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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MARY PHILLIPS,

Plaintiff,

v.
VICTOR COMMUNITY SUPPORT
SERVICES, INC.,

Defendant.

No. 11-cv-3182-TLN-CMK

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

A bench trial was conducted in this matter on May 12, 2014, through May 14, 2014. Plaintiff Mary Phillips (“Plaintiff”) alleged under the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12100 *et seq.*, that Defendant Victor Community Support Services, Inc. (“Defendant”): 1) discriminated against her because of a disability; 2) failed to make reasonable accommodations to enable her to perform the essential functions of her job; and 3) retaliated against her for engaging in protected activity. For each of the three claims, the Court finds Plaintiff has not shown by a preponderance of the evidence that the requisite elements are met. Therefore judgment is ordered in favor of Defendant. The Court submits the following Findings of Fact and Conclusions of Law pursuant to Federal Rule of Civil Procedure 52(a).

FINDINGS OF FACT

Trial testimony

1. The following witnesses testified at trial:

- Deborah Engs, “Ms Engs”, Plaintiff’s supervisor from late 2008 through Plaintiff’s termination. (Reporter’s Transcript, “TR”, 5–160.)
- Jubin Meriti, Plaintiff’s expert on damages. (TR 165–184.)
- Dawn Haskins, Plaintiff’s former supervisee and coworker. (TR 186–190.)
- Denise Craig, Plaintiff’s former supervisee and coworker. (TR 199–227.)
- Katherine Rayden, the Human Resources Director during the period from late 2008 through Plaintiff’s termination. (TR 199–227.)
- Toni Heideman, Plaintiff’s former roommate and coworker. (TR 229–234.)
- Mary Phillips, Plaintiff. (TR 242–335.)

Background and material events

2. Defendant provides behavior and mental health services to children and families. (TR 131:23-132:1.) Defendant employs over 900 employees. (TR 209:14-21.)
3. Plaintiff began her employment with Defendant beginning in November, 2001, when she served as a clinician.¹ (TR 242:10-12.)
4. Plaintiff was promoted to clinical supervisor in January, 2006. (Plaintiff’s Exhibit, “Pl. Ex.”, 77.)
5. Michael Elterman (“Dr. Elterman”) was Plaintiff’s executive director and supervisor from the start of her employment until sometime in 2004. (TR 242:13-16.)
6. Following Dr. Elterman’s departure, Paul Werner (“Dr. Werner”) became Plaintiff’s executive director and supervisor, until his departure in August or September, 2008. (TR 243:14-20.)

¹ The Court infers that Plaintiff, during her tenure with Defendant, was based at one or more offices in Shasta County.

- 1 7. Following Dr. Werner's departure, Ms. Eng became Plaintiff's executive director and
2 supervisor at the Shasta County office. (TR 6:25-7:1.)
- 3 8. At some point in 2007, Plaintiff had surgery due to complications from a prior case of
4 shingles. The surgery involved tying down her diaphragm. Plaintiff had the same type of
5 surgery in 2008. For each of the aforementioned surgeries, Plaintiff took approximately
6 six weeks off from work. (TR 252:16-253:24.) Following her second surgery in 2008,
7 Plaintiff returned to work in October, 2008. Her supervisor when she returned was Ms.
8 Eng. This was the first time Plaintiff had worked for Ms. Eng. (TR 253:24-254:4.)
- 9 9. Plaintiff's health issues resulted in chronic lung issues which were a disability within the
10 meaning of the ADA. (ECF No. 22 at 2; Pl. Ex. 61; TR 254:7-18.)
- 11 10. On January 7, 2009, Ms. Eng met with Plaintiff to discuss deficiencies in her work
12 performance. (TR 260:1-17) Subsequently, Ms. Eng received a letter from an attorney
13 representing Plaintiff. (TR 40:20-42:3.)
- 14 11. Plaintiff met with Ms. Eng and Trinda Dailey, the human resources manager at the time,
15 on January 12, 2009. (TR 261:19-24.) At that meeting, Plaintiff was given a severance
16 and release agreement, which had an effective date of January 14, 2009. (TR 262:1-3.)
17 Plaintiff did not sign the agreement. (TR 56:19-20.)
- 18 12. Plaintiff's attorney subsequently sent Defendant another letter, dated January 12, 2009,
19 stating in relevant part: "Unfortunately my client informs me that instead of responding
20 directly to me, Victor TC has further harassed Ms. Phillips with a termination/waiver of
21 rights ultimatum with a short unlawful two day response decision time. Needless to say
22 such conduct subjects the employer to litigation risks It is clear your attorney should
23 review this matter and contact [me] regarding this situation forthwith." (Pl. Ex. 100-7.)
- 24 13. On January 26, 2009, Plaintiff met with Ms. Eng and Trinda Dailey, at which point she
25 was demoted from clinical supervisor to clinician. (Pl. Ex. 79.) The demotion letter
26 stated in relevant part: "I have serious concerns regarding your performance, especially in
27 the areas of developing and maintaining trust with your supervisees, professional
28

1 communications with other staff and peers, working as a positive member of your team
2 and other leadership skills.” (Pl. Ex. 37.)

3 14. On August 19, 2009, Ms. Engs issued Plaintiff a written warning indicating that Plaintiff
4 left her scheduled clients to be seen by someone else without making arrangements for
5 coverage, and that Plaintiff did not contact her supervisor regarding the absence, in
6 violation of protocol. (Defendant’s Exhibit, “Def. Ex.”, L.)

7 15. On September 3, 2009, Plaintiff made a formal written request for accommodation to
8 work four days per week instead of five and modifications to her case load. That request
9 was granted in writing, and signed by Ms. Engs, Trinda Dailey, and Plaintiff.² (Pl. Ex.
10 36.)

11 16. On September 15, 2009, Ms. Engs issued Plaintiff a second written warning, stating
12 Plaintiff had failed to notify a client of the need to cancel an appointment and had failed to
13 notify her supervisor or office staff. (Def. Ex. M.)

14 17. On September 15, 2009, Ms. Engs also issued Plaintiff’s annual performance review,
15 with ten areas checked to indicate “unacceptable or needs improvement.” (Pl. Ex. 35.)

16 18. On November 3, 2009, Plaintiff was terminated. The reasons cited in the termination
17 letter were: a continued pattern of poor judgment, poor customer service, and a lack of
18 professional communication; the incidents giving rise to the two written warnings on
19 August 19, 2009, and September 15, 2009; an incident discussed at an October 30, 2009,
20 meeting with Ms. Engs, involving whether Plaintiff documented attempts to contact a
21 client’s guardian on a client database; and Plaintiff’s informing Ms. Engs her license had
22 expired just prior to her termination. (Pl. Ex. 34.) Ms. Engs also testified that the “full
23 scope” of Plaintiff’s employment was factored into the decision to terminate. (TR 106:7-
24 9.)

25 19. Ms. Engs testified that at no point did Plaintiff’s health issues factor into her analysis of
26 Plaintiff’s performance. (TR 9:25-10:3.) She testified that Plaintiff’s volume of leave,
27

28 ² The request was initially dated September 1, 2009, but the request was granted and signed by Plaintiff, Ms. Engs,
and Trinda Dailey on September 3, 2009.

1 and the reasons for her leave, were not considered in the decision to terminate. (TR
2 127:9-17.)

3 **Plaintiff's disability**

4 20. The Court does not locate within the trial testimony or the submitted briefing wherein
5 Plaintiff states a specific time period when her chronic lung issues became a disability, or
6 whether related health issues – for example the surgeries involving Plaintiff's diaphragm
7 in 2007 and 2008 – were or were not part of Plaintiff's disability. The main health issue
8 testified to at trial was Plaintiff's recurring bouts of pneumonia, which the parties agree
9 constitutes a disability.³

10 21. Plaintiff's Proposed Findings of Fact and Conclusions of Law (ECF No. 45 ¶ 34) asserts
11 that Plaintiff took leaves of absence ("LOAs") from work in April, May, July, August, and
12 September 2009, due to recurring bouts of pneumonia. Plaintiff directs the Court to
13 exhibits 30, 38, 60, 61, 62, and 63, which appear to show that LOAs were taken during
14 these months. (ECF No. 45 ¶34.) Defendant does not dispute the facts contained in the
15 aforementioned exhibits.

16 22. Plaintiff also testified – apparently consistently with her proposed FF&CL – that she
17 experienced recurring bouts of pneumonia a minimum of ten times in 2009, and that she
18 "might have missed a period of two weeks at a time and a week at another time." (TR
19 254:7-18.)

20 23. Plaintiff does not claim that she was discriminated against due to her chronic lung issues
21 (nor that she suffered any adverse employment actions) prior to her returning to work in
22 October, 2008.

23
24 _____
25 ³ A "disability" under the ADA refers to "(A) physical or mental impairment that substantially limits one or more
26 major life activities [; (B) a record of such an impairment; or (C) being regarded as having such an impairment (as
27 described in paragraph (3))." A "major life activity" includes, but is not limited to, "caring for oneself, performing
28 a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive,
bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions." 42 U.S.C.
12102(1) and (2).

1 24. In light of the foregoing, the Court finds Plaintiff was disabled due to her chronic lung
2 issues, starting at least in October, 2008, when she returned to work following her
3 diaphragm surgery.⁴

4 **Annual Performance Reviews: 2004 - 2009**

5 25. Plaintiff's annual performance reviews from 2004 through 2009 contained shaded areas
6 that indicated "unsatisfactory or needs improvement" and lighter areas that indicated
7 satisfactory or praiseworthy performance. They were signed by Plaintiff and her
8 supervisors at the time, either Dr. Elterman, Dr. Werner, or Ms. Eng. (Pl. Ex.'s 3, 4, 7, 8,
9 9, 35.)

10 26. Plaintiff's annual performance review dated January 12, 2004 (Pl. Ex. 4) was signed by
11 Dr. Elterman and did not contain any check-marked areas indicating Plaintiff's
12 performance was unacceptable or needed improvement. The concluding comment stated:

13
14 You have missed considerable amount of time from work which
15 has, I am sure, inconvenienced you a great deal. It has also
16 impacted the time you have been able to spend with your clients. It
17 is my hope that this year will be a healthier year for you. You have
18 missed 10 days due to ill health in this current fiscal year alone. On
19 one occasion, you could have added good information to the teams
20 [sic] knowledge base but felt that on one occasion you had
21 information you only wanted to share if you could get paid for it
22 above and beyond your salary. I believe as clinicians it is our
23 responsibility to pass along information to team members however
24 we receive it, to better the team. In many other instances you have
25 shared openly and willingly and in such a manner that indicates to
26 me that this instance was "out of character." In general, you have
27 been generous with your time and equipment, beyond expectations.
28 Overall, you are an asset to the team and your attitudes about
treatment and families are professional respectful, and has at least
as much impact on the successes that you have had with clients as
your clinical knowledge base. You have worked hard to gain the
knowledge you need for the new client base you are working with.
You have also provided an invaluable service to this agency by
being what I call a "utility infielder." Where ever we have needed
you, you were willing to perform and learn. This is an example of

25 ⁴ See Plaintiff's complaint, ECF No. 1 ¶ 9 (Plaintiff "suffers from chronic lung issues, and upon returning to work
26 from a lung-related surgery [] in October 2008 ..."); ECF No. 1 ¶ 11 (After being demoted in January, 2009, Plaintiff
27 "was required to miss significant additional amounts of work due to her disability including a hospitalization for a
28 week in April 2009 due to contracting pneumonia. After her discharge, she was required to miss at least ten
additional days of work due to recurring bouts of pneumonia over the next six months."). See Plaintiff's trial brief,
ECF No. 26 at 1 (Plaintiff's disability was "caused by chronic lung issues"); ECF No. 26 at 2 (Plaintiff returned to
work in October, 2008 "following a diaphragm surgery which was related to plaintiff's ... chronic lung issues.")

1 your unique contribution to this agency. You also have a fun
2 loving attitude and generally spread that around. While this is 'just'
3 who you are, it does not take away the positive influence it has on
4 the program. Thank you.

5 27. Plaintiff's annual performance review dated March 22, 2005 (Pl. Ex. 3) was signed by Dr.
6 Werner and contained one check-marked area which indicated Plaintiff's performance
7 was unacceptable or needed improvement. That area involved attendance and noted that
8 Plaintiff "[h]ad been absent, late, or left early a few times in the past year (due to illness)."
9 The concluding comment stated:

10 Ms. Phillips has demonstrated a great deal of flexibility in
11 providing clinical coverage in multiple programs ... She has
12 exhibited a positive attitude when asked to give an extra hand. Has
13 been supportive of peers and has shared her clinical knowledge and
14 skills. Ms. Phillips recognizes and is taking pro-active steps in
15 dealing w/ her health issues, which have affected her attendance
16 during evaluation period. It has been a pleasure working w/ Ms.
17 Phillips during this time.

18 28. Plaintiff's annual performance review (subsequent to her being promoted from clinician to
19 clinical supervisor) dated July 19, 2006 (Pl. Ex. 7) contained no check-marked areas in
20 which the Plaintiff's performance was unacceptable or needed improvement. The
21 concluding comment stated:

22 Mary has transitioned to being a clinical supervisor in a very
23 satisfactory manner. She has achieved a high level of trust with the
24 clinicians she supervises over a short period of time. Her desire to
25 learn + grow in the new role is complemented by her active role on
26 the VCSS Training Committee.

27 29. Plaintiff's annual performance review dated October 16, 2007 (Pl. Ex. 8) contained no
28 check-marked areas in which the Plaintiff's performance was unacceptable or needed
29 improvement. The concluding comment stated:

30 Mary is a valuable member of the leadership team who brings
intelligence, good perception, knowledge and skill to her role. She
is a diligent worker who makes every effort to be aware of
community partner needs, supervisee needs + program needs. She
will work on goal one especially this year.⁵

31 30. Plaintiff's annual performance review dated August 1, 2008 (Pl. Ex. 9) was signed by Dr.
32 Werner and contained check marks in the following areas indicating performance was

33 _____
⁵ Goal one appears to state: "Develop more supervisory [sic] presentation."

1 unacceptable or needed improvement: “Frequently requires assistance or direct
2 supervision with coordinating the provision of Medi-Cal client documentation to ensure
3 appropriate levels of billable service and compliance with state and federal requirements
4 for patient records,” and “Supervisor is inconsistent in providing live supervision.”

5 Accompanying comments written by Dr. Werner included:

6 Mary trains/supports staff to achieve their potential and provide
7 services according to professional standards. She encourages their
development clinically and as a united VCSS site.

8 Mary contributes ideas to the development of all VCSS programs
9 and encourages others to do the same. She has been an active
participant in the Strategic Priorities Program.

10 Mary has struggled to process accurately the Medical
11 documentation of her supervisees. Errors have gone undetected and
have been picked up by others. This area is one of needed growth.

12 Mary works well with a variety of community partners ... and in
13 the schools served by her supervisees.

14 Mary provides supervision to staff and documents this
appropriately. She is conscientious about completing evaluations.

15 Mary strives to work well with others, and to facilitate
16 communication and good relations among all staff at this site.

17 Mary is respectful of her supervisor, her peers, and those she
supervises. She is open to feedback, and does not hesitate to
18 suggest ways to improve our programs and solve problems.

19 Mary has good judgment about both clinical matters and program
issues.

20 Mary is creative, and suggests systems that will enable us to be
21 more effective in both pragmatic + clinical ways. At times she is
behind in reviewing closures and following up with documentation
22 that needs correct [sic].

23 Mary has done field supervision with all but one very experienced
clinician. She has stated she wishes to increase frequency to
24 agency minimum standard of quarterly.

25 Mary is sensitive to differences among people and is personally
accepting of others without judgment. She encourages her
26 supervisees to become increasingly culturally sensitive.

27 Mary works very well as a team member with the leadership team
and her school-based clinical team. She has a very strong work
28 ethic and has much to contribute to the agency based on her
knowledge + clinical experience. Her timely and accurate

1 processing of her supervisees medical documentation needs
improvement and must be an ongoing issue in her supervision.”

2 31. Plaintiff’s annual performance review dated September 15, 2009 (Pl. Ex. 35) which was
3 completed by Ms. Eng, contained check marks in the following areas indicating
4 Plaintiff’s performance was unacceptable or needed improvement, with accompanying
5 typed comments by Ms. Eng (italicized):

6 Assessments and/or plan development completed but turned in late.
7 *See peer chart audit corrections lists between Feb and Sept '09.*
8 *Multiple entries indicate Mary’s failure to submit important*
paperwork in a timely fashion.

9 Quality or timeliness of documentation is unacceptable. *Reference*
10 *audit corrections from peer audits. Mary has also had a*
11 *consent/registration incomplete from May '09 and continued to*
treat the client. Mary has also had difficulty closing charts in a
*timely fashion and has allowed TAR to expire.*⁶

12 Difficulty articulating mission, values, strategic priorities, and
13 inconsistent alignment. *Mary is clear on the mission, values and*
strategic priorities of our agency. She struggles, however, in
applying these to her every day work as exemplified by numerous
communication and teamwork errors.

14 Difficulty completing administrative duties as assigned with
15 inconsistency in meeting standards. *Mary sometimes responds to*
16 *administrative requests in a timely manner but other time does not.*
17 *Recent examples of this include completing her e-learning late and*
turning in her team evaluation late and has not attended the Safety
*and Wellness Committee meeting in the last 5 months.*⁷

18 Has on occasion failed to meet Agency standards regarding
19 attendance within the past year. *Mary has received two written*
warnings due primarily to her failure to call off appropriately and
notify her clients of appointment cancellation.

20 Has on occasion failed to meet Agency standards regarding
21 working harmoniously with others. *Written warnings have*
22 *highlighted times Mary has struggled to communicate with others*
and this has negatively impacted working with others. Mary has
attempted to repair these relationships.

23 Has on occasion failed to meet Agency standards regarding team
24 collaboration. *Mary has received a demotion and two written*
25 *warnings pertaining to her lack of team collaboration and*

26 ⁶ “TAR” refers to Treatment Authorization Request. The typed in portion by Ms. Eng originally stated “TARs”
27 (plural), which was crossed out and replaced with the handwritten “TAR” to indicate just one instance of allowing a
TAR to expire. (TR 320:3-18.)

28 ⁷ Plaintiff testified that she was not on the Safety and Wellness Committee in the five months preceding this review.
(TR 330:1-5.)

communication.

Has on occasion failed to meet Agency standards regarding respecting supervisor authority. *While Mary outwardly respects the authority of her supervisor, she sometimes commits to actions and fails to follow through.*

Sometimes makes decisions that violate established policies. Makes decisions based on emotion. *Mary's failure to follow procedures demonstrates a lack of sound decision making skills.*

On several occasions has not completed assigned tasks in a timely manner. *See reference to assessments / documentation / administrative duties as above.*

In the "Comments" section following these checked areas, Ms. Eng wrote:

During this evaluation period, Mary was demoted from Clinical Supervisor to Clinician due to her insufficient professional communication, lack of team work and below standard quality of work. Mary has also received 2 additional written warnings after the demotion for her failure to follow these same expectations. Mary frequently exhibits an energy and interest in improving the work she does, but often fails to put this into action. While Mary has some quality clinical skills, she struggles to bring the other necessary skills to her role with consistency; her intention is good but her follow through is often lacking. Where Mary excels is in her passion for mental health services and her ability to meet and exceed the Service Percentage expectation consistently.

In the "Individual Goals" section following the "Comments" section, Ms. Eng wrote:

- "Increase appropriate communication with all professional contacts."
- "Solve health problems."
- "Learn more / improve skills re: Trauma-focused CBT and Motivation Interviewing."

In the "Measurable Objectives" that correlated, respectively, to each "Individual Goal" enumerated above, Ms. Eng wrote:

- "Zero incidents representing a lack of communication in Mary's work."
- "Be released by doctor to return to full time regular schedule."
- "Attend trainings and bring info back to team and use for improved effectiveness."

32. The 2009 annual performance review also contained checked areas indicating positive performance, including the area of "Completes paperwork and turns it in on time." That area contained Ms. Eng's handwritten comment: "Mary completes her progress notes on time." (Pl. Ex. 35 at 2.)

1 33. Plaintiff met with Ms. Eng to discuss the 2009 annual performance review. (TR 317:17-
2 19.)

3 34. Regarding the “Individual Goals” and “Measurable Objectives” sections, Ms. Eng
4 testified that it was her practice to ask employees, during the meeting, what goals they
5 would like to include; Ms. Eng would write them on the review; and the employee would
6 review the document and sign it. (TR 79:5-12.)

7 35. Ms. Eng testified that it was Plaintiff’s idea to put “Solve health problems”, and “Be
8 released by doctor to return to fulltime regular schedule” on the 2015 annual performance
9 review. (TR 77:25-79:4.) Plaintiff testified that these items were already written on the
10 review when she went into the meeting on September 15, 2009, and that Plaintiff had not
11 told Ms. Eng that those were in fact her (Plaintiff’s) goals. (TR 271:19-272:9.)

12 36. To the extent Plaintiff and Ms. Eng offered conflicting testimony regarding whether Ms.
13 Eng had already filled in the “Individual Goals” and “Measurable Objectives” sections
14 on the September 15, 2009, annual review, prior to the meeting at which they discussed
15 the review, and whether Ms. Eng had consulted with Plaintiff prior to writing these goals,
16 the Court credits Ms. Eng’s testimony.⁸

17 37. Ultimately, Plaintiff’s five annual performance reviews, from 2004 through 2008,
18 described consistently good performance by Plaintiff. Three areas were checked, during
19 those five years, indicating unsatisfactory performance. The reviews mention errors in
20 completing paperwork accurately and in a timely manner. The reviews also mention
21 Plaintiff’s health problems.⁹

22
23 ⁸ The Court finds Ms. Eng credible on this point based on the fact that Plaintiff signed the September 15, 2009,
24 review without noting any objection to the “Individual Goals” and “Measurable Objectives”. Further, Plaintiff
25 submitted into evidence a “response” to the September 15, 2009, annual review. (Pl. Ex. 23.) The response is a
26 three-page document, typed, signed, and dated on September 15, 2009, and states “This response is not currently
27 being shared with my supervisor/Executive Director” (Pl. Ex. 23 at 6.) Plaintiff’s response addresses and
28 disputes the accuracy of many items contained in the annual review, while asserting Plaintiff’s belief she was being
retaliated against due to her prior attempts to fight her termination. As it relates to the Court’s credibility
determination on this point, Plaintiff’s response does not contain any mention of or objection to the handwritten
“Individual Goals” and Measurable Objectives” contained in the annual review. Essentially, Plaintiff had at least two
opportunities to object to the offending language contained in the “Individual Goals” and “Measurable Objectives” at
or near the time they were created but failed to do so.

⁹ The notes about Plaintiff’s health, in the 2004 through 2008 annual reviews, concerned Plaintiff’s absences due to

1 **Weekly/90 Day/Six Month Evaluations**

2 38. Plaintiff's "Weekly/90 Day/Six Month" evaluations, dated April 25, 2006 and July 19,
3 2006, had all boxes checked showing that Plaintiff met applicable performance and
4 conduct standards.¹⁰ (Pl. Ex.'s 5, 6.)

5 **The 2008 Personnel Review**

6 39. Ms. Eng prepared a "Review of Plaintiff's Personnel and Supervisory Record" (the
7 "2008 Personnel Review") in November, 2008, with the intent of making a summary
8 document of Plaintiff's employment with Defendant. (TR 20:8-9; Pl. Ex. 78.) That
9 review contained notes on Plaintiff's employment, beginning with her hire in November,
10 2001 and concluding with a November 26, 2008, Supervision Note by Ms. Eng. The
11 review also documented Plaintiff's health issues, as follows (Pl. Ex. 78 at 4-5):

12 Mary has had significant health issues during her employment as
13 indicated by previous notation and the following:

14 1/17/03 Documentation of an accommodation for "a disability that
15 affects her right hand" Mary was provided with a signature stamp.
16 It was also indicated that VCSS offered voice-activated software as
an additional accommodation but that Mary refused, choosing to
use a software she had paid for.

17 4/3/03 Mary filed for State Disability with return to work date
18 4/14/03

19 10/7/05 Claim Effective date for State Disability (Medical LOA for
20 Off-the Job Injuries, Illnesses and Disability: 9/26/05 – 10/31/05 for
surgery)

21 6/21/07 Claim Effective date for Mary filed for State Disability

22 5/7/08 Dr. note indicating Mary is to be off work due to medical
condition

23 5/12/08 Dr. note indicating Mary may return to work

24 5/23/08 Fit for Work exam requested of Hilltop Medical clinic due
25 to concerns of "...observations of uncontrolled coughing and
26 concerns about the clarity of her thinking". The exam signed by
Mark Pierce, M.D. indicated she was "Fit for Work with no

27 her health issues.

28 ¹⁰ The latter (Pl. Ex. 6) lists a date of July 19, 2007 at the top, but Dr. Werner and Plaintiff, next to their signatures,
both dated the review as July 19, 2006.

1 limitations”.

2 8/1/08 Mary’s last day of work; Earned wages through PTO from
3 8/4/08-8/15/08 per her disability application.

4 8/18/08 Mary began a Leave of Absence and applied for State
5 Disability

6 10/8/08 Mary returned to work with Hilltop Medical Clinic “Fit for
7 Work with no limitations” exam on 10/7/08

8 40. Ultimately, the Court views the 2008 Personnel Review to have emphasized negative
9 information and omitted some available positive information in Plaintiff’s record. That
10 review was not a comprehensive view of Plaintiff’s employment, given the record
11 submitted by the parties to the Court, but it does not indicate a pre-textual intent to
12 terminate Plaintiff.

13 **Written Warnings: September 15, 2009 & August 19, 2009**

14 41. Ms. Eng issued written warnings to Plaintiff on August 19, 2009 and September 15,
15 2009. (Def. Ex.’s L, M.)

16 42. The written warning dated August 19, 2009 (Def. Ex. L) stated:

17 On 8/14/2009 you left your scheduled clients to be seen by
18 someone else without making arrangement for coverage. In
19 addition you did not contact your supervisor regarding your leaving
20 work early. This demonstrates poor judgment, poor customer
21 service, and a lack of teamwork and professional communication.

22 Regarding the failure to notify your supervisor when you were
23 leaving work, the applicable portion of the Attendance standard
24 states: []

25 *‘All VCSS Shasta employees are expected to report to work as
26 assigned and/or requested, and to make every effort to avoid a
27 pattern of excessive absenteeism. Excessive absenteeism places
28 unfair burdens on co-workers and decreases the quality of service
delivery to children and families by disrupting work schedules,
creating inefficiencies and waste, delays, costly overtime and undue
job pressures.*

*[] Staff unable to report to work as scheduled must contact their
supervisor at least 1 hour prior to the start of the workday.*

*Staff calling in will call their direct supervisor explaining the need
for absence and what arrangements have been made for coverage*

1 *or changing appointments.*

2 *If the supervisor is unavailable to answer the phone, staff will leave*
3 *a voice mail message with the information as outlined above.*

4 *In addition to contacting the direct supervisor, staff will also notify*
5 *the office personnel and request that their absence be entered in the*
6 *Sign-Out log. This contact must be a person-to-person*
7 *conversation, not just a voice mail message.*

8 *Staff are responsible for arranging coverage for all scheduled*
9 *responsibilities for the missed time and must work with the*
10 *supervisor and/or team to ensure consistent and quality service to*
11 *children and families affected by unplanned time off.*¹¹

12 You have been warned about this behavior previously. In a
13 corrective action dated 1/26/09, it was explained that “You will
14 follow procedure when you must call in sick by contacting your
15 supervisor, the Executive Director, via cell phone as early as
16 possible, explaining your change in schedule to include whether
17 others dependent on your schedule have been contacted to cancel.”
18 Teamwork and communication were also referenced in the previous
19 corrective action: “You will participate in effective communication
20 with all members of the VCSS team as well as clients, families and
21 community partners.”

22 Plaintiff wrote in the “Employee Comments” section, below the warning:

23 “I accept that I did not follow proper procedure and will do so at all times
24 in the future.

25 43. With respect to the August 19, 2009, warning, Plaintiff testified: “I became very ill at
26 work. I was coughing a great deal, almost to the point of not being able to breathe very
27 well, and I realized I had to leave. I couldn’t see my clients. Ms. Eng was not in the
28 building. I went to the front desk and I told the office staff that I had to leave – this was
29 between coughs – and office staff indicated they would notify people or tell people or I
30 don’t remember the exact language, but my understanding from it was that they would
31 take care of anyone who had to be notified.” (TR 267:1-10.)

32 44. At the time the August 19, 2009, warning was issued, Plaintiff explained to Ms. Eng the
33 action Plaintiff had taken with respect to the cancellation of the appointment. (TR 266:6-
34 269-11.)

35 45. The written warning dated September 15, 2009 (Def. Ex. M) stated:

36 ¹¹ Italics not in original.

1 On the afternoon of 9/4/09, the office received a phone call from
2 the guardian of a new client with whom [Ms. Philips] had
3 scheduled an intake. The guardian was concerned because you had
4 not shown for the appointment that day as scheduled and the child
5 was in need of services. Your Outlook calendar indicated the
6 appointment was still scheduled and there was no notation in the
7 referral database explaining an attempted contact to cancel, even
8 though you took the day off after the appointment was scheduled.
9 You report that you attempted to contact the client to reschedule but
10 there was no way to leave a message. You failed, however, to
11 notify your supervisor as well as office staff who would be
12 receiving the client's call. This demonstrates poor judgment, poor
13 customer service, and a lack of teamwork and professional
14 communication.

15 You have been warned about this behavior previously. In a
16 corrective action dated 1/26/09, teamwork and communication were
17 referenced: 'You will participate in effective communication with
18 all members of the VCSS team as well as clients, families and
19 community partners.' In a corrective action dated 8/19/09, you
20 were reminded of the importance of arranging for coverage or
21 appropriately canceling and rescheduling appointments with your
22 clients.

23 Any further instance of this poor judgment, poor customer service,
24 lack of teamwork or professional communication, or failure to
25 follow any other protocol, will result in termination.

26 Plaintiff wrote in the "Employee Comments" section, below the warning: "Not as an
27 excuse, but an explanation I was extremely ill that day and was as stated unable to reach
28 client's mother either then or earlier [and] failed to put earlier attempts on referral
database[.]"

46. With respect to the September 15, 2009, warning, Plaintiff testified: "I was off sick one
day. I called Ms. Engs in the morning before work and told her I was not going to be in
that day because I was ill. I had an intake client. I attempted – whenever I felt well
enough during the day to try a phone call, I attempted to call that client. There was no
answer. Eventually, I stopped trying." (TR 269:21-270:1.)

47. Ms. Engs testified, regarding Plaintiff's attempt to document her attempts to contact the
client's guardian: "Mary told me verbally that she had attempted contact with that
guardian and that [s]he had documented that in the client database. When I reviewed the
client database to find that documentation, it was nonexistent." (TR 75:5-8.) During her

1 testimony, Plaintiff did not appear to dispute this statement by Ms. Eng, but did state she
2 could not put attempts to reach the client's mother on the "referral database," and that
3 would have to be done at Defendant's offices. (TR 270:19-23.)

4 48. Regarding protocol when an employee had to miss appointments with clients, Ms. Eng
5 testified: "Staff decides what needs to happen with their case loads. If they're out ill or
6 for whatever reason, they can certainly go to an office staff person and request assistance,
7 but they have to let their supervisor know what is happening and they have done that."
8 (TR 73:9-13.)

9 49. Ms. Eng testified Plaintiff did not communicate to her, on the days giving rise to the
10 written warnings, that Plaintiff was having recurring bouts of pneumonia. (TR 85:3-12.)

11 50. Dawn Haskins, Plaintiff's supervisee during Plaintiff's tenure as a clinical supervisor,
12 testified that, when she had to miss appointments with clients: "First thing that I would do
13 is to call my supervisor or text her or whatever her preference was and let the office staff
14 know I would not be in, and I would say 99 percent of the time I would call my clients and
15 let them know. There were a couple of occasions like a family emergency that I would
16 call and ask somebody to make that call for me." (TR 188:3-10.)

17 51. Denise Craig, Plaintiff's coworker and supervisee, testified that her practice, generally,
18 was to call clients herself when she had to miss an appointment, but she would not
19 consider herself subject to discipline if someone else did. (TR 196:4-25.)

20 52. Toni Heideman, Plaintiff's coworker and friend, testified that staff would notify clients
21 when a clinician had to miss an appointment. (TR 231:14-18.)

22 53. Plaintiff testified regarding the practice of staff – as opposed to the clinician – arranging
23 coverage: "Some of the clinicians did that if they were very sick and couldn't notify their
24 clients or if they were very sick at home or didn't have their client's phone numbers at
25 home." (TR 267:11-12.)

26 54. Ultimately, the Court finds that the protocol for missing work due to an illness is
27 described in the August 19, 2009 warning. That protocol required Plaintiff to call her
28 supervisor, leave a voicemail if the supervisor did not answer, and personally arrange

1 coverage for her missed appointments. Plaintiff did not follow protocol on each of the
2 days giving rise to either the August 19 or September 15, 2009, written warnings.
3 Relative to the August 19, 2009 matter, Plaintiff testified she did not contact the client to
4 cancel the appointment, she did not notify her supervisor, she told staff that she was
5 leaving, and based upon the staff's response she understood they would notify Plaintiff's
6 scheduled clients. (TR 267:1-10.). As to the September 15, 2009, matter, Plaintiff
7 testified she notified her supervisor Ms. Eng¹², she did not cancel her intake appointment
8 with a client, she did not notify staff, she tried to call the client but stopped after several
9 unsuccessful attempts, and she either did not or was unable to put her attempts to contact
10 the client in the database. (TR 269:21-270:1, 19-23.). In each instance, the Court finds
11 that Plaintiff either failed to contact clients and/or properly arrange for staff to notify
12 clients of her unavailability or failed to properly notify her supervisor of her
13 unavailability.

14 **MFT License**

15 55. Plaintiff's Marriage and Family Therapy ("MFT") license was not expired on the date she
16 was terminated, although in the days leading up to her termination, Plaintiff had explicitly
17 told Ms. Eng that she "couldn't go to the school to see kids because her license hadn't
18 been renewed." (Pl. Ex. 100-29; TR 113:14-17; 108:12-14.)

19 56. Defendant did not have a written policy with respect to what a clinician is supposed to do
20 to renew his or her license. (TR 126:22-127:8.)

21 57. A printout out from the Board of Behavioral Sciences, dated November 3, 2009, 8:23 AM
22 showed that Plaintiff's MFT license was set to expire on October 31, 2011. (Pl. Ex. 100-
23

24 ¹² Plaintiff's counsel argues (ECF No. 45 at 13-14) there was conflicting testimony between Plaintiff and Ms. Eng
25 regarding: 1) whether Plaintiff communicated to Ms. Eng that Plaintiff was having recurring bouts of pneumonia on
26 the dates giving rise to the written warnings of August 19, 2009 and September 15, 2009; and 2) whether Plaintiff
27 had told Ms. Eng she had been sick and tried to make arrangements for coverage on the dates giving rise to the two
28 written warnings. However, in reviewing the trial transcript, there did not appear to be material conflicts in the
testimony, rather the Court did find differences in Plaintiff's and Ms. Eng's interpretation of whether the protocol
and/or practice of missing appointments was followed. One area of conflict is noted in ¶ 47, wherein Plaintiff failed
to refute during her trial testimony Ms. Eng's testimony that Plaintiff expressly told her that she had inputted certain
information into the client database; when Ms. Eng checked the database she found that Plaintiff had not, in fact,
inputted the information. The Court credits Ms. Eng's testimony on this issue.

1 29.) Ms. Eng testified with reference to this printout: “I had checked the [BBS] database
2 prior to this printout, Exhibit 29, and it hadn’t posted yet. When I reviewed the printout
3 that day, it indicated it had been renewed.” (TR 111:18-19.)

4 58. Plaintiff testified she told Ms. Eng, at the meeting regarding her termination on
5 November 3, 2009, that her license had not expired. (TR 279:13-17.)

6 59. Plaintiff’s termination letter, dated November 3, 2009, stated as one of the reasons for
7 termination that: “On 11/2/09 you informed your Director that you would not be able to
8 provide treatment at your assigned schools because you believed your MFT license to be
9 expired. You submitted your license renewal form to your OSM/HRM on 10/19/09 with a
10 license expiration of 10/31/09. The renewal form states that it takes 4-6 weeks for the
11 renewal to be processed but you chose to delay your request to the office until there were
12 just 2 weeks left to renew. This represents poor judgment on your part and interferes with
13 your ability to provide service to your clients.” (Pl. Ex. 34.)

14 60. In a response to Plaintiff’s interrogatories, Defendant stated: “Additionally, Plaintiff was
15 no longer qualified for the position of clinician because she no longer held a valid MFT
16 license.” (Pl. Ex. 94 at 6.)

17 61. In Plaintiff’s February 26, 2010, position statement submitted to the EEOC, Defendant
18 stated: “Respondent agrees that Complainant was discharged on November 3, 2009,
19 because she failed to renew her Marriage and Family Therapist license. An essential
20 requirement of the Clinician position is to hold a clinical license ... Because Complainant
21 was no longer registered with the State to provide services, her work could no longer be
22 billed the State for Medi-Cal. Allowing an unlicensed clinician to work at schools could
23 have subjected VCSS to criminal liability for Medi-Cal fraud.” (Pl. Ex. 24 at 29.)

24 62. At her deposition, Ms. Eng stated that one of the reasons she terminated Plaintiff was that
25 Plaintiff had allowed her license to expire, and that she had checked the BBS database on
26 November 3 and it listed the license as expired. (Pl. Ex. 100 at 209:15-20.)

27 63. Ultimately, Plaintiff did not dispute that she stated to Ms. Eng, in the days leading up to
28 her termination, that her MFT license was going to expire. Plaintiff’s doing so was a valid

1 reason for termination. During her trial testimony on this issue, Ms. Eng stated that when
2 she checked the database prior to November 3, 2009, Plaintiff's license had not been
3 renewed, but when she checked the database on November 3, it showed Plaintiff's license
4 had been renewed to October 31, 2011. (TR 109:10-111:20.) During her deposition
5 testimony Defendant Eng contradicted her subsequent trial testimony when she stated
6 that when she checked the database on November 3, 2009, it said Plaintiff's license had
7 expired. (Pl. Ex. 100 at 209:15-20; TR 108:23-109:9.) At trial, Eng explained she
8 "clearly misspoke" during her deposition and never had a chance to review her deposition
9 transcript. (TR 110:4-25.) Plaintiff's counsel attacked Defendant Eng's credibility based
10 on what she testified to at the deposition on this issue versus her trial testimony. The
11 Court credits Defendant Eng's explanation that she simply misspoke during her
12 deposition. In any event, Plaintiff's termination letter indicates that she was not
13 terminated because her license had expired; rather one of the reasons as stated in the letter
14 was Plaintiff's poor judgment in delaying her license renewal.

15 **Request for accommodation**

16 64. Plaintiff made a written request for accommodation based on her disability which
17 included:

- 18 • A proposal to work 4 days per week rather than 5.
- 19 • A reduction in caseload, including that Plaintiff not receive any home-based referrals.
- 20 • A statement that Plaintiff's current caseload was 29 clients, 5 of which were home-
21 based and 8 which were opened in the last week; Plaintiff wrote in the request that the
22 29 clients "does not take into account the clients who [were] open to [her], but whom
23 [she] plan[ned] to close as soon as [she could] do the paperwork."

24
25 The request was granted and signed by Plaintiff, Ms. Eng, and Trinda Dailey on
26 September 3, 2009. (Pl. Ex. 36.)

27 65. Plaintiff's counsel sought to impeach Ms. Eng on when she became aware of Plaintiff's
28 disability. Plaintiff's counsel directed Ms. Eng to:

- 1 • The 2008 Personnel Review (Pl. Ex. 78), which documents that Plaintiff had health
2 problems prior to September 3, 2009.
- 3 • Internal human resources documents showing Ms. Eng signed off on Plaintiff's return
4 from leaves of absence to full-time status, including documents dated April 27, 2009,
5 May 4, 2009, and August 1, 2009. (Pl. Ex. 30.)
- 6 • A formal notice of leave granted to Plaintiff, signed by Trinda Dailey, and stating that
7 on April 27, 2009, Plaintiff "requested a leave of absence due to an off-the-job injury,
8 illness or disability, and you have provided us with a medical certificate of need." (Pl.
9 Ex. 38.)
- 10 • A form provided by Victor to Plaintiff to take to her private doctor regarding an
11 interactive process involving an ADA issue. The form stated Plaintiff had recurrent
12 bouts of pneumonia. The form was dated by Plaintiff's physician on August 28, 2009.
13 (Pl. Ex. 61.)
- 14 • An FMLA/CFRA¹³ Medical Certification, signed on June 9, 2009 by Plaintiff, stating
15 "Patient needs to be able to work intermittently until July 31, 2009. Patient may need
16 to leave early from work."¹⁴ (Pl. Ex. 63 at 1.)

17 66. Ultimately, the Court finds Ms. Eng was aware Plaintiff was experiencing health
18 problems at least starting in November, 2008, when she compiled the 2008 Personnel
19 Review that documented some of these problems.¹⁵ Ms. Eng was aware, starting at least
20 in April, 2009, when Plaintiff took a leave of absence for a recurring bout of pneumonia,
21 that Plaintiff was experiencing chronic lung issues. Ms. Eng was formally put on notice
22 that Plaintiff had a disability that required accommodation, on or about September 3,
23 2009, when Plaintiff made the written request. The Court does not view Ms. Eng's

24 ¹³ The federal Family and Medical Leave Act and the California Family Rights Act.

25 ¹⁴ A different FMLA/CFRA medical certification form, signed and dated by Plaintiff on April 29, 2009, was also
26 included in Plaintiff's Exhibit 63.

27 ¹⁵ Ms. Eng also testified that Dr. Werner had mentioned, during the time she and Dr. Werner were both working at
28 Victor in August or September 2008 that Plaintiff was not currently at work because she was on medical leave. (TR
91:14-22.)

1 testimony on when she became aware of Plaintiff's disability or other health problems
2 damaging as to Ms. Eng's overall credibility.

3 **Requests for extensions and reductions in caseload**

4 67. Plaintiff's Exhibit 100-28, entitled "Victor Community Support Services Clinician Case
5 Load", lists the caseload number for eight clinicians, including Plaintiff, as of October 5,
6 2009 and November 2, 2009. On October 5, 2009, Plaintiff had 29 cases, second most
7 among the listed clinicians. On November 2, 2009, Plaintiff had 28 cases, most among
8 the listed clinicians.¹⁶ (Pl. Ex. 100-28.)

9 68. Plaintiff testified, with respect to the period following the September 3, 2009, request for
10 accommodation, that neither her caseload nor her actual workload was reduced. (TR
11 276:15-17.)

12 69. Plaintiff testified, with respect to the period following the September 3, 2009, request that
13 she told Ms. Eng she had too much work to do given her health problems and, as a result,
14 that she could not complete all the tasks assigned to her. (TR 276:18-21.) Plaintiff
15 testified she "asked for an extension for my recerts on things like blood-borne pathogens
16 ... and [she] asked for an extension on closing cases," and that it was possible for Ms.
17 Eng to grant extensions for these tasks. Ms. Eng did not grant them. (TR 275:24-
18 276:25; 308:25-309:9.)

19 70. Plaintiff testified, generally, that between February and September 2009, she had
20 requested extensions from Ms. Eng to complete tasks because of her medical issues.
21 Those requests were denied. (TR 329:6-17.)

22 71. Plaintiff testified that the time constraints due to her medical issues made it difficult to
23 both provide good service to her clients and "close charts", and that she had explained this
24 to Ms. Eng. (TR 275:24-276:21.)

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¹⁶ The Court lacks context for what group of clinicians this was, but infers this was the group of clinicians working
28 on or around Plaintiff's site in Shasta County. Ms. Eng testified: "First of all, this document wasn't produced by my
office, so I have no way to know whether these are accurate numbers or inaccurate. I believe this was produced by
Mary herself." (TR 152:6-9.) Otherwise, Ms. Eng did not appear to dispute that, at the time of Plaintiff's
termination, she had among the highest caseloads of the clinicians working at or around Plaintiff's site.

1 72. Plaintiff did not put in writing her requests for extensions or her explanations that she
2 needed more time to complete tasks due to her medical issues. (TR 331:20-23.)

3 73. Ms. Eng testified, with respect to the period following the September 3, 2009, request,
4 that Plaintiff never told her that Plaintiff was unable to close cases due to her medical
5 condition. Ms. Eng also testified: “In order for a clinician to have a lower caseload, they
6 have to transfer or close cases off of their own caseload, and that’s their responsibility. I
7 documented numerous times in supervision notes that Plaintiff failed to do her closings on
8 time and we talked several times about reducing her caseload, and that was up to her. (TR
9 91:6-92:10.)

10 74. Ms. Eng completed supervision notes based on weekly meetings with Plaintiff. During
11 these sessions, Ms. Eng would present questions, concerns, kudos or anything that she
12 believed Plaintiff’s job required her to have knowledge of, and Plaintiff could raise
13 concerns she had. Ms. Eng would take handwritten notes each session on what was said,
14 and she allowed the supervisee to review the notes and sign them.¹⁷ (TR 138:9-140:1.)

15 75. Ms. Eng’s supervision note, dated September 3, 2009, states: “Mary is transferring 2 of
16 her schools to another clinician. Mary will dedicate time next week for closings ...” (Def.
17 Ex. P at 43.)

18 76. Ms. Eng’s supervision note, dated September 15, 2009, states: “[Plaintiff] [r]ecently
19 completed 2 closings; has 9+ closings pending.]” (Def. Ex. P at 44.)

20 77. Ms. Eng’s supervision note, dated September 29, 2009, states: “[Plaintiff] [d]id 2 new
21 openings but one may be transferred to another clinician because of school changes.
22 Working on closing cases.” (Def. Ex. P at 45.)

23 78. Ms. Eng’s supervision note, dated October 6, 2009, states: “[Plaintiff] [w]ill have 28
24 clients after completing 6 pending closings. 2 referrals pending. Mary wants to continue
25 to expand groups. This may lead to an increase in Rehab referrals.” (Def. Ex. P at 46.)

26
27 ¹⁷ Some of Ms. Eng’s supervision notes documented interactions she had had with other employees regarding
28 Plaintiff’s performance; so these were not a documentation of her meetings with Plaintiff and they were not signed by
Plaintiff. (See Def. Ex. P at 7-8.)

1 79. Ms. Eng's supervision note, dated October 29, 2009, states: "She has reduced her caseload
2 to 28 but is pending 5 openings," and includes further discussion regarding Plaintiff's
3 attempts to close cases. (Def. Ex. P at 47.)

4 80. In sum, Plaintiff testified that between February and her termination, she verbally
5 requested extensions to complete work, including requests for extensions to close cases,
6 but did not do so in writing. Ms. Eng testified that after the September, 2009
7 accommodation request, Plaintiff never told her that Plaintiff was unable to close cases
8 due to her medical condition. It seems wholly inconsistent that Plaintiff would submit a
9 written request for accommodation due to disability on September 3, 2009, yet fail to also
10 request in that very same document extensions to both complete work and close cases due
11 to medical reasons. It's also worth noting that Plaintiff signed the request for
12 accommodation which was approved by Ms. Eng. Simply put, this Court did not find
13 Plaintiff's testimony regarding her verbal requests for extensions to complete work and
14 close cases for medical reasons to be credible. Further, Ms. Eng's supervision notes,
15 which were signed by Plaintiff, show that Ms. Eng and Plaintiff addressed the reduction
16 of Plaintiff's caseload multiple times after September 3, 2009, including the opening and
17 closing of specific cases. The supervision notes provide a somewhat detailed picture of
18 Plaintiff either working on or attempting to close cases. The supervision notes also
19 indicate that Plaintiff wanted to continue to expand groups which would lead to an
20 increase in referrals to Plaintiff. Further, Defendant Eng documented Plaintiff's attempts
21 to close cases. Overall, the supervision notes show that Plaintiff did not make an adequate
22 effort to reduce her caseload on her own. The Court notes that Plaintiff's annual
23 performance review dated August 1, 2008, signed by Dr. Werner, also references an issue
24 Plaintiff had with closing casings: "At times she is behind in reviewing closures and
25 following up with documentation that needs correct [sic]." (Pl. Ex. 9)

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1 **Service percentage**

2 81. Plaintiff’s “percentage billed to Medi-Cal” or to other agencies, for the pay periods of
3 September 13, 2009 to September 26, 2009; September 27, 2009 to October 10, 2009; and
4 the first quarter of 2009-2010 was the “highest among her peers.”¹⁸ (Pl. Ex. 100-20; TR
5 98:1-24.) That Plaintiff consistently met or exceeded her service percentage expectations
6 was included on the September 15, 2009 annual review. (Pl. Ex. 35 at 6.)

7 **Problems with paperwork**

8 82. Paperwork and accurate recordkeeping were important for meeting Defendant’s mission
9 as well as funding source expectations regarding payment. (TR 134:20-135:4.)

10 83. During Plaintiff’s employment under Ms. Eng’s supervision, Defendant was required to
11 make a request to Shasta County every six months to reauthorize the services Defendant
12 delivered to a child. Doing so required the timely completion of a treatment plan for the
13 child by the clinician. Plaintiff had problems completing her treatment plans. (TR 135:8-
14 136:4.)

15 84. While Plaintiff’s supervisor, Dr. Werner completed supervision notes that documented
16 Plaintiff’s performance and his and Plaintiff’s meetings regarding Plaintiff’s performance.
17 (Def. Ex. P at 1-6; Pl. Ex. 83.)

18 85. Dr. Werner’s supervision note, dated January 4, 2008, stated: “Additional errors encoding
19 / billing called to Mary’s attention that were given to her at leadership meeting on 1-3.”
20 (Pl. Ex. 83 at 17.)

21 86. Dr. Werner’s supervision note, dated January 8, 2008, stated in part: “Errors in TBS cases
22 reviewed with Mary and Suzanne [;] Notes not sent to Co. [;] Duplicate notes, missing
23 notes [;] Time same on summary (weekly) [;] Error in time on multiple documents, e.g.
24 daily or weekly [;] Notes not signed [;] Diff. between summary and notes [;] Variability in
25 quality of notes [;] Missing weekly [;] Lack of [unreadable] on cases [;] Mary told things
26

27
28 ¹⁸ The Court infers this was the group of clinicians working generally within Plaintiff’s supervision group, or at Plaintiff’s site, in Shasta County.

1 need to change. Errors need to be caught, fixed if she is to continue in job.” (Pl. Ex. 83 at
2 17.)

3 87. Dr. Werner’s supervision note, dated April 8, 2008, stated in part: “Improvement in areas
4 discussed before about paperwork.” (Pl. Ex. 83 at 8.)

5 88. Dr. Werner’s supervision note, dated June 17, 2008, stated in part: “Talked about
6 improvements in paperwork.” (Pl. Ex. 84 at 4.)

7 89. Dr. Werner’s supervision note, dated July 15, 2008, stated in part: “Discussed means of
8 avoiding clerical errors in documentation + picking them up in reviewing documentation.”
9 (Pl. Ex. 83 at 3.)

10 **Relationships with coworkers and supervisees**¹⁹

11 90. Dr. Werner’s supervision notes on Plaintiff, dating from at least May 2, 2006 through July
12 29, 2008, during the time Plaintiff was a clinical supervisor, contained no indication
13 Plaintiff had a poor relationship with her supervisees. (Pl. Ex. 83; TR 52:20-53:6.)

14 91. The annual performance review dated August 1, 2008, completed by Dr. Werner,
15 contained mostly positive comments of Plaintiff’s relationship with her co-workers and
16 supervisees, with the exception of her processing the medical documentation of her
17 supervisees. (Pl. Ex. 9.)

18 92. Ms. Eng’s supervision note, dated October 14, 2008, describes that a staff member had
19 approached Ms. Eng with concerns regarding Plaintiff’s role as a supervisor, including
20 that (as written by Ms. Eng), Plaintiff had “publically and inappropriately made
21 comments during staff meeting yesterday. [The staff member] reported that this has
22 happened previously and she is concerned about impact of supervisor’s contention on
23 direct staff.” (Def. Ex. P at 7.)

24 93. Ms. Eng’s supervision note, dated October 17, 2008, describes one of Plaintiff’s
25 supervisees, Rachel Freeman, reporting to Ms. Eng that she felt “belittled, unheard, and
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27
28 ¹⁹ At trial, the parties did not object on hearsay grounds to any of the evidence included in this section. The parties stipulated to the admission of the applicable portions of Ms. Eng’s supervision notes. (Def. Ex. P1-P47.)

- 1 dismissed” by Plaintiff. The note was not signed by Plaintiff. (Def. Ex. P at 8; TR 38:17-
2 22.)
- 3 94. Ms. Eng’s supervision note, dated November 5, 2008, described a discussion Ms. Eng
4 and Plaintiff had regarding steps Plaintiff intended to take to improve relations with co-
5 workers and be a more effective supervisor. The note was signed by Plaintiff. (Def. Ex.
6 P. at 11.)
- 7 95. Ms. Eng’s supervision note, dated November 6, 2008, describes a staff member’s concern
8 regarding “long-standing difficulties” working with Plaintiff. The note was not signed by
9 Plaintiff. (Def. Ex. P at 12.)
- 10 96. Ms. Eng testified Plaintiff’s supervisee, Maria Rodriguez-Roa, had informed Ms. Eng
11 she did not trust Plaintiff in their supervisor-supervisee relationship. (TR 39:21-24.)
- 12 97. A supervisor evaluation form regarding Plaintiff, completed by a clinician who resigned in
13 December, 2008, contained mostly negative ratings. The employee exit survey completed
14 by the same clinician cited “did not get along with my supervisor” as the primary reason
15 for leaving. In accompanying comment to the exit survey, the employee wrote:
16 “Terminate or demote Mary Phillips + hire a clinical supervisor that can represent
17 themselves professionally and has adequate experience in clinical work + supervision.”
18 (Pl. Ex. 88.)
- 19 98. Dawn Haskins testified she had no problems with Plaintiff serving as her supervisor. (TR
20 187:3-5.) She believed some of her co-workers were frustrated with Plaintiff having to
21 miss time from work due to medical issues. (TR 188:24-190:11.)
- 22 99. Denise Craig testified she had no problems with Plaintiff serving as her supervisor and
23 thought Plaintiff was a good supervisor. (TR 194:9-13.)
- 24 100. Ultimately, the Court views the facts to be that some staff members did not have any issue
25 with Plaintiff as a supervisor. However, other employees did have concerns with Plaintiff
26 serving as their supervisor in the period following Plaintiff’s return to work in October,
27 2008 until termination was raised by Ms. Eng at the January 7, 2009 meeting. The
28

1 disgruntled employees presented a legitimate reason to raise the issue of termination at the
2 January 7, 2009, meeting.

3 **January, 2009 Meetings**

4 101. Plaintiff testified, regarding the January 7, 2009, meeting with Ms. Eng, that Ms. Eng:
5 “told me that there were issues with my performance, and when I requested to know what
6 the issues were, she said she didn’t feel that I could correct the issues, so she thought I
7 would be better off not working for Victor.” (TR 260:13-17.) Ms. Eng testified she did
8 not recall discussing termination with Plaintiff on January 7th. (TR 41:20-22.) To the
9 extent Defendant Eng’s lack of recall creates a conflict, the Court credits Plaintiff’s
10 uncontradicted testimony and finds there is a possibility termination was raised at the
11 January 7, 2009, meeting based on what transpired during the meeting on January 12,
12 2009.

13 102. Regarding the meeting with Ms. Eng on January 12, 2009, at which Plaintiff was
14 presented with the severance and release, Plaintiff testified she understood the January 14,
15 2009, date on the release to be her last day to “make a decision.” (TR 262:1-8.)

16 103. Regarding the meeting on January 26, 2009, at which Plaintiff was demoted, Plaintiff
17 testified: “I don’t remember any discussion. I remember being told I was demoted and
18 being told that there was nothing I could do about it.” (TR 264:20-22.) Regarding that
19 same meeting, Ms. Eng testified she had a discussion with Plaintiff regarding
20 maintaining trust with her supervisees and that Plaintiff had expressed concerns to her that
21 the information was inaccurate. (TR 58:10-59:6.) To the extent there is a conflict, the
22 Court credits Ms. Eng’s testimony.

23 **Social Security Disability**

24 104. Plaintiff applied for Social Security Disability (“SSD”) shortly after her termination. She
25 began to receive payment benefits in 2010. She is still receiving SSD benefits. (TR
26
27
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1 302:1-303:5.) Plaintiff's two back surgeries were the medical condition permitting her to
2 receive benefits.²⁰ (TR 303:23-25.)

3 105. Plaintiff testified she was capable of working, despite her current receipt of SSD benefits.
4 Plaintiff has applied for other jobs since her termination, including applying for a clinician
5 position in Shasta County, California. (TR 282:17-284:4, 304:6-12.)
6

7 **CONCLUSIONS OF LAW**

8 **At will employment**

9 106. The parties do not appear to dispute that Plaintiff's employment with Defendant was at
10 will. The Court notes that under California law, an employee's term of employment,
11 when not specified in an employment contract or other document or oral agreement, is
12 considered a term that may be terminated "at will" by either party. *Pomeroy v. Wal-Mart*
13 *Stores, Inc.*, 834 F. Supp. 2d 964, 973 (E.D. Cal. 2011). See Cal. Labor Code § 2922.
14 ("An employment, having no specified term, may be terminated at the will of either party
15 on notice to the other.") "Thus, in the absence of any evidence of the duration or term of
16 employment under a written or oral agreement, there is a statutory presumption that
17 employment is terminable at will, and a contract of employment may be ended at any time
18 at the option of either party." *Eisenberg v. Alameda Newspapers, Inc.*, 74 Cal. App. 4th
19 1359, 1386 (1999). The at-will presumption may be rebutted only by evidence of an
20 express or implied agreement that the employment will terminate only "for cause." *Hoy v.*
21 *Sears, Roebuck & Company*, 861 F. Supp. 881, 885 (N.D. Cal. 1994).
22

23 **McDonnell Douglas burden-shifting**

24 107. The Court does not formally track the burden-shifting framework of a *McDonnell-*
25 *Douglas* analysis. See *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 855-56 (9th Cir. 2002):

26 Regardless of the method chosen to arrive at trial, it is not normally
27 appropriate to introduce the *McDonnell Douglas* burden-shifting
28 framework to the jury. At that stage, the framework "unnecessarily
 evade[s] the ultimate question of discrimination *vel non*." *U.S.*

²⁰ Plaintiff did not appear to testify further at trial regarding these back surgeries. (TR 252:16-253:24.)

1 *Postal Serv. Bd. v. Aikens*, 460 U.S. 711, 714 (1983)].

2 Once at the trial stage, the plaintiff is required to put forward
3 evidence of discrimination “because of” a protected characteristic.
4 [f.n.] After hearing both parties' evidence, the district court must
5 decide what legal conclusions the evidence could reasonably
6 support and instruct the jury accordingly. This determination is
7 distinct from the question of whether to invoke the *McDonnell*
8 *Douglas* presumption, which occurs at a separate, earlier stage of
9 proceedings, involves summary judgment rather than jury
10 instructions, and is unrelated to the number of possible motives for
11 the challenged action. *Costa v. Desert Palace, Inc.*, 299 F.3d 838,
12 855-56 (9th Cir. 2002).²¹

13 This was not a jury trial, but the Court finds the above-cited reasoning in *Costa* applicable
14 to this case. The Court does consider, in its analysis, whether Defendant had legitimate,
15 non-discriminatory reasons for taking any adverse employment action, *Texas Dept. of*
16 *Community Affairs v. Burdine*, 450 U.S., 254-255 (1981), because its findings in that
17 regard are relevant to whether Plaintiff has shown, by a preponderance of the evidence,
18 that her disability was a motivating factor for those actions.

19 **Discrimination under the ADA: Applicable Law**

20 108. To prevail on her disability discrimination claim under the ADA, Plaintiff must establish
21 that she: 1) has a disability; 2) is qualified by demonstrating the ability to perform the
22 essential functions of the job with or without a reasonable accommodation; and 3) that she
23 suffered an adverse employment action because of the disability. *Hutton v. Elf Etochem*
24 *No. Am., Inc.*, 273 F.3d 884, 891-92 (9th Cir. 2001).

25 109. To be “qualified”, the disabled individual must possess the requisite skill, experience,
26 education, and other qualification standards for the employment position; and must be
27 able to perform the essential functions of the position held or desired with or without
28 reasonable accommodation. 29 C.F.R. § 1630.2(m).

29 ²¹ The *Costa* court also stated: “In one limited circumstance, the [*McDonnell-Douglas*] presumption retains vitality at trial: where there is no rebuttal by the employer, but the plaintiff's prima facie case is in factual dispute. The jury then determines whether the prima facie case is established. If it is, the jury must find discrimination.” *Costa*, 299 F.3d at 851, n. 6 (citing *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 509-510). In the instant suit, Plaintiff has made a prima facie case.

1 110. Under 42 U.S.C. § 12112(a), “No covered entity shall discriminate ... because of the
2 disability of such individual”). The ADA’s “because of” language does not require a
3 showing that a disability or a reasonable request for accommodation be the sole cause for
4 an adverse employment action. *Head v. Glacier Northwest, Inc.*, 413 F.3d 1053, 1063-
5 1066 (9th Cir. 2005). “[T]he ADA outlaws adverse employment decisions motivated,
6 even in part, by animus based on a plaintiff’s disability or request for an accommodation –
7 a motivating factor standard.” *Id.* at 1065.

8 **Failure to Accommodate under the ADA: Applicable Law**

9 111. A “reasonable accommodation” under the ADA means: “[m]odifications or adjustments
10 to the work environment, or to the manner or circumstances under which the position held
11 or desired is customarily performed, that enable an individual with a disability who is
12 qualified to perform the essential functions of that position”; or “[m]odifications or
13 adjustments that enable a covered entity's employee with a disability to enjoy equal
14 benefits and privileges of employment as are enjoyed by its other similarly situated
15 employees without disabilities.” 29 C.F.R. § 1630.2(o). A reasonable accommodation
16 may include “job restructuring, part-time or modified work schedules ... and other similar
17 accommodations for individuals with disabilities.” 29 C.F.R. § 1630.2(o).

18 112. The Court’s inquiry looks to whether “the employer took reasonable steps to
19 accommodate [Plaintiff’s] limitations in ways that would not impose undue hardship.”
20 *McAlindin v. Cnty. of San Diego*, 192 F.3d 1226, 1236 (9th Cir. 1999) (referencing 42
21 U.S.C. § 12112(b)(5)(A)). “The essence of the concept of reasonable accommodation is
22 that, in certain instances, employers must make special adjustments to their policies for
23 individuals with disabilities ... The ADA places a duty to accommodate on employers in
24 order to remove barriers that could impede the ability of qualified individuals with
25 disabilities to perform their jobs. Moreover, this is a continuing duty that is not exhausted
26 by one effort.” *Id.* (internal citations and quotation marks omitted).

1 113. “To determine the appropriate reasonable accommodation it may be necessary for the
2 covered entity to initiate an informal, interactive process with the individual with a
3 disability in need of the accommodation. This process should identify the precise
4 limitations resulting from the disability and potential reasonable accommodations that
5 could overcome those limitations.” 29 C.F.R. § 1630.2(o)(3).

6 **Retaliation under the ADA: Applicable Law**

7
8 114. With respect to Plaintiff’s retaliation claim under the ADA, Plaintiff must show: 1) she
9 engaged in conduct protected under the ADA; 2) she suffered an adverse employment
10 action; 3) there was a causal link between the protected conduct and the adverse
11 employment action; and 4) the protected activity was a motivating factor in the adverse
12 employment action. See Ninth Circuit Model Jury Instruction & Comment 12.10 (2007).

13 **Ultimate Conclusions of Law**

14 115. Plaintiff’s chronic lung issues were a disability within the meaning of the ADA.

15 116. Plaintiff engaged in conduct protected under the ADA: she consulted an attorney
16 regarding her fear of being discriminated against due to her disability in January, 2009;
17 she requested time off multiple times in 2009; and she made a formal request for
18 accommodation, on or about September 3, 2009.²²

19 117. Plaintiff experienced adverse employment actions during the time she was disabled: she
20 was demoted and eventually terminated.

21 118. Plaintiff was qualified for the position of clinician, with a reasonable accommodation
22 given her health issues when terminated, and without a reasonable accommodation if her
23 health issues improved.

24 119. Defendant had legitimate, non-discriminatory reasons for demoting and terminating
25 Plaintiff.

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²² As stated, *supra*, the Court finds there is insufficient evidence to find that Plaintiff requested extensions to complete work due to her medical issues, and thus does not find that Plaintiff engaged in a protected activity by making such requests.

1 120. Plaintiff has not shown by a preponderance of the evidence that her disability was a
2 motivating factor in her demotion or termination.

3 121. Plaintiff has not shown by a preponderance of the evidence that Defendant failed to
4 accommodate her disability.

5 122. Plaintiff has not shown by a preponderance of the evidence that her engaging in a
6 protected activity was a motivating factor in her demotion or termination.

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ORDER

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10 In consideration of the foregoing Findings of Fact and Conclusions of Law, it is ordered
11 that judgment is entered in favor of Defendant. The Clerk of the Court is directed to close the
12 case.

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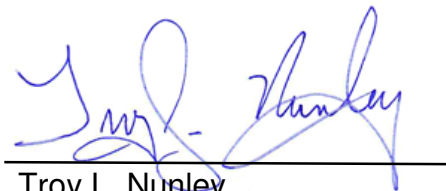
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Dated: March 27, 2015

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Troy L. Nunley
United States District Judge

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