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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

SANDRA SEALOCK, Plaintiff and Appellant, v. COSTCO WHOLESALE CORPORATION, Defendant and Respondent.	A110863 (Alameda County Super. Ct. No. VG03082806)

Plaintiff Sandra Sealock appeals from the judgment entered for defendant Costco Wholesale Corporation after defendant's motion for summary judgment was granted on plaintiff's claims of employment discrimination and retaliation, and related causes of action. Plaintiff contends that there are triable issues of material fact precluding the grant of summary judgment, and that it was an abuse of discretion for the court to deny her motion for a continuance to conduct further discovery.

We conclude that summary judgment was erroneously granted on the employment discrimination and retaliation claims, as well as on the related causes of action for unfair business practices and wrongful termination in violation of public policy. There are triable issues of fact on the discrimination cause of action, but only as to the period beginning shortly before plaintiff's employment was terminated. Plaintiff also has a viable cause of action for retaliation; but only termination of her employment, and not rejection of her job applications after her discrimination charge, can be considered

retaliatory. Summary adjudication was warranted on plaintiff's cause of action for intentional infliction of emotional distress, and on her claim for punitive damages. Denial of the continuance was not an abuse of discretion.

We reverse the judgment with directions to enter an order summarily adjudicating the emotional distress and punitive damages claims.

I. BACKGROUND

Plaintiff began working for defendant in 1989. She was diagnosed by Dr. James Boccio with plantar fascitis in both feet in September 1991. She had surgery on her feet for the condition in 1998, followed by a period of disability from January 24 through September 7, 1998. She was working as a front end supervisor prior to her surgery. Dr. Boccio approved plaintiff's return to work on September 7 on the conditions that the work be limited to five hours per day and four days per week. Plaintiff testified at her deposition that, before these conditions were arranged, she spoke with warehouse manager Jan Burdick and assistant warehouse manager Michelle Hughes, who "asked me to work with my doctor to get me back in any way, and they would accommodate me in any way to get me back to work. And they would offer me a table and chairs; they would let me sit; they would let me do whatever to get the doctor to release me in any way to get back."

Plaintiff took a few weeks of vacation and returned to work on October 1, 1998. Dr. Boccio executed a disability certificate dated September 29, 1998, stating "RTW [return to work] 10/1/98 40 hrs per week. Will follow-up w/Appt if any problems." Plaintiff testified that defendant and Boccio had reached an understanding in conversations that she would have a job sitting down when she returned to work, and she was initially assigned to cover for a membership manager, Becky, who was on maternity leave. In March 1999, plaintiff was promoted by the new warehouse manager, Jim Harris, to assistant front end manager. Harris had met plaintiff before becoming warehouse manager, when they were both off work undergoing physical therapy following their foot surgeries, and she had told him about her operation. While plaintiff was filling in for Becky she mentioned to Harris that she and Becky would like to switch

positions, but plaintiff was returned to the front end assistant manager position when Becky returned from maternity leave in July 1999.

Plaintiff testified that "they stopped accommodating me" after she went to work at the front end, and she ended up spending 10 to 11 hours a day, five days a week, on her feet. She said that Harris and front end manager, Salpi Calhoun, initially gave her "certain days off the front end doing paperwork," but then "started gradually taking away my office responsibilities of sitting down. . . . [¶] Any time I was sitting down, they were making me come back to the front end." She frequently told Calhoun that she needed breaks to get off her feet. "[I] talked to her constantly about it," plaintiff testified, "And they just—they could not give me [a reason] or explanation. They just kept saying, 'I need you at the front end,' and the restrictions went down to giving me no restrictions and I couldn't physically do it." She also spoke to Harris "on a couple [of] occasions about not getting the accommodations and that I needed to be off my feet." Harris did not tell her to get a doctor's note so that he could accommodate her. Instead, he made "comments . . . ridiculing Dr. Boccio because he had the same—he had the surgery on one foot that I had on both and made comments that the doctor wanted him out of work. And he laughed, like, 'Yeah, right.' You know, made negative comments about it. [¶] And I didn't really feel I was getting the support from him because I'm [the] one that needed the accommodations, and that's what I was worried about. I didn't get the support I needed."

Plaintiff sought treatment with Dr. Boccio on May 19, 2000; he had not treated her since August 1998. Boccio certified plaintiff as disabled from May 19 to July 10, 2000. Plaintiff testified that when she returned to work in July 2000, she requested reassignment to a vacant executive membership management position that was "consistent with my medical restrictions." Harris denied the request, telling her that "they wanted 'fresh blood,' " a comment she regarded as indicative of gender and disability discrimination. After two weeks on the job, plaintiff told Boccio that she was having severe foot pain, and he certified her as disabled from July 24 to October 31, 2000. On October 31, Boccio signed a disability certificate stating, "Return to work

11-13-00." In his other 2000 certificates, Boccio checked a box for "Totally Incapacitated" and wrote "no work."

Boccio testified in his deposition that when he certified that plaintiff was "totally incapacitated" and could do "no work," he was referring only to her usual front end assistant manager position. He thought that plaintiff could perform sedentary work, with the restrictions that she not lift more than 10 to 20 pounds and spend no more than 30 to 60 minutes standing and walking. Boccio's notes from plaintiff's October 31 appointment stated in part, "Discuss return to work and likelihood of increased heel pain. Tennis shoes, orthotics." Plaintiff acknowledged in her deposition that the October 31 certificate authorized her return to work on November 13, 2000 with no restrictions; she resumed working as front end assistant manager on that date.

When plaintiff returned to see Dr. Boccio on February 5, 2001, she reported foot pain, and said she was working 55 to 60-hour weeks and from nine to 11 days straight. Boccio or someone from his office executed disability certificates stating that plaintiff was totally incapacitated and unable to work from February 13, 2001 to April 1, 2002. Boccio testified that the certificate dated December 6, 2001, which stated that plaintiff was totally incapacitated and unable to work from February 14, 2001 to January 1, 2002, was meant to cover only the period from December 6, 2001 to January 1, 2002. The last certificate in the series, which was dated January 1, 2002, and covered the period from that date to April 1, 2002, noted, in addition to total disability and inability to work, that plaintiff was "in vocational rehab." Boccio testified that the 2001 and 2002 certificates, like those in 2000, referred only to plaintiff's inability to perform her usual front end assistant manager position, and he opined that she was capable of performing a sedentary job, with the restrictions noted above (lifting no more than 10 to 20 pounds, standing and walking not more than 30 to 60 minutes), during this time. The certificates themselves simply said "no work" without any qualification, and Boccio did not communicate his understanding to Costco about plaintiff's ability to perform other work.

Meanwhile, Dr. Boccio had concluded in April 2001 that plaintiff would never be able to work in a position that required her to stand on concrete floors eight to 10 hours a

day. In May 2001 Boccio advised defendant's disability insurer, Unum, that he would allow plaintiff to return to work in a sedentary position that did not require her to stand or walk for more than one hour in an eight-hour day.[1] In September 2001, defendant's workers' compensation medical evaluator, Dr. Glenn Pfeffer, concluded that plaintiff's condition had become "permanent and stationary," and that she could work if she could sit for 15 minutes after 90 minutes of standing or walking, and she did not lift more than 50 pounds. On October 17, 2001, Tina Chong, a claims adjustor for Cambridge, Costco's third-party workers' compensation administrator, wrote plaintiff to inform her that she was eligible for vocational rehabilitation benefits. On October 17, 2001, Chong wrote Harris a letter advising that Dr. Pfeffer (erroneously described in the letter as plaintiff's treating physician) had determined that plaintiff could not be returned to her former job, and that an accommodation meeting was necessary to determine whether she could be returned to a modified or alternate position.

Cambridge hired vocational consultant Kris Jussila to assist in accommodating plaintiff, and Jussila set up an accommodation meeting on October 30, 2001. On October 23, Jussila contacted plaintiff's attorney for authorization to invite plaintiff to the meeting, but the authorization was declined. Plaintiff testified that she was never informed about the meeting. The meeting was attended by Jussila, Harris, and a payroll clerk. It was determined that plaintiff could be accommodated in her assistant front end manager position, consistent with Dr. Pfeffer's assessment, by providing her a wheelchair where she could sit for 15 minutes after 90 minutes of standing. On October 30, Jussila sent plaintiff a letter on behalf of Costco offering this accommodation. No lifting limit was offered because the assistant front end manager position did not require lifting more than 20 pounds—less than Pfeffer said plaintiff could manage.

On November 1, 2001, Unum, the disability insurer wrote Dr. Boccio asking for information on plaintiff's current condition. The letter said, "Ms. Sealock's employer,

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[1] Boccio stated in his deposition that he did not consider Unum to be acting on defendant's behalf.

Costco, is very pro-active in accommodating their employees to return to work. We are trying to assist in this process to determine what type of accommodations might be needed to enable Ms. Sealock to return to work with Costco." Boccio examined plaintiff on November 8, 2001, and concluded that she could not stand for more than 30 minutes per day, or lift more than 10 pounds, at work. After that examination, Boccio wrote a November 8, 2001, letter to plaintiff's worker's compensation counsel, which stated in part: "Due to the fact that she has not resolved her symptoms completely and with any on feet activity her symptoms increase, I have recommended that she undergo vocational rehab. I do not feel she will be able to resume a standing job on hard surfaces throughout the day. Her activities should be limited at work to less than half an hour of standing with less than ten pounds of lifting at anytime."

Plaintiff called Jussila on November 8, 2001, informed Jussila that Dr. Pfeffer was not her treating physician, and told Jussila that Dr. Boccio refused to release her to return to work under the offered conditions. On November 9, Boccio responded to Unum's request for information, and indicated that plaintiff was limited to standing and walking "less than 30 minutes a day." Boccio told Unum that plaintiff "will be unable to resume prior job. Recommend vocational rehab." On November 13, plaintiff wrote defendant, "I reject this offer of modified or alternative work. . . . Dr. Boccio has stated I cannot return to work on modified and has referred me to vocational [rehabilitation]."

On December 18, 2001, Cambridge's claims adjustor Chong sent Dr. Boccio a fax asking him to clarify his November 8 report and indicate whether plaintiff could stand for 30 minutes per hour or per day. Boccio wrote back on that date, "I do not feel that [plaintiff] would be able to resume a job that is on a hard concrete surface. The job modifications that Costco has offered have been reviewed and fifteen minutes in a wheel chair is not sufficient to prevent the recurrence of her fascitis. She will continue to be on hard surfaces for prolonged period[s] of time, which will exacerbate her symptoms. Again at this time I feel she is a candidate for vocational retraining. She is temporary totally disabled but can and should undergo vocational retraining during this time. Her symptoms should continue to improve gradually with the utilization of the Richie Braces

as long as her standing and walking is limited to thirty minutes." Boccio testified that, when he certified plaintiff as temporarily totally disabled, "That means that she's totally disabled for a limited amount of time, not permanent. [¶] Q. And does that mean she is totally disabled from her usual and customary position? [¶] A. No. It means that she's totally disabled from any position."

Chong faxed Harris a letter on December 18, 2001, stating: "The applicant's attorney has disputed your Offer of Modified Work, because treating Dr. Boccio released Ms. Sealock to lift only 10 lbs with less than half an hour of standing. His report is attached. Your job offer was based on lifting of 20 pounds. [¶] Please fax me a letter confirming if you can provide seated work (wheelchair) and advise if you can modify the job offer to comply with a 10 pound lifting restriction. If you cannot accommodate a 10 pound lifting restriction as well as the seated work restriction, we may have to provide Ms. Sealock with rehabilitation services."[2]

On December 19, 2001, Harris wrote to plaintiff: "At this time, the warehouse would like to offer to you reasonable accommodation in your position as Front End Assistant Manager. According to your physician, you have a 10lb lifting restriction which we can accommodate and a sedentary restriction of 45 minutes every hour. We can offer sedentary accommodation of 15 minutes every hour. If you have any concerns about your ability to perform in this position, please give me a call to discuss them. If your doctor agrees, we would be willing to provide these accommodations."[3] Harris admitted in his deposition that he was of the opinion, when defendant was attempting to

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[2] It is not clear from the evidence which of Boccio's reports—his letter of November 8 or his letter of December 18—were attached to Chong's fax, but according to Fact 57 in plaintiff's separate statement of undisputed material facts, which defendant did not dispute, defendant was informed of the December 18 letter.

[3] Defendant did not dispute Fact 58 in plaintiff's statement of material facts that Harris made this offer "[d]espite [having been] made aware of Dr. Boccio's medical restrictions . . . ." It is not apparent from the record how Harris derived the 45-minute per hour sedentary restriction or what was its basis.

accommodate plaintiff, that a person entirely confined to a wheelchair could have performed the duties of assistant front end manager.[4] Dr. Boccio testified that he would have approved plaintiff's return to work if defendant had offered a modified position that involved lifting no more than 10 pounds and standing no more than 30 minutes a day.

On January 10, 2002, Harris wrote plaintiff a letter referring to the accommodation offered after the October 30 meeting and Dr. Boccio's disapproval thereof, and enclosing a resignation form for plaintiff to sign "[a]s no work is available." The letter stated that defendant would assume that plaintiff agreed to resign if she did not respond by February 1, 2002. Plaintiff called Harris on January 26, 2002, and, according to her testimony, talked to him "about wanting to come back." Plaintiff has declared that "[d]uring our conversation, I informed Mr. Harris that I was ready, willing, and able to return to work with Costco to any position consistent with my medical restrictions as determined by Dr. Boccio." Plaintiff testified that Harris "said he would do whatever it would take to get me to come back. He wanted to accommodate me." Plaintiff made a contemporaneous note of the January 26 conversation on her copy of Harris's January 10 letter, memorializing his "I [will] do anything for you comment." On February 19, 2002, Harris wrote plaintiff to advise that she had been terminated effective February 1. The letter referred again to plaintiff's failure to accept the accommodation offered after the October 30 meeting, and added: "You were offered an opportunity to resign which you choose not to accept. Rather, you elected vocational rehabilitation through your workers compensation carrier. Therefore, we are terminating your employment. . . . [¶] If your medical condition changes, please feel free to call us about further employment. . . ."

Plaintiff worked with a vocational rehabilitation counselor after her termination, and began vocational rehabilitation training in April 2002. On April 21, 2002, plaintiff

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[4] Harris was asked, "[C]orrect me if I'm wrong, I think you told me that as of job accommodation meetings for Ms. Sealock, it was your opinion that an individual who had to use a wheelchair for their entire eight hour shift could perform the duties of the assistant front end manager position?" He answered, "Yes, that's my opinion."

wrote David Renz, the manager of defendant's Novato warehouse, to express her interest in a membership-marketing manager position, and "in any full-time administrative fields, should any become available (payroll, sales audit, floater, vault, marketer, etc.)." Renz replied that the application period for the membership-marketing position had closed before plaintiff's letter was received.

On May 21, 2002, plaintiff wrote Harris a letter informing him that "I have a Doctors release to return to work in any sedentary position. This would be any of the following positions: payroll, sales audit, vault, floater, safety coordinator, expense payables, and any Regional Buying Office position. This could also enable me to be available in any other warehouse, should these positions become available. As past experience, not all positions available are always posted, so please acknowledge this letter as an open reques[t] to return to work as we discussed. [¶] On 1-26-02, we discussed that I had all intentions of returning to any other position, because you had only offered me back at my old position, in which the Doctor would not release me. You agreed to do whatever I wanted." Defendant's "worklife" manager, Cindy Schmertzler, wrote back to plaintiff on June 5, 2002, stating, "I have enclosed a physicians statement of work capabilities. Your letter mentions that you are seeking sedentary work. If you would like us to evaluate any other work capacities you may have, please have your physician complete this form so that we may review any accommodations you may require. [¶] Also, please let me know which locations you would be interested in seeking job opportunities that match your work capabilities."

On June 13, 2002, plaintiff's attorneys wrote defendant asking it to modify her position to require no standing or walking for more than 30 minutes per day, no lifting more than 10 pounds, and no bending, squatting, kneeling, crawling, climbing, pushing or pulling. Alternatively, the letter asked that plaintiff be transferred to any position that was "consistent with her medical restrictions." The letter also invited defendant to enter into an interactive process to try to find an acceptable accommodation. On June 28, 2002, plaintiff filed a charge of disability discrimination against defendant with the Equal Employment Opportunity Commission (EEOC) and the Department of Fair Employment

and Housing. On August 7, 2002, plaintiff's counsel responded to Schmertzler's June 5 letter, and advised that plaintiff was interested in positions in any of defendant's Northern California facilities or in its Washington home office. The letter enclosed Dr. Boccio's statement of plaintiff's work capacities, indicating among other things that she could stand and walk for one-half hour a day, carry up to 10 pounds, and drive a car no more than 33 percent of the time.

On October 7, 2002, Schmertzler wrote plaintiff and offered her a part-time expense clerk position in South San Francisco. Plaintiff testified that Dr. Boccio would not release her for the job because it would have involved a two-hour commute each way. On November 5, 2002, Schmertzler wrote plaintiff a letter recounting their telephone conversation on October 14, when plaintiff advised that she was interested only in certain positions at certain locations, including facilities in Northern California, and defendant's home office in the state of Washington. Schmertzler said that the manager positions plaintiff wanted were incompatible with her medical restrictions, and there were no vacancies for the other positions at the desired facilities at that time. Schmertzler said that she would send plaintiff job postings for the home office about every two weeks, and that plaintiff could determine whether she was qualified for those positions. Schmertzler said that she would also inform plaintiff of positions she might be qualified to perform at defendant's Bay Area facilities, including facilities other than those in which plaintiff had expressed an interest.

Plaintiff testified that, contrary to what Schmertzler said in the letter, she told Schmertzler that she was "pretty much open to anything" in "the administrative field," including ". . . payroll, the sales auditor, the vault, admin manager," and "[m]embership-marketing manager"—"the only functions that," as she put it, "would be sitting down." Plaintiff has identified various openings in these positions and also an inventory control specialist in the Bay Area that she could have filled from May 2001 to June 2003. From November 2002 to June 2003, Schmertzler sent plaintiff postings for jobs—all but three in Washington—with cover notes asking plaintiff to contact her if she was interested. Plaintiff applied unsuccessfully for a number of positions by communicating with the

contact person listed on the job posting, rather than with Schmertzler. In February 2003, plaintiff filed a second charge of discrimination with the EEOC, based on defendant's failure to return her to work. In May 2003, Schmertzler wrote plaintiff stating that it had come to her attention that plaintiff was applying for positions directly, rather than through her, and thereby hampering her ability to assist plaintiff in finding a suitable position. Schmertzler opined that at least two of the jobs for which plaintiff had applied were incompatible with her physical limitations. Schmertzler asked plaintiff to provide documentation from a physician of her current medical restrictions.

On June 16, 2003, Schmertzler wrote plaintiff to offer her the job of membership-marketing supervisor at the South San Francisco warehouse. Dr. Boccio wrote Chong on July 3, 2003, clearing plaintiff to take the position with the following restrictions: "She is to limit her standing and walking to forty-five minutes to one hour duration. She should have a wheelchair available to allow her to sit and also to move around the job site in a non-weight bearing position. She should also be allowed to be up and down on and off her feet depending on her physical discomfort." Defendant agreed to provide those accommodations, and furnished plaintiff with a wheelchair and access to a desk and chair. Plaintiff took the membership-marketing manager position in July 2003, was reinstated without a break in service, and has worked for defendant since that time. In 2004, she resumed working as an assistant front end manager, the job she held before her employment was terminated, and she has since been promoted to center manager of the South San Francisco warehouse.

To recapitulate for purposes of the following discussion, plaintiff was off work from January to September 1998 following her surgery; worked from October 1998 to May 2000; was off work from May 2000 to November 2000 except for two weeks in July of that year; worked from November 2000 to February 2001; was off work from February 2001 until her employment was terminated in February 2002; and was rehired in July 2003.

Plaintiff filed her complaint against defendant in February 2003,[5] seeking compensatory damages, punitive damages, and attorney's fees, and asserting causes of action for: (1) employment discrimination based on defendant's alleged failure to provide reasonable accommodation for her disability; (2) retaliation, based on defendant's termination of plaintiff's employment after she requested accommodation, and its failure to rehire her before and after she filed her EEOC charge; (3) unfair business practices in violation of Business and Professions Code section 17200 et seq.; (4) wrongful termination in violation of public policy; and (5) intentional infliction of emotional distress. The complaint included a prayer for punitive damages.

Defendant filed its motion for summary judgment or summary adjudication on February 7, 2005. On March 29, 2005, plaintiff filed an ex parte motion to continue the summary judgment hearing, and the hearing was continued from April 25 to May 9, 2005. On April 25, 2005, plaintiff moved for a further continuance of the summary judgment hearing. The motion was denied, and the hearing proceeded on May 9.

In its order granting summary judgment, the court found that from February 13, 2001 until plaintiff's termination in February 2002, defendant reasonably relied on Dr. Boccio's certificates stating that plaintiff was totally incapacitated and unable to work. The court further found that plaintiff's claims were time barred to the extent they were based on events occurring more than one year before she filed her first charge of discrimination with the EEOC in June 2002. These findings were dispositive of the cause of action for failure to accommodate plaintiff's disability. The court found no triable issue on the cause of action for retaliation because plaintiff had no evidence (1) that defendant's personnel who rejected her employment applications after she filed her EEOC charges knew of those charges or of plaintiff's disability, or (2) that she was more qualified than the applicants who were given those positions. The court concluded that,

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[5] Harris was originally named as an additional defendant, but was dismissed from the suit.

in view of all of the foregoing findings, the causes of action for unfair business practices, wrongful termination, and intentional infliction of emotional distress were also untenable.

II. DISCUSSION

A. Summary Judgment and Adjudication

"A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) We review the trial court's decision de novo, considering all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports. [*Artiglio v. Corning Inc.* (1998) 18 Cal.4th 604, 612.] In the trial court, once a moving defendant has 'shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established,' the burden shifts to the plaintiff to show the existence of a triable issue; to meet that burden, the plaintiff 'may not rely upon the mere allegations or denials of its pleadings . . . but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action . . . .' (Code Civ. Proc., § 437c, subd. (o)(2); [see *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 854-855].)" (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476-477.)

"In reviewing the evidence, we strictly construe the moving party's evidence and liberally construe the opposing party's and accept as undisputed only those portions of the moving party's evidence that are uncontradicted. 'Only when the inferences are indisputable may the court decide the issues as a matter of law. If the evidence is in conflict, the factual issues must be resolved by trial. "Any doubts about the propriety of summary judgment . . . are generally resolved *against* granting the motion, because that allows the future development of the case and avoids errors." [Citation.] ' " (*Herberg v. California Institute of the Arts* (2002) 101 Cal.App.4th 142, 148 (*Herberg*).)

Summary adjudication lies to challenge each cause of action separately, as well as the claim for punitive damages. (Code Civ. Proc., § 437c, subd. (f)(1).) If a triable issue exists as to any cause of action, then defendant is not entitled to judgment as a matter of

law and the grant of summary judgment must be reversed. However, because defendant moved alternatively for summary adjudication, we must separately examine each cause of action and the claim for punitive damages, under the de novo standard of review (*Certain Underwriters at Lloyd's of London v. Superior Court* (2001) 24 Cal.4th 945, 972), to determine whether summary adjudication should have been granted as to that cause of action or those damages (see, e.g., *Mathieu v. Norrell Corp.* (2004) 115 Cal.App.4th 1174, 1188-1189, 1191 (*Mathieu*)).

B. Failure to Accommodate

(1) From February 2001

The California Fair Employment and Housing Act (Gov. Code, § 12900; hereafter FEHA) requires an employer "to make reasonable accommodation for the known physical or mental disability of an applicant or employee" if it can do so without undue hardship to its operation. (Gov. Code, § 12940, subd. (m).) "Reasonable accommodation" may include "[j]ob restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices . . . and other similar accommodations for individuals with disabilities." (Gov. Code, § 12926, subd. (n)(2).) The employer must "engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition." (Gov. Code, § 12940, subd. (n).)

The court in *Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 263 (*Jensen*) held persuasively that if the employee is disabled within the meaning of FEHA—and there is no dispute that plaintiff's plantar fascitis qualifies as a disability—"the employer cannot prevail on summary judgment on a claim of failure to reasonably accommodate unless it establishes 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. . . ."

As we have said, the trial court found no evidence of a failure to reasonably accommodate plaintiff from February 2001 to her termination in February 2002 because Dr. Boccio certified her as totally incapacitated and unable to work during this period. The court noted that an employer cannot be held liable for disability discrimination where it relies in good faith on medical opinions in making its decisions. (See *Crocker v. Runyon* (6th Cir. 2000) 207 F.3d 314, 319 (*Crocker*); see generally *Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 812 (*Richards*) [California courts often look to decisions construing federal antidiscrimination statutes when interpreting FEHA]; *Brundage v. Hahn* (1997) 57 Cal.App.4th 228, 235 (*Brundage*) [decisions interpreting federal law can be persuasive authority on issues arising under parallel provisions of FEHA].)

The court's analysis was sound for the time from February 2001 until Harris received the fax from Chong on December 18, 2001, attaching Boccio's report on the restrictions plaintiff needed and asking defendant whether those restrictions could be accommodated. Up until that time, the only medical information defendant received concerning plaintiff's medical condition was Dr. Pfeffer's assessment and Boccio's disability certificates. Boccio testified that when he wrote "no work" on the certificates he meant no work in plaintiff's customary position, and he said that the December 6 certificate, which covered the period from February 14 to January 1, 2002, was meant to cover only the period from December 6, 2001 to January 1, 2002. However, in the absence of evidence that he informed defendant of these qualifications and corrections defendant was entitled to rely on what the certificates said. Although Boccio communicated his opinion of the accommodations plaintiff required to defendant's disability insurer, that communication was not tantamount to informing defendant itself. Plaintiff notes that defendant knew Boccio was her treating physician and never contacted him to discuss what she needed. However, defendant had no duty to do so because there is no evidence that plaintiff did anything to initiate an interactive process

during this time. (See *Spitzer v. Good Guys, Inc.* (2000) 80 Cal.App.4th 1376, 1384-1385 (*Spitzer*) [employee is responsible for starting the process]).

Accordingly, while the reasonableness of an accommodation is ordinarily an issue of fact for the jury (*Hanson v. Lucky Stores, Inc.* (1999) 74 Cal.App.4th 215, 228, fn. 11; *Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 954 (*Prilliman*)), there is no evidence creating a triable issue as to the reasonableness of the accommodation defendant offered on October 30, 2001. The only medical information defendant had been provided were Dr. Boccio's opinions that plaintiff was totally disabled and unable to work, in which case no accommodation was feasible, and Dr. Pfeffer's opinion of the restrictions plaintiff required, which defendant offered to provide.

The situation is different, however, with respect to defendant's offer of December 19, 2001. At that point, defendant had received Chong's fax and Dr. Boccio's report indicating, contrary to Boccio's disability certificates, that plaintiff could possibly return to work with standing and lifting restrictions. To be sure, Boccio's report to Chong was not a model of clarity. It did not answer Chong's question as to whether the 30-minute standing restriction meant 30 minutes per hour or per day. It stated on the one hand that plaintiff was "temporar[ily] totally disabled," and on the other that her symptoms would likely improve if her standing and walking were limited to "30 minutes." Boccio testified that by "temporarily totally disabled," he meant "totally disabled from any position." However, the question is not what Boccio was thinking when he wrote the report, the issue is how a reasonable employer in defendant's position would have interpreted that report, in the context of Chong's simultaneous inquiry about a further accommodation.

Once defendant received information that Dr. Boccio thought plaintiff could work under certain conditions—"less than half an hour of standing . . . (wheelchair)" and a 10-pound lifting limit, per Chong's fax to Harris describing Boccio's opinion—defendant's ability to claim good faith reliance on Boccio's disability certificates was disputable, as was the reasonableness of the new accommodation offered, given the conditions Boccio specified. Defendant then had conflicting opinions, those of Boccio and Pfeffer, about

what was necessary to accommodate plaintiff.[6] (Compare *Crocker, supra,* 207 F.3d at pp. 317, 319 [applicant failed separate physicals administered by two doctors].) Harris knew that Boccio, not Pfeffer, was plaintiff's treating physician, and had no reason to necessarily give the nontreating Dr. Pfeffer's opinion more credence. Even if it were unclear whether Boccio thought plaintiff could stand 30 minutes an hour or a day, the December offer was outside his parameters because it provided for "sedentary accommodation" of only 15 minutes per hour. A trier of fact could find, from what Harris learned of Boccio's opinion of plaintiff's capabilities, and from Harris's admission that plaintiff could have performed her assistant front end manager duties entirely from a wheelchair, that his December accommodation offer was inadequate and unreasonable. Thus, defendant is not entitled to summary judgment on the ground that, as of December 18, 2001, it can be said as a matter of law that "reasonable accommodation was offered and refused." (*Jensen*, *supra*, 85 Cal.App.4th at p. 263.)

The dissent sees "no significant difference between the information available to defendant before or after December 18,"(dis. opn, *infra*, p. 3) but there is no dispute that defendant received new information on December 18—a medical opinion from Boccio that differed both from his previous "totally incapacitated" certificates, and from Dr. Pfeffer's opinion—and the significance of that information is, in our view, a jury question. The new information was ambiguous (whether plaintiff could stand 30 minutes per hour or per day) and equivocal (Boccio also described plaintiff as totally temporarily disabled), but that information distinguished the situation on December 19 when the second accommodation offer was made from that on October 30 when the first offer was extended. The dissent is wrong to assert that "nothing in Harris's December 19 letter [was] inconsistent with the ambiguous medical information being provided to defendant." (Dis. opn, *infra*, p. 4.) Again, the December offer of 15 minutes of sitting per hour fell short of what Boccio thought plaintiff required, whether he thought that plaintiff could

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[6] That fact is undisputed. Defendant acknowledged at the oral argument on appeal that, at this stage, it had received competing medical opinions of plaintiff's limitations.

stand 30 minutes per hour or per day and, again, there is no dispute on the point. Defendant has characterized the December offer as a "compromise" between competing medical opinions, and thus conceded, as it must under the evidence, that the offer was inconsistent with the opinion Boccio held.

The dissent argues that the second, compromise offer was a reasonable one, but the evidence does not as a matter of law compel that finding. Defendant's first offer, based on Dr. Pfeffer's assessment, was 15 minutes of sitting after 90 minutes of standing. After receiving Dr. Boccio's opinion that plaintiff could stand for only 30 minutes, defendant sweetened its offer to 15 minutes of sitting every hour, in a sort of horse trading. As established by Harris's testimony that plaintiff could have done her job entirely from a wheelchair, there was no work-related reason in the record on appeal why defendant could not have offered 30 minutes of sitting every hour rather than 15. Therefore, the second offer was arguably unreasonable. The dissent presents an argument that might be persuasive to some jurors, but that is not the question on a motion for summary judgment nor are the reasonable inferences indisputable. (*Herberg*, *supra*, 101 Cal.App.4th at p. 148 [summary judgment is denied unless inferences are indisputable; doubts are resolved against the moving party].) We thus reiterate that whether a "reasonable accommodation was offered and refused" (*Jensen, supra,* 85 Cal.App.4th at p. 263) was a jury issue here.

The other potential grounds for summary judgment are also absent after the December 18, 2001 communication to Harris informing him of Dr. Boccio's restrictions. Defendant has not established that there was "no vacant position within [its] organization for which [plaintiff] was qualified and which [plaintiff] was capable of performing with or without accommodation." (*Jensen*, *supra*, 85 Cal.App.4th at p. 263.) To the contrary, Harris has admitted that plaintiff could have performed her assistant front end manager's duties entirely from a wheelchair. It also appears that defendant may have had other vacant positions plaintiff could have performed before she was terminated. (See

Prilliman, supra, 53 Cal.App.4th at p. 950 [reasonable accommodation may entail informing a disabled employee of other suitable job opportunities with the employer].)[7]

Nor is this a case where summary judgment can be granted on the ground that the employer did everything it could to find a reasonable accommodation, but the employee failed to participate in the interactive process in good faith. (*Jensen*, *supra*, 85 Cal.App.4th at p. 263.) Again, it is a triable issue whether defendant did "everything in its power" to accommodate plaintiff after receiving information that her treating physician may not have considered her to be totally incapacitated. As we have said, defendant's December 19 offer was inconsistent with the sedentary restriction Dr. Boccio thought was necessary, and of what could have been offered given defendant's acknowledgment that plaintiff's job could have been done entirely from a wheelchair. While that fact alone is dispositive of the third potential ground for summary judgment, the adequacy of plaintiff's participation in the interactive process is also debatable.

The interactive process is one in which both sides are supposed to communicate directly and exchange essential information without delay or obstruction. (*Jensen*, *supra*, 85 Cal.App.4th at p. 263.) When the employer has " ' ". . . take[n] 'positive steps' to accommodate the employee's limitations, [the employee has] a duty to cooperate with the employer's efforts by explaining [his or] her disability and qualifications. . . ." ' " (*Spitzer*, *supra*, 80 Cal.App.4th at p. 1385.) The employee is responsible for "understand[ing] his or her own physical or mental condition well enough to present the

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[7] Plaintiff cites evidence of other positions she could have filled between the time she was terminated and rehired as proof of an ongoing FEHA violation, but the duty of accommodation extends only to employees and applicants (Gov. Code, § 12940, subd. (m)). Thus, if plaintiff were found to have been wrongfully terminated, defendant's subsequent acts might bear on the issue of damages, but they could not be characterized as a failure to accommodate. Plaintiff argues that Schmertzler could have done more to get her rehired, including informing her of more job postings; defendant argues that plaintiff could have done more to cooperate with Schmertzler. These are jury arguments as to whether there were losses plaintiff could reasonably have avoided. (See *State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1042-1044 [damages in FEHA suits are limited by doctrine of avoidable consequences].)

employer at the earliest opportunity with a concise list of restrictions which must be met . . . ." (*Jensen*, *supra*, 85 Cal.App.4th at p. 266.)

When defendant took a positive step to accommodate plaintiff with its October 2001 offer, plaintiff's written response was that "Dr. Boccio has stated I cannot return to work on modified and has referred me to vocational [rehabilitation]." When defendant made its December 2001 accommodation offer, plaintiff's response was to lodge a January 1, 2002 disability certificate from Boccio stating that she was totally incapacitated, could do no work, and was in vocational rehabilitation. Rather than explaining what she required, these communications suggested that she was unable to, or uninterested in, returning to work. On the latter point, there is evidence that plaintiff was telling people in 2001 that she needed to "get out of retail" and wanted to train for a "new career." Plaintiff's participation in the interactive process by herself or through her attorney evidenced a failure to communicate fully and clearly with her employer. Under the circumstances, defendant can argue that it was justified in demanding plaintiff's resignation because she had withdrawn from the interactive process and signaled that any further accommodation offer would have been futile.

On the other hand, after plaintiff received the October 2001 offer, she called Jussila and said that Dr. Boccio would not authorize her to work under the restrictions offered. Thus, when plaintiff later wrote defendant and said that Boccio would not approve her return to work "on modified," she was likely referring only to the October offer, and not to any accommodation whatsoever. Defendant's second offer in December 2001, again, did not provide what Boccio believed was necessary. Thus, while the argument would not be a strong one, plaintiff can claim in defense of the January 1, 2002 "totally incapacitated," "in vocational rehab[ilitation]" certificate that, after the receipt of the second offer, she was justified in thinking that any further request for accommodation would have been futile. Plaintiff has testified that she told Harris on January 26, 2002, that she wanted to come back to work for defendant in any capacity within Boccio's restrictions, and that Harris told her he "would do whatever it would take" to get her back. That testimony supports an argument that plaintiff had not withdrawn from the

interactive process, and that the process was still ongoing, when she was terminated in February 2002. "On these . . . equivocal facts, it cannot be said that [defendant] met its burden of establishing . . . that [plaintiff] was responsible for the breakdown in the informal, interactive process" prior to her termination. (*Jensen*, *supra*, 85 Cal.App.4th at p. 266; see *Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 60-61, fn. 20 [responsibility for breakdown in interactive process was question of fact], 62, fn. 23; see also *Herberg, supra,* 101 Cal.App.4th at p. 148 [summary judgment is denied unless inferences are indisputable; doubts are resolved against the moving party].)

Defendant argues that plaintiff should be judicially estopped from claiming to have been a victim of discrimination because she received temporary total disability benefits for periods when she alleges defendant should have returned her to work. Defendant's brief simply repeats a footnote in its points and authorities below that the trial court found "cursory" and "unpersuasive." We agree with the court's assessment of this contention.

The doctrine of judicial estoppel applies when: " '(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake. . . .' " (*Drain v. Betz Laboratories, Inc.* (1999) 69 Cal.App.4th 950, 957.) Defendant has not identified any "administrative proceeding" in which plaintiff took a position inconsistent with this lawsuit. (Compare, *id.* at p. 958 [workers' compensation referee had approved a settlement agreement between the parties].) Nor has defendant shown that plaintiff has taken "totally inconsistent" positions in claiming disability benefits and discrimination. Defendant cites evidence of the amount of benefits received, but nothing of what was said to obtain them. This showing is insufficient because the receipt of disability benefits does not necessarily preclude recovery for discrimination. (See *id.* at pp. 959-960 [discussing *Prilliman*, *supra*, 53 Cal.App.4th 935, and *Bell v. Wells Fargo Bank* (1998)

62 Cal.App.4th 1382].) Consequently, it has not been demonstrated that the conditions for judicial estoppel are satisfied here.

(2) Before February 2001

The trial court found that plaintiff's claims for failures to accommodate her disability prior to February 2001 were barred by FEHA's one-year statute of limitations. (Gov. Code, § 12960, subd. (d).) A plaintiff may recover for violations beyond the one-year period under the continuing violation doctrine, which applies when "the employer's unlawful actions are (1) sufficiently similar in kind—recognizing . . . that similar kinds of unlawful employer conduct, such as acts of harassment or failure to reasonably accommodate disability, may take a number of different forms [citation]; (2) have occurred with reasonable frequency; (3) and have not acquired a degree of permanence. (Citation.)" (*Richards, supra,* 26 Cal.4th at p. 823.) Under the permanence prong of the test, the statute of limitations begins to run "*either* when the course of conduct is brought to an end, as by the employer's cessation of such conduct or by the employee's resignation, *or* when the employee is on notice that further efforts to end the unlawful conduct will be in vain." (*Richards, supra,* at p. 823.) Here, the court found that the similarity requirement was not satisfied, reasoning that "Plaintiff's claim of failure to accommodate her disabilities prior to [February 13, 2001] is not sufficiently similar to Plaintiff's claim that Costco failed to accommodate her at a time when her physician represented her as being totally incapacitated from work."

We agree, for different reasons, that plaintiff has no viable cause of action for failure to accommodate before February 13, 2001. As we have said, an employer who relies in good faith on medical opinions concerning the employee's condition cannot be held liable for failing to accommodate a disability. (See *Crocker, supra,* 207 F.3d at p. 319.) Thus, in the absence of a contrary medical opinion, an employer need not accommodate an employee who has been certified as totally incapacitated and unable to work by her physician, or an employee who has been returned to work by her physician without restriction. This defense is largely dispositive of plaintiff's pre-February 2001 claims.

There are three time periods in question. The first is some time between July 1999, when plaintiff was transferred from the membership department to work as assistant front end manger, and May 19, 2000, when she was certified as unable to work by Dr. Boccio. Plaintiff testified that she was required to spend more and more time on her feet during this period, to the point where she was on her feet 10 to 11 hours per day, five days a week, and she "couldn't physically do it." Plaintiff has testified that she repeatedly requested more time off her feet during this period, but she had been returned to work 40 hours per week in September 1998 without any restrictions. Dr. Boccio's September 1998 certificate stated "[]will follow-up w/Appt if any problems," but plaintiff did not seek further treatment from Boccio until May 19, 2000. Under these circumstances, defendant was entitled to receive information from Boccio about what plaintiff needed before it was required to accommodate any alleged disability. (*Crocker, supra,* 207 F.3d at p. 319.) While it appears that plaintiff was called upon to work more than the 40 hours per week Boccio had specified, there is no evidence that she objected to her hours of work.

The second period at issue was the two weeks plaintiff worked in July 2000, the only time from May 19 to November 13, 2000, when she was not certified by Dr. Boccio as being totally disabled. During the July 2000 work interval she applied for an executive membership management position, but Harris rejected her, stating that "they wanted 'fresh blood.' " Again, however, defendant had no information from Dr. Boccio that plaintiff required any accommodation at that point.

The third period was from November 13, 2000, to February 2001, the last interval plaintiff worked before her termination. Plaintiff has no tenable claim for this period because she had been returned to work by Dr. Boccio without restriction, and there is no indication that she requested any accommodation during this time.

C. Retaliation

It is unlawful for an employer "to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under [FEHA], or because the person has filed a complaint, testified, or assisted in any

proceeding under this part." (Gov. Code, § 12940, subd. (h).) "To establish a prima facie case of retaliation, a plaintiff must show she engaged in a protected activity, she was thereafter subjected to adverse employment action by her employer and there was a causal link between the two." (*Mathieu*, *supra*, 115 Cal.App.4th at p. 1185.) "A causal link may be established with evidence demonstrating that the employer was aware of the protected activity and the adverse action followed within a relatively short time." (*California Fair Employment & Housing Com. v. Gemini Aluminum Corp.* (2004) 122 Cal.App.4th 1004, 1018.) Protected activity includes not only filing a formal charge of discrimination, but also requesting accommodation of a disability. (*Wright v. CompUSA, Inc.* (1st Cir. 2003) 352 F.3d 472, 477-478 [interpreting retaliation provision of the federal Americans with Disabilities Act (ADA)]; *Coons v. Secretary of U.S. Dept.* (9th Cir. 2004) 383 F.3d 879, 887 [same]; see generally *Richards*, *supra*, 26 Cal.4th at p. 812; *Brundage, supra,* 57 Cal.App.4th at p. 235.)

Here, we agree with the trial court that plaintiff has no viable retaliation cause of action for rejections of her job applications after she filed her discrimination charges, because there is no showing that any of the persons who declined to rehire her during that period were aware of her disability or of those filings.[8] This problem with plaintiff's retaliation claim is a consequence of her failure to work through Schmertzler in applying for positions with defendant.

However, the summary judgment order failed to consider plaintiff's other protected activity of requesting accommodation for her disability. As we have shown, plaintiff has a viable cause of action for failure of accommodation beginning in mid-December 2001. Her employment was terminated shortly thereafter, in February of 2002. The "causal link" element of the prima facie case is satisfied simply by showing that the adverse employment action followed the protected conduct closely in time, and that the employer was aware of that conduct. (*Morgan v. Regents of University of*

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[8] This does not mean that plaintiff cannot recover damages for that period if her termination is found to have been retaliatory. (See fn. 7, *supra*.)

California (2000) 88 Cal.App.4th 52, 69 (*Morgan*).) Accordingly, plaintiff has established a prima facie case of retaliatory termination.

"Once an employee establishes a prima facie case, the employer is required to offer a legitimate, nonretaliatory reason for the adverse employment action. [Citation.] If the employer produces a legitimate reason for the adverse employment action . . . the burden shifts back to the employee to prove intentional retaliation." (*Akers v. County of San Diego* (2002) 95 Cal.App.4th 1441, 1453.) The employee is required to show that the employer's proffered justification was a mere pretext. (*Perez v. County of Santa Clara* (2003) 111 Cal.App.4th 671, 676.) " '[T]he employee " 'must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder *could* rationally find them "unworthy of credence," [citation], and hence infer "that the employer did not act for the [asserted] non-discriminatory reasons." [Citations.]' [Citations.]" . . .' " (*Morgan, supra,* 88 Cal.App.4th at p. 75.)

Defendant proffered several nondiscriminatory reasons for terminating plaintiff's employment. Defendant says that plaintiff was terminated because she rejected offers of reasonable accommodation. The "weakness[]" (*Morgan, supra,* 88 Cal.App.4th at p. 75) of this justification is that, as we have explained, it is disputable whether defendant's final accommodation offer was a reasonable one. Defendant claims that it terminated plaintiff because there were no accommodations it could offer that would have allowed her to work within her doctor's restrictions. This justification is implausible (*ibid.*) in view of Harris's testimony that plaintiff could have done her job entirely from a wheelchair. Defendant states that it terminated plaintiff because she had chosen to participate in vocational rehabilitation rather than request further accommodation. However, that explanation would not be "[]worthy of credence" (*ibid.*) if a trier of fact believes plaintiff's testimony that she told defendant, shortly before she was fired, that she wanted to return to work in any capacity that accommodated her disability.

Given the record of defendant's attempts to respond to plaintiff over long periods of time, plaintiff will have an uphill battle to convince a trier of fact that she was

terminated for requesting accommodation. However, the proffered reasons for the termination are not so persuasive as to entirely preclude an inference that they were pretextual. Thus, while plaintiff may have a weak case for retaliation, it is sufficient to withstand summary adjudication. (*Herberg, supra,* 101 Cal.App.4th at p. 148 [summary judgment is denied unless inferences are indisputable; doubts are resolved against the moving party].)

D. Other Causes of Action and Claim for Punitive Damages

The causes of action for unfair business practices under the Unfair Competition Law (UCL) (Bus. & Prof. Code, § 17200 et seq.) and for wrongful termination in violation of public policy stand or fall on the viability of the FEHA causes of action. Unlawful practices covered by the UCL include discrimination in employment, and the remedies under the UCL are cumulative to those under FEHA. (*Herr v. Nestlé U.S.A., Inc.* (2003) 109 Cal.App.4th 779, 789.) A termination in violation of FEHA constitutes a wrongful termination in violation of public policy (*City of Moorpark v. Superior Court* (1998) 18 Cal.4th 1143, 1159-1161), and FEHA does not preempt assertion of that cause of action (*Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 885). Therefore, these causes of action, like those under FEHA, cannot be summarily adjudicated.

The cause of action for intentional infliction of emotional distress requires, among other things, proof of conduct by the defendant that is "outrageous" and "exceeding all bounds usually tolerated by a decent society." (*Agarwal v. Johnson* (1979) 25 Cal.3d 932, 946, disapproved on another point in *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 574, fn. 4.) Such proof is lacking here. When the evidence is viewed in the light most favorable to plaintiff, it shows only that she may have suffered disability discrimination and wrongful termination. Even if those personnel decisions were unlawful, they are insufficient to support a claim for intentional infliction of emotional distress. (See *Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 80 [managing personnel is not outrageous conduct beyond the bounds of human decency; if decisions were improperly motivated, remedy is to sue for discrimination].) There is no evidence of the sort of extreme conduct required for this tort. (Compare *Alcorn v. Anbro Engineering,*

Inc. (1970) 2 Cal.3d 493, 496-499 [shouted racial epithets]; see also *id.* at p. 499, fn. 5 [distinguishing employment cases involving less extreme conduct].) As explained above, there was a failure in communications on both sides, but defendant's conduct does not rise to the level of outrageous conduct.

Summary adjudication of the punitive damages claim must also be upheld, if for no other reason than plaintiff's failure to offer any argument on the subject. (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, §§ 349, 594, pp. 394, 627 [appellant has burden of showing error with an adequate argument].) There is, in any event, insufficient evidence of the requisite despicable conduct on defendant's part. (See *American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton* (2002) 96 Cal.App.4th 1017, 1050-1051 [although defendants had been "disingenuous" and acted with "willful and conscious disregard" of the plaintiff's interests, their conduct did not "reach the level of despicability found in cases in which punitive damages were found to be proper"].) "Taken as a whole, and even construing the facts most favorably to [plaintiff] . . . this is not a case in which a jury could determine by clear and convincing evidence that punitive damages are warranted." (*Id.* at pp. 1053-1054; see *Mathieu*, *supra*, 115 Cal.App.4th at pp. 1185-1188, 1190-1191 [FEHA retaliation claim survived summary adjudication, but punitive damage claim did not].)

E. Denial of the Continuance

Plaintiff contends that it was an abuse of discretion for the court to deny her second request for a continuance of the summary judgment hearing to conduct further discovery. Plaintiff wanted to depose defendant's employees with the most knowledge of her workers' compensation and disability benefits claims "to determine when Defendant possessed information regarding Plaintiff's disability medical restrictions and what information it possessed." Plaintiff also wanted time to compel defendant to produce documentation on the qualifications of individuals hired to positions she could have performed, and on other employees defendant had accommodated, "particularly with the use of a wheelchair."

In denying the motion, the court noted among other things that the complaint was filed on February 13, 2003, the discovery in question was not sought until January and March of 2005, and no explanation was offered as to why the evidence, if essential, could not have been obtained sooner. "We agree with the majority of courts holding that lack of diligence may be a ground for denying a request for a continuance of a summary judgment motion hearing." (*Cooksey v. Alexakis* (2004) 123 Cal.App.4th 246, 257.) There was a reasonable justification under the law for denying the continuance, and thus no abuse of discretion. (*Gonzales v. Nork* (1978) 20 Cal.3d 500, 507.) Nor was plaintiff prejudiced by the ruling. As we have shown, she did not need the additional evidence to defeat the summary judgment motion on most of her causes of action, and there was no showing that any of the evidence was likely to bolster her emotional distress or punitive damage claims.

III. DISPOSITION

The judgment is reversed with directions to enter an order of summary adjudication as to the cause of action for intentional infliction of emotional distress and the claim for punitive damages. The parties shall bear their own costs on appeal.

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Marchiano, P.J.

I concur:

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Stein, J.

Dissenting

I respectfully dissent from the majority's conclusions that summary judgment was erroneously granted.

As set forth in detail in the majority opinion, plaintiff's plantar fascitis, its affect on her ability to work and defendant's efforts to accommodate her, has a history spanning several years. The majority concludes from its review of the record that the trial court's "analysis was sound for the time from February 2001 until Harris received the fax from Chong on December 18, 2001, attaching Boccio's report on the restrictions plaintiff needed and asking defendant whether those restrictions could be accommodated." (Maj. Opn., *ante*, at p. 15.) It arrives at this conclusion because up to December 18, the only information defendant had from Dr. Boccio was that "plaintiff was totally disabled and unable to work, in which case no accommodation was feasible, and Dr. Pfeffer's opinion of the restrictions plaintiff required, which defendant offered to provide." (Maj. Opn., *ante*, at p. 16.) The majority finds, however, that Chong's fax to Harris, Harris's response, and his subsequent deposition testimony combine to create triable issues regarding the reasonableness of the accommodations offered to plaintiff. I disagree.

A brief review of the information available to defendant concerning plaintiff's condition and defendant's action is necessary. Defendant convened an "accommodation meeting" on October 30, 2001,[1] "to explore the possibility of returning Ms. Sealock to work in either a modified or alternative position." A letter offering accommodations was sent to plaintiff following this meeting. That offer of accommodation stated in part: "Costco has modified this position by providing a wheelchair within the front end area to allow Ms. Sealock 15 minutes of sedentary rest while she continues to perform her job duties. No accommodation is required for lifting due to no lifting over 20 lbs." This

[1] Jussila's attempt to arrange plaintiff's attendance at the meeting was rebuffed by plaintiff's counsel.

offer was followed by Dr. Boccio's letter of November 8, to Roy J. Otis[2] that stated in part: "Due to the fact that she has not resolved her symptoms completely and with any on feet activity her symptoms increase, I have recommended that she undergo vocational rehab. I do not feel that she will be able to resume a standing job on hard surfaces throughout the day. Her activities should be limited at work to less than a half an hour of standing with less than ten pounds of lifting at anytime."

The record indicates that there were two responses to this November 8 letter. Woods, an attorney with Gearheart & Otis, responded by letter of December 3, 2001. This letter attached a copy of the October 30 offer to accommodate, and requested "a supplemental report . . . stating whether you believe the modified work that is described in the exhibits attached to this letter comports with the applicant's work restrictions." This letter also requested that Dr. Boccio "state whether you believe the applicant is still totally temporarily disabled despite the fact that you are recommending she undergo vocational retraining at this time." On December 18, Chong sent a fax to Dr. Boccio requesting that he clarify his "report" of November 8. Dr. Boccio's responses to both of these inquiries were identical letters dated December 18, 2001.[3] The majority recognizes that the letter of December 18 is "not a model of clarity." (Maj. Opn., *ante*, at p. 16.) In fact, Dr. Boccio acknowledged that his letter did not clarify whether the plaintiff's "standing and walking is limited to thirty minutes" "out of every 60 minutes or 30 minutes out of the eight-hour work day." The letter, however, did comply with Woods's request that he state if plaintiff was "totally temporarily disabled." He stated she "is temporary totally disabled but can and should undergo vocational retraining during this time."[4]

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[2] Otis is apparently an attorney with Gearheart & Otis, who represented plaintiff in connection with a worker's compensation claim.

[3] The only difference between these letters is the recipient's name and address.

[4] "Where an employee has been temporarily disabled by an industrial injury, he [she] is considered temporarily *totally* disabled if he [she] is unable to earn any income

Notwithstanding Dr. Boccio's lack of clarification of plaintiff's sedentary requirements and his statement that she was "totally disabled," Chong sent a fax to Harris on December 18, that is set forth in part in the majority opinion. (Maj. Opn., *ante*, at p. 7.) Harris then sent his letter of December 19 to plaintiff which read in part: "According to your physician you have a 10lb lifting restriction which we can accommodate and a sedentary restriction of 45 minutes every hour.[5] We can offer sedentary accommodation of 15 minutes every hour."

The majority divines from these documents that: "Once defendant received information that Dr. Boccio thought plaintiff could work under certain conditions—'less than half an hour of standing . . . (wheelchair)' and a 10-pound lifting limit, per Chong's fax to Harris describing Boccio's opinion—defendant's ability to claim good faith reliance on Boccio's disability certificates was disputable, as was the reasonableness of the new accommodation offered, given the conditions Boccio specified." (Maj. Opn., *ante*, at p. 16.) I disagree and find this analysis inconsistent with the majority's conclusion that no triable issues existed prior to December 18, 2001.

I see no significant difference between the information available to defendant before or after December 18, or in the actions it took in response to that information. The October 30, 2001, and December 19, offers of accommodation were both made when the undisputed evidence showed plaintiff was certified by her treating physician as "Totally incapacitated" - "No work." The October 30 offer was copied to Dr. Boccio and resulted in his letter of December 18, which he admitted did not clarify his report of November 8. I find nothing in Harris's December 19 letter that is inconsistent with the ambiguous

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during the period when he [she] is recovering from the effects of the injury. (*Herrera v. Workmen's Comp. App. Bd.* (1969) 71 Cal.2d 254, 257.) Plaintiff's status as "temporary totally disabled" directly impacts the amount that she is entitled to under the Worker's Compensation Law. (Lab. Code §§ 4653 & 4654.)

[5] I have been unable to find anything in the record indicating that Dr. Boccio proposed a "sedentary restriction of 45 minutes every hour."

medical information being provided to defendant. Harris's offer of sedentary accommodation set forth in his December 19 letter is consistent with the October 30 proposal, which the majority does not find fault with, and with the 10-pound lifting accommodation mentioned by Dr. Boccio.

Any confusion or misunderstanding of the scope of the sedentary accommodation was not the fault of defendant. The uncertainty created was only compounded by plaintiff's call to Harris on January 26, 2002, in which she stated that she was willing to return to work in any position consistent with Dr. Boccio's medical restrictions. Dr. Boccio, however, had certified that plaintiff was "totally incapacitated" from January 1 through April 1, 2002. I cannot say that as part of the interactive process Harris's offer to accommodate was unreasonable in view of the confusing information provided by Dr. Boccio. Furthermore, Harris's deposition testimony that a person confined to a wheelchair could do the job of assistant front end manager is not significant. Dr. Boccio never suggested that a reasonable accommodation would be for plaintiff to work *all* of the time from a wheelchair. My reading of the record convinces me defendant was committed to working out reasonable accommodations to allow plaintiff to continue her employment, and in fact took reasonable action in a futile attempt to reach that objective.

In my opinion the summary judgment was proper since there are no triable issues that "would allow a reasonable trier of fact to find the underlying fact[s]" to support plaintiff's causes of action. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) I would affirm the judgment.

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Swager, J.