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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SEMHAL SIRAJ,

Plaintiff,

v.

BAYER HEALTHCARE LLC,

Defendant.

No. C 09-00233 SI

**ORDER DENYING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT**

The Court held a hearing on defendant's motion for summary judgment on February 26, 2010. For the reasons set forth below, the Court hereby DENIES defendant's motion.

BACKGROUND

Plaintiff Semhal Siraj filed a complaint against defendant Bayer HealthCare LLC in Alameda County Superior Court on December 18, 2008. The case was removed to this Court on January 20, 2009. Subject matter jurisdiction is based on diversity of citizenship and amount in controversy pursuant to 28 U.S.C. § 1332(a). Plaintiff alleges the following causes of action: (1) disability discrimination via termination in violation of the California Fair Employment and Housing Act (FEHA), Cal. Gov't Code § 12940(a), (2) failure to provide reasonable accommodations in violation of FEHA, Cal. Gov't Code § 12940(m), (3) failure to engage in an interactive process in violation of FEHA, Cal. Gov't Code § 12940(n), and (4) wrongful termination in violation of public policy. Defendant has moved for summary judgment as to all claims.

Plaintiff Semhal Siraj was a Production Technician in the Berkeley, CA facility of defendant Bayer HealthCare LLC. The Berkeley facility is responsible for biotechnology and biological products research, development, and manufacturing. Plaintiff started working in the Media/Fermentation

1 department (“Building 55”) at the Berkeley facility in May 2005. The Media/Fermentation department
2 manufactures blood products for hemophiliacs, and plaintiff’s general responsibility was to take care
3 of the fermentation process to keep the cells alive and avoid contamination. The department operates
4 on a 24-hour production schedule, with employees working 10.5 hour shifts in teams of 2 or 3. Siraj
5 Depo., Docket No. 46, Ex. A at 72:1.

6 On February 25, 2007, plaintiff injured her right hand while trying to hang a harvest bag at work.
7 The injury was diagnosed by Dr. Douglas Chin as “radial tunnel syndrome,” which presented as
8 cramping and fatigue in her right forearm. Plaintiff was able to return to work in March 2007, but was
9 limited to some extent by a set of physical restrictions prescribed by Dr. Chin. At that time, the
10 restrictions were “no repetitive, sustained or forceful use of the right hand.” Royle Depo., Docket No.
11 46, Ex. C at 52:25. Plaintiff discussed the restrictions with her supervisors, and was reminded on at least
12 one occasion that she should not exceed those restrictions. Siraj Depo. at 75:13. To stay within her
13 restrictions, plaintiff would ask her shift partner(s) for help with any task that “require[d] lifting or
14 pulling heavy stuff.” *Id.* at 72:21. From March to October 2007, plaintiff continued to work as a
15 Technician in Building 55. Defendant contends that from the time the medical restrictions were
16 implemented, plaintiff was not able to perform several of her essential job duties, but that defendant
17 temporarily allowed plaintiff’s two coworkers to perform those tasks.

18 In October 2007, to accommodate a labor shortage, defendant transferred a number of employees
19 out of the Media/Fermentation department (Building 55). As a result, the Building 55 shifts were
20 downsized from three operators to two operators per shift. From October 2007 to January 2008,
21 Building 55 was shut down, and plaintiff was able to perform paperwork within her restrictions during
22 that time. When production resumed in January 2008, plaintiff was assigned to fill-in for Rachel
23 Rodriguez (5:00 a.m. - 3:30 p.m. shift), who had gone on maternity leave. Plaintiff worked with one
24 other employee, Anteneh Haile, during that shift. Haile states that “[i]t is customary that those persons
25 working the same shift work together to split up the standard work in order to ensure that all the
26 processes for the day are completed.” Haile Decl., Docket No. 51 at 2. Haile also noted that “[plaintiff]

1 and I worked as a team to accomplish those tasks listed on the Standard Work form on a daily basis and
2 would between the two of us decide how to split up the work.” *Id.*

3 In March 2008, plaintiff’s physician changed the status of her work restrictions from temporary
4 to permanent. At the behest of Bayer management, plaintiff’s manager Saulye Sherrell conducted an
5 assessment of the department’s ability to accommodate plaintiff on a permanent basis. Sherrell Decl.
6 ¶ 7. On April 18, Sherrell submitted her follow-up assessment to Bayer Occupational Health,
7 concluding that Building 55 could no longer accommodate plaintiff’s work restrictions. *Id.* ¶ 8.
8 According to Sherrell, the reasons that defendant was no longer able to accommodate plaintiff included:
9 the reduction of operators working from 3 per shift to 2 per shift, the production shutdown during which
10 plaintiff was able to perform paperwork, and the change in status of the restrictions from temporary to
11 permanent. *Id.*

12 In May 2008, defendant asked for and received a more specific description of plaintiff’s
13 restrictions, which included: (1) no cable-tying for longer than 2 minutes continuously, followed by a
14 minimum of 5 minutes rest and/or alternate work activities, (2) no pipetting for longer than 20 minutes
15 continuously, followed by a minimum of 30 minutes of rest and/or alternate work activities, (3) no
16 lifting more than 5 pounds with the unassisted right hand, (4) no repetitive use of the right hand for
17 greater than 20 minutes continuously, followed by a minimum of 30 minutes of rest and/or alternate
18 work activities. Larios Decl., Docket No. 44 at 1.

19 Plaintiff’s expert, Jeff Malmuth, is of the opinion that plaintiff could still perform many of the
20 tasks associated with her position. Docket No. 62, Ex. A. Malmuth stated that plaintiff could lift items
21 significantly heavier than 10 pounds despite her restrictions by using primarily her left hand. *Id.* at
22 74:11. Furthermore, Malmuth believes that plaintiff could even perform the job functions that required
23 repetitive use of the right hand, as long as she did not exceed the 20 minute limit without taking a break
24 or switching activities. *Id.* at 83:18. Defendant objects to much of Malmuth’s testimony, saying that
25 it is “conclusory and defies common sense.” Docket No. 63 at 3.

26 Following an Accommodations Review Meeting on May 15, 2008, Sherrell asked two of
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1 plaintiff's supervisors, Winsor Larios and Noel Reyes, to conduct a written analysis of the physical
2 demands of standard work for Media/Fermentation shifts. Sherrell Declaration ¶ 11; Exhibit G. On
3 May 20, 2008, plaintiff was called into a meeting with representatives from Bayer Human Resources
4 and Bayer Occupational Health, where she was told that her permanent restrictions could not be
5 accommodated. Plaintiff's Opposition at 8. Plaintiff was asked to turn in her badge and keys at this
6 time, and was placed on medical leave. *Id.* On May 29, 2009, Siraj exceeded the maximum leave
7 provisions under the governing CBA. Russey Decl., Docket No. 43. Bayer technically continues to
8 employ plaintiff, although she does not receive any monetary compensation or benefits. *Id.*

10 LEGAL STANDARD

11 Summary judgment is proper “if the pleadings, depositions, answers to interrogatories, and
12 admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any
13 material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P.
14 56(c). The moving party bears the initial burden of demonstrating the absence of a genuine issue of
15 material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The moving party, however, has
16 no burden to negate or disprove matters on which the non-moving party will have the burden of proof
17 at trial. The moving party need only demonstrate to the Court that there is an absence of evidence to
18 support the non-moving party's case. *See Id.* at 325.

19 The burden then shifts to the non-moving party to “set out ‘specific facts showing a genuine
20 issue for trial.’” *Id.* at 324 (quoting Fed. R. Civ. P. 56(e)). To carry this burden, the non-moving party
21 must “do more than simply show that there is some metaphysical doubt as to the material facts.”
22 *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). “The mere existence
23 of a scintilla of evidence . . . will be insufficient; there must be evidence on which the jury could
24 reasonably find for the [non-moving party].” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

25 In deciding a summary judgment motion, the evidence is viewed in the light most favorable to
26 the non-moving party, and all justifiable inferences are to be drawn in its favor. *Id.* at 255. “Credibility
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1 determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts
2 are jury functions, not those of a judge . . . ruling on a motion for summary judgment.” *Id.* However,
3 conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues
4 of fact and defeat summary judgment. *Thornhill Publ'g Co., Inc. v. GTE Corp.*, 594 F.2d 730, 738 (9th
5 Cir. 1979).

7 **DISCUSSION**

8 Although the parties treat plaintiff’s claims separately, the substance of the first three claims
9 overlap to a significant degree. The first cause of action alleges that plaintiff was discriminated against
10 based on her injury because she was placed on medical leave when she could in fact perform all of her
11 essential job functions. The defense to the discrimination claim is that plaintiff was “unable to perform
12 her essential duties even with reasonable accommodations.” Cal. Gov’t Code § 12940(a)(1). The
13 second cause of action alleges that defendant failed to accommodate plaintiff because although she
14 could complete all required tasks with the help of a shift partner, Bayer denied her that opportunity. The
15 third cause of action alleges that defendant failed to engage in the interactive process potential
16 accommodations with plaintiff. The central issue in this case is whether it was permissible for defendant
17 to place plaintiff on permanent leave because medical restrictions rendered her unable to complete every
18 job task *by herself*, despite the fact that she and her shift partner were able to complete the tasks *as a*
19 *team*.

21 **I. Disability Discrimination**

22 Plaintiff claims that defendant’s act of placing her on medical leave constituted disability
23 discrimination in violation of the California Fair Employment and Housing Act (FEHA). To prove
24 disability discrimination, plaintiff needs to demonstrate that defendant “impermissibly discriminated
25 because plaintiff was able to do the job with or without reasonable accommodation.” *Green v. State of*
26 *Calif.*, 165 P.3d 118, 123 (Cal. 2007). Under the FEHA, it is plaintiff’s initial burden to demonstrate

1 that “he or she is a qualified individual under the FEHA (i.e., that he or she can perform the essential
2 functions of the job with or without reasonable accommodation).” *Id.* at 121. Disability discrimination
3 cannot be shown if the plaintiff was “unable to perform . . . her essential duties even with reasonable
4 accommodations, or [could not] perform those duties in a manner that would not endanger . . . her health
5 or safety or the health or safety of others even with reasonable accommodations.” Cal. Gov. Code §
6 12940(a)(1).

7 “‘Essential functions’ means the fundamental job duties of the employment position the
8 individual with a disability holds or desires,” but “does not include the marginal functions of the
9 position.” Cal. Gov. Code § 12926(f). Evidence relevant to whether a particular function is essential
10 includes, but is not limited to: the employer’s judgment as to which functions are essential, written job
11 descriptions, the amount of time spent on the job performing the function, the consequences of not
12 requiring the incumbent to perform the function, terms of the collective bargaining agreement, work
13 experiences of past incumbents, and the current work experience of incumbents in similar jobs. Cal.
14 Gov. Code § 12926(f)(2)(A-G).

15 Defendant argues that the essential job responsibilities of a Production Technician are clearly
16 delineated, and that plaintiff was unable to fulfill those duties. Defendant asserts that the standard work
17 forms for Building 55, which list all of the tasks that must be completed during a given shift, constitutes
18 a comprehensive list of plaintiff’s essential duties. However, in support of this assertion defendant only
19 offers the circular argument that “all tasks listed on the Standard Work forms are essential duties for all
20 Technicians . . . because the reason for the Production Technician position is to perform whichever
21 Standard Work tasks need to be completed while the Technician is on duty.” Defendant’s Motion at 16.
22 Plaintiff readily admitted that her restrictions often forced her to seek assistance from her partner, Mr.
23 Haile, especially in tasks that involved manipulating heavy containers. Defendant argues that once
24 plaintiff stopped working with Mr. Haile, “there [was] no guarantee that [plaintiff’s] new coworker
25 would have been equally willing to do [plaintiff’s] work . . . [t]here is certainly no reason why the
26 coworker would be *required* to do so.” *Id.* at 18. Based on that reasoning, defendant concludes that “it

1 was essential that Siraj be able to perform *all* the standard work tasks herself, not just some of them.”

2 *Id.*

3 It is undisputed that plaintiff was unable to perform some of the tasks associated with her
4 assigned shift. This fact, however, does not necessarily compel a finding that plaintiff was unable to
5 perform her *essential* duties. Defendant devised the work schedule for its employees, and chose to have
6 them work in teams of three (and later two in response to a labor shortage). The evidence before the
7 Court at this time does not indicate that there was any required manner in which the employees in
8 Building 55 were supposed to divide the labor. Plaintiff and Mr. Haile were seemingly able to devise
9 an arrangement in which all of the tasks were completed. Defendant refers to this division of labor as
10 creating a “light-duty” position for plaintiff, and frames that position as a means for her to avoid
11 performing the essential duties of the position. It is possible, however, that plaintiff compensated for
12 her inability to lift heavy objects by performing a greater number of tasks that would not violate her
13 medical restrictions. The Court finds that there is a triable issue of fact as to what the essential functions
14 of plaintiff’s job actually were, and whether she was able to perform those functions.

15 Defendant also argues that the testimony offered by plaintiff’s expert Jeff Malmuth is “absurd,”
16 because he states that plaintiff could perform duties that required her to lift objects weighing greater than
17 ten pounds.¹ Defendant’s Reply at 4. Defendant asserts that because the restrictions rendered plaintiff
18 unable to lift more than five pounds with the unassisted right hand, she would be unable to lift more than
19 ten pounds using both hands. The Court does not agree with defendant’s logic. While it is certainly
20 possible to pick up a ten pound object using each hand equally, it is also possible to pick up that object
21 using one hand, or using primarily one hand and the other to balance. Malmuth said that plaintiff was
22 able lift, within her restrictions, items that ranged in weight from 3.35 to 12.35 kilograms (7.4 to 27.2

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25 ¹ Defendant objects to Malmuth’s statements, arguing that they are conclusory and defy
26 common sense. Docket No. 63. The Court finds that these contentions go to the weight rather than
27 the admissibility of the evidence, and can be contested during cross-examination. The objections are
28 therefore overruled. Defendant also raises objections to plaintiff’s characterization of certain facts,
which are overruled as well.

1 pounds). Malmuth Report, Docket No. 46, Ex. D at 60. If lifting items in that range was an essential
2 function of plaintiff's job, there is a triable issue of fact as to whether plaintiff could lift them without
3 violating her medical restrictions.

4 5 **II. Failure to Engage in the Interactive Process and Failure to Accommodate**

6 Plaintiff alleges that defendant violated the FEHA by failing to engage in an interactive process
7 with plaintiff to accommodate her disability. Section 12940 provides, in relevant part, that it is unlawful
8 for an employer "to fail to engage in a timely, good faith, interactive process with the employee . . . to
9 determine effective reasonable accommodations, if any, in response to a request for reasonable
10 accommodation by an employee . . . with a known physical or mental disability or known medical
11 condition." See Cal. Gov. Code § 12940(n). An "employer cannot prevail on summary judgment on
12 a claim of failure to reasonably accommodate unless it establishes through undisputed facts that (1)
13 reasonable accommodation was offered and refused; (2) there simply was no vacant position within the
14 employer's organization for which the disabled employee was qualified and which the disabled
15 employee was capable of performing with or without accommodation; or (3) the employer did
16 everything in its power to find a reasonable accommodation, but the informal interactive process broke
17 down because the employee failed to engage in discussions in good faith." *Jensen v. Wells Fargo Bank*,
18 102 Cal. Rptr. 2d 55, 68 (Cal. App. 2000).

19 Defendant first contends that it had no duty to create a "light-duty" position for plaintiff on a
20 permanent basis. "[A]n employer has no duty . . . to accommodate a disabled employee by making a
21 temporary accommodation permanent if doing so would require the employer to create a new position
22 just for the employee." *Raine v. City of Burbank*, 37 Cal. Rptr. 3d 899, 908 (Cal. App. 2006). Plaintiff
23 argues that she was never performing a "light-duty" position, and was therefore not requesting that
24 defendant create a permanent version. The accommodation requested by plaintiff was to be allowed to
25 continue her old job as a Technician, not to be given another position. The differences between the two
26 parties on this point again stem from the question of whether plaintiff was able to perform the essential
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1 functions of her job within the medical restrictions, which has been addressed above.

2 Defendant also argues that plaintiff's claims for failure to accommodate must be dismissed
3 because "reasonable accommodation was offered and refused." *Jensen v. Wells Fargo Bank*, 102 Cal.
4 Rptr. at 68. A reasonable accommodation may include "job restructuring, reassignment to a vacant
5 position, part-time or modified work schedules, acquisition or modification of equipment or devices,
6 adjustment or modification of examinations, training materials or policies . . . and other similar actions."
7 *Watkins v. Ameripride Servs.*, 375 F.3d 821, 828 (9th Cir. 2004) (citing Cal. Code Regs. tit. 2, §
8 7293.9(a)(2)). A Bayer representative left a phone message for plaintiff shortly after she was placed on
9 leave, offering plaintiff a chance to apply for a position with the Conformance division. Plaintiff did
10 not return that call, citing the fact that she did not want the position because it was not covered by her
11 union's collective bargaining agreement, and she would thus lose her seniority and benefits. Plaintiff
12 also notes that she was not actually offered the position, but was merely offered the opportunity to
13 apply. Plaintiff also states that the open position with Conformance was awarded to a former
14 Supervisor, and other employees with the same background as plaintiff were passed over. Plaintiff
15 interprets these facts as proof that she never had a chance to obtain the Conformance position.
16 Defendant counters that plaintiff would have been seriously considered for the position, but never she
17 never gave the company a chance because she failed to return the call. Defendant also points out that
18 the position with Conformance was actually more highly paid than her previous job, and therefore would
19 have constituted a reasonable accommodation even though it was non-union. The Court finds that there
20 is a disputed issue over whether giving plaintiff the option to apply for a position with Conformance
21 constitutes a "reasonable accommodation [that] was offered and refused." *Jensen*, Cal. Rptr. 102 2d at
22 68.

23 Defendant also moves for summary judgment on plaintiff's claim that defendant failed to engage
24 in the interactive process. Defendant supports its position with several facts, including: plaintiff's
25 supervisors discussed the medical restrictions with her, at least some of those supervisors reminded her
26 to stay within the restrictions, and representatives contacted her about the opening in the Conformance
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1 division. Plaintiff argues that defendant only discussed potential accommodations internally, and that
2 “she never once sat down with anyone from Bayer to accommodate those restrictions.” Plaintiff’s
3 Opposition at 23. Whether these interactions constitute a failure “to engage in a timely, good faith,
4 interactive process with the employee” is not clear, and summary judgment on the issue at this stage
5 would therefore be inappropriate.

6 The Court finds that there are disputed issues as to whether plaintiff’s disability could reasonably
7 have been accommodated, the degree to which defendant engaged in an interactive process with
8 plaintiff, and whether such a process could have been fruitful.

9 10 **III. Wrongful Termination**

11 Defendant argues that plaintiff’s wrongful termination claim fails because plaintiff cannot
12 establish that defendant violated the FEHA. As discussed above, the Court finds that there are triable
13 issues on plaintiff’s FEHA claim.

14 Defendant also contends that plaintiff cannot maintain a wrongful termination claim because she
15 was not actually terminated as an employee. Instead, “she remains on medical leave of absence until
16 she is able to perform the essential functions of her position.” Defendant’s Reply at 14. Plaintiff
17 contends that placement on medical leave of absence is “constructive termination,” which traditionally
18 requires a showing that “the employer either intentionally created or knowingly permitted working
19 conditions that were so intolerable or aggravated at the time of the employee's resignation that a
20 reasonable employer would realize that a reasonable person in the employee's position would be
21 compelled to resign.” *Turner v. Anheuser-Busch, Inc.*, 876 P.2d 1022, 1029 (Cal. 1994). At the hearing,
22 the parties clarified that plaintiff is not receiving any monetary compensation or benefits, even though
23 she is still technically employed by defendant. Rather, plaintiff remains an employee as a technicality,
24 so that if her medical restrictions were to be lifted she could be reinstated into her previously held
25 position. Although plaintiff did not technically resign, she was asked to turn in her keys and badge, and
26 no longer receives payment of any kind. Whether this arrangement constitutes constructive termination
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1 is unclear, and summary judgment is therefore denied.

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CONCLUSION

4 For the foregoing reasons, the Court hereby DENIES defendant's motion for summary judgment.
5 (Docket No. 42).

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IT IS SO ORDERED.

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9 Dated: March 8, 2010

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SUSAN ILLSTON
United States District Judge