

United States District Court  
For the Northern District of California

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

ELIZABETH ALEXANDER,  
Plaintiff,  
v.  
NATIONWIDE LIFE INSURANCE COMPANY,  
Defendant.

No. C 09-1677 CW  
ORDER GRANTING IN  
PART AND DENYING IN  
PART DEFENDANT'S  
MOTION FOR SUMMARY  
JUDGMENT  
(Docket No. 21)

Plaintiff Elizabeth Alexander charges Defendant Nationwide Life Insurance Company with unlawful employment practices and related torts. Defendant moves for summary judgment on Plaintiff's claims. Plaintiff opposes the motion only with respect to her claims for disability discrimination and failure to accommodate her disability. The motion was heard on August 5, 2010. Having considered oral argument and the papers submitted by the parties, the Court GRANTS in part Defendant's Motion for Summary Judgment and DENIES it in part.

BACKGROUND

1  
2 Plaintiff was an employee of Defendant or its predecessor from  
3 1985 until the termination of her employment on February 9, 2007.  
4 When Defendant discharged her, she held the position of Program  
5 Director. In that role, she supervised a team of employees who  
6 marketed Defendant's products throughout Northern California.

7 At the age of eighteen, Plaintiff was diagnosed with bipolar  
8 disorder. During her career with Defendant, Plaintiff experienced  
9 at least five manic episodes, resulting from the disorder.

10 According to the American Psychiatric Association, a manic episode  
11 "is defined by a distinct period during which there is an  
12 abnormally and persistently elevated, expansive, or irritable  
13 mood." Pl.'s Request for Judicial Notice (RJN),<sup>1</sup> Ex. 1 at 357.

14 In 1994 and 1999, Plaintiff suffered manic episodes, for which  
15 she required hospitalization. She took leave on both occasions.  
16 She states that, upon returning to work after each of these two  
17 episodes, she was not criticized for her condition or disciplined  
18 for her absence.

19 In early May, 2003, Plaintiff experienced another manic  
20 episode. On or about May 6, 2003, she was found dancing and  
21 obstructing traffic on the Golden Gate Bridge. The following day,  
22 she felt compelled to travel to Chicago to rescue her brother "from  
23 an imagined deadly peril." Alexander Decl. ¶ 4. Before leaving,

24  
25 \_\_\_\_\_  
26 <sup>1</sup> Plaintiff asks the Court to take judicial notice of the  
27 description of a manic episode contained in the Diagnostic and  
28 Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV).  
Defendant does not oppose Plaintiff's request and the Court GRANTS  
it. Fed. R. Evid. 201(b); see also United States v. Cantu, 12 F.3d  
1506, 1512 (9th Cir. 1993) (relying on definition from the DSM-IV).

1 she asked Jim Laffoon, her assistant, to come to her home and  
2 retrieve work-related documents. After he arrived, Plaintiff told  
3 Laffoon that she "has been many people through time" and that she  
4 believed her supervisor, Robert Bilo, and another employee "were  
5 responsible for 9/11." Adams Decl., Ex. 3 at D000620. Based on  
6 this conversation, Laffoon believed that Plaintiff "needed some  
7 kind of help." Id., Ex. 2, Laffoon Depo. at 30:8-13. He recounted  
8 his encounter with Plaintiff to Bilo, who in turn informed the  
9 human resources department about her behavior.

10 Defendant responded by assembling an Incident Management Team  
11 (IMT). An IMT was a "multi-disciplinary team" comprised of  
12 employees from various departments, including the "office of  
13 general counsel" and "associate health services." Adams Decl., Ex.  
14 4, Hill Depo. 30:5-7. IMTs were convened when employees threatened  
15 "harm to themselves or someone else." Id. at 32:7-9. Catherine  
16 Hill, a licensed social worker employed in Defendant's Employee  
17 Assistance Program, led the IMT handling Plaintiff's case.  
18 Throughout its work, the IMT updated Bilo on Plaintiff's status.

19 The IMT directed Bilo to place Plaintiff on paid leave. It  
20 also sought assistance from Crisis Management International (CMI),  
21 an organization that provided "corporate crisis intervention  
22 services." Id., Ex. 6, Lacovara Depo. 16:7-8. CMI assigned  
23 Dominick Lacovara, who had experience as a psychiatric social  
24 worker, to Plaintiff's case. Lacovara was charged with  
25 facilitating Plaintiff's treatment and evaluation.

26 Before returning to work, Plaintiff underwent a fitness-for-  
27 duty evaluation, which was completed by Dr. Jeffrey Gould, a  
28 psychiatrist. In a letter to Hill, Dr. Gould opined that Plaintiff

1 would be able to return to her position if she was "able to comply  
2 with psychiatric medication treatment with a local psychiatrist."

3 Id., Ex. 9 at 000372. He also stated,

4 Signs of future impending relapse for Ms. Alexander could  
5 include bizarre behavior similar to that observed prior  
6 to her current leave of absence. Additional signs of  
7 relapse may include euphoric and irritable moods, talking  
8 rapidly, being easily distracted, having delusional  
9 thoughts, engaging in pleasurable activities that carry a  
10 high potential for painful consequences, or activities  
11 that are clearly dangerous.

12 Id. Bilo discussed Plaintiff's condition with Dr. Gould. See  
13 Adams Decl., Ex. 13 at D00564.

14 In June, 2003, with the assistance of Lacovara, Plaintiff  
15 entered the care of psychiatrist Dr. Alan Dubin and therapist  
16 Catherine Kamins. When she began her treatment with Dr. Dubin, she  
17 expressed her desire to have a child with her "soon-to-be husband,"  
18 Ruel Cazar. Alexander Decl. ¶ 5. She stated her concern that  
19 Zyprexa, a drug she was then taking to stabilize her mood, could  
20 cause a health risk for an unborn child. Dr. Dubin "agreed that  
21 Zyprexa would pose such a health risk if [Plaintiff] became  
22 pregnant" and presented her with "an alternative course of  
23 treatment consisting of taking large daily doses of Omega 3 fatty  
24 acids while carefully and gradually tapering the daily dosages of  
25 Zyprexa down to zero, with the goal of then maintaining mood  
26 stability through continued large doses of Omega 3 fatty acids."  
27 Dubin Decl. ¶ 3. In his experience, such a regimen "proved  
28 reasonably effective with some patients." Id. Plaintiff accepted  
Dr. Dubin's treatment plan and, by the fall of 2003, she was  
"exclusively using Omega-3." Alexander Decl. ¶ 5. She states  
that, through her use of Omega-3 fatty acids, she "remained free of

1 any manic episodes for nearly three years . . . ." Id. ¶ 6.

2 In 2006, Plaintiff suffered her next manic episode. Sometime  
3 in June of that year, Bilo notified his program directors that  
4 there would be a two-day meeting in Sacramento, California. At  
5 around the time Bilo posted notices about the meeting, he began to  
6 have concerns that Plaintiff was not taking her medication. Before  
7 the event, Plaintiff contacted Bilo and asked to be excused from  
8 the meeting. She complained of being "tired and stressed out" and  
9 expressed a desire to go to Big Sur to relax. Lee Decl., Ex. 2,  
10 Bilo Depo. 125:18-20. Bilo refused Plaintiff's request and  
11 required her to attend the meeting.

12 Upon arriving at the conference, Plaintiff exhibited unusual  
13 behavior, including "talking very loudly," "not staying on point"  
14 and expounding on "conspiracy theories" about Defendant's  
15 management. Id. at 127:20-24. Bilo believed Plaintiff was acting  
16 out of character. After the meeting was convened, Plaintiff  
17 launched into a rant about Defendant's mistreatment of its  
18 employees. At this point, Bilo adjourned the session. He then  
19 spoke with Plaintiff individually and suggested that she take a  
20 break. Thereafter, Plaintiff returned to her hotel room.

21 Plaintiff continued to exhibit odd behavior throughout the  
22 duration of the two-day meeting. On the last day, Plaintiff did  
23 not attend the closing session. Instead, she wandered through a  
24 local shopping center's parking lot, acting strangely. Her  
25 behavior prompted a merchant to call the El Dorado County Sheriff's  
26 Department. The responding deputy contacted Bilo and then  
27 committed Plaintiff to a mental health facility for observation.  
28 She was released from the facility one day later.

1           Because of her behavior during the meeting, Bilo sought  
2 assistance from human resources. Defendant again convened an IMT  
3 and retained Lacovara to work with Plaintiff. She was placed on  
4 leave and directed to undergo another fitness-for-duty evaluation  
5 with Dr. Gould.

6           On July 25, 2006, Bilo had an hour-long phone call with Dr.  
7 Gould about Plaintiff. Bilo then sent an email to Hill about the  
8 conversation, stating that he understood that Plaintiff's manic  
9 behavior would recur in the future and "the only remedy is  
10 prevention . . . because once it happens there is not much you can  
11 do." Adams Decl., Ex. 13. On July 26, 2006, in another email,  
12 Bilo expressed his discomfort with continuing to work with  
13 Plaintiff. He stated that he understood that there were "major  
14 concerns about the legality of letting Elizabeth go," but that he  
15 wanted "to have a better understanding of our options as a  
16 company." Id., Ex. 14.

17           On or about August 4, 2006, Dr. Gould issued his report on  
18 Plaintiff. He believed that she had returned "to her baseline  
19 functioning" and that she could return to work so long as she  
20 adhered to a proper medication regimen. Id., Ex. 15 at 000373. He  
21 opined that an appropriate treatment plan required "antipsychotic,  
22 mood stabilizing, or benzodiazepine classes of medication and does  
23 not include alternative treatment regimens such as Omega-3  
24 supplements in place of conventional psychiatric  
25 medication . . . ." Id. at 000374 (emphasis in original). He  
26 stated that, if Plaintiff took conventional medications, Defendant  
27 would not have "to make any accommodations for her employment."  
28 Id.

1 Plaintiff returned to the care of Dr. Dubin. He followed the  
2 treatment plan he prescribed for her in 2003: Plaintiff took  
3 Zyprexa, which was gradually replaced with large doses of Omega-3  
4 fatty acids.

5 On August 16, 2006, Plaintiff returned to work after being on  
6 leave for approximately six weeks. Upon her return, Bilo presented  
7 Plaintiff with a One-Time Notice<sup>2</sup> for her "inappropriate conduct"  
8 at the Sacramento meeting. It does not appear, however, that he  
9 informed her that she would have to adhere to Dr. Gould's  
10 recommendations for preventing manic episodes. The One-Time Notice  
11 also warned her not to use her corporate American Express card to  
12 make personal purchases. Lee Decl., Ex. F. Plaintiff claims that,  
13 prior to receiving the One-Time Notice in August, 2006, Defendant  
14 had never "advised or counseled" her against making personal  
15 charges on her corporate credit card. Alexander Decl. ¶ 7. She  
16 asserts that she had been using her corporate credit card for  
17 personal charges since 1999, but that she reimbursed Defendant for  
18 these purchases. She maintains that, had Defendant warned her  
19 sooner, she "would have willingly stopped charging personal  
20 expenses on the card . . . ." Id.

21 Plaintiff's final manic episode while employed with Defendant  
22 began in January, 2007. Sometime in mid-January, while on layovers  
23 during her return from a business trip to Columbus, Ohio, she made  
24 personal charges on her corporate credit card and phoned a former  
25 administrator of Defendant to accuse him of "controlling the  
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27 <sup>2</sup> "A one-time notice is a written document that  
28 identifies . . . unacceptable conduct and briefly describes the  
conduct that occurred." Lee Decl., Ex. G.

1 weather." Alexander Decl. ¶ 8. On January 22, Plaintiff learned  
2 from a home pregnancy test that she could be pregnant, knowledge  
3 that she claims worsened her manic state.

4 On the morning of January 23, Plaintiff went to the hospital  
5 to confirm her pregnancy. She missed a conference call that she  
6 was to have with Bilo. That afternoon, she contacted Sheilah  
7 Toothill, Bilo's assistant, to inform her that she was traveling to  
8 London "to unwind." Id. ¶ 9. Thereafter, Plaintiff sent a two-  
9 and-a-half page, single-spaced email to Bilo and other  
10 administrators, which began by addressing training for a new  
11 employee. However, the email devolved into a rambling, incoherent  
12 discussion about work and personal issues. That evening, Plaintiff  
13 left for London.

14 On January 24, Plaintiff left a voicemail with Bilo's office,  
15 providing her contact information in London and indicating that she  
16 would return on January 29. She also stated that she was having  
17 difficulty using her mobile phone. Sometime that same day, Bilo  
18 contacted Julie Hoover, a human resources employee, and stated, "I  
19 want to let [Plaintiff] go." Adams Decl., Ex. 20. At or around  
20 that time, Defendant convened an IMT. Bilo was a member of the  
21 IMT.

22 In the early morning hours of January 26, Plaintiff reportedly  
23 ran naked through the halls of her hotel, "knocking on doors and  
24 upsetting other patrons." Alexander Decl., Ex. 2. Police then  
25 found Plaintiff walking naked in the street. At around 3:00 a.m.,  
26 she was involuntarily committed to a mental health ward at a London  
27 hospital.

28 On January 29, Plaintiff sent a note to hospital personnel,



1 indicating her desire to return to the United States. At around  
2 noon that day, Bilo left a message on Plaintiff's mobile phone,  
3 stating that she had been placed on paid leave. He sent her an  
4 email indicating the same. That afternoon, Lacovara, whom  
5 Defendant had again retained to handle Plaintiff's case, spoke with  
6 Cazar, who was by then Plaintiff's husband. Cazar indicated that  
7 Plaintiff would return to the United States within the week, but  
8 stated that he did not have specific details. After speaking with  
9 Lacovara, Cazar left a voicemail for Bilo, stating that Plaintiff  
10 was in London with medical complications from her pregnancy.

11 On January 30, Cazar contacted Toothill and informed her that  
12 Plaintiff had not returned as expected on January 29 because of a  
13 problem with her flight, but that she would return sometime that  
14 week. He also stated that she was suffering pregnancy-related  
15 complications. Toothill told Cazar that Plaintiff had been placed  
16 on paid leave. Cazar subsequently called Plaintiff to inform her  
17 that Defendant had placed her on leave. That same day, the IMT  
18 decided to check the charges made to Plaintiff's corporate credit  
19 card.

20 On February 1, Lacovara spoke to Cazar. Cazar reiterated that  
21 Plaintiff would return to the United States within the week, but  
22 indicated that "there was no way [Plaintiff] can be contacted  
23 directly." Adams Decl., Ex. 7 at 69. He reassured Lacovara that  
24 Plaintiff was safe.

25 On or about February 7, the IMT decided to terminate  
26 Plaintiff's employment. A review of Plaintiff's corporate credit  
27 card records revealed that she had charged \$12,000 for personal  
28 purchases during that billing cycle. Hoover sent Plaintiff a

1 letter, notifying her that, as of February 9, 2007, her employment  
2 was terminated "due to job abandonment and a violation of the One-  
3 Time Notice (August 16th 2006) including the use of your Corporate  
4 American Express for personal expenses." Adams Decl., Ex. 23.

5 On February 11, Plaintiff was discharged from the London  
6 hospital and, thereafter, returned to the United States.

7 On or about July 16, 2007, she filed a charge of  
8 discrimination with the California Department of Fair Employment  
9 and Housing (DFEH), alleging that she had been subjected to  
10 differential treatment and discharged on the basis of her sex and  
11 disability.

12 Plaintiff's complaint pleads seven causes of action: (1) a  
13 claim under the California Fair Employment and Housing Act (FEHA)  
14 for sex discrimination; (2) a FEHA claim for retaliation; (3) a  
15 FEHA claim for disability discrimination; (4) a FEHA claim for a  
16 failure to accommodate her disability; (5) intentional infliction  
17 of emotional distress; (6) negligent infliction of emotional  
18 distress; and (7) a claim under California Labor Code § 206 for a  
19 failure to pay wages due. In her opposition to Defendant's motion  
20 for summary judgment, Plaintiff states that she withdraws her  
21 claims for sex discrimination, retaliation, intentional infliction  
22 of emotional distress, negligent infliction of emotional distress  
23 and violation of California Labor Code § 206. Accordingly, the  
24 Court grants summary judgment against her on these claims. Only  
25 her claims for disability discrimination and a failure to  
26 accommodate her disability are considered below.

27 LEGAL STANDARD

28 Summary judgment is properly granted when no genuine and

1 disputed issues of material fact remain, and when, viewing the  
2 evidence most favorably to the non-moving party, the movant is  
3 clearly entitled to prevail as a matter of law. Fed. R. Civ. P.  
4 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986);  
5 Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1288-89 (9th Cir.  
6 1987).

7 The moving party bears the burden of showing that there is no  
8 material factual dispute. Therefore, the court must regard as true  
9 the opposing party's evidence, if supported by affidavits or other  
10 evidentiary material. Celotex, 477 U.S. at 324; Eisenberg, 815  
11 F.2d at 1289. The court must draw all reasonable inferences in  
12 favor of the party against whom summary judgment is sought.  
13 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,  
14 587 (1986); Intel Corp. v. Hartford Accident & Indem. Co., 952 F.2d  
15 1551, 1558 (9th Cir. 1991).

16 Material facts which would preclude entry of summary judgment  
17 are those which, under applicable substantive law, may affect the  
18 outcome of the case. The substantive law will identify which facts  
19 are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248  
20 (1986).

21 Where the moving party does not bear the burden of proof on an  
22 issue at trial, the moving party may discharge its burden of  
23 production by either of two methods:

24 The moving party may produce evidence negating an  
25 essential element of the nonmoving party's case, or,  
26 after suitable discovery, the moving party may show that  
27 the nonmoving party does not have enough evidence of an  
28 essential element of its claim or defense to carry its  
ultimate burden of persuasion at trial.

Nissan Fire & Marine Ins. Co., Ltd., v. Fritz Cos., Inc., 210 F.3d

1 1099, 1106 (9th Cir. 2000).

2 If the moving party discharges its burden by showing an  
3 absence of evidence to support an essential element of a claim or  
4 defense, it is not required to produce evidence showing the absence  
5 of a material fact on such issues, or to support its motion with  
6 evidence negating the non-moving party's claim. Id.; see also  
7 Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 885 (1990); Bhan v.  
8 NME Hosps., Inc., 929 F.2d 1404, 1409 (9th Cir. 1991). If the  
9 moving party shows an absence of evidence to support the non-moving  
10 party's case, the burden then shifts to the non-moving party to  
11 produce "specific evidence, through affidavits or admissible  
12 discovery material, to show that the dispute exists." Bhan, 929  
13 F.2d at 1409.

14 If the moving party discharges its burden by negating an  
15 essential element of the non-moving party's claim or defense, it  
16 must produce affirmative evidence of such negation. Nissan, 210  
17 F.3d at 1105. If the moving party produces such evidence, the  
18 burden then shifts to the non-moving party to produce specific  
19 evidence to show that a dispute of material fact exists. Id.

20 If the moving party does not meet its initial burden of  
21 production by either method, the non-moving party is under no  
22 obligation to offer any evidence in support of its opposition. Id.  
23 This is true even though the non-moving party bears the ultimate  
24 burden of persuasion at trial. Id. at 1107.

25 DISCUSSION

26 I. Disability Discrimination

27 A. Applicable Law

28 In disparate treatment cases, plaintiffs can prove intentional

1 discrimination through direct or indirect evidence. "Direct  
2 evidence is evidence which, if believed, proves the fact of  
3 discriminatory animus without inference or presumption." Godwin v.  
4 Hunt Wesson, Inc., 150 F.3d 1217, 1221 (9th Cir. 1998) (citation  
5 and internal quotation and editing marks omitted).

6 Because direct proof of intentional discrimination is rare,  
7 such claims may be proved circumstantially. Guz v. Bechtel Nat'l,  
8 Inc., 24 Cal. 4th 317, 354 (2000). To do so, plaintiffs must  
9 satisfy the burden-shifting analysis set out by the Supreme Court  
10 in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973), and  
11 Texas Department of Community Affairs v. Burdine, 450 U.S. 248  
12 (1981). Guz, 24 Cal. 4th at 354. The McDonnell Douglas burden-  
13 shifting framework is used when analyzing disability discrimination  
14 claims under FEHA. Id.; see also Brundage v. Hahn, 57 Cal. App.  
15 4th 228, 236 (1997).

16 The Ninth Circuit has instructed that district courts must be  
17 cautious in granting summary judgment for employers on  
18 discrimination claims. See Lam v. Univ. of Hawai'i, 40 F.3d 1551,  
19 1564 (9th Cir. 1994) ("We require very little evidence to survive  
20 summary judgment' in a discrimination case, 'because the ultimate  
21 question is one that can only be resolved through a "searching  
22 inquiry" -- one that is most appropriately conducted by the  
23 factfinder.'" (quoting Sischo-Nownejad v. Merced Cmty. Coll.  
24 Dist., 934 F.2d 1104, 1111 (9th Cir. 1991)).

25 B. Prima Facie Case

26 Within the McDonnell Douglas framework, plaintiffs may  
27 establish a prima facie case of disability discrimination by  
28 showing that: (1) they had a disability, (2) they were qualified

1 individuals and (3) they were subjected to an adverse employment  
2 action because of their disability. Brundage, 57 Cal. App. 4th at  
3 236. The burden at the prima facie stage is minimal. Caldwell v.  
4 Paramount Unified Sch. Dist., 41 Cal. App. 4th 189, 197 (1995).

5 Defendant acknowledges that Plaintiff has bipolar disorder, a  
6 recognized mental disability. See Brundage, 57 Cal. App. 4th at  
7 236. It contends, however, that Plaintiff fails to satisfy her  
8 prima facie burden because she was not a qualified individual and  
9 that, even if she were, she fails to provide evidence that adverse  
10 actions were taken against her because of her disability.

11 1. Qualified Individual

12 California's proscription against disability discrimination  
13 applies only to "those employees with a disability who can perform  
14 the essential duties of the employment position with reasonable  
15 accommodation." Green v. State, 42 Cal. 4th 254, 264 (2007); Cal.  
16 Gov. Code § 12940(a)(1). "Therefore, in order to establish that a  
17 defendant employer has discriminated on the basis of disability in  
18 violation of the FEHA, the plaintiff employee bears the burden of  
19 proving he or she was able to do the job, with or without  
20 reasonable accommodation." Green, 42 Cal. 4th at 262. Because  
21 California and federal employment discrimination laws are similar,  
22 federal cases are instructive. Guz, 24 Cal. 4th at 354.

23 Plaintiff contends that she could perform the essential duties  
24 of her position as long as she was accommodated with medical leave  
25 after she suffered manic episodes. She proffers testimony from  
26 Biló, who stated that she was a "solid pro" and had more positive  
27 than negative evaluations. Adams Decl., Ex. 1, Biló Depo. 99:13-  
28 100:8. She also points to Laffoon's testimony that he enjoyed

1 working with her and that she was “[c]omplete, focused, directed,  
2 well-organized.” Id., Ex. 2, Laffoon Depo. 93:6-7. The record  
3 also contains evidence that, after taking each medical leave for  
4 her disability, she would return to work; Defendant does not  
5 contend that Plaintiff was not able to perform her job’s essential  
6 duties upon returning from these leaves. Based on this evidence,  
7 Plaintiff satisfies her prima facie burden to show that she was a  
8 qualified individual.

9 Defendant argues that Plaintiff cannot be considered a  
10 qualified individual because she did not take Zyprexa as  
11 recommended by Dr. Gould. It cites Siefken v. Village of Arlington  
12 Heights, in which the plaintiff, a police officer, was fired after  
13 he experienced a diabetic reaction that caused him to drive  
14 erratically while on duty. 65 F.3d 664, 665 (7th Cir. 1995). The  
15 Seventh Circuit upheld the district court’s dismissal of his  
16 discrimination claim under the Americans with Disabilities Act  
17 (ADA). The court reasoned that, because the plaintiff failed to  
18 “monitor his medical condition sufficiently to allow him to perform  
19 the duties of a patrol officer,” his discharge did not violate the  
20 ADA. Id. at 666. Further, the plaintiff did not ask his employer  
21 to accommodate his diabetes before or after the incident; instead  
22 he sought a “second chance,” which the court explained did not  
23 constitute an accommodation under the ADA. Id.

24 Siefken is distinguishable on the facts. Here, there is no  
25 evidence that Plaintiff was informed of Dr. Gould’s advice for  
26 treating her bipolar disorder or that Defendant instructed her to  
27 follow his advice as a condition of her employment. Instead,  
28 Plaintiff followed the medication regimen prescribed by Dr. Dubin,

1 which called for Plaintiff gradually to replace her intake of  
2 Zyprexa with Omega-3 fatty acids. As noted above, Plaintiff wanted  
3 to become pregnant, and Dr. Dubin adjusted his treatment as a  
4 result. Dr. Dubin contends that, in his experience, treating  
5 bipolar patients with Omega-3 fatty acids "proved reasonably  
6 effective." Dubin Decl. ¶ 3. Defendant does not offer evidence  
7 that Dr. Dubin's treatment plan was so objectively inadequate that  
8 Plaintiff's decision to follow it amounted to a failure to monitor  
9 her bipolar disorder. Defendant's disagreement with Dr. Dubin's  
10 prescription does not, as a matter of law, render Plaintiff an  
11 unqualified individual. This is a question of fact for a jury.  
12 See Dark v. Curry County, 451 F.3d 1078, 1088 (9th Cir. 2006)  
13 (concluding that dispute between employer's and employee's  
14 physicians regarding employee's fitness for duty raised a genuine  
15 issue of material fact as to employee's qualifications). Also,  
16 unlike Siefken, Plaintiff did not merely seek a "second chance;"  
17 she maintains that Defendant should have afforded her leave as an  
18 accommodation.

19 Further, the Ninth Circuit has expressed disapproval of  
20 Siefken. In Dark, an employee knew that an epileptic seizure could  
21 be imminent, but nevertheless drove his employer's pickup truck.  
22 451 F.3d at 1081. The employee suffered a seizure while operating  
23 the truck, requiring a passenger to take control of the vehicle to  
24 bring it to a stop. Id. His employer subsequently discharged him  
25 for being unable to perform the essential functions and duties of  
26 his position and engaging in misconduct that threatened public  
27 safety. Id. The Ninth Circuit reversed the district court's grant  
28 of summary judgment, concluding that the employee was entitled to a



1 trial on his disability discrimination claim under the ADA. Id. at  
2 1091.

3       There, as here, the defendant cited Siefken to argue that an  
4 employer does not violate the anti-discrimination laws when it  
5 fires an employee who "does not control his disability and fails to  
6 meet the employer's legitimate job expectations." 451 F.3d at 1090  
7 n.9. The Ninth Circuit distinguished Siefken on the facts,  
8 concluding that Dark sought an accommodation that would have  
9 changed "the ordinary terms and conditions of his work," in  
10 contrast to Siefken who asked only for a "'second chance' to change  
11 his own behavior." Dark, 451 F.3d at 1090 n.9 (citing Siefken, 65  
12 F.3d at 666-67). The Ninth Circuit also added that its prior  
13 precedent "demonstrates that our court has not taken an approach as  
14 unforgiving as that exhibited" by the Seventh Circuit in Siefken.  
15 Dark, 451 F.3d at 1090 n.9 (citing Nunes v. Wal-Mart Stores, Inc.,  
16 164 F.3d 1243, 1245-47 (9th Cir. 1999) and Humphrey v. Memorial  
17 Hosps. Ass'n, 239 F.3d 1128, 1137 (9th Cir. 2001)).

18       Under Ninth Circuit precedent, as reflected in Dark, Plaintiff  
19 creates a triable issue as to whether she was a qualified  
20 individual.

21               2. Adverse Employment Actions Taken Because of  
22               Plaintiff's Disability

23       Plaintiff complains that she was reprimanded, through the One-  
24 Time Notice, and subsequently terminated because of conduct  
25 resulting from her bipolar disorder.

26       Plaintiff cannot obtain relief based on the One-Time Notice.  
27 As noted above, the One-Time Notice advised Plaintiff that she  
28 violated Defendant's policies through her conduct in Sacramento and

1 misuse of her corporate credit card. Communications that merely  
2 notify employees of policy violations do not constitute adverse  
3 employment actions, even if they are "cited as part of the reason  
4 for an employment decision." McRae v. Dep't of Corr. & Rehab., 142  
5 Cal. App. 4th 377, 392 (2006). Plaintiff offers no evidence that  
6 receiving the One-Time Notice, on its own, materially affected the  
7 "terms, conditions, or privileges" of her employment. Id. at 386  
8 (citation omitted). Thus, to the extent that Plaintiff's  
9 discrimination claim is based on the One-Time Notice, summary  
10 judgment is warranted in favor of Defendant.

11 Plaintiff, however, makes out a prima facie case with regard  
12 to the termination of her employment. Plaintiff contends that the  
13 conduct for which she was terminated resulted from her disability.  
14 Conduct "resulting from a disability is considered to be part of  
15 the disability . . . ." Humphrey, 239 F.3d at 1139. Thus, "where  
16 an employee demonstrates a causal link between the  
17 disability-produced conduct and the [adverse action], a jury . . .  
18 may find that the employee was terminated on the impermissible  
19 basis of her disability." Gambini v. Total Renal Care, Inc., 486  
20 F.3d 1087, 1093 (9th Cir. 2007).<sup>3</sup>

21 Defendant states that it fired Plaintiff because she abandoned  
22 her job and continued to use her corporate credit card for personal  
23 purposes. Plaintiff did not return to work as expected on January  
24 29, 2007 because of her involuntary commitment to a mental health

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26 <sup>3</sup> Defendant suggests that Gambini is not instructive because  
27 it concerns discrimination claims under Washington state law.  
28 However, for the principle on which this Court relies, the Gambini  
court cited Humphrey, which addresses the ADA. See Gambini, 486  
F.3d at 1093.

1 ward in a London hospital. Thus, Plaintiff's mental disability  
2 caused her failure to return to work, for which Defendant  
3 terminated her. Further, Plaintiff states that the continued  
4 misuse of her corporate credit card resulted from her manic  
5 condition. Defendant offers no evidence to the contrary. Nor does  
6 Defendant show that, when she was not suffering a manic episode,  
7 Plaintiff made personal purchases on her corporate credit card in  
8 violation of company policy. If a jury draws all inferences in  
9 Plaintiff's favor, it could reasonably conclude that Defendant  
10 terminated her because of disability-produced conduct and, by  
11 extension, her disability.

12 Defendant defends its firing of Plaintiff by asserting that it  
13 fired her "for misconduct unrelated to her disability." Reply at  
14 9. It asserts that Hoover, Hill and Bilo did not know that  
15 Plaintiff was suffering a manic episode in 2007, citing Cazar's  
16 representations that Plaintiff was suffering complications with her  
17 pregnancy. Although Cazar's statements could support an inference  
18 that Defendant was ignorant of Plaintiff's actual condition, the  
19 record also contains sufficient evidence to suggest that Hoover,  
20 Hill and Bilo knew that Plaintiff's bipolar disorder was the  
21 driving force behind her purported misconduct. Indeed, Plaintiff's  
22 actions, on their own, were sufficient to alert Defendant that she  
23 was suffering a manic episode. Without warning, Plaintiff abruptly  
24 left for London and, before doing so, sent Bilo and others an  
25 incoherent, rambling email. During the same period, Plaintiff made  
26 several personal purchases with her corporate credit card,  
27 including an \$8,859.10 plane ticket to London; the last time  
28 Plaintiff misused her corporate credit card was during her previous

1 manic episode. At her deposition, Hoover agreed that, by January  
2 24, Defendant's management was aware that Plaintiff was  
3 experiencing "another bout of bazaar [sic] behavior." Adams Decl.,  
4 Ex. 19, Hoover Depo. 128:2-6. Also, Defendant's response indicated  
5 that it suspected that Plaintiff's actions were the result of her  
6 disability. For instance, the IMT case report on the matter  
7 referred to her bipolar disorder and "past history of behavior and  
8 emergency hospitalizations . . . ." Adams Decl., Ex. 21 at  
9 D000508. Further, as part of its plan, the IMT asked Lacovara, the  
10 psychiatric social worker who had evaluated Plaintiff after her  
11 2003 manic episode, to contact Plaintiff and assess her condition.  
12 Even after Cazar purportedly told Toothill that Plaintiff was doing  
13 fine, the IMT persisted with its plan to have Lacovara contact  
14 Plaintiff. Thus, considering all of the circumstances, a jury  
15 could reasonably infer that Defendant knew that Plaintiff was  
16 suffering a manic episode and terminated her for conduct that  
17 resulted from it.

18 It is true that Plaintiff's disability-related conduct  
19 violated Defendant's policies. Plaintiff does not have "absolute  
20 protection from adverse employment actions." Gambini, 486 F.3d at  
21 1095 (emphasis in original). As the Ninth Circuit has explained,  
22 to defend against a discrimination claim in which an employee's  
23 misconduct resulted from a disability, an employer is free to  
24 challenge the employee's status as a "qualified individual" or  
25 raise affirmative defenses, such as claiming that the accommodation  
26  
27  
28

1 requested is an undue burden.<sup>4</sup> Id.

2       Nonetheless, there is a triable issue on whether Defendant  
3 fired Plaintiff for conduct caused by her disability, and Plaintiff  
4 makes out a prima facie case for disability discrimination.

5       C.    Non-Discriminatory Reason and Evidence of Pretext

6       Once plaintiffs establish a prima facie case, a presumption of  
7 discriminatory intent arises. Guz, 24 Cal. 4th at 355. To  
8 overcome this presumption, defendants must come forward with a  
9 legitimate, non-discriminatory reason for the employment decision.  
10 Id. at 355-56. If defendants provide that explanation, the  
11 presumption disappears and plaintiffs must satisfy their ultimate  
12 burden of persuasion that defendants acted with discriminatory  
13 intent. Id. at 356.

14       To survive summary judgment, plaintiffs must then introduce  
15 evidence sufficient to raise a genuine issue of material fact as to  
16 whether the reason the employer articulated is a pretext for  
17 discrimination. Morgan v. Regents of Univ. of Cal., 88 Cal. App.  
18 4th 52, 68 (2000). Plaintiffs may rely on the same evidence used  
19 to establish a prima facie case or put forth additional evidence.  
20 See Coleman v. Quaker Oats Co., 232 F.3d 1271, 1282 (9th Cir.  
21 2000); Wallis v. J.R. Simplot Co., 26 F.3d 885, 892 (9th Cir.  
22 1994). However, "in those cases where the prima facie case  
23 consists of no more than the minimum necessary to create a  
24 presumption of discrimination under McDonnell Douglas, plaintiff  
25 has failed to raise a triable issue of fact." Wallis, 26 F.3d at

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26  
27       <sup>4</sup> Notably, in its papers and at the hearing, Defendant never  
28 claimed that placing Plaintiff on immediate and indefinite leave  
whenever she suffered a manic episode would have imposed an undue  
burden.

1 890.

2 Plaintiffs can provide evidence of "pretext (1) indirectly, by  
3 showing that the employer's proffered explanation is unworthy of  
4 credence because it is internally inconsistent or otherwise not  
5 believable, or (2) directly, by showing that unlawful  
6 discrimination more likely motivated the employer." Raad v.  
7 Fairbanks N. Star Borough Sch. Dist., 323 F.3d 1185, 1194 (9th Cir.  
8 2003) (citation and internal quotation marks omitted); accord  
9 Morgan, 88 Cal. App. 4th at 68. When plaintiffs present indirect  
10 evidence that the proffered explanation is a pretext for  
11 discrimination, that evidence "must be 'specific' and 'substantial'  
12 in order to create a triable issue with respect to whether the  
13 employer intended to discriminate." Morgan, 88 Cal. App. 4th at 69  
14 (citation omitted). When plaintiffs proffer direct evidence that  
15 the defendant's explanation is a pretext for discrimination, "'very  
16 little'" evidence is required to avoid summary judgment. Id.  
17 (citation omitted).

18 Defendant argues that it fired Plaintiff because she abandoned  
19 her job and violated the One-Time Notice by using her corporate  
20 credit card for personal purchases. It claims that, based on  
21 Cazar's representations, it did not know that her conduct stemmed  
22 from her disability. However, as explained above, adverse actions  
23 taken because of conduct resulting from a disability are considered  
24 taken because of the disability. Accordingly, Defendant fails to  
25 offer a legitimate, non-discriminatory reason for its action and  
26 does not shift the burden to Plaintiff to proffer evidence of  
27 pretext. See Dark, 451 F.3d at 1084.

28 Nonetheless, Plaintiff has offered specific and substantial

1 evidence that Defendant's reasons were pretext for discriminatory  
2 animus. As noted above, on January 24, the day after he received  
3 Plaintiff's rambling email, Bilo called Hoover to say that he  
4 wanted to "let her go." Adams Decl., Ex. 20. At that time,  
5 Plaintiff's absence did not qualify as job abandonment. Also,  
6 there is no evidence that Bilo knew at the time that Plaintiff had  
7 used her credit card for personal purposes; the IMT did not  
8 investigate Plaintiff's charges until January 30. Further, after  
9 her 2006 episode, Bilo expressed discomfort with continuing to work  
10 with Plaintiff and, although he understood that there were "major  
11 concerns about the legality" of terminating her employment, he  
12 sought advice on what options Defendant had for dealing with  
13 Plaintiff. Adams Decl., Ex. 14. Bilo's comments, made shortly  
14 after Plaintiff's manic episodes, constitute evidence that  
15 Defendant's explanation that it discharged Plaintiff for reasons  
16 unrelated to her disability was pretext.

17 Plaintiff also contends that, prior to receiving the One-Time  
18 Notice in August, 2006, Defendant had not warned her about personal  
19 use of her corporate credit card, even though she had been making  
20 personal purchases with it, and reimbursing the company, since  
21 1999. The timing of Defendant's warning, which occurred  
22 contemporaneously with Bilo's concerns about working with Plaintiff  
23 and shortly after one of her manic episodes, further supports an  
24 inference of pretext. That Defendant also investigated the  
25 activity on Plaintiff's corporate credit card during her 2007 manic  
26 episode strengthens this inference.

27 Accordingly, summary judgment is not warranted on Plaintiff's  
28 claim for disability discrimination, to the extent that it is based

1 on her termination. However, for the reasons stated above, the  
2 Court grants summary judgment in favor of Defendant on Plaintiff's  
3 claim insofar as it rests on the One-Time Notice.

4 II. Claim for a Failure to Accommodate Disability

5 Plaintiff alleges that Defendant failed to accommodate her  
6 disability by refusing to excuse her from the Sacramento meeting in  
7 June, 2006 and denying her extended medical leave during her manic  
8 episode in January and February, 2007.

9 Under California law, the "elements of a failure to  
10 accommodate claim are (1) the plaintiff has a disability under the  
11 FEHA, (2) the plaintiff is qualified to perform the essential  
12 functions of the position, and (3) the employer failed to  
13 reasonably accommodate the plaintiff's disability." Scotch v. Art  
14 Inst. of Cal.-Orange County, Inc., 173 Cal. App. 4th 986, 1009-10  
15 (2009).

16 A claim for a failure to accommodate implicates the duty of an  
17 employer to engage in an interactive process with an employee to  
18 determine a reasonable accommodation. As one California court  
19 explained,

20 Two principles underlie a cause of action for failure to  
21 provide a reasonable accommodation. First, the employee  
22 must request an accommodation. Second, the parties must  
23 engage in an interactive process regarding the requested  
24 accommodation and, if the process fails, responsibility  
25 for the failure rests with the party who failed to  
26 participate in good faith.

27 Gelfo v. Lockheed Martin Corp., 140 Cal. App. 4th 34, 54 (2006)  
28 (citations omitted).

29 In most cases, an employer's obligation to initiate the  
30 interactive process arises only after an employee makes an initial  
31 request. Brown v. Lucky Stores, Inc., 246 F.3d 1182, 1188 (9th



1 Cir. 2001). However, an exception to this rule applies "when the  
2 employer '(1) knows that the employee has a disability, (2) knows,  
3 or has reason to know, that the employee is experiencing workplace  
4 problems because of the disability, and (3) knows, or has reason to  
5 know, that the disability prevents the employee from requesting a  
6 reasonable accommodation.'" Id. (quoting Barnett v. U.S. Air,  
7 Inc., 228 F.3d 1105 (9th Cir. 2000)). In such cases, an employer  
8 has a duty to initiate the interactive process to determine a  
9 reasonable accommodation, even without a request by the employee.  
10 Brown, 246 F.3d at 1188; cf. Bultemeyer v. Fort Wayne Cmty. Schs.,  
11 100 F.3d 1281, 1285 (7th Cir. 1996) ("[I]f it appears that the  
12 employee may need an accommodation but doesn't know how to ask for  
13 it, the employer should do what it can to help.").

14 To the extent Plaintiff's claim is based on the denial of her  
15 request to be excused from the Sacramento meeting, it is time-  
16 barred. An aggrieved party must file an administrative complaint  
17 with DFEH within "one year from the date upon which the alleged  
18 unlawful practice . . . occurred." Cal. Gov't Code § 12960(d); see  
19 also Cucuzza v. City of Santa Clara, 104 Cal. App. 4th 1031, 1041  
20 (2002). Plaintiff filed her DFEH complaint on or about July 16,  
21 2007, more than one year after Bilo required her to attend.

22 Summary judgment is not warranted on Plaintiff's claim to the  
23 extent that it is based on Defendant's failure to place her on  
24 extended leave. Defendant asserts that it had no duty to  
25 accommodate Plaintiff with an extended leave of absence during her  
26 2007 manic episode because she did not request such an  
27 accommodation and failed to engage in an interactive process.  
28 However, Plaintiff has created a genuine dispute as to whether the

1 narrow exception outlined in Brown may apply. Defendant knew of  
2 Plaintiff's disability and, as explained above, a jury could infer  
3 that Defendant either knew, or had reason to know, that Plaintiff's  
4 behavior stemmed from her bipolar disorder. As for the third  
5 prong, Defendant was aware that, in the past, Plaintiff had been  
6 hospitalized for her disability. If viewed in the light most  
7 favorable to Plaintiff, this knowledge could support an inference  
8 that Defendant had reason to know that a debilitating manic episode  
9 prevented her from affirmatively seeking extended leave. Thus,  
10 that Plaintiff did not make a request does not immunize Defendant  
11 from liability on her failure to accommodate claim.

12 Finally, Defendant argues that it was not obliged to "waive  
13 discipline," forgive Plaintiff's misconduct and hold her position  
14 open for an indefinite amount of time. Plaintiff did not make such  
15 requests. Instead, she asserts that Defendant should have afforded  
16 her extended leave, as it had done in the past. As already noted,  
17 Defendant does not contend that granting her this accommodation  
18 would have caused it an undue burden.

19 Accordingly, summary judgment is not justified on Plaintiff's  
20 claim for a failure to accommodate her disability.

21 CONCLUSION

22 For the foregoing reasons, Defendant's Motion for Summary  
23 Judgment is GRANTED in part and DENIED in part. (Docket No. 21.)  
24 Plaintiff's claims for sex discrimination, retaliation, intentional  
25 infliction of emotional distress, negligent infliction of emotional  
26 distress and violation of California Labor Code § 206 are summarily  
27 adjudicated against her. The Court also summarily adjudicates that  
28 Plaintiff may not base her claims for disability discrimination and

1 a failure to accommodate her disability on the One-Time Notice or  
2 on the denial of her request to be excused from the June, 2006  
3 meeting. In all other respects, Defendant's motion is denied.

4 The Court refers the parties to H. Jay Folberg for further  
5 mediation. A final pretrial conference is scheduled for December  
6 21, 2010 at 2:00 p.m. A seven-day trial is scheduled to begin on  
7 January 10, 2011 at 8:30 a.m.

8 IT IS SO ORDERED.

9 Dated: 10/12/2010



CLAUDIA WILKEN  
United States District Judge

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