CASE NO.: C 074808

 COURT OF APPEAL
 THIRD APPELLATE DISTRICT

KRISTEN PARSKE

Plaintiff/Appellant

v.

 COUNTY OF SACRAMENTO

 Defendant/Respondent

ON APPEAL FROM THE SACRAMENTO COUNTY SUPERIOR COURT

CASE NO.: 34-2012-00123646 / PRESIDING JUDGE: HON. DAVID BROWN

OPENING BRIEF OF APPELLANT KRISTEN PARSKE (AOB)

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I. NATURE OF ACTION

This is a FEHA action brought by Kristen Parske against her former employer County

of Sacramento. During Plaintiff’s approved medical leave in connection with her

qualifying disability - sinus condition and sinus surgery, the Defendants approached

Plaintiff shortly after she requested an extension to her previously granted medical

leave and told her that she must either return to work before the date of her medical

release or medically resign or retire. The Defendants also provided Plaintiff with a

reasonable accommodation paperwork at the same time. Since the only

accommodation Plaintiff needed and could have been provided was that additional

medical leave for two extra months and she was too young to be eligible for

retirement, she concluded that the only option she had was to resign and so she did.

Plaintiff brought this case against the Defendants under FEHA for failing to reasonably

accommodate her disability, failing to engage in the interactive process with her,

disability discrimination, and failure to prevent discrimination. Clerk’s Transcript

00037 – 00049. The Superior Court granted a summary judgment, dismissing the

entire case.

1. STATEMENT OF FACTS AND PROCEDURAL HISTORY

Appellant Parske started working for the Respondents in February 2004 as a Social

Worker. Appellant initially went on medical leave in June 2011 in connection with her sinus and eye issues, eye surgery and complications following the surgery.

Appellant’s medical leave has been extended several times. Clerk’s Transcript 00105

– 00109. Around September 18, 2011, Plaintiff requested an extension to her

previously granted medical leave until December 12, 2011. Plaintiff’s then most recent

doctor’s note instructed Plaintiff to be off work until December 12, 2011, at which

point she was able to return to work with restrictions. Id. On October 12, 2011,

Appellant received a letter from the Respondents, in which they advised her that they

were not going to approve her leave beyond October 25, 2012, and that her options

were to either return to work on October 25, 2011, or resign or retire. Clerk’s

Transcript 00110-00111. The Defendants also Provided Appellant a reasonable

accommodations form, which Appellant concluded was futile, because she wasn’t able

to return to work by October 25, 2011 as she was required, regardless of any other

accommodations.

Around September 2011, Appellant submitted unpaid leave request, notifying the

Respondents that she needed additional time off due to complications past her sinus

surgery and due to her continuing inability to return to work as per her doctor’s

instructions. Clerk’s Transcript 00112. The Respondents denied that request even

though they knew that the reason Plaintiff made the request for unpaid leave was her

medical condition.

Not being able to return to work by October 25, 2011 due to her medical condition as

per the order of Appellant’s doctor, and not be able to retire due to her age, the

Appellant’s only choice was to resign, which she ended up doing around October 17,

2011.

Appellant sued her employer for disability discrimination, failure to prevent

discrimination, failure to provide reasonable accommodations and failure to engage in

the interactive process in violation of FEHA. The Sacramento Superior Court granted

the employer’s summary judgment, finding no trial issues of fact on any of Plaintiff’s

claims.

1. **RELIEF SOUGHT & STANDARD OF REVIEW**

Appellant is seeking to have a determination that the Superior Court erred in granting a

summary judgment, have the dismissal of the case vacated and having the case

remanded back to the Superior Court for further proceedings not in consistent with

this Court’s opinion.

The Superior Court’s granting of summary judgment is an appealable decision because

it is a final decision which disposed of the case, and as such it is subject to de novo

review. Merrill v Navegar, Inc. (2001) 26 Cal.4th 465, 476. The appellate court must

independently determine the construction and effect of the facts presented to the trial

judge as a matter of law. Saldana v Globe-Weis Systems Co. (1991) 233 Cal.App.3rd

1505, 1511-15. **The Court draws all reasonable interferences from the evidence in**

**the light most favorable to the party opposing summary judgment**. Nadaf-Rahrov

v Neiman Marcus Group, Inc. (2008) 166 Cal.App.4th 952, 963. [emphasis added] “All

doubts as to the propriety of granting summary judgment are resolved in favor of the

opposing party.” *Id*.

1. **TRIAL COURT’S ERRORS**
2. **Issue 1- Trial Court Erred by Concluding that Appellant Did Not Suffer Adverse Employment Action.**

 The trial court erroneously held that Appellant did not suffer adverse

employment action, concluding that the Respondent did not alter Appellant’s

terms, conditions or privileges of employment. Appellant did suffer adverse

employment action. As described in Jones v Department of Corrections and

Rehabilitation (2007) 152 Cal.App.4th 1357, this is broadly defined: a “substantial

adverse change in the terms and condition of the plaintiff’s employment”… an

adverse employment action is not limited to “ultimate” employment acts, such as

hiring, firing, demotion or failure to promote, but also includes the entire spectrum

of employment actions that are reasonably likely to adversely and materially affect

an employee’s job performance or opportunity for career advancement.

Under Turner v Anheuser-Busch, Inc. (1994) 7Cal.4th 1238, 1244-5, constructive

discharge occurs when an employer engages in conduct that effective forces the

employee to resign or retire. This is exactly what happened in this case. Plaintiff

was effective forced to resign when that was the only viable alternative among the

two others, i.e. to retire when she wasn’t able to, due to her age, or return to work

prior to the date when she was allowed to return to work by her doctor.

1. **Trial Court Erred in Concluding that Plaintiff Was Not Performing Competently, and This is Not the Standard Anyway.**

 The Defendants made a conclusory argument in their motion that Plaintiff

was not “competent” to perform at her job without providing any legal reasoning

or evidence to support the same. The trial court wrongfully concluded that Plaintiff

was not a “competent” employee during the relevant time because she was not

performing her job at all due to being on medical leave. This is a conclusion that

leads to an absurd result, suggesting that every employee on disability leave is a

non “competent” employee, which is obviously not true. Plaintiff was in fact

“competent” because she has been working for the Respondents for nearly seven

years before her separation, and she was ready to return to work on. More

important “competent” is not an element. The Defendants must have meant

“qualified”. If such, Plaintiff was more than qualified to perform her job duties

after 7 years of service with the Defendants.

1. **Trial Court Erred in Considering Discriminatory Intent as An Element of Appellant’s Disability Claims.**

A prima facie case for disability discrimination under the FEHA requires a

plaintiff to prove: 1) he suffers from a disability; 2) he is otherwise qualified to do

his job with or without accommodation; and 3) he was subjected to an adverse

action because of his disability. Brundage v. Hahn, (1997) 57 Cal.App.4th 228,

236. As indicated above, “intent” is not an element of a disability discrimination

claim. It logically follows that as a long a qualified disabled individual has been

denied available reasonable accommodation and/or interactive process, the

employer is liable, **whether this was done intentionally because of that**

**employee’s disability or not**. In their motion, the Defendants cite no authority for the proposition that intent is an element of the disability discrimination claim, because they can't, as it simply doesn't exist.

1. **Issues 4 & 5: Trial Court Erred in Dismissing Appellant’s Failure to Engage in the Interactive Process Claim Because Triable Issues of Fact Exist as to Who Caused the Breakdown in the Process.**

 Cal. Gov. Code §12940(n) requires the employer to engage in a timely good

faith interactive process to determine reasonable accommodations for a disabled

individual. An employer’s failure to engage in this process is a separate FEHA

violation. Wysinger v Automobile Club of Southern California (2007) 157

Cal.App.4th 413, 424-5. The focus of the interactive process centers on employee-

employer relationship so that capable employees can remain employed if their medical

problems can be accommodated. Gelfo v Lockheed Martin Corp. (2006) 140 Cal.

App.4th 34, 62. **Whether or not the employer engaged in the required good faith**

**interactive process is a question of fact, not law.** Wilson v County of Orange (2009)

169 Cal.App.4th 1185, 1993 [emphasis added]. Because both the employer and the

employee had a duty to cooperate in good faith with the interactive process, in cases

alleging a breakdown or failure of the process, courts and ultimately juries will assess

which side bears responsibility for the breakdown. Beck v Univ. of Wise Board of

Regents (7th Cir. 1996) 75 F.3d 1130, 1135. An employer fails to engage in the good

faith interactive process as a matter of law where it rejects the employee’s proposed

accommodation and offers no **practical** alternatives. Barnett v US Air, Inc., 228 F3d

1005, 1114 (9th Cir. 2000). [emphasis added] Further, an employer who fails to

properly engage in the interactive process is liable if any accommodation possibly or

plausibly could have worked, even if they were not discussed, considered or realized at

the time. *Id*. at 1116. An employer cannot prevail at the summary judgment state if

there is a genuine dispute as to whether the employer engaged in good faith interactive

process. Hanson v Lucky Stores, Inc. (1999), 74 Cal.App.4th 215, 226.

It should be clear that the employer caused the breakdown in the interactive

process. Instead of providing Plaintiff with just two more months of medical leave as

an accommodation, the Defendants forced her to choose between retiring, resigning or

returning to work before she was allowed to do so. The Defendant made it clear that

they “will not approve any additional leave” Clerk Transcript - 0010. To make it even

more clear, the Defendants stated in bold that Plaintiff’s failure to return to work on

October 25, 2011, would result in her being AWOL. Id. The Respondent presented no

evidence that allowing Plaintiff to complete her medical leave would impose any

kind of hardship on their operations or that it was otherwise unreasonable. Further, the

Respondent did not offer any **practical** alternative accommodations after rejecting

Plaintiff’s request for an extension of leave, and therefore caused a breakdown in the

interactive process, creating triable issues of fact on that claim.

The trial court concluded that Plaintiff failed to clarify her medical restrictions

by completing and returning the reasonable accommodation form. However, the

Defendants never asked for medical clarifications. They knew at all times what the

Appellant’s restriction was - she needed an extension to her previously granted

medical leave. The trial court correctly noted that Plaintiff did not return the

accommodations forms because she knew that the only accommodation that was

practical and effective was a short extension to her previously granted leave. The

Defendants never conditioned extending Plaintiff’s medical leave on completing the

accommodations paperwork. Their letter of October 15, 2011 was a clear “return to

work by this date or retire/resign” ultimatum. Contrary to the trial court’s

interpretation, the Appellant did not fail to provide “missing” information. She was

never told and the Defendants never claims that had Plaintiff filled out the reasonable

accommodation paperwork, her leave would have been extended. Further, contrary to

the trial court’s stating that Appellant “chose” to resign, she actually was forced to

resign.

**e. Trial Court Erred in Dismissing Appellant’s Failure to Provide Accommodations Claim Because Triable Issues of Fact Exist as to Whether The Defendant Failed to Accommodate Appellant.**

Cal. Gov. Code §12940(m) requires an employer to make reasonable

accommodations for individuals with known disabilities. The determination of

whether or not a reasonable accommodate could have been provided is factual in

nature. Prilliman v United Air Lines, Inc. (1997) 53 Cal.App.4th 935, 954. The

employer’s duty to accommodate is a continuing duty that is not exhausted by one

effort 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 Association (2001) 239

F.3d 1128, 1138. [emphasis added] An extended medical leave, or an extension of an

existing medical leave may be a reasonable accommodation. See 42 USC §12111(9),

(10); Norris v Allied-Sysco Food Services, Inc., 948 F.Supp. 1418, 1438 (N.D. Cal.

1996). 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 that the employee will be able to return to an existing position at some

time in the foreseeable future. Jensen v Wells Fargo Bank 85 Cal.App.4th 245, 263

(2000). If an employee is disabled, “the employer cannot prevail on summary

judgment on a claim for 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”. Id.

It is well established that a leave of absence of a finite duration can be a

reasonable accommodation. Hanson v Lucky Stores, Inc. (1999) 74 Cal.App.4th

215,226.

Here, the Respondents refused to provide Appellant with the only accommodation she

was asking - extending her medical leave by just a few weeks. They did not offer her

any alternative positions or any other accommodations. The Respondents certainly did

not do everything they could to provide Plaintiff with reasonable accommodations

after refusing to allow her to remain on medical leave until December 12, 2011 - less

than two months from the date that the Respondents demanded that Appellant report to

work in violation of her medical leave. Allowing Plaintiff to remain on medical leave

past October 25, 2011 and until December 11, 2011, when Plaintiff was released to

return to work was the exact accommodation Appellant needed and Respondents could

and should have provided. This in addition to denying Appellant an unpaid leave

request while knowing that the reason for that request is a disability, is discussed

below, creates a triable issue of fact on Plaintiff’s failure to accommodate claim. The

trial court did not even analyze this failure to accommodate claim.

**f. Trial Court Erred by Failing to Liberally Construe Evidence and Inferences from Such Evidence in Appellant’s Favor.**

 In ruling on the motion for summary judgment, the courts must consider the

evidence and inferences reasonably drawn from the evidence in the light most

favorable to the p arty opposing the motion. Aguilar v Atlantic Richfield Co. (2001) 25

Cal.4th 824, 843. The affidavits of the moving party are strictly construed and those

of his opponent liberally construed, and doubts as to the propriety of summary

judgment should be resolved against granting the motion. Flait v. North American

Watch Corp. 3 Cal.App.4th 467, 472 (1992). And, all inferences arising from the

evidence must be construed liberally in the plaintiff’s favor. Binder v. Aetna life

Insurance Co*.* 75 Cal.App.4th 832, 838 (1999). In an employment case, summary

judgment is inappropriate if there are conflicting inferences reasonably deductible

from the fact. Garcia v. Rockwell Int’l Corp., 187 Cal.App.3d 1556, 1563 (1986).

The Defendants admitted that if the Appellant did not return to work by October

25, 2011, she would have been deemed AWOL, and no other options made

available to her besides resigning or retiring, even though they knew that Appellant

could not return to work because of her medical condition until December 12,

2011. PMQ Depo, Clerk’s Transcript 00188. The Defendants further admitted that

Appellant also requested an unpaid leave, which the defendants knew was due to

her eye condition and difficulty driving, and yet they did not approve that request.

Id. Clerk’s Transcrtipt 00189 – 00192.

During the oral argument on the motion, the trial court zeroed in on the central

issue of this case, which should have been the exact ground for denying the

Respondent’s motion. The court recognized how confusing the Respondents’

actions were to Appellant during the oral argument on a motion:

  ***The Court****: … I am looking at this and saying to myself, okay, so if she did this paperwork and came in with the doctor’s note saying, hey, she can’t return today, she can’t return until … December 12… . Would she have been AWOL under this letter? … The way this reads it says a couple of things: subsequently you are expected to return to work on October 25 with a doctor’s release to full duty. That is directing her to get a doctor’s release to full duty with or without an accommodation. And then in the next paragraph you said, here are form, so you can complete them if you want to request an accommodation under ADA FEHA. Now, what it doesn’t quite seem to say is, if you come in with these forms, you might get that accommodation on December 11th, because it says you are expected to return to full duty. And then it says, below are options available to you if you cannot return to work on October 25 with a medical release… You can then either retire or resign. So what is missing, at least to me…. is something that would say if this lady came in on that day with those papers and the doctor said, she cannot appear today to work because she can’t go until December 12th, that is when she can come back under FEHA or ADA, … So suppose she had come in on that day and said, here I have got these papers saying I can’t work. Is she going to be AWOL?*

***The Defendant****: No. I think they would give her an accommodation.*

***The Court****: Then where does the letter say that?*

 Motion Hearing Transcript 8:13-9:26

 The Defendants then went on to argue that Plaintiff should have known

better because she was familiar with the process. This is hardly a legal argument.

To expect Plaintiff to assume that if she fills out ADA forms after being given an

ultimatum, then she will be able to continue her medical leave through December

11, 2011, cannot be reasonably expected, and it was certainly not the trial court’s

job to make that assumption against the non-moving party.

And yet the trial court did exactly the opposite of what it was supposed to do. **It**

**construed all evidence and all inference in the Respondents’ favor**. The court

concluded that Plaintiff was the one who “chose” to resign instead of seeing that a

reasonable jury could easily conclude that Plaintiff was forced to resign, or at the

very least she was confused by the options presented to her by the employer.

The trial court also concluded that Plaintiff was not “competent” to perform

without any reason or evidence whatsoever. The trial court also inferred that had

Plaintiff filled out the accommodations paperwork, this would have somehow

changed her then existing options of” either resign, retire or come back to work

before you are released.” This failure to properly construe evidence and

reasonable inferences from evidence in Plaintiff’s favor weighs heavily in favor of

reversing the summary judgment.

**g. Trial Court Erred by Considering the Merits of the Case, Weighing Evidence and by Engaging in Fact Finding at the Summary Judgment Stage**

 The Court’s role on a motion for summary judgment is to determine the

existence of a triable factual issue, but not to pass upon the merits of the issue

itself. Slobojan v Western Travelers Life Ins. Co. (1969) 70 Cal.2d 432, 436. The

trial court may not weight the evidence in the manner of a fact finder to determine

whose version is more likely true. Nor may the trial court grant summary judgment

based on the court’s evaluation of credibility.” Binder v Aetna Life Ins. Co. (1999)

75 Cal.App.4th 832, 840. Here, the trial court “determined” that Plaintiff chose to

resign, rather than being potentially confused and intimidated by the ultimatum,

due to the deadline imposed on her to return to work while she was still on medical

leave. The trial court “determined” that the accommodations paperwork that the

Defendants provided to Plaintiff would have changed anything without any

evidence to support the same.

1. CONCLUSION

Summary judgment must be reversed because numerous triable issues exist as to the Respondents' failure to accommodate Appellant, failure to engage in the interactive process with her or causing a breakdown in the interactive process when they made an ultimatum to Appellant of either return to work or resign/retire. All inferences at this stage with regard to (1) the Respondent’s ultimatum coupled with (2) vague accommodations paperwork, (3) denying her request for unpaid sick leave and (4) forcing her to retire - should be made in favor of Appellant as a non-moving party.

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Dated: June 20, 2014

RESPECTFULLY SUBMITTED,

*By: Arkady Itkin,*

*Attorney for Plaintiff / Appellant*

*Kristen Parske*