Filed 5/9/06

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

ROCHELLE Y. WILLIAMS, **Plaintiff and Appellant,** **v.** **GENENTECH, INC.,** **Defendant and Respondent.**	**A110611** **(San Francisco County Super. Ct. No. CGC-03-422285)**

Plaintiff Rochelle Y. Williams, a receptionist at Genentech, Inc. (Genentech), was criticized by her supervisors for mishandling an incident involving company security. Plaintiff suffered stress and an exacerbation of an existing medical condition following the criticism and began a medical leave that lasted seven months. Ultimately, plaintiff's position was filled during her leave, and, when she returned from the leave, she was unable to obtain a different position at Genentech and was terminated. Following her administrative complaint to the California Department of Fair Employment and Housing (DFEH) and the issuance of a right to sue letter, plaintiff filed the complaint in this matter. The trial court granted Genentech's motion for summary judgment, and plaintiff appeals that judgment as to her claims for disability discrimination (Gov. Code, § 12940, subd. (a)) (second cause of action), failure to provide a reasonable accommodation (§ 12940, subd. (m)) (third cause of action), failure to engage in a timely interactive process (§ 12940, subd. (n)) (fourth cause of action), and violation of the Unruh Civil

Rights Act (Unruh Act) (Civ. Code, § 51) (fifth cause of action).[1] We reject her contentions and affirm.

BACKGROUND

Plaintiff began working for Genentech as a receptionist in August 1990, and her job duties included greeting visitors, answering telephones, directing calls, and distributing security badges. Beginning in 1995, Rona Rios became supervisor of all the receptionists, including plaintiff. At the end of September 2000, Rios was promoted to the position of manager and Patricia Marasco became plaintiff's supervisor. Marasco reported to Rios, who reported to Arlene Thompson, the senior manager of telecommunications and transportation.

Receptionists were given daily "Per Alerts" regarding particular people to watch for and instructions to follow upon seeing them. The instructions included alerting security personnel by pressing a panic button in the lobby and responding to security's follow-up telephone call. On October 16, 2000, a woman identified in a Per Alert entered Genentech's lobby while plaintiff was on duty. Plaintiff contacted security and spoke to the security officer in a "code" of plaintiff's own devise, although there was no policy or procedure for doing so.[2] Security personnel then escorted the woman out of the building.

Later that day, the security supervisor informed Marasco that plaintiff had improperly handled the situation, and on October 18, 2000, Marasco and Rios met with plaintiff to address the complaint. At the meeting, Rios told plaintiff that security personnel had complained about her performance, reminded her to follow the Per Alert procedure and refrain from speaking in code, and said her choice of words could have

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[1] Plaintiff expressly states she does not appeal the judgment as to the causes of action for race discrimination (Gov. Code, § 12940, subd. (a)) (first cause of action), breach of contract (sixth cause of action), and intentional infliction of emotional distress (seventh cause of action). Thus, we consider her appeal as to those causes of action abandoned. (*Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 216, fn. 4.)

[2] The code used by plaintiff was, "hurry and bring the pizzas," and "it was a sad movie and [the woman] was crying."

"messed up the investigation." Following the meeting, plaintiff began to cry uncontrollably and hyperventilate. Genentech medical personnel transported her to the hospital emergency room where she was diagnosed as suffering an exacerbation of asthma.

Plaintiff commenced a medical leave on October 18, 2000, and on October 20, her physician certified her as unable to work until October 28, noting she had job related stress. Genentech's records show that plaintiff's leave was extended several times between October 20, 2000 and January 22, 2001.[3] On November 3, 2000, plaintiff's doctor noted she had depression and anxiety. On January 22, 2001, plaintiff's doctor extended her leave until March 5. Her doctor's records indicate that in early February she was being treated by a therapist. The record does not reveal when such therapy commenced or ended. Between April 12 and May 15, her physician diagnosed her as suffering from anxiety and depression and removed her from work as "totally incapacitated." She was released to return to work without restrictions effective May 16, 2001.

Genentech's written family and medical leave policy provided for six months of paid medical leave. It also provided that employees who qualified for leave under the California Family Rights Act (CFRA) (Gov. Code, § 12945.2) would be placed in the same or equivalent position upon their return to work if their leave did not exceed 12 weeks in a 12-month period. The policy provided that if an employee's CFRA/Family Medical Leave Act of 1993 (FMLA) (29 U.S.C. § 2601 et seq.) leave extended beyond 12 weeks, Genentech could not guarantee that a position would be available to the employee. The policy also provided that if an employee's position were filled during his or her leave, the employee would be provided 60 days following the employee's return to work to locate a position for which the employee was qualified, and Genentech would pay the employee his or her full salary during the first 30 days of that 60-day period.

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[3] The record does not reveal whether the leave was extended by Genentech or pursuant to plaintiff's doctor's certification.

Near the beginning of plaintiff's medical leave, she told Laura Bridgman, the senior human resources manager, that she felt "harassed" and unfairly treated by her "manager," Rios. In November 2000, while still on leave, she told Bridgman that she "did not want to return to work in a position under . . . Rios's management." Bridgman investigated plaintiff's "claim" and found that Rios had not engaged in any improper conduct toward plaintiff. However, Bridgman never responded directly to plaintiff's request for a different supervisor.

During plaintiff's medical leave, her position was covered by one of three floater receptionists who served as operators in the telephone operator room and covered the lobby receptionists during breaks, lunches, illnesses and vacations. Using a floater to cover plaintiff's position resulted in a number of business problems: inadequate coverage for illnesses, vacations and planned sabbaticals; receptionists' lunch breaks were shortened; only one receptionist could be out on a given day; and morale suffered.

On January 17, 2001, Bridgman sent a memo to the management team (Thompson, Rios and Marasco) with suggestions regarding plaintiff's expected return to work on January 22. A follow-up meeting was scheduled for January 29 "to strategize on next steps, i.e., the need for any type of follow-up meeting with [plaintiff] based upon the meeting which took place before she went out on leave, review all of [their] roles moving forward, [Marasco's] role to directly supervise [plaintiff] and give her feedback, etc." However, as explained above, on January 22 plaintiff did not return to work, since on that date her doctor extended her leave until March 5.

On January 29, 2001, Bridgman again met with Marasco, Rios and Thompson. According to Bridgman, Marasco and Rios, they discussed the need for a regular, full-time employee in plaintiff's position because using a floater to fill her position adversely impacted the other receptionists and the business. They also discussed that Andy Scherer, the former senior director of facilities, supported filling plaintiff's position. According to Bridgman and Marasco, they determined that having a temporary agency employee fill plaintiff's position was not a viable option due to the extensive training required, lack of qualified persons, and high turnover of temporary employees. Because

of plaintiff's previous extensions of her medical leave, Marasco, Rios, Bridgman and Thompson questioned whether plaintiff would actually return to work in March. At the January 29 meeting, it was agreed that plaintiff's position should be filled by a regular, full-time employee. According to Bridgman, Rios and Marasco, there was no discussion about plaintiff's reaction to or inability to handle the criticism delivered at the October 18, 2000 meeting, and they did not consider that issue in assessing and recommending that her position be filled. Bridgman provided Scherer and Joel Spray, the former director of site services, with the business rationale for the management team's determination that plaintiff's position should be filled. Bridgman did not inform Spray or Scherer that plaintiff's reaction to criticism provided an additional rationale for filling plaintiff's position. Spray and Scherer agreed that plaintiff's position should be filled based on the rationale Bridgman communicated to them and approved the decision.

On January 31, 2001, Bridgman notified plaintiff in writing that she had obtained a statement from plaintiff's doctor stating that plaintiff continued to be disabled and was unable to work through March 5. Bridgman's letter also notified plaintiff that on January 16, plaintiff had exhausted her 12-week "position guarantee," and Genentech was unable to hold her position open any longer and would need to hire a replacement. Bridgman also informed plaintiff that upon her expected return to work in March, she would be entitled to look for another position for 60 days, and Genentech would provide her with more information regarding job search benefits and services to assist her in locating that position. Plaintiff was also informed that she would continue on disability status as long as her doctor continued to certify her as disabled. Genentech posted plaintiff's position as vacant on February 7, 2001 and filled the position on February 26.

On March 21, 2001, Bridgman informed plaintiff that since plaintiff continued to remain disabled and unable to work, she would continue on disability status. Bridgman again informed plaintiff that when her doctor released her to return to work, she would have 60 days to look for another position at Genentech at which time Bridgman would meet with her to provide job search assistance.

On April 19, 2001, Genentech's disability insurer sent plaintiff for an independent medical evaluation. The independent physician determined that plaintiff was able to perform her regular and customary work as of that date. On May 15, plaintiff's own doctor released her to return to work with no restrictions. On May 17, plaintiff was provided with information regarding internal job search services and was informed that Bridgman and Genentech recruiter, Jenny Gee, were resources plaintiff could contact for assistance. Plaintiff was also informed that if she were unable to secure a position at Genentech within 60 days, her employment would be terminated.

From May through July 2001, there were no vacant receptionist positions at Genentech. During this period, Gee assisted plaintiff in looking for a different position within the company. After plaintiff provided Gee with her resume, which revealed that plaintiff had no scientific education and limited work experience, Gee told her there were no vacant positions for which she was qualified. However, plaintiff interviewed for several nonreceptionist positions at Genentech. The first, a labware technician position, required, inter alia, a Bachelor of Science degree or college coursework toward a science degree and mechanical aptitude. Carina Vargas, the hiring manager for the position, reviewed plaintiff's resume and found her unqualified for the position. Plaintiff also interviewed for positions as a packaging operator and a bioprocess technician, but was not hired because she lacked the requisite qualifications and experience. Because plaintiff was not hired for any position at Genentech during her 60-day job search period her employment was terminated effective July 16, 2001.

On July 9, 2002, plaintiff filed an administrative complaint against Genentech with the DFEH, alleging she had suffered race and disability discrimination. The claim alleged that on May 16 and July 16, 2001, Genentech denied her "return to work medical/CFRA/FMLA leave and terminated [her], respectively, because of [her] race (Africa[n]-American) and disability (stress-related)." A right to sue letter issued on July 10, 2002.

On July 12, 2004, plaintiff filed her second amended complaint (the operative complaint) against Genentech alleging that Genentech discriminated against her by filling

her position while she was on "stress leave," and refusing to hire her to a vacant position upon her return to work following her leave, resulting in her termination. The complaint alleged causes of action under the California Fair Employment and Housing Act (FEHA) for race discrimination (Gov. Code, § 12940, subd. (a)), disability discrimination (§ 12940, subd. (a)), failure to reasonably accommodate plaintiff's disability (§ 12940, subd. (m)), and failure to engage in a timely interactive process with plaintiff (§ 12940, subd. (n)). It also alleged violation of the Unruh Act (Civ. Code, § 51, subd. (f)), breach of contract, and intentional infliction of emotional distress.

The Summary Judgment Motion

Genentech moved for summary judgment or, alternatively, summary adjudication of issues on the disability discrimination claims on the grounds that: (1) plaintiff failed to exhaust her administrative remedies under the FEHA regarding Genentech's decision to fill her position and failure to accommodate her disability; (2) plaintiff could not establish a prima facie case of disability discrimination; (3) plaintiff could not establish that Genentech's legitimate business reasons for its employment decisions were a pretext for disability discrimination; and (4) Genentech did not fail to accommodate any alleged disability.[4] Genentech moved for summary judgment or summary adjudication of issues on the Unruh Act cause of action on the grounds that: (1) the Unruh Act does not apply in the context of employer-employee relations; (2) plaintiff could not establish a prima

[4] Genentech's separate statement of facts and points and authorities memorandum, filed in conjunction with the motion, did not specifically reference plaintiff's causes of action for failure to accommodate and failure to engage in the interactive process. Instead, they referred more generically to plaintiff's "claim for disability discrimination in violation of [the] FEHA." However, Genentech specifically argued the failure to accommodate and failure to engage in the interactive process claims in its reply memorandum below and at the summary judgment hearing. Moreover, in granting summary judgment on those causes of action, the court cited much of the same evidence Genentech relied on in moving for summary judgment on the disability discrimination claim. Given the similarity of issues and facts regarding the three causes of action, and because until recently they were not necessarily viewed as separate causes of action (see *Claudio v. Regents of University of California* (2005) 134 Cal.App.4th 224 and *Bagatti v. Department of Rehabilitation* (2002) 97 Cal.App.4th 344), Genentech's failure to break its argument and separate statement into three causes of action is harmless.

facie case of disability discrimination; (3) plaintiff could not establish that Genentech's legitimate business reasons for its employment decisions were a pretext for disability discrimination; and (4) Genentech did not fail to accommodate any alleged disability.

Plaintiff argued that deposition testimony by Thompson, as the senior manager of telecommunications and transportation, created triable issues of fact as to whether her disability was a motivating factor in Genentech's decision to fill her position while she was on medical leave. According to Thompson, she, Marasco, Rios and Bridgman recommended filling plaintiff's position because "it would be very difficult to manage [plaintiff]" and they were afraid that if her work performance needed coaching, "she'd have a reaction like she had before." Although the length of time plaintiff had been on leave, and the resulting hardship to staff, were factors in the decision to fill her position, Thompson said the "coaching issue" was the most significant factor. However, she thought a "significant concern" for Rios and Marasco in deciding to fill plaintiff's position was that plaintiff had been on medical leave a long time and they were not sure she would be coming back.

In support of plaintiff's assertion that Genentech failed to reasonably accommodate her disability by refusing to hire her to a vacant position, plaintiff relied on her declaration, which states that she was told by the interview panelists that she was qualified to be a labware technician.[5]

In reply, Genentech relied on worker's compensation psychological evaluations of

[5] Plaintiff's declaration stated that manager Hardyle Prashad told her she was qualified for the labware technician position and he would be surprised if she did not get it. The court properly ruled that this statement by Prashad contained in plaintiff's declaration was inadmissible hearsay, and we disregard it on appeal. In its reply, Genentech submitted Prashad's declaration that stated that he encouraged plaintiff to apply for the labware technician position although he had no responsibility in hiring for that position and no knowledge as to whether plaintiff met all of the qualifications for it.

plaintiff prepared by Dr. Edward Hyman[6] and Dr. Lawrence Petrakis[7] to argue that at the time it filled plaintiff's position in February 2001, plaintiff was still unable to perform the essential functions of a receptionist. In reply to plaintiff's claim that in November 2000 she requested an accommodation so that she would not work under Rios, Genentech asserted that such an accommodation was unnecessary because plaintiff was aware that Rios no longer supervised the receptionists by the beginning of 2001. Alternatively, Genentech argued that under federal law, a request to shield an employee from a particular supervisor is not a reasonable accommodation. Genentech also argued that it satisfied its obligation to engage in the interactive process and accommodate plaintiff's disability by communicating with her regarding her requests for leave and granting each of those requests. Finally, it argued that plaintiff was not entitled to any accommodations when she returned to work in May 2001 since she was released to return to work with no restrictions.

The Summary Judgment Ruling

As to plaintiff's claim that Genentech discriminated against her by filling her position, the court granted summary judgment on three grounds: (1) Plaintiff failed to timely exhaust her administrative remedies because her DFEH complaint was not filed within one year of Genentech's January 2001 decision to fill her position; (2) Genentech could not be liable for filling her position because plaintiff could not have returned to that position within a reasonable time; and (3) Genentech had legitimate, nondiscriminatory

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6 Dr. Hyman examined plaintiff in April 2003. In describing the history of plaintiff's present injury, the report quotes plaintiff as saying her medical doctor released her to go back to work in "May 2002." The summary section of Dr. Hyman's report states that plaintiff was "temporarily totally disabled by her disability from doing the work of her accustomed position through May 1, 2002" and was permanent and stationary as of that date. We agree with plaintiff that based on its context in Dr. Hyman's report, the date appears to be a typographical error and May 1, 2001, was intended.

7 Dr. Petrakis's February 2005 report stated plaintiff told him that after the October 2000 incident she did not think that she could return to the receptionist job she left at Genentech. Based on plaintiff's representation, Dr. Petrakis concluded that plaintiff "could not return to the previous job based on the facts as they stood when she left work on [October 18, 2000]."

reasons for filling her position, which plaintiff failed to establish were a pretext for disability discrimination. The court ruled that Thompson's deposition testimony did not create a triable factual issue as to whether Genentech's reasons for filling plaintiff's position were pretextual because plaintiff's reaction to criticism was not a disability requiring accommodation; and an employer has no obligation to provide, as an accommodation, a workplace free from stress or criticism. Further, the trial court concluded the decision to fill plaintiff's position was made by Spray and Scherer based on the legitimate business reasons Bridgman communicated to them.

As to plaintiff's claims for failure to accommodate and failure to engage in the interactive process, the court granted summary judgment on the grounds that plaintiff failed to exhaust her administrative remedies by not alleging a failure to accommodate or failure to engage in the interactive process in her DFEH complaint, and did not establish a triable issue of fact as to those claims. In particular, the court found that Genentech communicated regularly with plaintiff and her healthcare providers during her leave of absence. The court ruled, as a matter of law, that a request to shield an employee from a particular supervisor is not a reasonable accommodation. The court also ruled that Genentech had no duty to accommodate plaintiff upon her return to work by reassigning her to a different position because she was no longer disabled. Alternatively, the court ruled the duty to reassign extends only to comparable, vacant positions for which an employee is qualified, and plaintiff was not qualified for any vacant position at Genentech in May 2001 when she was released to return to work.

The court granted summary judgment on plaintiff's claim for violation of the Unruh Act, in part, on the ground that the Unruh Act does not apply to discrimination claims arising in the employer-employee relationship.

DISCUSSION

I. *Standard of Review*

We review summary judgment rulings de novo to determine whether the moving party has met its burden of persuasion that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law. When the defendant

is the moving party, it must show either (1) that the plaintiff cannot establish one or more elements of a cause of action, or (2) that there is a complete defense. If that burden of production is met, the burden shifts to the plaintiff to show the existence of a triable issue of fact with respect to that cause of action or defense. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850; Code Civ. Proc., § 437c, subds. (c), (*o*) & (p).) "All doubts as to whether there are any triable issues of fact are to be resolved in favor of the party opposing summary judgment. [Citation.]" (*Ingham v. Luxor Cab Co.* (2001) 93 Cal.App.4th 1045, 1049.) In reviewing the grant of summary judgment de novo, we must determine independently whether the record supports the trial court's conclusion that plaintiff's discrimination claims failed as a matter of law (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334-335 & fn. 7; *Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 805-807), and we are not bound by the trial court's stated reasons or rationales (*Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 951). " ' "Because discrimination cases often depend on inferences rather than on direct evidence, summary judgment should not be granted unless the evidence could not support any reasonable inference for the [opposing party]." ' [Citations.]" (*Spitzer v. Good Guys, Inc.* (2000) 80 Cal.App.4th 1376, 1386.)

II. *The FEHA Statutory Framework*

Subdivision (a) of Government Code section 12940 makes it an unlawful employment practice to discharge a person from employment or discriminate against the person in the terms, conditions or privileges of employment, because of a physical or mental disability.[8]

[8] Under the FEHA, physical disability, mental disability and medical condition are construed broadly so that applicants and employees are protected from discrimination due to "an actual or perceived physical or mental impairment that is disabling, potentially disabling, or perceived as disabling or potentially disabling." (Gov. Code, § 12926.1, subd. (b).) Physical and mental disabilities include "clinical depression." (§ 12926.1, subd. (c).) We assume for purposes of this appeal that at least during the period of her medical leave plaintiff had a mental disability as defined by the FEHA.

Under subdivision (m) of Government Code section 12940 it is an unlawful employment practice to "fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee" unless accommodation would "produce undue hardship to the [employer's] operation."[9]

Subdivision (n) of Government Code section 12940 makes it an unlawful employment practice to "fail to 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."

Government Code section 12965 authorizes the filing of a civil action based upon "an unlawful practice." Nothing in section 12965 limits the scope of an "unlawful practice" to disability discrimination, found in subdivision (a) of Government Code section 12940. (*Bagatti v. Department of Rehabilitation, supra,* 97 Cal.App.4th at p. 357.) The failure to provide a reasonable accommodation (§ 12940, subd. (m)) and the failure to engage in the interactive process (§ 12940, subd. (n)) are separate, independently actionable, unlawful employment practices under the FEHA. (*Bagatti*, at p. 357; *Smith v. International Brotherhood of Electrical Workers* (2003) 109 Cal.App.4th 1637, 1656; accord, *Claudio v. Regents of University of California, supra,* 134 Cal.App.4th at p. 243.) Thus, an employee may file a civil action based on any or all of these three statutorily defined unlawful employment practices, provided the plaintiff has obtained a right-to-sue notice. (*Bagatti*, at p. 357.) Plaintiff's complaint alleged, and there is no dispute, that she obtained such a notice. We discuss plaintiff's claims of disability discrimination, failure to accommodate and failure to engage in the interactive process separately.

III. *Disability Discrimination under the FEHA*

In essence, plaintiff's complaint alleged Genentech engaged in disability discrimination under Government Code section 12940, subdivision (a), based on

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9 Prior to January 2001, Government Code section 12940, subdivision (m) was designated subdivision (k). (Stats. 2000, ch. 1047, § 1.)

disparate treatment by filling her position in February 2001 while she was on medical leave, failing to rehire her to a vacant position upon her return from medical leave in May 2001,[10] and ultimately terminating her employment in July 2001. Plaintiff contends summary judgment was improperly granted as to those actions.

A shifting burden of proof is applied to claims of disability discrimination based on disparate treatment. Initially, the plaintiff has the burden of establishing a prima facie case of discrimination by proving that he or she (1) suffered from a disability, or was regarded as suffering from a disability; (2) could perform the essential duties of the job with or without reasonable accommodations, and (3) was subjected to an adverse employment action because of the disability or perceived disability. (*Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 254.)[11] To prevail, the plaintiff must show that "intentional discrimination was the 'determinative factor' in the adverse employment action . . . ." (Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group 2005) ¶ 7:356, p.7-49.) If the plaintiff employee meets his or her prima facie burden, the defendant employer must offer a legitimate nondiscriminatory reason for the adverse employment decision. Thereafter, the plaintiff employee bears the burden of proving the defendant employer's proffered reason was pretextual. (*Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 196-197.) To prevail on its summary judgment

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[10] To the extent that plaintiff contends that Genentech's November 2002 post-termination failure to rehire her to a receptionist position constitutes disability discrimination, any such claim is waived because it is raised for the first time on appeal. (See *Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 184-185, fn. 1; *County of Los Angeles v. Southern Cal. Edison Co.* (2003) 112 Cal.App.4th 1108, 1118.) In opposing the summary judgment motion, plaintiff referred to Genentech's refusal to rehire her to a receptionist position in 2002 solely as "probative of [its] discriminatory intent," in arguing that the continuing violations doctrine applied.

[11] In sole reliance on *Green v. State* (2005) 132 Cal.App.4th 97, review granted November 26, 2005, S137770, plaintiff argues that Genentech bears the burden of proving that she could not perform the essential functions of her job. After the completion of briefing in this case, the Supreme Court granted review in *Green*. Pending review, we rely on the line of cases holding that the plaintiff must show he or she is qualified to perform the essential functions of the job. (See, e.g., *Deschene v. Pinole Point Steel Co.* (1999) 76 Cal.App.4th 33, 44.)

motion, Genentech had the burden of negating plaintiff's prima facie case, or presenting evidence establishing, as a matter of law, a nondiscriminatory reason for its challenged adverse employment decisions. (*Id.* at p. 203.)

A. *Decision to Fill Plaintiff's Position While She Was on Leave*

1. *Exhaustion of Remedies*

In part, the court granted summary judgment on plaintiff's disability discrimination claim regarding Genentech's decision to fill her position on the ground that she failed to timely exhaust her administrative remedies: her DFEH complaint was filed on July 9, 2002, more than one year after the January 31, 2001 notice to plaintiff of the decision to fill that position.

In order to bring a civil action under the FEHA, the plaintiff must exhaust his or her administrative remedies by filing a written charge with the DFEH within one year of the alleged employment discrimination and obtaining a right to sue letter. (Gov. Code, § 12960; *Okoli v. Lockheed Technical Operations Co.* (1995) 36 Cal.App.4th 1607, 1613.) Absent some exception to the one-year statutory period, any conduct by Genentech occurring prior to July 9, 2001 cannot establish the basis for liability. (*Cucuzza v. City of Santa Clara* (2002) 104 Cal.App.4th 1031, 1040.)

Where applicable, the continuing violations doctrine provides an equitable exception to the one-year statute of limitations for FEHA actions. (*Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 823-824.) The continuing violations doctrine arises when an employee raises a claim based on conduct that occurred in part outside the limitations period. (*Id.* at p. 812.) "[W]hen the requisite showing of a temporally related and continuous course of conduct has been established, it is appropriate to apply the continuing violations doctrine to disability discrimination accommodation claims." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1058.)

In considering the applicability of the continuing violations doctrine, we consider the factors outlined in *Richards*. (*Yanowitz v. L'Oreal USA, Inc., supra,* 36 Cal.4th at p. 1059.) Specifically, we consider whether the employer's unlawful actions were "(1) sufficiently similar in kind . . . [citation]; (2) have occurred with reasonable

frequency; (3) and have not acquired a degree of permanence. [Citation.]" (*Richards v. CH2M Hill, Inc.*, *supra*, 26 Cal.4th at p. 823.) "Permanence" means "that an employer's statements and actions make clear to a reasonable employee that any further efforts at informal conciliation to obtain reasonable accommodation or end harassment will be futile." (*Ibid.*)

Plaintiff argues that Genentech's adverse actions in filling her position, failing to extend her leave status until a receptionist position was available, failing to accommodate her and then failing to rehire her were all similar acts demonstrating that Genentech's July 16, 2001 termination of her employment was due to her disability. We conclude that a reasonable trier of fact could find that these acts were similar in kind and occurred with sufficient frequency between January 31 and July 16, 2001 to constitute a continuous and temporally related course of conduct. Moreover, until July 16, when plaintiff was terminated, a reasonable trier of fact could find that plaintiff was not on notice that her efforts to maintain employment at Genentech would be futile. (See *Yanowitz v. L'Oreal USA, Inc.*, *supra*, 36 Cal.4th at p. 1059.) At the time her position was filled, plaintiff was still on leave and enjoyed, among other rights, the right to obtain another position she was qualified for within 60 days of her return to work. Applying the continuous violation doctrine in this factual context is consistent with the policy reasons underlying that doctrine: to discourage "the filing of unripe lawsuits and to promote the conciliatory resolution of claims." (*Id.* at p. 1057.) Thus, the evidence presented by plaintiff in support of her opposition to the summary judgment motion, establishes a triable issue on the application of the continuing violations doctrine.

2. *Plaintiff Failed to Establish a Prima Facie Case*

As part of her prima facie case for her disability discrimination claim, plaintiff was required to prove that she was a "qualified individual." (*Jensen v. Wells Fargo Bank*, *supra*, 85 Cal.App.4th at p. 255.) Under the Americans with Disabilities Act of 1990 (ADA) (42 U.S.C. § 12101 et seq.), a "qualified individual with a disability" is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."

(42 U.S.C. § 12111(8).)[12] "The essential functions of a position are 'the fundamental job duties of the employment position the individual with a disability holds or desires.' " (*Hastings v. Department of Corrections* (2003) 110 Cal.App.4th 963, 970, quoting Gov. Code, § 12926, subd. (f).)

The evidence submitted by Genentech in support of its motion established that on January 22, 2001, a week before the decision was made to fill plaintiff's position, her doctor extended her medical leave until March 5. Between April 12 and May 15, 2001, her physician diagnosed her as suffering from anxiety and depression and determined she was "totally incapacitated" and unable to work. Moreover, even assuming, as plaintiff argues, that the references in Dr. Hyman's report regarding plaintiff's disability in May "2002," were intended by Dr. Hyman to refer to 2001, the report several times states that plaintiff was "totally disabled by her disability from doing the work of her accustomed position through May 1, 200[1]." This evidence creates the reasonable inference that plaintiff was unable to perform the essential functions of her job at the time the decision was made to fill her position, and plaintiff presented no evidence rebutting that inference.[13] Moreover, she presented no medical evidence establishing that at the time the decision was made to fill her position, she could have returned to her position with a reasonable accommodation. Thus, she failed to establish a necessary element in bringing a disability discrimination claim.

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[12] Because the FEHA is modeled after the federal Rehabilitation Act of 1973 (29 U.S.C. § 701 et seq.) and the ADA (42 U.S.C. § 12101 et seq.), interpretations of these federal acts are a useful guide to interpreting and construing the FEHA. (*Pensinger v. Bowsmith, Inc.* (1998) 60 Cal.App.4th 709, 719, disapproved on other grounds in *Colmenares v. Braemar Country Club, Inc.* (2003) 29 Cal.4th 1019, 1031, fn. 6.)

[13] For the first time in her reply brief, plaintiff argues: (1) Genentech submitted the reports of Drs. Hyman and Petrakis in connection with its reply points and authorities memorandum, and therefore, she had no opportunity to address or respond to them; (2) the medical reports were not included in Genentech's separate statement of facts; and (3) the trial court indicated it did not want to hear argument about them. Because these arguments are made for the first time in plaintiff's reply brief, we do not consider them. (*Campos v. Anderson* (1997) 57 Cal.App.4th 784, 794, fn. 3.) In addition, plaintiff did

B. *Decision to Terminate*

Plaintiff appears to contend that she established the existence of a triable issue of fact regarding whether Genentech's failure to hire her for the labware technician position after being released to work in May 2001 constituted disability discrimination.[14] We disagree because, once again, we conclude that plaintiff has failed to establish a prima facie case.

Pursuant to the FEHA it is "an unlawful employment practice, unless based upon a bona fide occupational qualification . . . : [¶] (a) For an employer, because of the . . . physical disability, mental disability, [or] medical condition . . . of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment . . . ." (Gov. Code, § 12940, subd. (a).) However, an employer is not prohibited "from refusing to hire or discharging an employee with a physical or mental disability, . . . where the employee, because of his or her physical or mental disability, is unable to perform his or her essential duties even with reasonable accommodations . . . ." (Gov. Code, § 12940, subd. (a)(1).)

For two related reasons plaintiff's claim fails. First, the undisputed evidence established that Genentech had legitimate, nondiscriminatory reasons for failing to hire plaintiff for the labware technician position because she did not have the requisite qualifications. Second, plaintiff failed to rebut that showing with any evidence that such reasons were merely pretextual. Plaintiff testified she was unaware whether anyone who interviewed her for the labware technician position knew she had been on disability leave, and none of the interviewers made any comments or engaged in conduct

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not object to these reports on these bases below and, so, the objections are deemed waived. (Code Civ. Proc., § 437c, subd. (b).)

[14] Since plaintiff's appellate briefs do not discuss the packaging operator and bioprocess technician positions that she unsuccessfully applied for, we consider any claims related to those positions to be abandoned. (*Tiernan v. Trustees of Cal. State University & Colleges, supra,* 33 Cal.3d at p. 216, fn. 4.)

suggesting they would discriminate against a person with a disability or who had been on disability leave. Because it is undisputed that in the 60-day period following plaintiff's release to work there were no vacant receptionist positions and no other positions for which she was qualified, Genentech's decision to terminate her pursuant to its personnel policies was legitimate and nondiscriminatory.

IV. *Failure to Accommodate under the FEHA*

Under the FEHA, " 'an employer who knows of the disability of an employee has an affirmative duty to make known to the employee other suitable job opportunities with the employer and to determine whether the employee is interested in, and qualified for, those positions, if the employer can do so without undue hardship or if the employer offers similar assistance or benefit to other disabled or nondisabled employees or has a policy of offering such assistance or benefit to any other employees.' " (*Hanson v. Lucky Stores, Inc.* (1999) 74 Cal.App.4th 215, 225, quoting *Prilliman v. United Air Lines, Inc.*, *supra,* 53 Cal.App.4th at pp. 950-951.)

The elements of a failure to accommodate claim (Gov. Code, § 12940, subd. (m)) are similar, though not identical to the elements of a disability discrimination claim for disparate treatment. In each, the plaintiff must prove he or she is disabled and is a qualified person; however, in a failure to accommodate claim under subdivision (m), the plaintiff need not prove the adverse employment action was caused by this disability. (*Jensen v. Wells Fargo Bank, supra,* 85 Cal.App.4th at p. 256.)

The FEHA provides a nonexhaustive list of possible reasonable accommodations, including: making facilities accessible to and usable by disabled individuals; job restructuring, offering part-time or modified work schedules, reassigning to a vacant position, acquiring or modifying equipment or devices, adjusting or modifying examinations, training materials or policies, providing qualified readers or interpreters and "other similar accommodations for individuals with disabilities." (Gov. Code, § 12926, subd. (n); Cal. Code Regs., tit. 2, § 7293.9, subd. (a).) Because the FEHA's list of accommodations is incomplete, we may look to similar federal statutes for guidance. (*Prilliman v. United Air Lines, Inc.*, *supra,* 53 Cal.App.4th at p. 948.) A finite leave of

absence can be a reasonable accommodation under the FEHA provided it is likely that, at the end of such leave, the employee will be able to perform his or her employment duties. (*Hanson v. Lucky Stores, Inc.*, *supra*, 74 Cal.App.4th at p. 226.) In addition, an employer is not required to choose the best accommodation or the accommodation that the employee seeks. Instead, " ' "the employer providing the accommodation has the ultimate discretion to choose between effective accommodations, and may choose the less expensive accommodation or the accommodation that is easier for it to provide." [Citation.] . . . [A]n employee cannot make his employer provide a specific accommodation if another reasonable accommodation is instead provided. [Citations.]' [Citations.]" (*Id.* at p. 228, fn. omitted.)

A. *Exhaustion of Remedies*

The court granted summary judgment on plaintiff's failure to accommodate cause of action on the ground that her DFEH complaint did not specifically assert a failure to accommodate claim, and, therefore, she failed to exhaust her administrative remedies. We disagree.

As we discussed previously, in order to bring a civil action under the FEHA, the plaintiff must exhaust his or her administrative remedies by filing a written charge with the DFEH within one year of the alleged employment discrimination and obtaining a right to sue letter. (Gov. Code, § 12960; *Okoli v. Lockheed Technical Operations Co.*, *supra,* 36 Cal.App.4th at p. 1613.) The scope of the written charge defines the permissible scope of the subsequent civil complaint (*Yurick v. Superior Court* (1989) 209 Cal.App.3d 1116, 1121-1123), and allegations in the civil complaint which fall outside the scope of the administrative charge are barred for failure to exhaust (*Rodriguez v. Airborne Express* (9th Cir. 2001) 265 F.3d 890, 897). However, the FEHA requires that its procedural requirements "be construed liberally for the accomplishment of [its statutory] purposes." (Gov. Code, § 12993, subd. (a).) As a result, California courts, as well as numerous federal courts have endorsed the "like or reasonably related" standard. Under this standard, the allegations in a civil action are within the scope of the administrative charges filed, if those allegations are within the scope of the administrative

investigation that can reasonably be expected to grow out of those charges of discrimination. (*Sandhu v. Lockheed Missiles & Space Co.* (1994) 26 Cal.App.4th 846, 858-859.) Thus, where an administrative investigation would likely have encompassed the claim alleged in the civil complaint, there is no exhaustion of remedies bar. (See *Okoli*, at p. 1616, citing *Baker v. Children's Hospital Medical Center* (1989) 209 Cal.App.3d 1057, 1065 [investigation of race discrimination allegations in DFEH complaint would likely have encompassed allegations of harassment and differential treatment in civil action].)

Deppe v. United Airlines (9th Cir. 2000) 217 F.3d 1262, 1267 held that where a plaintiff's Equal Employment Opportunity Commission (EEOC) charge alleged "perceived disability," the plaintiff's civil complaint alleging another theory of disability discrimination fell within the "like or reasonably related" test and could proceed. Similarly, in *Yamaguchi v. U.S. Dept. of the Air Force* (9th Cir. 1997) 109 F.3d 1475, 1480, where a plaintiff's EEOC charge alleged sexual harassment, her civil action for sex discrimination was allowed to proceed because it was considered an integral part of the defendant's discriminatory scheme.

As plaintiff notes, the DFEH complaint form she filled out does not contain a box for asserting an employer's failure to reasonably accommodate a disability or failure to engage in a timely interactive process. Because an investigation into plaintiff's disability discrimination would likely have encompassed her causes of action for failure to accommodate and failure to engage in a timely interactive process, the court erred in barring these causes of action under the exhaustion of administrative remedies doctrine.

B. *Plaintiff Failed to Establish a Failure to Accommodate*

" 'Holding a job open for a disabled employee who needs time to recuperate or heal is in itself a form of reasonable accommodation and may be all that is required where it appears likely that the employee will be able to return to an existing position at some time in the foreseeable future. [Citation.]' " (*Claudio v. Regents of University of California, supra,* 134 Cal.App.4th at p. 244, quoting *Jensen v. Wells Fargo Bank, supra,* 85 Cal.App.4th at p. 263.) Though plaintiff does not dispute this, she appears to argue

that the seven months of leave granted was insufficient as an accommodation and Genentech failed to accommodate her disability in three different ways: not granting her November 2000 request to serve under a manager other than Rios when she returned to work; not holding her position open for her until she was released to return to work; and, after she was released to return to work in May 2001, not placing her in a vacant position. We reject each contention.

1. *Request for a Different Manager or Supervisor*

The evidence establishes that in November 2000, while on medical leave, plaintiff told Bridgman that she did not want to return to work in a position "under . . . Rios's management." As we stated previously, an employer is not required to choose the best accommodation or the accommodation the employee seeks. The employer has the discretion to choose between "effective accommodations," and may choose the accommodation that is less expensive or easier for the employer to provide. An employee cannot make his or her employer provide a specific accommodation if another reasonable accommodation is instead provided. (*Hanson v. Lucky Stores, Inc.*, *supra*, 74 Cal.App.4th at p. 228.)

Assuming that plaintiff was requesting to return to work in November 2000 under a supervisor or manager other than Rios, plaintiff presented no evidence that she was ready or able to return to work at that time or that continuing her on medical leave was not an effective or reasonable accommodation. In fact, the undisputed evidence was to the contrary. For reasons not disclosed in the record before us, plaintiff's medical leave was extended several times between its commencement on October 20, 2000, and January 22, 2001, when her doctor extended the leave to March 5. Between April 12 and May 15, plaintiff's physician diagnosed her as suffering from anxiety and depression and removed her from work as "totally incapacitated." At some point during her leave she was evaluated and treated by a therapist. The evidence presented permits the inference that the medical leave granted to plaintiff between October 20, 2000, and May 15, 2001, was a reasonable and effective accommodation for her documented anxiety and depression, which for all or part of that time rendered her totally incapacitated. Because

plaintiff failed to present a triable issue as to the reasonableness or effectiveness of the medical leave accommodation provided her, Genentech had no duty to provide her with the different accommodation she later requested.

2. *Holding Plaintiff's Position Open until Her Release to Return to Work*

" 'Reasonable accommodation does not require the employer to wait indefinitely for an employee's medical condition to be corrected. . . .' [Citation.]" (*Hanson v. Lucky Stores, Inc., supra*, 74 Cal.App.4th at pp. 226-227.) In this case, the evidence established that Genentech's medical leave policy provided for six months of paid medical leave. It also provided that employees who qualified for leave under the CFRA/FMLA would be placed in the same or equivalent position upon their return to work if their leave did not exceed 12 weeks in a 12-month period, and that if an employee's CFRA/FMLA leave extended beyond 12 weeks, Genentech could not guarantee that a position would be available to the employee. It is undisputed that by January 29, 2001, when the decision was made to fill plaintiff's position, Marasco, Bridgman and Rios were concerned that given the number of times plaintiff's leave had been extended, she might not actually return to work on March 5, as she was then scheduled to do. It was also undisputed that it was a hardship for Genentech to cover vacations and leaves when a receptionist in plaintiff's department was out.

By January 29, 2001, while plaintiff was still on leave, numerous dates had been set for her return to work, her position had been held open longer than the 12 weeks that Genentech's policies provided for, and the management team did not know when she would return to work. Based on the undisputed facts, we conclude that plaintiff has failed to raise a triable issue as to the reasonableness of Genentech's decision to fill plaintiff's position while continuing her on medical leave.

3. *Placement in a Vacant Position upon Her Release to Return to Work*

Pursuant to subdivision (m) of Government Code section 12940, an employer has an affirmative duty to reasonably accommodate an employee's disability only if the employer can do so without undue hardship. (*Prilliman v. United Air Lines, Inc., supra,* 53 Cal.App.4th at pp. 950-951.) Genentech was obligated to assign plaintiff to a position

upon her return to work only if an existing, vacant position were available for which she was qualified. (*Watkins v. Ameripride Services* (9th Cir. 2004) 375 F.3d 821, 828; *Hanson v. Lucky Stores, Inc., supra,* 74 Cal.App.4th at p. 227.) Plaintiff's claim fails because the undisputed evidence established that between May 2001, when she returned to work, and July 2001, when she was terminated, there were no vacant positions at Genentech for which she was qualified.

V. *Interactive Process under the FEHA*

An employer's obligation to engage in an interactive process to identify effective reasonable accommodations for a disabled employee arose from federal regulations implementing the ADA. (See *Humphrey v. Memorial Hospitals Ass'n* (9th Cir. 2001) 239 F.3d 1128, 1137.) These regulations require employers to engage with employees in an interactive, good faith communication process to identify and implement appropriate reasonable accommodations to permit the employee to perform his or her job effectively. (*Id.* at p. 1137; *Jensen v. Wells Fargo Bank, supra,* 85 Cal.App.4th at p. 261.) Under federal law, employers who fail to engage in such an interactive process in good faith face statutory liability if a reasonable accommodation would have been possible, and if the employer is responsible for the breakdown in the interactive process. (*Barnett v. U.S. Air, Inc.* (9th Cir. 2000) 228 F.3d 1105, 1116, vacated on other grounds in *U.S. Airways, Inc. v. Barnett* (2002) 535 U.S. 391; *Zivkovic v. Southern California Edison Co.* (9th Cir. 2002) 302 F.3d 1080, 1089.)

The requirement to engage in an interactive process is now incorporated in the FEHA. Pursuant to subdivision (n) of Government Code section 12940, it is an unlawful employment practice "For an employer . . . to fail to engage in a timely, good faith, interactive process with the employee . . . to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee . . . with a known physical or mental disability or known medical condition."

" 'The interactive process requires communication and good-faith exploration of possible accommodations between employers and individual employees' with the goal of 'identify[ing] an accommodation that allows the employee to perform the job

effectively.' [Citation.] . . . [F]or the process to work '[b]oth sides must communicate directly, exchange essential information and neither side can delay or obstruct the process.' [Citation.]" (*Jensen v. Wells Fargo Bank, supra*, 85 Cal.App.4th at p. 261, quoting *Barnett v. U.S. Air, Inc., supra,* 228 F.3d at pp. 1114-1115.) The requirement that an employer engage in an interactive process is triggered when the employee, or the employee's representative, gives the employer notice of the employee's disability and the desire for a reasonable accommodation. (*Jensen*, at p. 261; *Spitzer v. Good Guys, Inc., supra,* 80 Cal.App.4th at p. 1384.) The employer's duty to engage in the interactive process is a continuing one, and "extends beyond the first attempt at accommodation and continues when the employee asks for a different accommodation or where the employer is aware that the initial accommodation is failing and further accommodation is needed." (*Humphrey v. Memorial Hospitals Ass'n, supra*, 239 F.3d at p. 1138.)[15] This rule encourages employers to seek to find accommodations that "really work," and avoids an incentive for employees to "request the most drastic and burdensome accommodation possible out of fear that a lesser accommodation might be ineffective." (*Ibid;* see *Spitzer*, at pp 1387-1388 [where employer's supervisor is aware that earlier job restructuring was unsuccessful, a triable issue of fact existed as to whether further accommodation was necessary].)

In *Humphrey*, the plaintiff suffered from obsessive compulsive disorder that resulted in her absenteeism and tardiness at work. (*Humphrey v. Memorial Hospitals Ass'n, supra,* 239 F.3d at p. 1130.) As an accommodation, her employer permitted her to have a flexible start time. When, despite this accommodation, plaintiff continued to miss

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[15] Government Code section 12940, subdivision (n) was enacted in 2000 and became effective in 2001. (Stats. 2000, ch. 1049, § 7.5.) However, prior to its enactment, California courts recognized the existence of a duty to engage in the interactive process by analogizing to federal statutes and their interpretation in the federal courts. (See, e.g., *Jensen v. Wells Fargo Bank, supra,* 85 Cal.App.4th at pp. 262-263.) Moreover, Government Code section 12926.1, subdivision (e) provides: "The Legislature affirms the importance of the interactive process between the applicant or employee and the employer in determining a reasonable accommodation, as this requirement has been articulated by the [EEOC] in its interpretive guidance of the [ADA]."

work, she requested that she be allowed to work from home. Her employer summarily denied the request and ultimately terminated her as a result of her history of tardiness and absenteeism. (*Id.* at pp. 1131-1133.) The court held that *once the employer was aware that the initial accommodation was not effective*, the employer's rejection of the plaintiff's work-at-home request and its failure to explore with the plaintiff other alternative accommodations constituted a violation of its mandatory duty to engage in the interactive process. (*Id.* at p. 1139.)

A. *Exhaustion of Remedies*

For the reasons relied on in our discussion in part IV.A., *ante*, we conclude that an investigation into plaintiff's disability discrimination claim would likely have encompassed her cause of action for failure to engage in a timely interactive process, and the trial court erred in ruling that this cause of action was barred by the exhaustion of administrative remedies doctrine.

B. *Summary Judgment Was Properly Granted*

While on medical leave, plaintiff complained to Bridgman that she felt "harassed" by Rios and inquired about returning to work but not reporting to Rios. Plaintiff characterizes this as a request to terminate the current accommodation, the medical leave, and return to work immediately with a new accommodation, a different direct supervisor. This request, plaintiff argues, triggered Genentech's duty to engage in a timely, good faith interactive process with her to determine an effective reasonable accommodation, which it failed to do by not responding to her request. We disagree.

The fatal defect in this contention is plaintiff's concession that at the time she made the inquiry, Rios was no longer plaintiff's supervisor, and Marasco had assumed that role. Plaintiff argues that she did not know about this replacement, and, as part of the interactive process, Genentech was obligated to inform her of that change, paving the way for her return. The record, however, is to the contrary; Marasco had replaced Rios before the incident triggering plaintiff's medical leave and plaintiff was aware of it.

At oral argument, plaintiff characterized her November 2000 inquiry somewhat differently: as a request to return to work with the assurance that *Rios would have no*

verbal contact with her. Assuming this contention is encompassed in her briefing and, therefore, not waived, we reject it for two reasons. First, the words used by plaintiff in her November 2000 inquiry are not sufficiently malleable to support the interpretation she seeks and, so, a reasonable employer would not have been alerted that plaintiff sought such a modification of the workplace. Second, plaintiff presented no evidence suggesting that the accommodation Genentech had already provided was ineffective. Plaintiff's inquiry was made within a month after Genentech granted her request for a leave of absence. As we stated previously, a finite leave of absence can be a reasonable accommodation under the FEHA where it is likely that at the end of the leave the employee will be able to perform his or her employment duties. (*Hanson v. Lucky Stores, Inc., supra,* 74 Cal.App.4th at p. 226.) Plaintiff presented no evidence that in November 2000 Genentech was aware that the medical leave was not an effective accommodation for her anxiety and depression. Instead, the record reflects that during the entire seven-month leave she was treated by a therapist and her physician, who at times extended her leave after finding her "totally incapacitated." Moreover, throughout plaintiff's medical leave, the management team expected her to eventually return to work, although her return date was uncertain. Because plaintiff has failed to raise a triable issue of fact as to the effectiveness of the medical leave accommodation granted her, we conclude that her November 2000 inquiry, regardless of its proper interpretation, did not trigger a duty on the part of Genentech to explore with plaintiff other accommodations she might have preferred.

VI. *The Unruh Act Does Not Apply*

Civil Code section 51, the Unruh Act, provides protection against certain forms of discrimination. Plaintiff relies on subdivision (f) of that section to argue the trial court erred in concluding that the Unruh Act is inapplicable to employment discrimination claims.

Before its 1992 amendment, former Civil Code section 51 provided, in pertinent part: "All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, or blindness or other

physical disability are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." (Stats. 1987, ch. 159, § 1, p. 1094.) The 1992 amendment added the language: "A violation of the right of any individual under the [ADA] shall also constitute a violation of this section."[16] (Stats 1992, ch. 913, § 3, p. 4284.) We conclude, however, that this amendment provides no assistance to an *employee* suing for disability discrimination.

Prior to the 1992 amendment, our Supreme Court had repeatedly ruled that the Unruh Act did not apply to employment discrimination. (See *Rojo v. Kliger* (1990) 52 Cal.3d 65, 77; *Isbister v. Boys' Clubs of Santa Cruz, Inc.* (1985) 40 Cal.3d 72, 83, fn. 12; *Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 500.) Because the Legislature is deemed to have known of existing appellate court rulings when it enacted the 1992 amendment relied upon by plaintiff (*Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1155-1156), the decision to place that amendment within the Unruh Act reflects an intention to restrict its scope to discrimination outside the employment relationship. It is noteworthy that even after the enactment of this amendment, state and federal appellate courts have continued to hold that the Unruh Act does not apply to employment discrimination claims. (See *Alch v. Superior Court* (2004) 122 Cal.App.4th 339, 391; *Payne v. Anaheim Memorial Medical Center* (2005) 130 Cal.App.4th 729, 746-748; *Sprewell v. Golden State Warriors* (9th Cir. 2001) 266 F.3d. 979, 989; *Strother v. S. Cal. Permanente Medical Group* (9th Cir. 1996) 79 F.3d 859, 873-875.)

Our Supreme Court's reasoning for excluding employment claims from the Unruh Act is also instructive. In *Alcorn*, the Supreme Court excluded "the employment relationship from the protection of the Unruh Act [because] the Legislature's enactment of the [FEHA] concurrently with the Unruh Act 'indicated a legislative intent to exclude the subject of discrimination in employment from the latter act.' [Citation.] In other words, the issue of discrimination within the employment relationship was excluded from the Unruh Act, not because it was undeserving of attention, but because it was

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16 Legislation enacted in 2000 added subdivision designations to Civil Code section 51, and designated the subject provision as subdivision (f). (Stats. 2000, ch. 1049, § 2.)

specifically addressed within a different statutory scheme." (*Payne v. Anaheim Memorial Medical Center, supra,* 130 Cal.App.4th at p. 747, quoting *Alcorn v. Anbro Engineering, Inc., supra,* 2 Cal.3d at p. 500 [acknowledging the Unruh Act inapplicable to employment disputes but did apply to doctor's nonemployment based action against hospital].)

The 1992 amendment to Civil Code section 51 was one part of a revision of numerous discrimination related laws. The legislative intent was set out in the enabling statute: "It is the intent of the Legislature in enacting this act to strengthen California law in areas where it is weaker than the [ADA] . . . and to retain California law when it provides more protection for individuals with disabilities than the [ADA]." (Stats. 1992, ch. 913, § 1, p. 4282.) Among the affected statutes were *both* the Unruh Act and the FEHA.[17] Our decision to exclude employment discrimination from the 1992 amendment to the Unruh Act tracks the reasoning of *Alcorn;* we limit the scope of the amendment not because employment discrimination is "undeserving of attention, but because it was specifically addressed within a different statutory scheme." (*Payne v. Anaheim Memorial Medical Center, supra,* 130 Cal.App.4th at p. 747.)

Finally, the Unruh Act is " 'confined to discriminations against recipients of [a] "business establishment's . . . goods, services or facilities." ' [Citation.]" (*Alch v. Superior Court, supra,* 122 Cal.App.4th at p. 393.) Interpreting the 1992 amendment as plaintiff proposes would be anomalous. Employees subject to certain types of disability discrimination would have a claim under the Unruh Act, while those subject to every other form of discrimination precluded by that law would not. Plaintiff suggests no reason why the Legislature would intend such a result.

Thus, we conclude plaintiff may not rely on the Unruh Act to pursue her employment related claims.

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[17] Specifically, FEHA was amended to extend its protections by substituting "a reference to physical and mental disabilities for the existing reference to physical handicap." (Legis. Counsel's Dig., Assem. Bill No. 1077 (1991-1992 Reg. Sess.) 4 Stats. 1992, Summary Dig., p. 382.)

DISPOSITION

The judgment is affirmed. Respondent is awarded its costs on appeal.

SIMONS, J.

We concur.

JONES, P.J.

GEMELLO, J.

Superior Court of the City and County of San Francisco, No. CGC-03-422285, James L. Warren, Judge

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