical Leave Act ("FMLA"), the California Family Rights Act ("CFRA"), and wrongful termination in violation of public policy. For the reasons stated below, Defendant's motion will be granted and denied in part.

**I. LEGAL STANDARD**

A party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact for trial. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). "A fact is 'material' when, under the governing substantive law, it could affect the outcome of the case." Thrifty Oil Co. v. Bank of Am. Nat. Trust and Sav. Ass'n, 322 F.3d 1039, 1046 (9th Cir. 2003) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). An issue of material

1 fact is "genuine" when "the evidence is such that a reasonable jury  
2 could return a verdict for the nonmoving party." Id.

3 When the defendant is the moving party and is seeking summary  
4 judgment on one or more of a plaintiff's claims,

5 [The defendant] has both the initial burden of  
6 production and the ultimate burden of persuasion on  
7 [the motion]. In order to carry its burden of  
8 production, the [defendant] must either produce  
9 evidence negating an essential element of the  
10 [plaintiff's claim] or show that the [plaintiff]  
11 does not have enough evidence of an essential  
12 element to carry its ultimate burden of persuasion  
13 at trial. In order to carry its ultimate burden of  
14 persuasion on the motion, the [defendant] must  
15 persuade the court that there is no genuine issue  
16 of material fact.

17 Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc., 210 F.3d 1099,  
18 1102 (9th Cir. 2000) (citations omitted).

19 If the movant satisfies its initial burden, "the non-moving  
20 party must set forth, by affidavit or as otherwise provided in [Federal]  
21 Rule [of Civil Procedure] 56, specific facts showing that there is a  
22 genuine issue for trial." T.W. Elec. Serv., Inc. v. Pacific Elec.  
23 Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987) (citation and  
24 internal quotation marks omitted). The "non-moving [party] cannot rest  
25 upon the mere allegations or denials of the adverse party's pleading but  
26 must instead produce evidence that sets forth specific facts showing  
27 that there is a genuine issue for trial." Estate of Tucker ex rel.  
28 Tucker v. Interscope Records, Inc., 515 F.3d 1019, 1030 (9th Cir. 2008)  
(citation and internal quotation marks omitted).

Further, Local Rule 260(b) requires:

Any party opposing a motion for summary judgment or  
summary adjudication [must] reproduce the itemized  
facts in the [moving party's] Statement of  
Undisputed Facts and admit those facts that are  
undisputed and deny those that are disputed,  
including with each denial a citation to the

1 particular portions of any pleading, affidavit,  
2 deposition, interrogatory answer, admission, or  
3 other document relied upon in support of that  
denial.

4 If the nonmovant does not "specifically . . . [controvert duly  
5 supported] facts identified in the [movant's] statement of undisputed  
6 facts," the nonmovant "is deemed to have admitted the validity of the  
7 facts contained in the [movant's] statement." Beard v. Banks, 548 U.S.  
8 521, 527 (2006).

9 Because a district court has no independent duty to  
10 scour the record in search of a genuine issue of  
11 triable fact, and may rely on the nonmoving party  
12 to identify with reasonable particularity the  
13 evidence that precludes summary judgment, . . . the  
district court . . . [is] under no obligation to  
undertake a cumbersome review of the record on the  
[nonmoving party's] behalf.

14 Simmons v. Navajo Cnty., Arizona, 609 F.3d 1011, 1017 (9th Cir. 2010)  
15 (citation and internal quotation marks omitted).

16 Evidence must be "view[ed] . . . in the light most favorable  
17 to the non-moving party[,]" and "all reasonable inferences" that can be  
18 drawn from the evidence must be drawn "in favor of [the non-moving]  
19 party." Nunez v. Duncan, 591 F.3d 1217, 1222-23 (9th Cir. 2010) (quoting  
20 Bank of N.Y.C. v. Fremont Gen. Corp., 523 F.3d 902, 909 (9th Cir.  
21 2008)).

## 22 **II. UNCONTROVERTED FACTS**

23 Based upon the respective undisputed facts and supporting  
24 evidence submitted by each party under Local Rule 260(b), the following  
25 facts are uncontroverted in the summary judgment record:

26 Plaintiff Sujla Maharaj ("Plaintiff") began working for  
27 Defendant California Bank & Trust ("CBT") as a teller at its Millbrae,  
28 California branch on January 16, 1990. (Pl.'s Separate Statement of

1 Disputed Facts ("DF") #1.) In approximately December 2002, Plaintiff  
2 transferred to a Customer Service Representative ("CSR") position<sup>1</sup> in  
3 Defendant's Sacramento main branch. Id. Plaintiff subsequently obtained  
4 promotions up to a CSR III position. Id. Plaintiff remained in  
5 Defendant's Sacramento main branch from 2002 until she was terminated in  
6 2010. (Def.'s Separate Statement of Undisputed Facts ("UF") #1.)

7 Plaintiff took a medical leave of absence from May 15, 2009  
8 until July 27, 2009 ("first leave of absence"). Id. #2. This leave of  
9 absence lasted ten weeks and one day. (Decl. of Regina Parker ("Parker  
10 Decl.") ¶9, ECF No. 45-4.) Plaintiff was hospitalized on multiple  
11 occasions during the first leave of absence and was diagnosed with  
12 Rheumatoid Arthritis. (Dep. of Sujla Maharaj ("Pl.'s Dep.") 121:19-  
13 124:9, Ex. 1 to the Decl. of Alan Adelman ("Adelman Decl."), ECF No. 57-  
14 5; Report of Lloyd Ito, M.D. ("Ito Report"), as Ex. 8 to Adelman Decl.,  
15 ECF No. 57-12.) Plaintiff submitted eleven signed doctor's notes to  
16 Defendant in connection with the first leave of absence, which state  
17 Plaintiff was "ill and unable to attend work" or "unable to attend work"  
18 during the pendency of her leave. (Parker Decl. ¶6, Exs. B1-B11.)

19 Plaintiff began a second medical leave of absence ("second  
20 leave of absence") on December 28, 2009. (UF #5.) Reports prepared by  
21 Plaintiff's health care providers indicate she was hospitalized from  
22 December 26, 2009 through January 11, 2012 for diagnoses including a  
23 kidney infection. See generally, Report of Anvarali Velji, M.D. ("Velji  
24 Report"), Ex. 7 to Adelman Decl., ECF 57-11; Ito Report.) In connection  
25 with the second leave of absence, Plaintiff submitted five doctor's  
26 notes to Defendant, which state Plaintiff was "ill[,] "ill and unable

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27  
28 <sup>1</sup> "Customer Service Representative" is Defendant's term for a  
bank teller. (Decl. of Regina Parker ("Parker Decl.") ¶4, ECF No. 45-4.)

1 to attend work[,]” or “unable to attend work” through March 31, 2010.  
2 (UF #7, Parker Decl. ¶11, Exs. E1-E5.) Plaintiff was released to return  
3 to work without restrictions on April 1, 2010. (Parker Decl. ¶11, Ex.  
4 E5.)

5 As of February 2, 2010, Plaintiff had taken more than twelve  
6 workweeks of medical leave in the twelve-month period prior to February  
7 2, 2010. (Parker Decl. ¶13.) On February 4, 2010, Defendant sent a  
8 letter to Plaintiff, which states in part, “due to our business needs  
9 and the expiration of the FMLA Job Protection leave of 12 weeks reached  
10 on February 2, 2010, the Sacramento Branch needs to begin the process of  
11 filling your Customer Service Representative position to meet the  
12 ongoing demands within the Branch.” (Parker Decl. ¶15, Ex. G.)

13 On or about February 25, 2012, Defendant posted on its  
14 internal and external job posting websites a full-time teller position  
15 at the Sacramento main branch with the title CSR II (“CSR II position”).  
16 (UF #15.) On or about March 10, 2010, Defendant offered, and a candidate  
17 accepted, the CSR II position. (UF #16.) When Defendant offered the  
18 candidate the CSR II position, Defendant was aware that Plaintiff had  
19 been released to return to work on April 1, 2010. (Dep. of Regina Parker  
20 (“Parker Dep.”) 176:15-25, Ex. 3 to Adelman Decl., ECF No. 57-7.) When  
21 the candidate accepted the position, Defendant knew she would be unable  
22 to start working until April 5, 2010. (Dep. of Deborah Fredrickson  
23 (“Fredrickson Dep.”) 118:10-119:20, Ex. 4 to Adelman Decl., ECF No. 57-  
24 8) And due to new employment orientation and training, the candidate  
25 would not be able to work independently until at least April 20, 2010.  
26 Id. at 119:23-121:16.

27 Plaintiff applied for a CSR I position at Defendant’s  
28 Sacramento Arden branch on March 18, 2010. Id. at 147:3-148:5. The

1 Sacramento Arden branch CSR I position was filled on April 19, 2010.  
2 Id. at 147:23-24, 154:20-22. Plaintiff applied for a CSR III position in  
3 Defendant's Gardena, California branch on March 21, 2010. Id. at 97:7-  
4 17, 164:4-164:19. The Gardena CSR III position was filed on April 1,  
5 2010. Id. at 164:23-24. Plaintiff applied for a CSR II position in  
6 Defendant's San Mateo, California branch on April 12, 2010. Id. at  
7 97:21-98:9, 156:25-157:18. The San Mateo CSR II position was filed on  
8 May 3, 2010. Id. at 157:7-15. Plaintiff indicated her willingness to  
9 relocate on both the San Mateo and Gardena job applications. Id. at  
10 94:14-25, 158:8-13, 165:3-6.

### 11 III. DISCUSSION

#### 12 A. Disability Discrimination under the ADA and the FEHA

13 Defendant seeks summary judgment on Plaintiff's disability  
14 discrimination claims under the ADA and the FEHA arguing Plaintiff  
15 cannot satisfy her initial burden of establishing a prima facie case of  
16 discrimination. (Def.'s Mem. of P.&A. in Supp. of Mot. for Summ. J.  
17 ("Mot.") 1:28-2:2.) Defendant further argues that "[e]ven if Plaintiff  
18 could establish a *prima facie* case, . . . [Defendant] ha[d] legitimate,  
19 nondiscriminatory reasons for its employment decisions, and Plaintiff  
20 cannot meet her burden of establishing specific, substantial evidence of  
21 pretext for [Defendant's] employment decisions." Id. at 2:5-8.

22 When considering motions for summary judgment in employment  
23 discrimination cases under federal and state law, federal courts apply  
24 the McDonnell Douglas burden-shifting scheme as a federal procedural  
25 rule. Dawson v. Entek Intern., 630 F.3d 928, 934-36 (2011) (stating the  
26 McDonnell Douglas burden-shifting framework applies to state  
27 discrimination claims "regardless of th source of the federal court's  
28

1 subject matter jurisdiction over [the state] claim[s,]" i.e. diversity  
2 or supplemental).

3           The burden-shifting analysis of McDonnell Douglas Corp. v.  
4 Green, 411 U.S. 792 (1973) has three steps. Davis v. Team Elec. Co., 520  
5 F.3d 1080, 1089 (9th Cir. 2008). "The employee must first establish a  
6 prima facie case of discrimination." Id. To establish a prima facie  
7 case of disability discrimination under both the ADA and the FEHA,  
8 Plaintiff must show: "(1) [she] is a disabled person within the meaning  
9 of the statute; (2) [she] is a qualified individual with a disability;  
10 and (3) [she] suffered an adverse employment action because of [her]  
11 disability." Hutton v. Elf Atochem N. Am., Inc., 273 F.3d 884, 892 (9th  
12 Cir. 2001); Faust v. Cal. Portland Cement Co., 150 Cal. App. 4th 864,  
13 886 (2007) (requiring a Plaintiff establish the following for a FEHA  
14 claim: "(1) [she] suffers from a disability; (2) [she] is otherwise  
15 qualified to do [her] job; and, (3) [she] was subjected to adverse  
16 employment action because of [her] disability").

17           An individual is "qualified" under both the ADA and the FEHA  
18 if he or she is able to perform the essential functions of the  
19 employment position that he or she holds or desires with or without  
20 reasonable accommodation. Samper v. Providence St. Vincent Medical Ctr.,  
21 675 F.3d 1233, 1237 (9th Cir. 2012) (discussing the meaning of "qualified  
22 individual" under the ADA); Green v. State, 42 Cal. 4th 254, 264 (2007)  
23 (stating "the FEHA and the ADA both limit their prospective scope to  
24 those employees with a disability who can perform the essential duties  
25 of the employment position with reasonable accommodation").

26           "If the plaintiff establishes a prima facie case, the burden  
27 of production-but not persuasion-then shifts to the employer to  
28 articulate some legitimate, nondiscriminatory reason for the challenged

1 action." Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1062 (9th  
2 Cir. 2002).

3 "Finally, if the employer satisfies this burden, the employee  
4 must show that the 'reason is pretextual either directly by persuading  
5 the court that a discriminatory reason more likely motivated the  
6 employer or indirectly by showing that the employer's proffered  
7 explanation is unworthy of credence.'" Davis, 520 F.3d at 1089 (quoting  
8 Chuang v. Univ. of Cal. Davis, 225 F.3d 1115, 1123-24 (9th Cir.2000)).

9 **1) Prima Facie Case of Discrimination**

10 Defendant does not challenge Plaintiff's ability to satisfy  
11 the first element of her prima facie case for disability discrimination,  
12 i.e. whether she was "disabled" when Defendant decided to fill her  
13 position on February 4, 2010. Therefore, the issues to be decided are  
14 whether Plaintiff was a "qualified individual" at that time, and whether  
15 Defendant filled the position "because of" her disability.

16 Defendant contends Plaintiff "was not a 'qualified individual  
17 with a disability' . . . because at the time that [Defendant] posted and  
18 filled the teller position . . . , Plaintiff was . . . ill and unable to  
19 work at all . . . ." (Mot. 12:13-19.) Defendant argues, "[a] person who  
20 is not able to work at all is not a qualified individual with a  
21 disability under the ADA and/or the FEHA." Id. at 12:20-22. Defendant  
22 further argues that Plaintiff's disability discrimination claims should  
23 be dismissed in their entirety "for the additional reason that Plaintiff  
24 cannot raise a genuine issue of material fact that CBT knew of  
25 Plaintiff's alleged disability" when it filled her position. Id. at  
26 14:7-9. Defendant contends: "[u]nless Plaintiff can raise a genuine  
27 issue of material fact regarding [Defendant's] knowledge of Plaintiff's  
28 alleged disability at the time it undertook the alleged adverse



1 employment decisions, [Defendant] cannot be liable to Plaintiff for ADA  
2 and/or FEHA disability discrimination." Id. at 14:9-12.

3 Plaintiff counters that she was a "qualified individual,"  
4 because she could perform the essential functions of her position with  
5 the reasonable accommodation of a finite leave of absence until April 1,  
6 2010. (PL.'s Mem. of P.&A. in Opp'n to Def.'s Mot. ("Opp'n") 11:14-21,  
7 12:2, ECF No. 57.) Plaintiff also argues that she was a "qualified  
8 individual" because she could "perform the essential functions of . . .  
9 other vacant job[s] within the company[,] and "reasonable  
10 accommodation[s] include transfer to a vacant position for which the  
11 employee is qualified, absent undue burden to the employer." Id. at  
12 12:3-14. Plaintiff further rejoins, "Plaintiff kept Defendant's  
13 management fully informed regarding [her] health status[,] "Defendant  
14 never asked for more information or documentation than Plaintiff was  
15 providing, and Defendant had all the certainty that Defendant needed  
16 regarding Plaintiff's ability to work." Id. at 2:19, 3:3-4.

17 A genuine issue of material fact exists concerning whether  
18 Plaintiff is a "qualified individual" under both the ADA and the FEHA.  
19 Although Plaintiff's doctor's notes indicate she was unable to work at  
20 the time Defendant decided to fill her position, she was released to  
21 work without restriction on April 1, 2010, and

22 [n]umerous courts have held that "[h]olding a job  
23 open for a disabled employee who needs time to  
24 recuperate or heal is in itself a form of  
25 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."

26 Kranson v. Fed. Exp. Corp., No. 11-cv-05826-YGR, 2012 WL 4715337, at \*8  
27 (N.D. Cal. Oct. 1, 2012) (quoting Jensen v. Wells Fargo Bank, 74 Cal.  
28 App. 4th 245, 263 (1999)). "[W]here a leave of absence would reasonably

1 accommodate an employee's disability and permit [her], upon [her]  
2 return, to perform the essential functions of the job, that employee is  
3 otherwise qualified under the ADA." Humphrey v. Mem'l Hosps. Ass'n, 239  
4 F.3d 1128, 1135 (9th Cir. 2001) (citing Nunes v. Wal-Mart Stores, Inc.,  
5 164 F.3d 1243, 1247 (9th Cir. 1999)). Further, Plaintiff has presented  
6 evidence that she applied for vacancies after she learned that she was  
7 released to work as of April 1, 2010, and reassignment to a vacant  
8 position for which the disabled employee is qualified are also  
9 recognized reasonable accommodations. See Dark v. Curry Cnty. 451 F.3d  
10 1078, 1089 (9th Cir. 2006) (discussing reassignment to vacant positions  
11 under the ADA); Hanson v. Lucky Stores, Inc., 74 Cal. App. 4th 215, 227  
12 (stating "FEHA lists as reasonable accommodation reassignment to a  
13 vacant position").

14 A genuine issue of material fact also exists on the issue  
15 whether Defendant was aware of Plaintiff's disabilities. Although  
16 Defendant contends it was unaware of Plaintiff's disabilities when it  
17 elected to fill her position, Plaintiff has presented contrary evidence.  
18 Plaintiff testified that in May 2009, she told her direct supervisor,  
19 Doolee Kim, and the branch customer service manager, Susan Tamai, that  
20 she suffered from arthritis. (Pl.'s Dep. 43:16-44:11; 46:7-13.) Tamai  
21 testified that when Plaintiff was on medical leave, she knew Plaintiff's  
22 health was "quite serious," and that Plaintiff had a "prolonged  
23 hospitalization." (Tamai Dep. 53:13-54:8.) Tamai also testified that  
24 although she could not recall any specifics concerning Plaintiff's  
25 health condition at the time of her deposition, she previously knew what  
26 her "underlying health conditions" were. Id. at 55:8-21. Defendant's  
27 Human Resources Generalist, Regina Parker, testified that she was "aware  
28 that [Plaintiff] had been hospitalized on multiple occasions[,] and was

1 told that she had "kidney issues" in or around January of 2010. (Parker  
2 Dep. 49:1-50:9.) Plaintiff's husband's deposition testimony on this  
3 subject is as follows:

4 Q. And you don't recall what you had told Susan  
5 Tamai?

6 A. What I have told?

7 Q. Correct.

8 A. Well most of them, I told them what was her  
9 condition and the doctor's note was given and  
when she would be okay to come back to work.

10 Q. And what did you, when you talked to Susan  
11 Tamai or Doole Kim, what did you tell them  
about Sujla's condition?

12 A. Condition, I would tell them, yes.

13 Q. And what specifically did you tell them?

14 A. Whatever the doctors told us, I tell them.

15 (Dushyant Maharaj Dep. 62:19-64:16, attached as Ex. 6 to Adelman Decl.,  
16 ECF No. 57-10.)

## 17 **2) Pretext**

18 Defendant argues, "[a]ssuming, *arguendo*, that Plaintiff could  
19 establish a *prima facie* case of disability discrimination . . . [t]here  
20 are legitimate, nondiscriminatory reasons for the alleged adverse  
21 actions." (Mot. 16:20-24.) Specifically, Defendant argues that it "had  
22 a legitimate business need for a full-time customer service  
23 representative at the Sacramento Main Branch" because as of February 4,  
24 2010, "[Defendant] did not have sufficient staff to meet the needs of  
25 the [Sacramento main] branch." Id. 16:26-28. Defendant further contends  
26 that Plaintiff cannot establish . . . that [this business need] w[as] a  
27 pretext for discrimination" in light of the uncertainty of whether and  
28 when Plaintiff was returning . . . ." Id. 17:28-18:6.

1 Plaintiff has presented evidence which raises a triable issue  
2 of fact regarding whether Defendant's staffing needs necessitated  
3 Plaintiff's position be filled in February of 2010. Defendant did not  
4 post the job opening for Plaintiff's position until February 25, 2010,  
5 three weeks after it notified Plaintiff it had decided to fill her  
6 position. And, Defendant ultimately offered the position to a candidate  
7 who was unable to start until April 5, 2010, four days after Plaintiff  
8 was released to return to work without restrictions. Further, Regina  
9 Parker gave deposition testimony that around the time Defendant filled  
10 Plaintiff's position, another teller resigned, and Defendant "decided to  
11 replace [only] one [of the teller] position[s] and not replace both."  
12 (Parker Dep. 138:8-139:15.) Parker testified concerning the Sacramento  
13 main branch's business needs as follows:

14 Q. Was there anything different in business  
15 conditions between May of '09 and January,  
16 February '010 other than this other teller or  
customer service rep leaving at some point in  
'010.

17 A. Not that I'm aware of.

18 Q. And do you know how that position was filled?

19 A. Which position?

20 Q. The other customer service position in  
21 [Plaintiff's] branch that came open?

22 A. I believe they only decided to replace one  
position and not replace both.

23 Q. Why not? Why?

24 A. Just staffing, model, business decision, I'm  
25 not -

26 Q. So business was such that the bank,  
27 [Plaintiff's] branch, determined they didn't  
even need three customer service reps, they  
could operate with only two?

28 A. Yeah, but I believe they had more than that. I  
think they had four at one time, they had two

1                   gone, now they only had two, so they needed  
2                   three.

3                   Q.    Okay.

4                   A.    Also someone reduced their hours, went to part  
5                   time, so that's why they decided to go ahead  
6                   and post it.

7                   Q.    Do you know what led to [Plaintiff's] branch  
8                   in '010 needing one less teller or customer  
9                   service rep than they had previously?

10                  A.    I would say business, the way business was  
11                  going.

12                  Q.    Slowed down?

13                  A.    Somewhat. I think there was an evaluation of  
14                  the branch itself, and did we need five  
15                  people, probably not. You know, so there was  
16                  some of that because we did let go one of the  
17                  [customer service managers] because we had  
18                  . . . two . . . so there was a branch review.

19                  Q.    So you let go of a branch supervisor?

20                  A.    Uh-huh.

21                  Q.    When was that?

22                  A.    2011.

23 (Parker Dep. 138:8-139:19.) Susan Tamai also testified regarding the  
24 Sacramento main branch's decision to reduce its Customer Service  
25 Managers from two to one. (Tamai Dep. 156:22-159:3.) Defendant did not  
26 "add anyone to the branch to help perform the duties [the second  
27 Customer Service Manager] was performing[,]" and Defendant did not "do  
28 anything to take away certain tasks and responsibilities from [the]  
branch to make up for the fact that [it removed] one of [the] managerial  
[positions]." Id. at 158:12-14, 159:4-12. Although this change occurred  
in 2011, not in February of 2010 when Defendant decided to fill  
Plaintiff's position, Tamai testified that nothing "significant  
change[d]" in the Sacramento main branch's workload between January of  
2010 and January of 2011. Id. at 159:20-160:1.

1 "These are specific and substantial facts from which a  
2 reasonable jury could find that Plaintiff's disability was a motivating  
3 factor in [Defendant's] decision to [fill] h[er] position." Kranson,  
4 2012 WL 4715337, \*9.

5 For the stated reasons, Defendant's motion for summary  
6 judgment on Plaintiff's disability discrimination claims alleged under  
7 the ADA and the FEHA is denied.

8 **B. FEHA Claims for Failure to Provide a Reasonable Accommodation**  
9 **and Failure to Engage in the Interactive Process**

10 Defendant also seeks summary judgment on Plaintiff's FEHA  
11 claims in which Plaintiff alleges Defendant failed to engage in the  
12 interactive process and failed to reasonably accommodate her, as  
13 proscribed by California Government Code section 12940, subsections (m)  
14 and (n). Defendant argues "Plaintiff's inability to establish a claim  
15 for disability discrimination . . . is fatal to [these] claims . . . ."  
16 (Mot. 18:9-11.) Defendant further argues, "[e]ven if Plaintiff were able  
17 to establish a triable issue of fact regarding her disability  
18 discrimination . . . , Plaintiff cannot establish a triable issue of  
19 fact regarding her claims for alleged failure to provide reasonable  
20 accommodation and/or to engage in an interactive process" because "[t]he  
21 duty of an employer to reasonably accommodate an employee's disability  
22 does not arise until the employee gives the employer notice of [her]  
23 disability and physical limitations[,]" and "Plaintiff never provided  
24 [Defendant] with medical documentation or information identifying her  
25 alleged disability and any resulting limitations." Id. 18:14-17, 18:28-  
26 19:2, 19:22-26. However, a genuine issue of material fact exists on the  
27 issue whether Defendant was aware of Plaintiff's disability and  
28 limitations. Therefore, this portion of Defendant's motion is denied.

1           **C.     FMLA & CFRA Claims**

2           Defendant also moves for summary judgment on Plaintiff's fifth  
3 and sixth claims alleged under the CFRA and the FMLA, respectively,  
4 arguing "an employee's right to reinstatement under the FMLA and CFRA  
5 applies only when the employee returns to work and/or is able to perform  
6 his or her job duties after the expiration of 12 workweeks of protected  
7 leave[,] " and Plaintiff was not released to return to work at the  
8 expiration of her twelve week leave period. (Mot. 7:2-6, 7:19-22, 9:1-  
9 9.) Defendant further argues that Plaintiff cannot establish a prima  
10 facie case of retaliation under the FMLA or CFRA because the "eight and  
11 one-half months" time delay between "Plaintiff's termination and her  
12 exercise of protected CFRA/FMLA leave . . . coupled with the absence of  
13 any direct evidence of discrimination by [Defendant] are fatal to  
14 Plaintiff's claim that her termination somehow connected to her exercise  
15 of protected leave."<sup>2</sup> Id. at 10:14-21.

16           Plaintiff opposes Defendant's motion on her CFRA/FMLA claims  
17 on three separate grounds. Plaintiff argues Defendant violated her  
18 rights under the CFRA and the FMLA by 1) terminating her employment  
19 while she was taking a CFRA/FMLA protected leave, 2) failing to  
20 designate her medical leave as CFRA/FMLA qualifying and/or failing to  
21 notify her regarding her right to reinstatement under CFRA/FMLA, and 3)  
22 "refusing to re-hire Plaintiff upon [her] being released to return to  
23 work" in retaliation for taking CFRA/FMLA protected leave. (Opp'n 18:4-  
24 8, 18:16-20, 19:7-12, 19:17-19, 19:24-25, 20:13-15.)

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26  
27           <sup>2</sup> Defendant contends Plaintiff's employment was "formally  
28 terminated" effective December 29, 2010, not when it notified her on  
February 4, 2010, that it was going to begin the process of filling her  
position. (Parker Decl. ¶ 21, Ex. H; see also Def.'s Reply 3:22-23.)

1           Concerning Plaintiff's second theory of CFRA/FMLA liability,  
2 Defendant replies: "any lack of notice could not have had any effect on  
3 Plaintiff's exercise of [her] CFRA/FMLA rights." (Def.'s Reply 3:8-10,  
4 ECF No. 59.) Defendant argues, "[u]nlike an employee who is able to work  
5 part time or who is caring for a sick relative, here, the undisputed  
6 facts establish that Plaintiff was unable to work at all during the  
7 [f]irst or second Leave of Absence . . . [or] at the conclusion of her  
8 FMLA/CFRA leave[, t]herefore, any lack of notice regarding Plaintiff's  
9 CFRA/FMLA rights does not create any CFRA/FMLA liability . . . ." Id. at  
10 3:5-10.

11           Both the CFRA and the FMLA "entitle[] eligible employees to  
12 take up to 12 unpaid workweeks in a 12-month period" for a "serious  
13 health condition." Rogers v. Cnty. of Los Angeles, 198 Cal. App. 4th  
14 480, 487 (2011) (discussing the CFRA and the FMLA) (citing CAL. GOV'T CODE  
15 § 12945.2(a) and 29 U.S.C. § 2612(a)(1)(D)). Further, an employee who  
16 takes leave under CFRA/FMLA has a "right to return to his or her job or  
17 an equivalent job after using protected leave." Bachelor v. Am. West  
18 Airlines, Inc., 259 F.3d 1112, 1122 (9th Cir. 2001) (discussing  
19 reinstatement rights under the FMLA) (citing 29 U.S.C. §2614(a)); see  
20 also Rogers, 198 Cal. App. 4th at 355 (citing 12945.2(a)). However, "an  
21 employer does not violate the FMLA [or the CFRA] when it [terminates] an  
22 employee who is indisputably unable to return to work at the conclusion  
23 of the 12-week period of statutory leave." Edgar v. JAC Products, Inc.,  
24 443 F.3d 501, 506-07 (6th Cir. 2006) (discussing FMLA); see also Rogers,  
25 198 Cal. App. 4th at 488 ("CFRA's reinstatement right only applies when  
26 an employee returns to work on or before the expiration of the 12-week  
27 protected leave . . . .").



1 Further, the CFRA and the FMLA "plainly prohibit[] the use of  
2 [statutory]-protected leave as a negative factor in an employment  
3 decision." Bachelor, 259 F.3d at 1125; see also Rogers, 198 Cal. App.  
4 4th at 490-91 ("The CFRA provides that '[i]t shall be an unlawful  
5 employment practice for an employer to . . . discriminate against . . .  
6 any individual because of . . . (1) [that] individual['s] exercise of  
7 the right to . . . medical leave provided by' the CFRA.") (quoting CAL.  
8 GOV'T CODE 12945.2(1)). Plaintiff is required to establish a "causal  
9 connection" between her taking statutory-protected medical leave and the  
10 employment decision at issue to succeed under this type of CFRA/FMLA  
11 claim. Rogers, 198 Cal. App. 4th at 359-60 (discussing CFRA  
12 "retaliation" claim); See also Bachelor, 259 F.3d at 1125 (stating a  
13 plaintiff can satisfy her burden of proving that the "taking of  
14 FMLA-protected leave constituted a negative factor in the decision to"  
15 take an adverse employment action "by using either direct or  
16 circumstantial evidence, or both").

17 It is undisputed that Plaintiff was provided twelve weeks of  
18 medical leave, and that the twelve weeks of leave expired on February 2,  
19 2010. It is also undisputed that Plaintiff was unable to return to work  
20 as of February 2, 2010. Plaintiff's doctor's notes "are sufficient to  
21 establish that Plaintiff was not able to engage in the essential  
22 functions of [her] job." Jackson v. Simon Property Group, 795 F. Supp.  
23 2d 949, 964 (N.D. Cal. 2011). Therefore, Defendant is entitled to  
24 summary judgment on Plaintiff's CFRA and FMLA claims to the extent they  
25 are premised on Plaintiff's first theory of liability, i.e. that  
26 Defendant "terminated" her employment during her second leave of  
27 absence. See Edgar, 443 F.3d at 506-07; see also Rogers, 198 Cal. App.  
28 4th at 488.

1 Defendant is also entitled to summary judgment on Plaintiff's  
2 CFRA and FMLA claims, to the extent they are premised on Plaintiff's  
3 second theory of liability, i.e. that Defendant violated these acts by  
4 failing to properly designate Plaintiff's leaves of absence as CFRA/FMLA  
5 qualifying leaves and/or failing to adequately notify Plaintiff of her  
6 right to reinstatement under CFRA/FMLA.

7 Accepting as true . . . that Defendant failed  
8 to inform Plaintiff that the leave it was providing  
9 h[er] was designated [CFRA/FMLA leave,] . . . no  
10 rational finder of fact could conclude that  
11 Plaintiff's exercise or attempted exercise of h[er]  
12 [CFRA/FMLA] rights was in any way affected by  
13 Defendant's failure to inform h[er] that the Act[s]  
14 entitled h[er] to a leave of up to 12 work weeks  
15 . . . . "Assuming arguendo that Plaintiff should  
16 have been given more explicit notice than was given  
17 . . . Plaintiff's right to reinstatement could not  
18 have been impeded or affected by the lack of notice  
19 because h[er] leave was caused by a serious health  
20 condition that made h[er] unable to perform the  
21 functions of h[er] position, . . . and it is  
22 undisputed that that inability continued for  
23 [approximately] two months after the end of h[er]  
24 12-week [statutory] leave period. Any lack of  
25 notice of the statutory 12-week limitation on  
26 [CFRA/FMLA] leave could not rationally be found to  
27 have impeded Plaintiff's return to work. . . . [T]o  
28 the extent that [P]laintiff contends that the  
assumed right to notice stands as an independent  
right . . . , and that an employee may sue the  
employer for failure to give notice even if that  
failure in no way affected the employee's leave,  
benefits, or reinstatement, we reject that  
contention."

22 Jackson, 795 F. Supp. 2d at 965 (quoting Sarno v. Douglas Elliman-  
23 Gibbons & Ives, Inc., 183 F.3d 155, 161-62 (2nd Cir. 1999)) (internal  
24 brackets and quotation marks omitted).

25 However, Plaintiff has presented evidence which creates a  
26 genuine issue of material fact preventing summary judgment in favor of  
27 Defendant on Plaintiff's third theory of CFRA/FMLA liability, i.e. that  
28 Defendant refused to re-hire Plaintiff after she was released to return

1 to work in retaliation for taking CFRA/FMLA protected leave. Plaintiff  
2 applied for a vacant teller position in Defendant's San Mateo office  
3 after she was released to return to work without restrictions.  
4 (Fredrickson Dep. 156:25-157:15.) Deborah Fredrickson, one of  
5 Defendant's human resources staff, gave deposition testimony that  
6 Plaintiff was qualified for the San Mateo position, but was not  
7 considered for the position because "she lived in Sacramento . . . and  
8 applied for a position in San Mateo." Id. at 157:16-22. However,  
9 Plaintiff's application for the San Mateo opening indicated that she was  
10 willing to relocate, and Fredrickson testified that she called Plaintiff  
11 concerning her application for the San Mateo position, and Plaintiff  
12 responded that "she was open to opportunities in other locations  
13 . . . ." Id. at 70:12-71:14, 94:14-25, 158:4-10. Fredrickson also  
14 testified that if an applicant is qualified for a position and is  
15 willing to relocate, the fact that they do not live in the city where  
16 the position is held is not "a basis to reject their application." Id.  
17 at 158:11-17. Fredrickson's testimony belies Defendant's contention that  
18 it had a legitimate, non-discriminatory reason to reject Plaintiff's  
19 application for the San Mateo position.

20 Plaintiff also presented deposition testimony from two of  
21 Defendant's employees, from which a reasonable inference could be drawn  
22 that Defendant refused to rehire Plaintiff because she took protected  
23 medical leave. Regina Parker testified that when she spoke to the  
24 Sacramento main branch about filling Plaintiff's position in early  
25 February 2010, branch staff had an ongoing concern that Plaintiff would  
26 be unable to return to work "even when the doctor notes reflected she'd  
27 be able to return in the very near future." (Parker Dep. 61:4-63:16.)  
28 And Susan Tamai testified regarding Plaintiff's absences as follows:

1 Q. What was [Plaintiff's] attendance like?

2 A. Oh, that was - I know she had to take off a  
3 lot, I know, for doctor's appointments. She  
4 did get sick, other than these leaves, I'm  
5 talking about.

6 Q. Did you see that as a negative attribute of  
7 her as an employee having to take time off?

8 A. Yeah, she seemed to take off more than a usual  
9 employee.

10 Q. Due to medical issues?

11 A. Yes.

12 Q. Did that concern you?

13 A. It concerned me to - well, of course it  
14 affected the work but she seemed to have a lot  
15 of different health issues which I know at one  
16 point maybe we discussed how - we were talking  
17 to her about, "How come the doctor's can't  
18 find out what was wrong with you," because she  
19 had certain ailments that seemed to go on and  
20 on and on.

21 And she'd go to the doctor and they would  
22 give her some medicine or either send her  
23 home. Then she'd get those symptoms again, and  
24 I remember we would tell her, "You really got  
25 to talk to your doctors and find out what's  
26 wrong."

27 (Tamai Dep. 114:18-115:14.)

28 The referenced evidence "suggests that [Defendant's rejection  
of Plaintiff for the San Mateo position] may have been tainted with  
[its] attitude towards her leave." Liu v. Amway Corp., 347 F.3d 1125,  
1137 (9th Cir. 2003). Further, "the proximity in time between  
[Plaintiff's] leave and [her rejection for the San Mateo position] also  
provides supporting evidence of a connection between the two events."

Id.

For the stated reasons, Defendant's summary judgment motion on  
Plaintiff's CFRA/FMLA claims is granted, except to the extent it is

1 premised upon Defendant's failure to reinstate her after she was  
2 released to return to work.

3 **D. Wrongful Termination in Violation of Public Policy**

4 Defendant also seeks summary judgment on Plaintiff's wrongful  
5 termination in violation of public policy claim. In support of this  
6 portion of its motion, Defendant only argues as follows: "Because  
7 Plaintiff cannot raise a genuine issue of material fact with respect to  
8 any of the claims in her complaint, Plaintiff's claim for violation of  
9 public policy likewise fails and should be dismissed." (Mot. 20:3-5.)

10 Since Plaintiff's disability discrimination claims, FEHA  
11 failure to accommodate/failure to engage in the interactive process  
12 claims and a portion of her FMLA/CFRA claims survive the motion, this  
13 portion of Defendant's motion is denied.

14 **IV. CONCLUSION**

15 For the foregoing reasons, Defendant's summary judgment motion  
16 is granted and denied in part as follows:

- 17 1. Defendant's motion on Plaintiff's first and second claims  
18 alleging disability discrimination under the FEHA and the  
19 ADA is DENIED;
- 20 2. Defendant's motion on Plaintiff's third and fourth claims  
21 alleging failure to accommodate and failure to engage in  
22 the interactive process under the FEHA is DENIED;
- 23 3. Defendant's motion on Plaintiff's fifth and sixth claims  
24 alleging violation of the CFRA and the FMLA is GRANTED  
25 except to the extent those claims are premised upon  
26 Defendant's failure to rehire Plaintiff for the position  
27 to which she applied after she was released to return to  
28 work; and

