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

FAIUPU MYERS,

No. 2:13-CV-2209-CMK

Plaintiff,

vs.

MEMORANDUM OPINION AND ORDER

CHECK SMART FINANCIAL, LLC,

Defendant.

_____ /

Plaintiff, who is represented by retained counsel, brings this civil action for workplace discrimination.¹ Pursuant to the written consent of all parties, this case is before the undersigned as the presiding judge for all purposes, including entry of final judgment. See 28 U.S.C. § 636(c). Following the Ninth Circuit Court of Appeals’ July 3, 2017, memorandum opinion concluding that plaintiff’s claims are timely and exhausted, the matter is before the court on the remainder of defendant’s motion for summary judgment (Doc. 28). The parties appeared before the undersigned on January 10, 2018, at 10:00 a.m., and following oral argument the matter was submitted.

¹ The action was removed to this court from the Butte County Superior Court based on diversity. See 28 U.S.C. § 1441(b).

1 **I. BACKGROUND**

2 This action proceeds on plaintiff’s first amended complaint (Doc. 13) against
3 defendant Checksmart Financial, LLC. Plaintiff asserts the following claims:

- 4 Claim 1 Wrongful Termination in Violation of Public Policy
5 Claim 2 Breach of Implied Covenant of Good Faith and Fair Dealing
6 Claim 3 Intentional Infliction of Emotional Distress
7 Claim 4 Disability Discrimination in Violation of California Government
8 Code § 12940.

9 Plaintiff’s claims were initially filed in state court and later removed by defendant under this
10 court’s diversity jurisdiction (plaintiff is a California resident and defendant is a Delaware
11 corporation).

12 **A. Plaintiff’s Factual Allegations**

13 Plaintiff states that she began working for defendant on March 16, 2007, as a
14 teller/cashier at defendant’s Butte County location. Plaintiff states that her employment was
15 pursuant to an “oral employment contract” and that, at all relevant times, she performed her
16 duties and obligations under that agreement. Plaintiff alleges that she was terminated on April 3,
17 2012 because of her pregnancy. According to plaintiff, her termination violates public policy as
18 well as California law.

19 **B. The Parties’ Evidence**

20 According to defendant, the following facts are undisputed:

- 21 1. Plaintiff was employed as a teller/cashier in 2007.
22 2. Plaintiff was an “at-will” employee of defendant and plaintiff’s wage
23 statements and W-2s identified defendant as her employer.
24 3. Plaintiff received defendant’s employee handbook which stated that
25 defendant would “consider requests for reasonable accommodations for
26 disabling conditions related to pregnancy, childbirth, or related medical
conditions if requested” and that the employee “must provide a
certification from her medical provider setting forth her medical
restrictions which includes the dates . . . the restrictions will be in place.”

- 1 4. At all relevant times, defendant maintained an attendance policy providing
2 that employees who fail to call in and report for work will be considered to
3 have abandoned their employment.
- 4 5. In early 2012, while an employee of defendant, plaintiff requested leave
5 related to her pregnancy and anticipated childbirth.
- 6 6. Plaintiff failed to include the required medical certification with her
7 request.
- 8 7. Defendant sent plaintiff a letter on February 17, 2012, asking plaintiff to
9 submit a medical certification by March 12, 2012, warning plaintiff that
10 the failure to provide the medical certification could result in denial of the
11 requested leave.
- 12 8. Defendant sent plaintiff a second letter on March 13, 2012, informing
13 plaintiff that her request for leave had been denied because she did not
14 provide the medical certification, but that the denial could be reconsidered
15 if plaintiff provided the medical certification by March 26, 2012, after
16 which time plaintiff's request for leave would be considered withdrawn.
- 17 9. Defendant sent plaintiff a third letter on March 28, 2012, making a final
18 request for the medical certification and informing plaintiff that the
19 certification is "necessary to approve your leave of absence and secure
20 your position with the company."
- 21 10. On April 4, 2012, defendant informed plaintiff that her by-then prolonged
22 absence from work was considered unexcused due to her failure to provide
23 the medical certification supporting her leave request, and that her
24 employment had been terminated pursuant to defendant's attendance
25 policy.
- 26 11. On April 4, 2012, defendant also informed plaintiff that she could reapply
for her position.
12. Plaintiff reapplied but was considered ineligible for re-hire because she
refused to repay a debt she owed defendant.

20 Defendant's statement of undisputed facts is based on the declaration of Pagle Helterbrand,
21 defendant's Vice President for Human Resources, and exhibits thereto, as well as testimony from
22 plaintiff's August 5, 2014, deposition. Relevant exhibits from plaintiff's deposition include the
23 following:

- | | | |
|----|-----------|--|
| 24 | Exhibit 4 | Acknowledgment of receipt of employee handbook signed by
25 plaintiff on June 6, 2011. |
| 26 | Exhibit 7 | February 17, 2012, letter to plaintiff from Ashley Rymer,
defendant's Benefits Administrator, instructing plaintiff to return a |

1 completed Certification of Health Care Provider form by March
2 12, 2012. The letter cautioned: "Failure to provide certification
3 may result in denial of continuation of leave."

3 Exhibit 10 March 13, 2012, letter to plaintiff from Ashley Rymer regarding
4 non-receipt of a completed Certification of Health Care Provider
5 form. Plaintiff was advised that her leave had been denied and that
6 "the company absence policies will apply for any days you have or
7 will miss." Plaintiff was also advised that her leave request could
8 be re-opened if she returned the completed Certification of Health
9 Care Provider form by March 26, 2012. Plaintiff was informed
10 that failure to comply with this deadline would be construed as
11 withdrawal of her leave request.

8 Exhibit 11 March 28, 2012, letter to plaintiff from Ashley Rymer, sent via
9 Federal Express delivery, regarding the absent Certification of
10 Health Care Provider form. Plaintiff was given one final deadline
11 of April 2, 2012, to return the completed form. Plaintiff was again
12 cautioned that "[t]he company's attendance policy will be applied
13 to your absences."

12 According to plaintiff, the following facts are undisputed:

- 13 1. Plaintiff's last day at work before her pregnancy leave was January 20,
14 2012.
- 15 2. Plaintiff provided her employer the "form for disability benefits" on
16 January 25, 2012.
- 17 3. "After her hospital visit on January 20, 2012" plaintiff provided her
18 employer "papers from the emergency room and a doctor's note confining
19 Plaintiff to bedrest."
- 20 4. Plaintiff gave birth on March 4, 2012.
- 21 5. On April 4, 2012, plaintiff contacted her employer and was told she was
22 terminated.
- 23 6. Plaintiff was told she could be re-hired if she paid \$400 she owed on the
24 company credit card.

22 According to plaintiff, the following facts are in dispute:

- 23 1. Plaintiff disputes defendant's contention that, on February 17, 2012,
24 defendant sent her a letter asking plaintiff to return a completed medical
25 certification by March 12, 2012.
- 26 2. Plaintiff disputes defendant's contention that she did not return a
completed medical certification.

1 depositions, answers to interrogatories, and admissions on file, together
2 with the affidavits, if any,” which it believes demonstrate the absence of a
genuine issue of material fact.

3 Id., at 323 (quoting former Fed. R. Civ. P. 56(c)); see also Fed. R. Civ. P.
4 56(c)(1).

5 If the moving party meets its initial responsibility, the burden then shifts to the
6 opposing party to establish that a genuine issue as to any material fact actually does exist. See
7 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). In attempting to
8 establish the existence of this factual dispute, the opposing party may not rely upon the
9 allegations or denials of its pleadings but is required to tender evidence of specific facts in the
10 form of affidavits, and/or admissible discovery material, in support of its contention that the
11 dispute exists. See Fed. R. Civ. P. 56(c)(1); see also Matsushita, 475 U.S. at 586 n.11. The
12 opposing party must demonstrate that the fact in contention is material, i.e., a fact that might
13 affect the outcome of the suit under the governing law, Anderson v. Liberty Lobby, Inc., 477 U.S.
14 242, 248 (1986); T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass’n, 809 F.2d 626, 630
15 (9th Cir. 1987), and that the dispute is genuine, i.e., the evidence is such that a reasonable jury
16 could return a verdict for the nonmoving party, Wool v. Tandem Computers, Inc., 818 F.2d 1433,
17 1436 (9th Cir. 1987). To demonstrate that an issue is genuine, the opposing party “must do more
18 than simply show that there is some metaphysical doubt as to the material facts Where the
19 record taken as a whole could not lead a rational trier of fact to find for the non-moving party,
20 there is no ‘genuine issue for trial.’” Matsushita, 475 U.S. at 587 (citation omitted). It is
21 sufficient that “the claimed factual dispute be shown to require a trier of fact to resolve the
22 parties’ differing versions of the truth at trial.” T.W. Elec. Serv., 809 F.2d at 631.

23 In resolving the summary judgment motion, the court examines the pleadings,
24 depositions, answers to interrogatories, and admissions on file, together with the affidavits, if
25 any. See Fed. R. Civ. P. 56(c). The evidence of the opposing party is to be believed, see
26 Anderson, 477 U.S. at 255, and all reasonable inferences that may be drawn from the facts placed

1 before the court must be drawn in favor of the opposing party, see Matsushita, 475 U.S. at 587.
2 Nevertheless, inferences are not drawn out of the air, and it is the opposing party’s obligation to
3 produce a factual predicate from which the inference may be drawn. See Richards v. Nielsen
4 Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), aff’d, 810 F.2d 898, 902 (9th Cir.
5 1987). Ultimately, “[b]efore the evidence is left to the jury, there is a preliminary question for
6 the judge, not whether there is literally no evidence, but whether there is any upon which a jury
7 could properly proceed to find a verdict for the party producing it, upon whom the onus of proof
8 is imposed.” Anderson, 477 U.S. at 251.

10 III. DISCUSSION

11 Defendant argues that summary judgment in its favor is appropriate because
12 plaintiff’s termination was based on a legitimate non-discriminatory reason. See Guz v. Bechtel
13 National, Inc., 24 Cal. 4th 317 (2000); Green v. State of California, 42 Cal. 4th 254 (2007).
14 Specifically, defendant argues that plaintiff failed to provide information necessary to excuse her
15 absences and that she was fired under the company’s attendance policy.

16 When the plaintiff in an employment discrimination case makes a prima facie case
17 of discrimination, the burden shifts to the employer to produce evidence that its action was taken
18 for a legitimate non-discriminatory reason. See Guz, 24 Cal. 4th at 354-56. If the employer
19 meets this burden, the burden shifts once again back to the plaintiff to show that the employer’s
20 reason was pretext for discrimination. See Horn v. Cushman & Wakefield Western, Inc., 72 Cal.
21 App. 4th 798, 807 (1999); see also Guz, 24 Cal. 4th at 360. The plaintiff meets this burden with
22 evidence that shows weaknesses, implausibilities, inconsistencies, or contradictions in the
23 employer’s explanation for its action. See Morgan v. Regents of the University of California, 88
24 Cal. App. 4th 52, 72 (2000); see also Dep’t of Fair Employment and Housing v. Lucent
25 Technologies, 642 F.3d 728, 746 (9th Cir. 2011) (citing Morgan). Where evidence of pretext is
26 circumstantial and not direct, the plaintiff must provide specific and substantial facts to create a

1 triable issue of pretext. See Godwin v. Hunt Wesson, Inc., 150 F.3d 1217, 1222 (9th Cir. 1998).

2 California law permits employers to require written medical certification as a
3 condition to granting pregnancy leave. See 2 Cal. Code Reg. § 11050(b); see also Cal. Code
4 Reg. § 11050(c)(1). In this case, plaintiff does not deny that she failed to provide the
5 Certification of Health Care Provider form completed by her doctor, despite numerous letters
6 from defendant. According to defendant, plaintiff's request for pregnancy leave was denied for
7 this reason and she was terminated based on unexcused absences. Defendant has rebutted any
8 presumption of discrimination by providing evidence of a legitimate non-discriminatory reason –
9 in this case violation of defendant's attendance policy – for plaintiff's termination. The burden
10 shifts to plaintiff to provide evidence of pretext.

11 In opposition to defendant's motion, plaintiff contends:

12 Here in Myers, the Defendants do not make a claim that it did not
13 know of Plaintiff's pregnancy nor that it did not receive any medical
14 documents from the Plaintiff. It simply is complaining that the Plaintiff
15 did not comply with the Defendants own requirements for documentation.

15 Plaintiff argues:

16 Since there is a claim by the Defendants that the Plaintiff provided
17 them with inadequate paperwork and a claim by the Plaintiff that she
18 provided paperwork consistent with previous pregnancies in which she
19 complied with her employer's requirements by giving them a note from
20 her doctor and medical reports was sufficient she has presented an issue of
21 fact for a trier of fact.

20 Plaintiff's argument is not supported by admissible evidence. Plaintiff has not
21 provided the court with copies of the doctor's note or medical report she claims she provided to
22 defendant on January 25, 2012, following her hospital stay on January 20, 2012, nor has plaintiff
23 submitted any evidence of "paperwork consistent with previous pregnancies" submitted in
24 compliance with defendant's requirements. In fact, there is no evidence that plaintiff was
25 employed by defendant during any prior pregnancy. Plaintiff has simply provided no admissible
26 evidence to undermine defendant's evidence showing that plaintiff was terminated for unexcused

1 absences.

2 Plaintiff cites to portions of her deposition as evidence that defendant knew about
3 her doctor's requirement of bedrest and, by implication, her termination for failure to provide the
4 requested Certification of Health Care Provider form was a pretext. Specifically, she cites the
5 following testimony:

6 Q. Okay. Did you give any of it, the ER note or the doctor's
7 note that you receive on that Monday [January 20, 2012], did you give
8 either of those to Veronica?

8 A. Yes.

9 Q. Okay. Which ones did you give to her?

10 A. Both, the one from the emergency and then the one from
11 the doctor's note.

12 Q. And what did the doctor's note say?

13 A. Releasing me for bedrest.

14 Q. And do you recall for how long?

15 A. Until after I had the baby.

16 * * *

17 Q. Okay. And when – and you gave that note, the light duty
18 note, to Veronica?

18 A. Yes.

19 Q. Okay. And did you have any discussions with Veronica
20 about that doctor's release?

21 A. She said that she was going to turn it in showing that I'm
22 released from the doctor to come back to work and she'll give me a call.

23 This evidence is inadmissible hearsay to the extent plaintiff is offering her testimony as to the
24 contents of the emergency room notes, doctor's note, or statements made by Veronica. See Fed.
25 Rules of Evid. 801(c), 802. Plaintiff has offered no admissible evidence that she ever provided
26 any medical information or notes to defendant, nor has she provided any admissible evidence of
the contents of such medical information or notes.

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2. Plaintiff's motion to modify the scheduling order (Doc. 60) is denied as moot; and

3. The Clerk of the Court is directed to enter judgment in favor of defendant and close this file.

DATED: March 13, 2018



CRAIG M. KELLISON
UNITED STATES MAGISTRATE JUDGE