UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

ELSA ROBERTS, Plaintiff, v. KAISER FOUNDATION HOSPITAL, et al., Defendants.	No. 2:12-cv-2506-CKD ORDER

Defendants' motion for summary judgment came on regularly for hearing on February 4, 2015.[1] Andrea Miller and Janet Meredith appeared for plaintiff. Matthew Hawkins appeared for defendants. Upon review of the documents in support and opposition, upon hearing the arguments of counsel, and good cause appearing therefor, THE COURT FINDS AS FOLLOWS:

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[1] After the parties consented to the jurisdiction of a United States Magistrate Judge for all purposes pursuant to 28 U.S.C. § 636(c) (ECF Nos. 17, 21), the action was reassigned to the undersigned for all further proceedings and entry of final judgment. (ECF No. 24.)

I. Relevant Facts[2]

All facts referred to below are not genuinely disputed by the parties unless otherwise noted.[3] The court does not cite to any facts that are irrelevant to resolution of the pending motion.

Plaintiff was hired by The Permanente Medical Group, Inc. ("TPMG") in 2002 as a part-time, on call lab assistant and became a permanent part-time employee in 2003. While employed at TPMG, plaintiff was a member of the SEIU Union. The Union had a collective bargaining

[2] Both plaintiff and defendants have filed evidentiary objections. Plaintiff filed objections to certain factual assertions made in defendants' statements of undisputed fact numbers 22 and 34. (ECF No. 37-4.) However, plaintiff attacks only defendants' phrasing of its factual assertions and not the evidence underlying these factual assertions. Statements of undisputed facts are not evidence, the admissibility of which can be challenged under the Federal Rules of Evidence, but summaries of the material facts contained in the cited evidence, which the court reviews independently. See Local Rule 260. Accordingly, these objections are not well taken and are overruled. Defendants filed twenty-six evidentiary objections to portions of the declarations of Jessica Roberts and Diane Horn. (ECF No. 41.) For purposes of this motion, the testimony provided by Jessica Roberts and Diane Horn in the objected-to portions of these declarations is irrelevant. Accordingly, the court sustains defendants' objections based on relevance, namely objection numbers 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 19, 20, 21, 24, and 26. Furthermore, defendants' objection numbers 17 and 23 are sustained on the grounds that the objected-to statements are inadmissible hearsay. Defendants' remaining objections are overruled. Plaintiff also filed objections to defendants' reply briefing, asserting that the court should disregard defendants' reply in its entirety because it asserts new arguments and presents new evidence not first raised in their motion for summary judgment. (ECF No. 42.) However, these objections provide no indication of what arguments defendants have asserted in their reply that were not first asserted in their motion. Furthermore, even if the court were to disregard defendants' evidence filed in support of their reply, the omission of such evidence would not materially affect the outcome of the present motion. Accordingly, plaintiff's request to disregard defendants' reply is denied.

[3] In support of the motion for summary judgment, defendants submitted requests for judicial notice of plaintiff's first amended complaint filed in the present action and plaintiff's administrative complaints filed with the California Department of Fair Employment and Housing and the U.S. Equal Employment Opportunity Commission in connection with the present action. (ECF No. 34-3.) The court grants defendants' request of these documents because they are properly subject to judicial notice under Federal Rule of Evidence 201. See Biggs v. Terhune, 334 F.3d 910, 916 n.3 (9th Cir. 2003) ("Materials from a proceeding in another tribunal are appropriate for judicial notice."), overruled on other grounds, Hayward v. Marshall, 603 F.3d 546, 555 (9th Cir. 2010); Clifford v. Regents of Univ. of California, 2012 WL 1565702, at *5 (E.D. Cal. Apr. 30, 2012) (taking judicial notice of plaintiff's original and amended complaints "because those documents are already before the Court").

agreement ("CBA") in place with TPMG, which required that employees bid for open jobs and that open positions be awarded on the basis of seniority.

While working on December 1, 2009, plaintiff accidentally stuck herself with a needle she had just used to draw blood from a patient. The patient told plaintiff that he had HIV and Hepatitis C. Plaintiff was then taken to the emergency room where she received care. As a result of this incident, plaintiff began suffering from nightmares, anxiety, and other emotional distress with regard to the patient and whether she had contracted his diseases. However, it was later determined that plaintiff had not contracted HIV or Hepatitis C.

Following her injury, plaintiff briefly returned to work, but this caused her emotional state to worsen. Plaintiff submitted a request for leave under the Family Medical Leave Act ("FMLA"), which was approved beginning January 5, 2010. Plaintiff continued to receive extensions for her leave under the FMLA through August 1, 2010, but was denied an additional requested extension because she did not actively work at least 1,250 hours during the required period. Nevertheless, plaintiff was granted an extension of her leave. Plaintiff then returned to work and worked for the majority of October 2010 through August 2011.

On August 17, 2011, an investigatory interview took place between plaintiff and defendant Nunes regarding plaintiff's recent absences. During this meeting, plaintiff stated that she had gone to a doctor's appointment during her absence on July 21, 2011, and that her other absences were covered as FMLA leave. On September 20, 2011, Nunes held a follow up attendance meeting with plaintiff. During this meeting, Nunes told plaintiff that she had contacted Athens, plaintiff's workers' compensation administrator, and was told that plaintiff had gone to a doctor's appointment on July 20, 2011, not July 21, 2011, as plaintiff had told her during their previous meeting. Nunes also warned plaintiff that if such absences occurred in the future, plaintiff could be terminated. The absences addressed during these two meetings were ultimately found to be protected absences. On September 27, 2011, plaintiff submitted an injury report noting that plaintiff was suffering from a great deal of anxiety after her September 20, 2011 meeting with Nunes.

On October 10, 2011, Dr. Hellman, plaintiff's treating psychologist who also worked for TPMG, submitted a work status report to TPMG stating that he had been treating plaintiff and that plaintiff could return to work on the condition that she either be "restricted from visual/verbal contact and from being directly supervised by current supervisor," or be relocated to an alternate worksite. (Hellman Deposition, Exh. 143; Hiatt Declaration ¶ 7, Exh. 2.) The report further stated that if neither of these accommodations could be made, then plaintiff should be regarded as unable to return to work until October 31, 2011. TPMG believed that Dr. Hellman intended the restricted contact condition to mean that plaintiff could be accommodated only if she had absolutely no contact with her supervisor Nunes, including even incidental contact, while at work. (Hanson Deposition 133:1-11.) Plaintiff contends that Dr. Hellman actually meant that plaintiff only be restricted from direct supervision by Nunes, and that incidental physical and verbal contact with Nunes would be permitted. (Hellman Deposition 49:14-51:12.)

TPMG determined that it could not provide plaintiff with the request to limit her contact with Nunes because the location of plaintiff's work site and the fact that Nunes regularly moved between buildings during her shift; this precluded TPMG from effectively providing such an accommodation. TPMG further determined that it could not provide plaintiff with a transfer to one of its other work sites because of plaintiff's work hours and the fact that the CBA's seniority-based job bidding system precluded TPMG from simply placing plaintiff into an open position at another site. Defendant Carretti called plaintiff on October 13, 2011 and informed her that TPMG could not provide her with her requested accommodations.

On October 18, 2011, Dr. Hellman submitted a second work status report to TPMG, which contained the exact same requested accommodations provided in the October 10, 2011 report. The report further indicated that if either of the requested accommodations could not be provided, then plaintiff would be considered unable to return to work until November 20, 2011. On November 2, 2011, Heather Hiatt, a disability case manager for TPMG, called and left a message for Dr. Hellman seeking clarifications regarding the October 18, 2011 report he had submitted. Specifically, Hiatt noted that the report did not provide any information concerning plaintiff's work limitations and requested that Dr. Hellman provide clarification as to what

plaintiff's actual restrictions were. Dr. Hellman responded on November 9, 2011 and told Hiatt that he would not comment on plaintiff's restrictions because plaintiff had been transferred to the care of another doctor. Dr. Hellman had referred plaintiff to Dr. Greenberg, an outside psychologist, due to TPMG's change in policy that precluded TPMG employees from providing services to TPMG employees claiming conditions related to their work for TPMG.

On November 18, 2011, Dr. Greenberg provided TPMG with a note stating that plaintiff was under his care and that she was unable to return to work until December 20, 2011. On November 23, 211, defendant Hanson sent an email to two other TPMG employees, Carrie Miller and Al Donaldson, explaining Dr. Greenberg's note. Hanson also added at the end of the email that "Kaiser HAS to develop a way of dealing more effectively with these sorts of, what I consider to be bogus, time off notes." (Hanson Deposition, Exh. 13 (emphasis in original).)

On December 19, 2011, Hiatt sent plaintiff a letter stating that TPMG had a return to work program that would allow plaintiff to engage in modified work while she recovered. The letter also asked plaintiff to "provide an updated certification from [her] medical care provider indicating [her] work restrictions by, December 30, 2011, to begin the [return to work] process." (Hiatt Declaration, Exh. 5.) The letter requested that plaintiff provide such information "if [it was] applicable." (Id.) On December 23, 2011, Dr. Greenberg faxed Hiatt a verification of treatment ("VOT") letter stating that plaintiff was under his care and unable to return to work until February 1, 2011, at which time he would reevaluate her. On December 29, 2011, plaintiff called Hiatt in response to Hiatt's December 19, 2011 letter. During this conversation, Hiatt explained that TPMG's return to work program was available and if plaintiff's doctor indicated that plaintiff could return to work with restrictions, TPMG would work with plaintiff to determine whether plaintiff could be accommodated. Plaintiff replied that she was unable to return to work at that time.

Plaintiff submitted to TPMG a VOT letter dated January 23, 2012 from Dr. Meisner, one of plaintiff's treating physicians, stating that plaintiff was ill and unable to return to work through March 23, 2012. Plaintiff submitted another VOT letter dated February 28, 2012 from Dr. Greenberg stating that plaintiff was unable to return to work through April 1, 2012. Plaintiff

submitted fourth VOT letter dated March 12, 2012 from Dr. Meisner stating that plaintiff was unable to return to work through May 11, 2012 due to a serious medical condition.

On March 20, 2012, Hiatt sent plaintiff another letter regarding TPMG's return to work program and offered to work with plaintiff to determine whether TPMG could provide plaintiff with a reasonable accommodation. The letter noted that while the offer had already been extended to plaintiff, Hiatt wanted to offer it again in case plaintiff's "situation ha[d] changed." (Hiatt Declaration, Exh. 11.) Plaintiff then submitted another VOT letter dated May 7, 2012 from Dr. Greenberg stating that plaintiff was unable to return to work until June 19, 2012. Over the next three months, plaintiff submitted three more VOT letters from Dr. Greenberg; the last of the three letters indicated plaintiff's inability to return to work until October 15, 2012.

On August 30, 2012, Hiatt sent plaintiff a third letter following up on plaintiff's status. Hiatt reiterated TPMG's offer to work with plaintiff to determine her limitations and whether it could provide plaintiff with a reasonable accommodation. The letter also informed plaintiff that TPMG would need "an understanding of [plaintiff's] limitations" in order to best assist her in returning to work. (Hiatt Declaration, Exh. 16.) The letter further informed plaintiff that her leave would expire on November 5, 2012 pursuant to the terms of the CBA and stated that Hiatt would like to work with plaintiff prior to that time to determine a reasonable accommodation. Finally, the letter stated that plaintiff would remain on medical leave of absence while TPMG "await[ed] clarification of [her] restrictions." (Id.) Hiatt also enclosed a form with the letter for plaintiff to give to her physician that requested a statement of plaintiff's limitations for purposes of determining a possible accommodation.

Plaintiff submitted another VOT dated October 11, 2012 from Dr. Greenberg stating that plaintiff would be unable to return to work until January 1, 2013. On October 24, 2012, plaintiff contacted Andrew Jackson, a disability case manager at TPMG, and told him that she was permanently disabled and was in the process of applying for Social Security disability benefits. Jackson shared this information with Hiatt.

On October 31, 2012, Hiatt sent plaintiff a fourth letter requesting that plaintiff provide a statement of her work limitations so that TPMG could work with her in assessing a reasonable

accommodation. The letter further stated that if plaintiff wanted to engage in the interactive process, she would need to contact Hiatt by November 7, 2012. Hiatt also wrote that if she did not hear from plaintiff by that date, then she would assume that plaintiff did not want to engage in the interactive process and that TPMG would cease its efforts to engage with her. (Hiatt Declaration, Exh. 19.) Plaintiff called Hiatt concerning this letter on November 7, 2012. During this conversation, plaintiff stated that she was confused and did not know what was going on.[4] Plaintiff also stated that she "d[id] not want to engage in [the interactive] process" and that Hiatt should talk to plaintiff's doctors. (Hiatt Declaration, Exh. 20.) On November 15, 2012, Hiatt sent plaintiff a letter reiterating what was said during the November 7, 2012, conversation, including that plaintiff was "not interested in the interactive process or reasonable accommodation." (Hiatt Declaration, Exh. 21.) The letter also instructed plaintiff to contact her doctor so she could obtain information regarding her restrictions by no later than November 23, 2012. Finally, Hiatt wrote that if such information had not been provided by that date, then TPMG would assume that plaintiff was not interested in pursuing the interactive process. Plaintiff did not respond to Hiatt's letter by November 23, 2012.

On December 10, 2012, Dr. Greenberg sent TPMG a letter stating that plaintiff's condition had not improved significantly despite treatment, plaintiff currently could not return to work with or without limitation, and he was continuing to work with plaintiff with the hope to return her to work at TPMG in another setting and under a different supervisor. Plaintiff submitted another VOT letter dated December 28, 2012 from Dr. Greenberg stating that plaintiff would be unable to return to work until February 1, 2013. No further notes or VOT letters were provided by plaintiff's doctors.

While plaintiff's contractual leave under the CBA ended on November 7, 2012, TPMG extended plaintiff's leave until January 8, 2013, when it terminated plaintiff's employment.

On February 20, 2013, plaintiff filed her first amended complaint against defendants, alleging claims for violations of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101

[4] The court notes that plaintiff's claim that she was "confused" is somewhat belied by the fact that she filed a well-stated complaint in pro per in this action on October 5, 2012. ECF No. 1.

et seq., and its California counterpart, the Fair Employment and Housing Act ("FEHA"), Cal. Gov't Code § 12940 et seq., for failure to reasonably accommodate her disability and engage in the interactive process; intentional infliction of emotional distress; violations of the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2601 et seq., and its California counterpart, the Family Rights Act ("FRA"), Cal. Gov't Code § 12945.2, for denying plaintiff's request to exercise her right to FMLA payment; and wrongful termination in violation of public policy.

II. Summary Judgment Standards

Summary judgment is appropriate when it is demonstrated that there "is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A party asserting that a fact cannot be disputed must support the assertion by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials. . ." Fed. R. Civ. P. 56(c)(1)(A).

Summary judgment should be entered, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Id.

If the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually does exist. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). In attempting to establish the existence of this factual dispute, the opposing party may not rely upon the allegations or denials of their pleadings but is required to tender evidence of specific facts in the form of affidavits, and/or admissible discovery material, in support of its contention that the dispute exists or show that the materials cited by the movant do not establish the absence of a genuine dispute. See Fed. R. Civ. P. 56(c); Matsushita, 475 U.S. at 586 n.11. The opposing party must demonstrate that the

fact in contention is material, i.e., a fact that might affect the outcome of the suit under the governing law, see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987), and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the nonmoving party, see Wool v. Tandem Computers, Inc., 818 F.2d 1433, 1436 (9th Cir. 1987).

In the endeavor to establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." T.W. Elec. Serv., 809 F.2d at 631. Thus, the "purpose of summary judgment is to 'pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.'" Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e) advisory committee's note on 1963 amendments).

In resolving the summary judgment motion, the evidence of the opposing party is to be believed. See Anderson, 477 U.S. at 255. All reasonable inferences that may be drawn from the facts placed before the court must be drawn in favor of the opposing party. See Matsushita, 475 U.S. at 587. Nevertheless, inferences are not drawn out of the air, and it is the opposing party's obligation to produce a factual predicate from which the inference may be drawn. See Richards v. Nielsen Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), aff'd, 810 F.2d 898, 902 (9th Cir. 1987). Finally, to demonstrate a genuine issue, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts . . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" Matsushita, 475 U.S. at 587 (citation omitted).

III. Defendants' Motion for Summary Judgment

As an initial matter, the court notes that plaintiff has withdrawn her claims against all defendants under the FMLA and FRA, and her claims under the ADA and FEHA against defendants Carretti, Hanson, and Nunes. Accordingly, the only claims left in dispute are plaintiff's ADA and FEHA claims against TPMG, and claims for intentional infliction of emotional distress and wrongful termination against all defendants.

A. ADA/FEHA Claims

Plaintiff's first through fourth causes of action concern violations of the ADA and FEHA with regard to whether TPMG failed to provide plaintiff with a reasonable accommodation and whether it engaged in the interactive process in good faith.

1. Failure to Accommodate

Plaintiff asserts in her first and second causes of action that TPMG failed to provide her a reasonable accommodation in violation of the ADA and FEHA.

The ADA prohibits discrimination against a "qualified individual with a disability on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). "'[Q]ualified individual with a disability' means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). Under the ADA, an employer discriminates against a qualified individual with a disability by "not making reasonable accommodations to the known physical or mental limitations of [the] otherwise qualified individual with a disability who is an . . . employee, unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the business of [the employer]." 42 U.S.C. § 12112(b)(5)(A). Similarly, the FEHA makes it unlawful for an employer "to fail to make reasonable accommodation for the known physical or mental disability of an . . . employee," unless the employer can demonstrate that accommodation will "produce undue hardship" to its operation. Cal. Gov't Code § 12940(m). The elements of a failure to accommodate claim under both the ADA and FEHA are "(1) the plaintiff has a disability under the [ADA and] FEHA, (2) the plaintiff is qualified to perform the essential functions of the position, and (3) the employer failed to reasonably accommodate the plaintiff's disability." Scotch v. Art Inst. of Cal.-Orange Cty., Inc., 173 Cal.App.4th 986, 1009-10 (2009); Griffin v. United Parcel Serv., Inc., 661 F.3d 216, 222 (5th Cir. 2011).

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An employer cannot prevail at summary judgment against a claim it failed to accommodate an admittedly disabled employee unless it is able to establish through undisputed facts that "(1) reasonable accommodation was offered and refused; (2) there simply was no vacant position within the employer's organization for which the disabled employee was qualified and which the disabled employee was capable of performing with or without accommodation; or (3) the employer did everything in its power to find a reasonable accommodation, but the informal interactive process broke down because the employee failed to engage in discussions in good faith." Jensen v. Wells Fargo Bank, 85 Cal. App. 4th 245, 262 (2000). Although an accommodation for an employee's disability is neither "reasonable" nor required if it works an undue burden on the employer's organization, to prevail on this defense the employer may not merely assert such hardship. Rather, the employer must produce evidence that an accommodation is objectively unreasonable under the circumstances. Gosvener v. Coastal Corp., 51 Cal. App. 4th 805, 813 (1996); Cal. Gov. Code, § 12926(s); Cal. Code Regs., tit. 2, § 7293.9(b).

In this case, defendants do not dispute in their motion that plaintiff was disabled within the meaning of both the ADA and FEHA, or that plaintiff was qualified to perform her job. Rather, they argue that TPMG is entitled to summary judgment because plaintiff's requested accommodations were not reasonable.

Dr. Hellman provided TPMG with letters on both October 10, 2011 and October 18, 2011 stating that plaintiff could return to work on the condition that she either be "restricted from visual/verbal contact and from being directly supervised by current supervisor," or be relocated to an alternate worksite. (Hiatt Declaration ¶¶ 6-7, Exhs. 2-3.) TPMG interpreted the request for restricted contact to mean that plaintiff should be held completely "out of sight and sound of her supervisor." (ECF No. 34-1 at 10.) This requested accommodation was denied after it was determined that it would be unreasonable because the location of plaintiff's work site and the fact that plaintiff's supervisor, Tracy Nunes, regularly traveled between buildings meant that TPMG would have to restructure the management of the department plaintiff worked in if it were to provide such an accommodation. Plaintiff argues that TPMG incorrectly interpreted this request and asserts that what Dr. Hellman meant by "restricted contact" was that plaintiff be restricted

from all but incidental contact, meaning plaintiff could have visual and verbal contact with Nunes outside of direct supervision.

Even if plaintiff's interpretation of this restriction is taken as true, such a request is functionally identical to a request that plaintiff be given a new supervisor, which is per se unreasonable. The *EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, Question 33, states: "[a]n employer does not have to provide an employee with a new supervisor as a reasonable accommodation." 1999 WL 33305876, at *24 (Oct. 17, 2002). Furthermore, the great majority of courts, both within the Ninth Circuit and elsewhere, have held that employers are not required to provide an employee with a different supervisor as an accommodation as a matter of law. See, e.g., Gaul v. Lucent Technologies Inc., 134 F.3d 576, 581 (3d Cir. 1998) ("[B]y asking to be transferred away from individuals who cause him prolonged and inordinate stress, [plaintiff] is essentially asking this court to establish the conditions of his employment, most notably, with whom he will work. However, nothing in the ADA allows this shift in responsibility.") (citation and quotation marks omitted); Weiler v. Household Fin. Corp., 101 F.3d 519, 526 (7th Cir. 1996) ("The ADA does not require HFC to transfer Weiler to work for a supervisor other than Skorupka . . . ."); Alsup v. U.S. Bancorp, 2015 WL 224748, at *8 (E.D. Cal. Jan. 15, 2015) (dismissing plaintiff's reasonable accommodation claim under FEHA because "plaintiff's requested accommodation, transfer to a new position under a new supervisor, is unreasonable as a matter of law"); Gazzano v. Stanford Univ., 2014 WL 794803, at *4, n.59 (N.D. Cal. Feb. 27, 2014) (noting that even if plaintiff had properly raised a request for transfer to a new supervisor as an accommodation, such an accommodation was per se unreasonable); Adams v. Alderson, 723 F. Supp. 1531, 1531-32 (D.D.C. 1989), aff'd sub nom., Adams v. G.S.A., 1990 WL 45737 (D.C. Cir. Apr. 10, 1990) (the requested accommodation, transfer of plaintiff or supervisor or both, "is clearly not one reasonably expected of [the employer]"). But see Kennedy v. Dresser Rand Co., 193 F.3d 120, 122-23 (2d Cir. 1999) (declining to adopt a rule finding request for transfer to a new supervisor to be unreasonable as a matter of law, but finding a rebuttable presumption that such a transfer is an

unreasonable accommodation). Accordingly, this requested accommodation was per se unreasonable and TPMG properly denied it.

Plaintiff's second requested accommodation, that TPMG relocate her to another work site, was also per se unreasonable under the circumstances presented by the evidence. Generally, under both the ADA and the FEHA, "reassignment to a vacant position" is considered a reasonable accommodation. 42 U.S.C. § 12111(9)(B); Cal. Gov't Code § 12926. However, when a request for such an accommodation directly conflicts with the collectively-bargained seniority rights of other employees, the request is per se unreasonable. Willis v. Pac. Mar. Ass'n, 244 F.3d 675, 682 (9th Cir. 2001). Nevertheless, a request may still be reasonable when the language of the collective bargaining agreement is flexible enough to permit the accommodation under the circumstances. Id.; see Buckingham v. United States, 998 F.2d 735, 741 (9th Cir. 1993) (holding that under the Rehabilitation Act, which contains provisions similar to the ADA, transfer of a disabled employee would not conflict with the collective bargaining agreement which contained an exception to seniority rules for "the most unusual of circumstances").

Defendants assert that this request was denied because the CBA between TPMG and plaintiff's union required that vacant positions be filled on the basis of seniority and that the CBA's seniority provision would have been violated had TPMG simply granted the request and moved plaintiff to an open job at one of its other sites. Defendants argue that TPMG's denial was proper because the CBA's terms made plaintiff's request per se unreasonable. Plaintiff argues that her request for this accommodation was not in direct conflict with the CBA because TPMG could have worked with her to identify available positions at other job sites for which plaintiff was qualified and then have her bid for such a position. Plaintiff further asserts that TPMG could have, in the alternative, sought a variance from the union with regard to the CBA's seniority placement provision in order to get around the requirement.

Plaintiff's assertion that defendant could have worked with plaintiff to secure her a position within the confines of the seniority system dictated by the CBA is not supported by the evidence. Plaintiff fails to point to any evidence that indicates that TPMG had vacant positions at other sites for which plaintiff would have been qualified, or that such vacancies would become

available in the near future. See Kotwica v. Rose Packing Co., 637 F.3d 744, 750 (7th Cir. 2011) ("[P]laintiffs, when alleging that an employer's failure to reassign them violated the ADA's anti-discrimination provisions, bear the burden of showing that there is a vacant position in existence for which they are qualified.") Furthermore, plaintiff merely notes that she had roughly nine years of seniority, but provides no evidence that this would have been sufficient to secure an open position had she entered a bid. See Schmidt v. Safeway Inc., 864 F. Supp. 991, 997 (D. Or. 1994) ("An employer is not required to offer an accommodation that is likely to be futile . . ."); Hanson v. Lucky Stores, Inc., 74 Cal. App. 4th 215, 226 (1999). The evidence in the record shows only that plaintiff requested relocation as an accommodation and that the CBA to which both plaintiff and TPMG were bound imposed a seniority system that required employees to bid on an open position that would be awarded to the most senior employee who entered a bid. Plaintiff fails to create a genuine issue of material fact regarding her reassignment request because she is unable to rebut defendants' evidentiary showing that her relocation would have violated the collectively-bargained seniority system.

Plaintiff's second argument, that TPMG could have sought a variance, is also not well taken. Plaintiff provides no evidence that the terms of the CBA were flexible enough to permit such a break from the standard seniority rules. In fact, the only evidence concerning the terms of the CBA shows that the positions at other job sites were awarded based on seniority; the evidence provides no indication that any deviation from the CBA's provision requiring seniority-based placements was permitted. Furthermore, contrary to plaintiff's contention, TPMG was not required to approach the union regarding a variance before the request could be deemed unreasonable. In U.S. Airways, Inc. v. Barnett, the United States Supreme Court held that for an ADA claim based on an employer's failure to provide reasonable accommodation, "a showing that the assignment would violate the rules of a seniority system warrants summary judgment for the employer" unless the plaintiff can present evidence of "special circumstances surrounding the particular case that demonstrate the assignment is nonetheless reasonable." 535 U.S. 391, 406 (2002). This interpretation of the ADA also applies to plaintiff's claim under the FEHA. See Alsup, 2015 WL 224748, at *8 (citing Hastings v. Dep't of Corr., 110 Cal. App. 4th 963, 973

(2003)) ("[C]ases interpreting the ADA are persuasive authority for interpreting the FEHA."). Here, defendants have provided evidence that reassigning plaintiff to a different site would have violated the terms of the CBA, and plaintiff presents no evidence demonstrating the existence of special circumstances to rebut this showing. Accordingly, plaintiff's second request for accommodation was also per se unreasonable.

Furthermore, as discussed in further detail below with respect to plaintiff's interactive process claims under the ADA and FEHA, plaintiff and her doctors never provided TPMG with information regarding plaintiff's workplace restrictions, thus leaving TPMG with insufficient information to allow it to discern and propose alternative accommodations beyond the two unreasonable accommodations provided by plaintiff. The undisputed facts show that TPMG sent plaintiff letters on multiple occasions requesting information from her and her treating physicians concerning the workplace limitations imposed by her condition. Despite these efforts, plaintiff never provided the requested information that would have aided TPMG in finding a reasonable accommodation for plaintiff. Given the lack of information regarding plaintiff's disability and the limitations it imposed, TPMG could not have reasonably been expected to develop and propose alternative accommodations. See Beck v. Univ. of Wisconsin Bd. of Regents, 75 F.3d 1130, 1137 (7th Cir. 1996) ("Because the University was never able to obtain an adequate understanding of what action it should take, it cannot be held liable for failure to make 'reasonable accommodations.'"); 29 C.F.R. § Pt. 1630, App. ("[I]n some instances neither the individual requesting the accommodation nor the employer can readily identify the appropriate accommodation. . . . [T]he employer may not know enough about the individual's disability or the limitations that disability would impose on the performance of the job to suggest an appropriate accommodation."). Accordingly, because the facts demonstrate that the only two accommodations suggested by plaintiff were per se unreasonable and TPMG was not provided with information sufficient to develop and propose alternative accommodations, TPMG is entitled to summary judgment with respect to plaintiff's reasonable accommodation claims under the ADA and FEHA.

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2. Failure to Engage in the Interactive Process

Plaintiff asserts in her third and fourth causes of action that TPMG failed to engage in the interactive process in good faith in violation of the ADA and FEHA.

Under the ADA, once an employee requests an accommodation, "the employer must engage in an interactive process with the employee to determine the appropriate reasonable accommodation." Zivkovic v. S. California Edison Co., 302 F.3d 1080, 1089 (9th Cir. 2002). Similarly, under the FEHA, it is unlawful for an employer "to fail to engage in a timely, good faith, interactive process with the employee . . . to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee . . . with a known physical or mental disability or known medical condition." Cal. Gov't Code § 12940(n). "The interactive process requires: (1) direct communication between the employer and employee to explore in good faith the possible accommodations; (2) consideration of the employee's request; and (3) offering an accommodation that is reasonable and effective." Id. "'Liability for failure to provide reasonable accommodations ensues only where the employer bears responsibility for the breakdown' in the interactive process." Id. (quoting Beck, 75 F.3d at 1137). "In order to demonstrate good faith, employers can point to cooperative behavior which promotes the identification of an appropriate accommodation. Employers should 'meet with the employee who requests an accommodation, request information about the condition and what limitations the employee has, ask the employee what he or she specifically wants, show some sign of having considered employee's request, and offer and discuss available alternatives when the request is too burdensome.'" Barnett v. U.S. Air, Inc., 228 F.3d 1105, 1114 (9th Cir. 2000) (quoting Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 317 (3d Cir. 1999)), vacated on other grounds, U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (2002).

Defendants argue that the undisputed evidence shows that plaintiff was the one who bore responsibility for the breakdown in the interactive process and that TPMG made numerous attempts to interact with and obtain information from plaintiff and her treating physicians in an attempt to discern the limitations caused by plaintiff's disability and what accommodations could be reasonably made to allow her to return to work. Plaintiff asserts that the evidence provides a

genuine dispute as to whether TPMG was at fault for the breakdown in the interactive process because it shows that TPMG did not do everything in its power to find a reasonable accommodation for plaintiff once she began the interactive process. For the reasons stated below, the undisputed evidence shows that TPMG engaged plaintiff in the interactive process in good faith and made a number of reasonable attempts to obtain information from plaintiff that was necessary to determine whether it could provide plaintiff with a reasonable accommodation.

Plaintiff triggered the interactive process on October 10, 2011 when Dr. Hellman provided TPMG with the first work status report indicating that plaintiff could return to work if she were restricted from verbal and visual contact with Nunes or was relocated to a job at another site. On October 13, 2011, Carretti called plaintiff regarding this report and informed her that TPMG could not provide plaintiff with these requested accommodations. Plaintiff contends that this initial denial shows that TPMG failed to act in good faith because it denied plaintiff's requests without seeking clarification from plaintiff's physician concerning what was meant by "restricted contact" with her supervisor or proposing any alternative accommodations. However, for the reasons noted above, both accommodations plaintiff requested were per se unreasonable even when plaintiff's interpretation of what was requested is accepted as true. Furthermore, while Dr. Hellman's October 11, 2011 report provided proposed accommodations; it provided no discussion of plaintiff's actual limitations. Without information concerning plaintiff's limitations, TPMG could not have been reasonably expected to provide alternative accommodations at that juncture. See Barnett, 228 F.3d at 1114 ("Both sides must communicate directly, exchange essential information and neither side can delay or obstruct the process."); Beck, 75 F.3d at 1135 ("A party that fails to communicate, by way of initiation or response, may . . . be acting in bad faith.").

On October 18, 2011, Dr. Hellman provided TPMG with a second report that set forth the exact same accommodations that were noted in the October 11, 2011, report. The report stated that if such accommodations could not be provided, plaintiff would be considered unable to work through November 20, 2011. On November 2, 2011, Hiatt called and left a message with Dr. Hellman requesting clarification of plaintiff's physical and psychological limitations. Dr.

Hellman responded on November 9, 2011, and told Hiatt that he could not comment on plaintiff's restrictions because plaintiff had been transferred to a new doctor. On November 18, 2011, Dr. Greenberg, plaintiff's new doctor, provided TPMG with a note indicating that plaintiff was unable to return to work until December 20, 2011. On December 19, 2011, Hiatt sent plaintiff a letter informing plaintiff that TPMG had a return to work program that would allow plaintiff to work as she continued her recovery and requesting plaintiff to provide an updated certification from her doctor indicating her work restrictions, "if applicable," by no later than December 30, 2011 so TPMG could begin the return to work process. (Hiatt Declaration, Exh.5.) On December 23, 2011, Dr. Greenberg faxed a letter to TPMG indicating that plaintiff was unable to work until February 1, 2012. The letter did not include any indication of plaintiff's restrictions. Plaintiff later called Hiatt regarding the December 19, 2011 letter. Hiatt explained to plaintiff that TPMG's return to work program was available to her if her doctor indicated that she was able to return to work with restrictions. Plaintiff replied that she was unable to return to work at that time.

Between January and October of 2012, plaintiff's treating physicians provided TPMG with eight letters stating that plaintiff could not return to work. None of these letters contained any indication as to what plaintiff's restrictions were. Also during this period, Hiatt sent plaintiff two more letters again offering TPMG's return to work program and to work with plaintiff in finding an accommodation. In the second of these letters, Hiatt stated that TPMG needed information concerning plaintiff's limitations so TPMG could work with her to develop accommodations that would allow her to return to work. Hiatt also informed plaintiff that her leave would expire under the CBA on November 5, 2012, and that Hiatt would like to work with plaintiff in finding an accommodation prior to this date. Hiatt enclosed a letter requesting a description of plaintiff's work restrictions for plaintiff to give her doctor. Plaintiff did not respond to either of these letters and continued to submit letters from her doctors that only stated that plaintiff could not return to work.

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On October 31, 2012, Hiatt sent plaintiff another letter noting that she wanted to work with plaintiff in finding a reasonable accommodation, but first needed information concerning plaintiff's restrictions and ability to return to work. Hiatt also wrote that if plaintiff did not respond, she would assume plaintiff did not wish to engage in the interactive process and that TPMG would cease its efforts to engage with her. Plaintiff called Hiatt on November 7, 2012. During this conversation, Hiatt again instructed plaintiff on the interactive process. Plaintiff stated that she "was confused a lot" and did not "know what [was] going [on]." (Hiatt Deposition, Exh. 28.) Plaintiff further told Hiatt to "just see my dr." and that she "d[id] not want to engage in [the] process."[5] (Id.) Hiatt sent plaintiff another letter on November 15, 2012, as a follow up to their phone conversation. In this letter, Hiatt reiterated what was stated during the phone conversation, including plaintiff's statement that she was not interested in the interactive process. Hiatt also instructed plaintiff to contact her doctor so she could obtain information regarding her restrictions by no later than November 23, 2012. Finally, Hiatt warned plaintiff that if such information had not been provided by that date, then TPMG would assume that plaintiff was not interested in pursuing the interactive process. Plaintiff did not respond to this letter before November 23, 2012.

On December 13, 2012, Dr. Greenberg sent TPMG a letter stating that plaintiff had given him the November 15, 2012 letter, that plaintiff's condition precluded her from work, and that he hoped to later return plaintiff to work with the condition that she be precluded from contact with her supervisor or be transferred to another job site. However, the note did not contain any information regarding plaintiff's functional workplace restrictions. This was the last doctor's note provided by plaintiff prior to her termination.

These undisputed facts show that plaintiff bore the responsibility for the breakdown in the interactive process. Moreover, they show that TPMG engaged in a good faith effort to engage with plaintiff in the interactive process in order to discern her limitations and potentially fashion a reasonable accommodation that would allow her to return to work. TPMG attempted to reach out

[5] Plaintiff's statement that she did not wish to engage in the interactive process is corroborated by the fact that she filed the complaint in the instant action on October 5, 2012. ECF No. 1.

to plaintiff and her doctors concerning the limitations caused by her disability numerous times in an attempt to obtain information regarding plaintiff's functional limitations, which was necessary for TPMG to evaluate whether it could provide plaintiff with a reasonable accommodation. The undisputed evidence makes it clear that neither plaintiff nor her doctors provided this information. Because TPMG was never able to obtain an adequate understanding of what action it should take, it cannot be held liable under the circumstances for a failure on its part to develop and propose reasonable accommodations for plaintiff. See Beck, 75 F.3d at 1136 ("Where the missing information is of the type that can only be provided by one of the parties, failure to provide the information may be the cause of the breakdown and the party withholding the information may be found to have obstructed the process."); 29 C.F.R. § 1630.2(o)(3) ("[The interactive] process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.").

Plaintiff argues that TPMG already had all the information regarding her limitations in October of 2011 when Dr. Hellman provided his initial letter. However, there is no evidence that plaintiff or her doctors provided information regarding her functional limitations at that time, or at any time between her initialization of the interactive process and her termination. Plaintiff's disability, which resulted from anxiety, depression, and other mental distress, made it essential that TPMG have information regarding plaintiff's limitations before it could have reasonably been expected to readily identify an appropriate accommodation for plaintiff because the nature of the disability did not obviously indicate what plaintiff's functional limitations might have been. The undisputed facts show that TPMG had only information that plaintiff was under her physicians' care, requested restrictions in the form of limited contact with her supervisor or relocation to another work site, and that her condition precluded her from returning to work if such accommodations could not be provided. TPMG was not required to speculate as to what a reasonable accommodation might be based on the little information it possessed. See Willis, 244 F.3d at 682 (quoting 42 U.S.C. § 12112(b)(5)(A)) ("The ADA protects a disabled person by prohibiting affected employers from 'not making reasonable accommodations to the *known* physical or mental limitations of an otherwise qualified [employee] with a disability . . . .'")

(emphasis added). Furthermore, TPMG's numerous requests to obtain information regarding plaintiff's limitations demonstrates that it acted in good faith to further the interactive process and determine whether a reasonable accommodation could be fashioned so plaintiff could return to work. Taylor, 184 F.3d at 317 ("[A]n employer cannot be faulted if after conferring with the employee to find possible accommodations, the employee then fails to supply information that the employer needs or does not answer the employer's request for more detailed proposals.").

Plaintiff also argues that a genuine issue of material fact exists as to whether her failure to provide TPMG with the requested information regarding her limitations makes her at fault for the breakdown because the evidence shows that plaintiff's condition continued to decline, such that by November of 2012, she was suffering from extreme confusion that caused her to not understand what she had to do to continue the process.[6] However, even if plaintiff's confusion limited her responsibility for the break down; it does not negate the fact that the undisputed evidence shows that defendant fulfilled its duty to engage in a timely, good faith interactive process with plaintiff under the circumstances. See Beck, 75 F.3d at 1137 ("Liability for failure to provide reasonable accommodations ensues only where the employer bears responsibility for the breakdown. But where . . . the employer does not obstruct the process, but instead makes reasonable efforts both to communicate with the employee and provide accommodations based on the information it possessed, ADA liability simply does not follow."); Taylor, 184 F.3d at 317 ("All the interactive process requires is that employers make a good-faith effort to seek accommodations.").

Finally, plaintiff contends that there is a genuine factual issue as to whether TPMG fulfilled its duty to engage in the process because the first two of Hiatt's letters sent in 2012 included ambiguous requests for more information that could be construed to mean that TPMG wanted plaintiff to provide additional information only "if [plaintiff's] situation had changed." (ECF No. 37 at 14.) However, even after TPMG began to send plaintiff letters with what plaintiff admits to be unambiguous requests for more information in August of 2012, plaintiff still failed to

[6] Again, the court is skeptical of this claim as plaintiff was clearly not so confused as to be incapable of filing a federal complaint to initiate this proceeding.

provide TPMG with the requested information. Accordingly, even if the first two letters contained conditional requests, they would not change who was liable for the breakdown because defendant continued to request the information and plaintiff failed to provide it.

Given the circumstances presented by the undisputed evidence, no reasonable juror could find that TPMG acted in bad faith in attempting to engage with plaintiff or that TPMG was the party that caused the process to break down. Accordingly, summary judgment will be granted with respect to plaintiff's third and fourth causes of action.

B. Intentional Infliction of Emotional Distress

Plaintiff asserts in her fifth cause of action that all defendants are liable for intentional infliction of emotional distress for their respective conduct in dealing with plaintiff during the events stemming from plaintiff's needle prick incident. In her opposition, plaintiff states that she bases her emotional distress claim on the following conduct: (1) "[d]efendants improperly inquired into plaintiff's medical appointments and revealed what plaintiff believed to be protected information at an attendance meeting"; (2) Nunes verbally warned plaintiff at an attendance meeting that plaintiff had attendance problems and that if those problems continued, plaintiff might be terminated; (3) defendants refused to provide plaintiff's disability insurance company with a required statement regarding the hours she had worked for TPMG; and (4) individual defendants falsely claimed that plaintiff was faking disability and encouraged TPMG to decline a grant of plaintiff's requested accommodations. (ECF No. 37 at 20.)

To prevail on a cause of action for intentional infliction of emotional distress under California law, a plaintiff must prove: (1) outrageous conduct by the defendant, (2) the defendant's intention of causing or reckless disregard of the probability of causing emotional distress, (3) the plaintiff's suffering severe or extreme emotional distress, and (4) actual and proximate causation of the emotional distress by the defendant's outrageous conduct. Cervantes v. J.C. Penney Co., 24 Cal.3d 579, 593 (1979). In order for a defendant's conduct to be considered "outrageous," such conduct must be so extreme as to "exceed[ ] the bounds of what is generally tolerated in a civilized society." Braunling v. Countrywide Home Loans Inc., 220 F.3d 1154, 1158 (9th Cir. 2000). "Conduct which exhibits mere rudeness and insensitivity does not

rise to the level required for a showing of intentional infliction of emotional distress." Id. Rather, the conduct should create a condition for the plaintiff that "no reasonable [person] in a civilized society should be expected to endure." Fletcher v. Western Nat'l Life Ins. Co., 10 Cal. App.3d 376, 397 (1970). "Whether a defendant's conduct can reasonably be found to be outrageous is a question of law that must initially be determined by the court; if reasonable persons may differ, it is for the jury to determine whether the conduct was, in fact, outrageous." Berkley v. Dowds, 152 Cal. App. 4th 518, 534 (2007) (citing Alcorn v. Anbro Engineering, Inc., 2 Cal.3d 493, 499 (1970)).

Furthermore, under California's Workers' Compensation Act, workers' compensation generally provides the exclusive remedy for emotional distress arising from the workplace. Cole v. Fair Oaks Fire Protection Dist., 43 Cal.3d 148, 160 (1987); Livitsanos v. Superior Court, 2 Cal. 4th 744, 756 (1992). However, an exception to this general rule exists when the employer's conduct "contravenes fundamental public policy . . . [or] exceeds the risks inherent in the employment relationship." Livitsanos, 2 Cal. 4th at 754. "Emotional distress caused by misconduct in employment relations involving . . . promotions, demotions, criticism of work practices, negotiations as to grievances, is [considered] a normal part of the employment environment. A cause of action for such a claim is barred by the exclusive remedy provisions of the workers' compensation law." Accardi v. Superior Court, 17 Cal. App. 4th 341, 352 (1993) (citing Cole, 43 Cal.3d at 160).

Here, defendants argue that all the conduct plaintiff points to in support of her emotional distress claim cannot reasonably be found to be outrageous as a matter of law. Defendants further contend that workers' compensation provides the exclusive remedy for this claim because all of the complained-of conduct arises from defendants' workplace actions. Plaintiff contends that summary judgment on this claim should be denied because a reasonable jury could find defendants' conduct sufficiently outrageous, plaintiff's emotional distress is non-compensable under the workers' compensation law, and there exists a genuine dispute as to whether defendants' conduct occurred as a normal part of the employment relationship.

With regard to the claim that defendants improperly inquired into plaintiff's medical appointments, the evidence shows that Nunes told plaintiff during an attendance meeting that she had contacted plaintiff's workers' compensation administrator and was told that plaintiff had gone to a doctor's appointment on July 20, 2011, rather than on July 21, 2011, as plaintiff had claimed. This does not amount to "outrageous" conduct as a matter of law. Plaintiff bases this claim only on the *belief* that the information Nunes obtained from plaintiff's doctor and revealed during this meeting was protected by law and that revealing the information in this manner was improper. There is no evidence in the record that this violated HIPAA or any other privacy law, that Nunes obtained and revealed other medical information about plaintiff, or that Nunes contacted plaintiff's doctor directly to obtain this information. Furthermore, Nunes' inquiry into this subject was in furtherance of obtaining information concerning plaintiff's attendance record and, thus, was workplace conduct that falls into the exclusivity provision of California's Worker's Compensation Act. See Accardi, 17 Cal. App. 4th at 352-53 (1993).

With respect to plaintiff's second claim of conduct, the evidence shows that during the September 20, 2011 follow up attendance meeting with plaintiff, Nunes gave plaintiff a verbal warning and made a statement that should plaintiff face attendance problems in the future, she might be terminated. Plaintiff claims that this conduct was outrageous because all of the absences discussed during this meeting were ultimately found to be protected absences. However, "conduct, including misconduct, relating to . . . criticism of work practices is usually considered a normal part of the employment environment and thus barred by the exclusivity provisions of California's worker's compensation law." Accardi, 17 Cal. App. 4th at 352-53. Therefore, a claim based on this conduct is barred as a matter of law. Furthermore, simple pleading of personnel mismanagement is insufficient to support an emotional distress claim, even if improper motivation is alleged. See Janken v. GM Hughes Electronics, 46 Cal. App. 4th 55, 80 (1996) ("Managing personnel is not outrageous conduct beyond the bounds of human decency . . .").

Plaintiff's third basis for her emotional distress claim, that defendants failed to complete and provide required forms to MetLife, plaintiff's disability insurance company, also lacks any evidentiary support. There is no evidence that defendant TPMG's representatives failed to

complete and send the forms to MetLife. In fact, the only evidence plaintiff cites to in support of her contention shows that MetLife received the requested information from defendants, including plaintiff's wage records. A letter dated November 29, 2012 sent to plaintiff from MetLife notes that TPMG sent MetLife documentation concerning plaintiff's pre-disability hours and hourly wages. (Meredith Declaration, Exh. 12.) Plaintiff appears to argue that her claim is based on the contention that the information TPMG supplied regarding plaintiff's hours was false and that TPMG failed to provide MetLife with updated information indicating that plaintiff worked an average of more than twenty hours per week. However, nothing in the record supports a contention that the information supplied to MetLife to TPMG was false or that TPMG's failure to provide MetLife with additional information concerning plaintiff's wages somehow amounted to extreme or outrageous conduct under the circumstances.

Finally, plaintiff argues that the individual defendants acted outrageously by falsely claiming that plaintiff was faking disability and encouraging TPMG to decline plaintiff's requested accommodations. The only evidence plaintiff provides in support of this claim is an email written on November 23, 2011 by Hanson to two other TPMG employees concerning one of plaintiff's requests for continued medical leave that includes the following statement: "Kaiser HAS to develop a way of dealing more effectively with these sorts of, what I consider to be bogus, time off notes." (Hanson Deposition, Exh. 13.) The undisputed evidence shows that this communication could not have had any effect on TPMG's decision to decline plaintiff's requested accommodations because Carretti had already informed plaintiff that TPMG had reviewed and declined her requests for accommodation prior to the date Hanson sent this email. Furthermore, even when the evidence is viewed in a light most favorable to plaintiff, a reasonable jury might find that Hanson's comment demonstrated, at most, rudeness and insensitivity on her part; it was not conduct so extreme as to "exceed[ ] the bounds of what is generally tolerated in a civilized society." Braunling, 220 F.3d at 1158. Summary judgment is appropriate on this claim.

C. Wrongful Termination Claim

Finally, plaintiff asserts in her eighth cause of action that defendants terminated her from her employment with TPMG in violation of public policy. Plaintiff bases this claim on

defendants' alleged violations of FEHA. Defendants argue that they should be granted summary judgment with respect to this claim because the claim is derivative of plaintiff's reasonable accommodation and interactive process claims under FEHA to which defendants are entitled to summary judgment.

"Under California common law, although 'an at-will employee may be terminated for no reason, or for an arbitrary or irrational reason, there can be no right to terminate for an unlawful reason or a purpose that contravenes fundamental public policy.'" Dep't of Fair Employment & Hous. v. Lucent Technologies, Inc., 642 F.3d 728, 748 (9th Cir. 2011) (quoting Silo v. CHW Med. Found., 27 Cal. 4th 1097, 1104 (2002)). "The elements for this tort are (1) the existence of a public policy and (2) a nexus between the public policy and an employee's termination." Lucent Technologies, Inc., 642 F.3d at 749 (citing Turner v. Anheuser-Busch, Inc., 7 Cal. 4th 1238 (1994)). Termination stemming from a violation of statutory law, such as the FEHA, may form the basis for a wrongful termination claim. See Silo, 27 Cal. 4th 1097.

"Where courts have granted summary judgment as to the plaintiff's FEHA claims, the courts have concluded that summary judgment is appropriate on the plaintiff's public policy claim." Stewart v. Boeing Co., 2013 WL 6839370, at *8 (C.D. Cal. Dec. 23, 2013); see Cavanaugh v. Unisource Woldwide, Inc., 2007 WL 915223, at *11 (E.D. Cal. Mar. 26, 2007) (granting summary judgment in favor of employer as to plaintiff's wrongful termination in violation of public policy claim, because it granted summary judgment in favor of employer on plaintiff's age discrimination claim).

Defendants correctly assert that plaintiff's claim for wrongful termination in violation of public policy is derivative of her statutory claims under FEHA. See Nielsen v. Trofholz Technologies, Inc., 750 F. Supp. 2d 1157, 1171 (E.D. Cal. 2010) (citing Jennings v. Marralle, 8 Cal. 4th 121, 135-36 (1994)), aff'd, 470 F. App'x 647 (9th Cir. 2012). Because the Court grants summary judgment on plaintiff's claims asserted under FEHA, summary judgment should be similarly granted on plaintiff's wrongful termination claim. Accordingly, the court will grant defendant's motion with respect to plaintiff's wrongful termination claim.

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IV. Conclusion

For the reasons discussed above, IT IS HEREBY ORDERED that:

1. Defendants' motion for summary judgment (ECF No. 34) is granted.

2. Judgment is entered for defendants Ronald Carretti, Tracy Nunes, Shirley Hanson, and The Permanente Medical Group, Inc.

3. The Clerk of Court is directed to close this case and vacate all dates.

Dated: February 10, 2015

CAROLYN K. DELANEY
UNITED STATES MAGISTRATE JUDGE

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