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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

DEBORAH W. MCMURRAY, Plaintiff and Respondent, v. CITY OF BURBANK, Defendant and Appellant.	B173230 (Los Angeles County Super. Ct. No. BC247304)

APPEALS from an order and a judgment of the Superior Court of Los Angeles County, Edward A. Ferns, Judge. Reversed with directions.

Liebert Cassidy Whitmore, Debra L. Bray, Irma Rodriguez Moisa, Sergio Bent; Horvitz & Levy, Jason R. Litt, Julie L. Woods; Dennis A. Barlow, City Attorney, and Juli C. Scott, Chief Assistant City Attorney, for Defendant and Appellant.

Pine & Pine, Norman Pine, Beverly Tillett Pine; Law Offices of Goldberg & Gage, Bradley C. Gage; Law Offices of Stephen Love, C. Stephen Love; Law Offices of Christopher Brizzolarra and Christopher Brizzolarra for Plaintiff and Respondent.

INTRODUCTION

Defendant City of Burbank appeals from an order denying its motion for a judgment notwithstanding the verdict and its motion for a new trial, as well as from a judgment entered after a jury returned a special verdict finding defendant liable for disability discrimination and failure to provide reasonable accommodation for plaintiff Deborah McMurray's disability, but exonerating defendant of liability for age or gender discrimination, retaliation and violation of the California Family Rights Act. Defendant contends it was entitled to judgment notwithstanding the verdict, in that there is no substantial evidence of disability discrimination or failure to provide reasonable accommodation for plaintiff's disability. Defendant also challenges the admission of certain evidence and asserts that there was juror misconduct. Inasmuch as we agree that defendant was entitled to judgment notwithstanding the verdict, we reverse the judgment and direct the entry of a new judgment in favor of defendant.

FACTS[1]

When plaintiff applied for an administrative analyst position with defendant, she completed a preemployment drug screening form dated May 1987. Plaintiff noted on the form that she was taking Tagamet due to a peptic ulcer, Xanax, Darvocet to treat headaches and Tylenol to treat minor headaches. Although the screening form does not include the information, plaintiff took Xanax for anxiety. There is no evidence that plaintiff would have been unable to perform her job duties had she not taken Xanax, that she ever told her supervisors she took Xanax to manage disabling anxiety, that her supervisors ever saw the list of medications, or that her supervisors were aware of the conditions for which physicians prescribed Xanax.

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[1] Additional facts will appear in the discussion as necessary to the resolution of the issues presented.

Defendant hired plaintiff in May 1987 as an administrative assistant to the community development director. Plaintiff received outstanding performance evaluations, which prompted defendant to promote plaintiff to administrative analyst in the community development department in June 1988. Plaintiff also worked as an administrative analyst in the library and management services department until 1991, at which time she transferred to the parks department. In September 1992, plaintiff's supervisor, Mary Alvord (Alvord), the director of the department, appointed plaintiff administrative officer of the parks department without opening to the public applications for the position. Plaintiff continued to receive outstanding performance evaluations.

It became clear to Alvord by June 1995, however, that although plaintiff had excellent skills which were quite valuable for budget preparation, she also had problems communicating with staff members. Plaintiff had a tendency to become unduly excitable and emotional when working under pressure and to overreact to volatile situations. Her personnel evaluations from 1995 to June 1998 stressed that she needed to work on remaining calm rather than adding to anxiety in the workplace. At no time did plaintiff disagree with these evaluations.

Plaintiff received a commendation from the Mayor in 1998. She received many other commendations as well. She also received regular salary increases. Plaintiff's qualifications and abilities led the City of Burbank to classify her as the number one candidate when she applied for a job comparable to defendant's deputy director position.

In early 1998, plaintiff told defendant's assistant finance director, Sandra Schmidt (Schmidt), that she needed help with the budget. Schmidt acknowledged that the workplace became quite hectic between January and June each year as the departments assembled their budgets. Schmidt told Alvord she was concerned because plaintiff appeared ill.[2]

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[2] There is no evidence, however, that plaintiff told Schmidt she suffered from a disability.

On approximately August 13, 1999, Alvord told plaintiff that several people, including two elected officials, had voiced concern about plaintiff's health. Alvord said that while the department greatly needed plaintiff's administrative work, plaintiff should not sacrifice her health for the job. Alvord recommended that plaintiff take some time off from the job. Plaintiff gently chided Alvord, saying she also worked too much.[3]

On September 13, 1999, plaintiff's physician, Dr. Schott, placed plaintiff on a four-week medical leave which he eventually extended to six weeks. After defendant had a physician of its choice certify plaintiff's fitness, which was its routine practice after any medical leave of comparable length, she returned to work on October 25, 1999. Upon her return, plaintiff told Alvord that she was in excellent health.

After plaintiff's return to work, her coworkers and her supervisor, Alvord, repeatedly ignored her at meetings, and generally ostracized her. Some commented on her weight loss and "rail thin" appearance. Her coworkers also were rude to her. Plaintiff's telephones often went unanswered as well.

On November 9, 1999, plaintiff told her psychotherapist, Herbert Krose (Krose), that "[w]ork has been hell. Totally ignored." Krose considered plaintiff to be suffering from major, serious depression. In his opinion, all of plaintiff's problems were work-related. Plaintiff's psychiatrist, Dr. Bitar, concurred. He noted that the stress plaintiff endured at work caused her to be suicidal.

Plaintiff complained to assistant city manager, Steve Helvey (Helvey), that plaintiff's coworkers no longer held her in the same degree of esteem, there was tension in the workplace and she felt she was being pushed aside since returning from her medical leave. Helvey met with plaintiff and her husband and discussed several options. One option was that Helvey would attempt to obtain an increased retirement allowance if plaintiff wanted to leave. Plaintiff's recollection of the conversation is that Helvey said the executive committee had discussed inducing her to retire. The city council would not

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[3] Again, there is no evidence that plaintiff told Alvord she suffered from a disability.

agree to increase plaintiff's retirement allowance. As plaintiff recalls, Helvey then told her she could use sick leave, retire with the standard allowance or be terminated.

Between fall 1999 and winter 2000, defendant removed responsibility from plaintiff for the "Y.E.S. Fund" and the Veteran's Committee and assigned these projects to deputy directors. Michael Flad (Flad) became plaintiff's supervisor when he replaced Alvord as parks and recreation department director in April 2000. In Spring 2000, Flad advised plaintiff to attend fewer city council meetings than she had in the past. He wanted division heads to attend instead. Although these actions reduced plaintiff's work load, she perceived them as discriminatory actions which deprived her of the most satisfying portions of her work.

Flad noted in plaintiff's June 2000 evaluation that she needed to work on having a "[l]ess intense work persona," being "a problem solver," and having a "'calming' influence on other" department members. Flad reduced plaintiff's performance status from "outstanding" to "meets standard of performance." When plaintiff refused to sign the evaluation and characterized it as unfair, in that he had only six weeks in which to evaluate her while the evaluation covered an entire year's performance, Flad agreed. He reevaluated her performance as "outstanding."

Plaintiff once again took medical leave in June 2000. When defendant declined to accept the restrictions her physician suggested on June 13, 2000, plaintiff remained on leave until her physician cleared her on June 22, 2000 to return to work without restrictions and defendant's physician thereafter concurred. Plaintiff returned to work on June 28, 2000.

Following her return at the end of June, plaintiff perceived that her work situation worsened. Defendant had terminated her at-home access to its e-mail service. According to Flad, he did so because plaintiff was working via e-mail while she was on medical leave. In addition, for a brief time after plaintiff returned to work, a coworker had access to her e-mail. During the months following her return, plaintiff had difficulty receiving messages and her telephones often went unanswered. Plaintiff still had no assistance in managing her workload. She consequently worked a great deal of overtime.

Ultimately, on October 12, 2000, plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission. She alleged that she had been subjected to different terms and conditions of employment since she returned from medical leave in 1999.

After plaintiff filed the discrimination charge, she no longer supervised clerical staff. Plaintiff faced "increasing stress at work," as a consequence of which her symptoms worsened. By February 12, 2001, she had severe symptoms which included chest pain. Her physician concluded that she should take another medical leave. He feared that her symptoms might be associated with coronary heart disease. Plaintiff began her third medical leave in March 2001 and thereafter remained on leave due to temporary total disability.

DISCUSSION

Standard of Review

We review the trial court's denial of a judgment notwithstanding the verdict by applying the substantial evidence rule. We examine the entire record in the light most favorable to the verdict and accept all reasonable inferences which support it. (*Tognazzini v. San Luis Coastal Unified School Dist.* (2001) 86 Cal.App.4th 1053, 1058.) Speculation or conjecture does not qualify as substantial evidence. (*Buckley v. California Coastal Com*. (1998) 68 Cal.App.4th 178, 192; *Martin v. Lockheed Missiles & Space Co*. (1994) 29 Cal.App.4th 1718, 1735.)

Waiver of Argument

Plaintiff asserts that defendant has waived its substantial evidence argument by selectively presenting only evidence pertaining to promotions denied plaintiff while ignoring a wealth of other evidence demonstrating defendant's acts of disability discrimination. Plaintiff points to evidence that coworkers and supervisors ignored her, called her a name, made comments about her physical appearance, took away committee

assignments, reduced the number of city council meetings she attended, encouraged her to retire, evaluated her performance unfairly, deprived her of essential assistance and ended her at-home e-mail access. At trial, however, plaintiff argued that all of these acts except the elimination and reduction of assignments were acts of age or gender discrimination, or of retaliation. Inasmuch as the jury returned a verdict in favor of defendant with respect to the age and gender discrimination causes of action, as well as the retaliation cause of action, it was not unreasonable of defendant to ignore evidence related to those causes of action.

While plaintiff did argue that reducing her supervisory responsibilities, as well as taking away committee and job assignments, were acts of disability discrimination, her primary focus necessarily was on the promotion denials. As we discuss *post*, plaintiff presented no evidence that reductions in her job responsibilities resulted in a demotion, pay reduction, elimination of advancement opportunities, loss of benefits or a *material* reduction in her job responsibilities, i.e., were adverse employment actions. (*McRae v. Department of Corrections* (2005) 127 Cal.App.4th 779, 788-789, 801.) She also presented no evidence that any of these actions were final in the sense that they could not be reversed or modified through an internal review process. (*Id*. at p. 790.) In the absence of such evidence, there was no proof that changes in her work assignments were adverse employment actions.

An appellant's responsibility when challenging the sufficiency of the evidence is to set forth in their entirety all of the *material* evidentiary facts. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881; *Sprague v. Equifax, Inc*. (1985) 166 Cal.App.3d 1012, 1027-1028.) Defendant did set forth all facts it considered material on the questions whether plaintiff presented substantial evidence that she suffered adverse employment action, had a disability when defendant undertook those actions, and defendant knew of the disability at the time. The waiver rule therefore is inapplicable in this case.

Disability Discrimination

It generally is unlawful for an employer to discriminate against an employee on the basis of physical or mental disability if the employee is able to perform the fundamental duties of her position either with or without reasonable accommodation. (Gov. Code, § 12940, subd. (a).) To prevail on a claim of disability discrimination, a plaintiff must present substantial evidence that she suffers from a disability, is qualified to perform the duties of the position she holds and the employer subjected her to some adverse employment action because of the disability. (*Finegan v. County of Los Angeles* (2001) 91 Cal.App.4th 1, 7; cf. *Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 254.) Given the similarity between federal and state employment discrimination law, we may consider federal precedent. (*Guz v. Bechtel National, Inc*. (2000) 24 Cal.4th 317, 354; *Trop v. Sony Pictures Entertainment, Inc*. (2005) 129 Cal.App.4th 1133, 1144.)

A person suffers from a physical or mental disability if she has a physical or mental condition which limits her ability to achieve a major life activity such as working. (Gov. Code, § 12926, subds. (i), (k).) Although there is evidence that plaintiff had suffered intermittently from anxiety and depression since sometime before 1993, she acknowledged that her intermittent suffering did not prevent her from working through much of 1999. To the contrary, she voluntarily worked hundreds of hours of overtime. By September 1999, however, the stress associated with her employment caused plaintiff to suffer difficulty in concentrating, weight loss, nightmares, mood swings and severe anxiety, as well as to have suicidal thoughts periodically. In the opinion of her psychiatrist, plaintiff was having difficulty functioning. We shall assume for the sake of argument that side effects from stress which are sufficient to cause overall difficulty in functioning qualify as a disability, and that plaintiff consequently had a disability when she took medical leave in fall 1999.

The remaining question is whether defendant subjected plaintiff to adverse employment action *because of* her disability. The question presupposes that the employer knows of the disability when it subjects the employee to adverse employment action (*Brundage v. Hahn* (1997) 57 Cal.App.4th 228, 236) at a time when the employee

otherwise is able to perform the essential functions of her position with or without reasonable accommodation (*Quinn v. City of Los Angeles* (2000) 84 Cal.App.4th 472, 480, 482; *Deschene v. Pinole Point Steel Co*. (1999) 76 Cal.App.4th 33, 44). In other words, plaintiff had to prove that defendant knew she suffered from a disability when she returned to work.

Employer's Knowledge of Disability

When plaintiff went on leave in 1999, her physician's note simply stated that she was on "medical leave for 4 weeks." The subsequent note stated that the physician was extending her leave for two weeks due to a viral infection. The notes clearly did not inform defendant that plaintiff was disabled.

Even if defendant had known that plaintiff's 1999 medical leave was stress-related, and there is no evidence it did know, that knowledge would not allow us to impute to defendant notice that plaintiff suffered from a disability while she was on medical leave. (See, e.g., *Brundage v. Hahn*, *supra*, 57 Cal.App.4th at p. 237; *Miller v. National Cas. Co*. (8th Cir. 1995) 61 F.3d 627, 629-630; *Lewis v. Zilog, Inc*. (N.D.Ga. 1995) 908 F.Supp. 931; cf. *Trop v. Sony Pictures Entertainment, Inc*., *supra*, 129 Cal.App.4th at p. 1146.) Knowledge that a medical leave is stress-related is insufficient because disability, i.e., difficulty in achieving the life activity of working, is not the only reasonable inference available. It could be medically advisable for an employee who remained fully capable of doing her job to take a leave of absence as a preventative measure. Exhaustion, for instance, is not a disability but could lead to disability if left untreated. As noted in *Brundage*, vague statements disclosing an unidentified disability accordingly do not provide an employer notice of an employee's covered disability. (*Brundage*, *supra*, at p. 237.)

Plaintiff argues that defendant necessarily knew she was disabled upon her return from her fall 1999 six-week medical leave. As plaintiff sees it, the requirement that she submit to a physical examination by defendant's selected physician, to whom she was to provide a list of all medications she took, establishes that defendant "had notice of her

complete medical picture as of October 1999."[4] (Underscoring omitted.) There is no evidence, however, that plaintiff produced a list of her medications, that defendant's selected physician shared this or any other specific medical information with defendant, as opposed to the general information that plaintiff was fit to return to work, or that defendant would have appreciated the significance of any of the medications plaintiff took had it been supplied with a list. There consequently is no basis from which we could infer that defendant had medical information which would put it on notice that plaintiff was disabled when she returned to work.

Plaintiff's statements to her immediate supervisor, Alvord, upon returning from her 1999 leave provide further support for a conclusion that defendant had no reason to know plaintiff was disabled when she returned to work. She told Alvord that she was in excellent health and was prepared to tackle her assignments "with nothing but a smile." Moreover, plaintiff promptly resumed a schedule which included a heavy load of overtime.

Plaintiff additionally argues that the negative aspects of her performance evaluations put defendant on notice that she suffered from a disability. These entries, spanning the period from 1995 to June 1998, uniformly noted that plaintiff had a tendency toward excitability and emotional overreaction, and needed to work on remaining calm. A volatile temperament is not necessarily a sign of psychological disability, however. We consequently cannot impute knowledge of a disability to defendant based upon plaintiff's performance assessments. (*Brundage v. Hahn*, *supra*, 57 Cal.App.4th at p. 237.)

Plaintiff also asserts that defendant *perceived* her to have a physical or mental disability "from the time she returned from her medical leave in October 1999 through

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[4] Plaintiff also cites a notation made by her psychotherapist, Krose, that defendant wanted all of her medical records. Plaintiff cannot rely on this evidence for any purpose other than to establish that she told Krose this, however, as the trial court instructed the jury.

the time she was forced to go out on indefinite medical leave in March 2001." In our view, the assertion has merit.

Following her return from her first medical leave, plaintiff regularly complained that she was overstressed and overworked, but she nevertheless periodically took on assignments that were not within the scope of her job and dropped everything to meet others' deadlines. On occasion, plaintiff became physically ill after staff meetings due to stress and perceived harassment. She still appeared to be unwell. Clearly upset, she complained of what she perceived to be coworker mistreatment. She displayed insecurity.

These factors, coupled with plaintiff's volatile temperament, would have led any observant employer to conclude that plaintiff suffered from some sort of mental disability. In short, there is substantial evidence that defendant knew or believed plaintiff suffered from a disability after she returned to work in October 1999.

Dr. Weissman, a specialist in internal medicine, began treating plaintiff, who was suffering from headaches, chest pain and gastrointestinal problems, in January 2000. Plaintiff informed him that she was enduring a great deal of stress at work. Once again, we shall assume for the sake of argument that stress impaired plaintiff's ability to function sufficiently to render her disabled.

At some point in June 2000, plaintiff once again took medical leave. Neither party directs us to any evidence as to what reason plaintiff's physician gave defendant for the leave. We consequently presume there is none.

Defendant knew from Dr. Weissman's June 13, 2000 letter, however, that the leave apparently was stress-related, in that Dr. Weissman viewed a substantial reduction in stress to be an essential precondition to plaintiff's return to work. This reinforces the conclusion that defendant knew or believed that plaintiff continued to suffer from disabling stress. Inasmuch as there is substantial evidence of defendant's knowledge, we turn next to the question of whether defendant discriminated against plaintiff, i.e., subjected her to adverse employment action.

Adverse Employment Action

As noted *ante*, an employer's action is adverse when it is final, no longer subject to review and reversal or modification, and either results in an employee's demotion or pay reduction, the elimination of advancement opportunities, a material loss of benefits, a significant reduction in material job responsibilities or some other action which has a comparable effect. (*McRae v. Department of Corrections*, *supra*, 127 Cal.App.4th at pp. 790, 801.) An unwarranted negative assessment or the toleration of coworkers' harassment may qualify as adverse actions. (Cf. *Yanowitz v. L'Oreal USA, Inc*. (2005) 36 Cal.4th 1028, 1055, fn. 15.)

An employer may rebut prima facie evidence that it acted with discriminatory intent by producing evidence that it had a legitimate business reason for its action. If the employer does so, the employee must prove that the proffered reason was pretextual. (*Guz v. Bechtel National, Inc*., *supra*, 24 Cal.4th at pp. 355-356; cf. *Yanowitz v. L'Oreal USA, Inc*., *supra*, 36 Cal.4th at p. 1042.) Although we shall examine each category of asserted adverse action separately at the outset as a matter of convenience, it is appropriate that we consider all of the asserted adverse actions collectively in the end. (Cf. *Yanowitz*, *supra*, at p. 1055.)

Relieving Plaintiff of Job Responsibilities

As we have discussed with respect to plaintiff's claim that defendant waived its substantial evidence argument, plaintiff presented no evidence that removing certain assignments and supervisory responsibilities from her resulted in her demotion, loss of pay, loss of advancement opportunities, loss of benefits, or a *significant* reduction in her *material* job responsibilities. Such evidence is essential in proving that the employment actions taken were adverse. (*McRae v. Department of Corrections*, *supra*, 127 Cal.App.4th at pp. 788-789, 801.)

Defendant defined plaintiff's job as performing, under direction, "complex administrative and managerial duties," and supervising "the activities of clerical and support personnel." According to defendant, the administrative officer's "typical tasks"

were undertaking independent research, specialized studies and investigations, all of which might "require oral presentations"; writing reports; developing, coordinating and otherwise taking responsibility for the administration of municipal programs; performing the "statistical research, data collection, and implementation" necessary to coordinate budget preparation; representing the department head at meetings and administrative matters and appearing before commissions or agencies, as well as training, supervising and evaluating subordinate employees. The core of the job, in other words, was a broad spectrum of complex tasks essential to the administration of the parks and recreation department. These tasks were the *material* responsibilities of plaintiff's job.

While it is true that clerical staff assisted plaintiff with her work when she was their supervisor, the staff performed many other tasks which were not directly related to plaintiff's work. Clerks assisted members of the public who appeared at the counter, answered the phone, issued park permits, processed mail, and typed agenda bills and staff reports in addition to assisting with projects and with the budget. Supervision of the clerical staff consequently would be a *material* responsibility of plaintiff's job only if the inability to supervise significantly impaired plaintiff's ability to perform her job. (Cf. *Yanowitz v. L'Oreal USA, Inc*., *supra*, 36 Cal.4th at pp. 1054-1055.) As we shall discuss *post* in more detail, there is contradictory evidence as to whether clerical staff refused to assist plaintiff for a time after she ceased supervising the staff, but there is no evidence that plaintiff's inability to supervise clerical staff impaired her ability to perform her job.

In any event, defendant explained the legitimate business reasons it had for reducing some of plaintiff's responsibilities. In early 1999, long before plaintiff took her first medical leave, Alvord reorganized the parks and recreation department to create a third deputy director position, after which she filled that position, as well as the deputy directorship vacated by Flad. Alvord reassigned the "Y.E.S. Fund" project to one of the two newly appointed deputy directors and reassigned the Veteran's Committee work to the other because she believed these assignments aligned more properly with recreation services, an area in which the new deputy directors had significant expertise, whereas plaintiff's expertise was in the area of administration. Now that the department had an

additional deputy director and could handle the workload, it was appropriate to move the assignments to the recreation division.[5]

Plaintiff failed to refute this evidence or to prove the proffered reasons were pretextual. Once defendant offered legitimate business reasons for its actions, it was plaintiff's burden to do so. (*Guz v. Bechtel National, Inc.*, *supra*, 24 Cal.4th at pp. 355-356; *McRae v. Department of Corrections*, *supra*, 127 Cal.App.4th at p. 790.) Inasmuch as plaintiff did not carry her burden, her claim that reassignment of the "Y.E.S. Fund" and the Veteran's Committee was discriminatory fails as a matter of law. (*Trop v. Sony Pictures Entertainment, Inc.*, *supra*, 129 Cal.App.4th at pp. 1149-1150.)

Flad decided in mid-2000 to reduce the number of city council meetings plaintiff attended in part to alleviate plaintiff's workload after she complained of being overworked and in part because he wanted to compel division heads to attend the meetings. Once again, plaintiff failed to refute this evidence or to prove that the proffered reasons were pretextual. To the contrary, her counsel stressed that the meetings always occurred at night, which supports an inference that attendance was burdensome to plaintiff. Having failed once more to carry her burden of proving defendant's legitimate business reasons were pretextual, plaintiff's claim that reducing her attendance at city council meetings was discriminatory is defective as a matter of law. (*Trop v. Sony Pictures Entertainment, Inc.*, *supra*, 129 Cal.App.4th at pp. 1149-1150.)

According to Flad, he removed plaintiff's supervisory responsibility over clerical personnel in mid-2000 in response to plaintiff's continuing complaint that she was overworked. He discussed with plaintiff the possibility of taking this action before he made the decision. Plaintiff did not object to the reduction of her responsibilities in this fashion. Inasmuch as plaintiff offered no evidence to refute Flad's testimony or to demonstrate that his reasons were pretextual, this claim of discriminatory conduct fails as

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[5] Although plaintiff characterizes these as "plum" assignments, there is no evidence to that effect.

clearly as have the other actions which reduced plaintiff's assignments. (*Trop v. Sony Pictures Entertainment, Inc.*, *supra*, 129 Cal.App.4th at pp. 1149-1150.)

Failing to Promote Plaintiff

The focus of plaintiff's disability discrimination claim at trial was the promotions she failed to receive: to deputy director in June and August 1999 and to director in 2000. We may dispose of deputy director promotions at once.

There is not a scintilla of evidence that Alvord, who made the promotions, or any other of defendant's employees who held supervisory rank, knew in June or August 1999 that plaintiff suffered from a mental or psychological disability, although Alvord and others certainly knew by August 1999 that plaintiff appeared to be unwell. This could be attributed to exhaustion, however, which is not, in and of itself, a disability. Inasmuch as mental or physical disability is not the only rational inference to be drawn from plaintiff's appearance, we cannot impute to defendant notice that plaintiff suffered from such a disability in August 1999. (See, e.g., *Brundage v. Hahn*, *supra*, 57 Cal.App.4th at p. 237; *Miller v. National Cas. Co.*, *supra*, 61 F.3d at pp. 629-630.)

Inasmuch as there is no evidence that Alvord knew plaintiff suffered from a disability when Alvord made the deputy director promotions in June and August 1999, it is immaterial *why* she failed to promote plaintiff. It could not have been *because of* plaintiff's disability.

We turn next to the director's position, which the city manager, Robert Ovrum (Ovrum), filled in April or May 2000 by rehiring Flad, who previously had worked for defendant's parks and recreation department as a deputy director. We shall assume for the sake of argument that Ovrum had notice that plaintiff suffered from a disability.

At this point, Flad not only had experience as a former deputy director of the department but as the city manager for Ukiah, California. Alvord recommended Flad for the position of parks and recreation department director. She had observed him assemble programs, handle difficult disciplinary issues and assume progressive responsibilities. Flad also had considerable credibility within the community. Plaintiff, in contrast,

primarily had administrative and financial skills. She lacked the experience and leadership skills which were essential for a department director to possess.

After interviewing Flad, Ovrum agreed with Alvord's assessment. Ovrum considered Flad to have very good interpersonal, communication and writing skills; good judgment and vision; and the ability to work with minimal supervision. In addition, Ovrum was aware that Flad knew the community very well. Ovrum also agreed with Alvord's assessment of plaintiff's abilities and limitations.

Yet again, plaintiff has not refuted this evidence or offered proof that the proffered reasons were pretextual.[6] Her failure to do so is fatal to this claim of disability discrimination. (*Trop v. Sony Pictures Entertainment, Inc*., *supra*, 129 Cal.App.4th at pp. 1149-1150.)

Requiring Plaintiff to See Defendant's Doctor

When plaintiff's personal physician certified her fit to return to work in October 1999, defendant required that she first receive clearance from its own doctor. Plaintiff fails to explain how this was an adverse employment action. The requirement did not subject plaintiff to different terms and conditions of employment. It was defendant's practice to require clearance from its doctor when an employee took a medical leave of some length. In contrast to the employee's personal physician, defendant's doctor would know the nature of the employee's job duties, as well as the reason for the medical leave, thus ensuring that it was safe for the employee to return to work. Plaintiff points to

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[6] Plaintiff's testimony that Alvord told her in the summer of 1999 not to apply for the deputy directorship to which Alvord ultimately appointed Terri Stein because, if plaintiff did apply, Alvord would not select her does not accomplish the task. It is part of a chain of evidence dating back to 1996 which supports only one rational inference: defendant's superiors long had considered her to have reached the pinnacle of her achievement in the parks and recreation department.

nothing in the record which would support a conclusion that defendant acted unreasonably in imposing the requirement in October 1999.[7]

Different Treatment

Plaintiff argues that there is substantial evidence she was treated differently when she returned from her 1999 medical leave. She claims that Alvord and other managers ignored her and she endured comments about her weight loss which she considered to be derogatory.

We note initially that there is no evidence that other managers ignored plaintiff. There is only evidence that on one occasion, they *might* have done so.

Sometime between January and June 2000, one employee, Beverly Starleaf (Starleaf), looked through the conference room window and observed that there were no seats at the conference table when plaintiff entered the conference room, and, as a consequence, plaintiff took a seat against the wall. Approximately four managers, a couple of whom had their backs to plaintiff, were in "a huddle" around the conference table discussing something. Starleaf was not in the room. She did not know what the managers were discussing but *assumed* that plaintiff could not hear what they were saying.

With respect to plaintiff's own supervisor, Alvord, plaintiff testified that Alvord stopped ignoring her when the assistant city manager, Helvey, told Alvord to stop in January 2000 after plaintiff complained to him. In other words, defendant ameliorated the problem, which consequently did not have the permanence necessary to qualify as an

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[7] The same discussion applies to defendant's June 2000 requirement that plaintiff receive clearance from defendant's physician before returning to work, although for a different reason. On June 13, 2000, Dr. Weissman conditioned plaintiff's return to work on the substantial elimination of stress from her job. Nine days later, on June 22, he cleared her for return to work without restriction. Given the closeness in time of Dr. Weissman's two letters, accepting Dr. Weissman's clearance without further investigation would have been irresponsible.

adverse employment action. (*McRae v. Department of Corrections, supra,* 127 Cal.App.4th at p. 790.)

Plaintiff also presented evidence that coworkers did not invite her to birthday parties and made rude comments about her appearance on two occasions. Such actions do not qualify as adverse employment actions. (*Brooks v. City of San Mateo* (9th Cir. 2000) 229 F.3d 917, 929; *Nunez v. City of Los Angeles* (9th Cir. 1998) 147 F.3d 867, 875; cf. *Yanowitz v. L'Oreal USA, Inc*., *supra*, 36 Cal.4th at p. 1054, fn. 13, and cases cited therein.)[8]

January 2000 Conversations with Helvey

It is undisputed that plaintiff did not work for Helvey, and in fact worked in a different building from that in which Helvey worked. It is equally undisputed that although Helvey knew plaintiff had taken some sort of medical leave, he did not know, and would have no reason to know, any of the specifics concerning the leave. Moreover, Helvey left defendant's employ in March 2000. There is no evidence he had any involvement in decision-making related to plaintiff's employment between January and March. Accordingly, even if Helvey's comments urging plaintiff to retire and suggesting that others also thought she should do so, coupled with his efforts to obtain an enhanced retirement package for her, could be construed as adverse employment action, there is no evidence that he took such action *because of* plaintiff's disability. It necessarily follows that his actions did not constitute disability discrimination.[9] (*Brundage v. Hahn*, *supra*, 57 Cal.App.4th at p. 236.)

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[8] The same analysis applies to John Nicoll's statement at a staff meeting during the summer of 2001 that plaintiff was a "twit."

[9] As noted previously, the jury found that plaintiff did not suffer from age or gender discrimination, or from acts of retaliation, and that defendant had not violated the California Family Leave Act.

June 2000 Performance Evaluation

After Flad became department director in approximately April 2000, he received more complaints about plaintiff than about any other employee. He discussed these complaints with plaintiff almost weekly. He noted in her 1999-2000 performance evaluation that she needed to have a "less intense work persona." Inasmuch as she required improvement in her work relationships, he rated her performance as "meets standards." Later, after plaintiff complained that the evaluation was unfair, Flad agreed, in that he had only six weeks in which to evaluate her after assuming the directorship but the evaluation covered an entire year. He prepared a new evaluation which rated her performance as "outstanding."

In other words, Flad's initial review was not a permanent action but was subject to review and revision. It consequently does not qualify as an adverse employment action. (*McRae v. Department of Corrections*, *supra*, 127 Cal.App.4th at p. 790.) That there is no copy of the corrected performance review in plaintiff's personnel file is a circumstance which falls into the same category: it remains subject to review and correction.

E-mail Access

While plaintiff was on medical leave in June 2000, the employee who was performing many of plaintiff's duties obtained access to plaintiff's e-mail so that she could handle business-related messages. When plaintiff returned, the substitute employee's access inadvertently remained in place. As soon as the substitute employee realized the error and defendant learned of it, defendant corrected it. The substitute employee never utilized access to plaintiff's e-mail after plaintiff returned to work, however. This was not an adverse employment action, if for no other reason, because it was a less-than-final, correctible action. (*McRae v. Department of Corrections*, *supra*, 127 Cal.App.4th at p. 790.)

Lack of Assistance

Apparently, sometime in late 2000, the supervising clerk told her clerical staff not to do plaintiff's work, inasmuch as plaintiff no longer supervised the clerical staff. In addition, the staff no longer treated plaintiff with respect. Her telephones often went unanswered.[10] Plaintiff complained to Flad about the lack of respect and the refusal to answer her telephones. He admonished the clerical staff that he would not tolerate rude behavior in the workplace and stressed that staff were to answer plaintiff's telephones. In other words, far from ignoring plaintiff's complaints, defendant did what it could to ameliorate the problem. There consequently was no adverse employment action. (*McRae v. Department of Corrections*, *supra*, 127 Cal.App.4th at p. 790.)

Flad also addressed plaintiff's complaint that clerical staff members refused to assist plaintiff with her work. Sometime before July 7, 2000, Flad told plaintiff to send her work to Flad's secretary, who then would ensure that clerical staff handled it as promptly as possible. Plaintiff thereafter told Assistant City Attorney Terry Stevenson that "things had gotten better."

In summary, there is no evidence that management countenanced clerical staff's refusal to assist plaintiff or that any such refusal permanently impaired plaintiff's performance. Without such impairment, there was, again, no adverse employment action. (Cf. *Yanowitz v. L'Oreal USA, Inc.*, *supra*, 36 Cal.4th at pp. 1054-1055.)

Plaintiff also claims that Flad required her to remain in her office and conduct business only by e-mail. The evidence does not support the claim. In response to complaints he had received about plaintiff from other departments, Flad suggested to her that whenever it was both possible and practical, perhaps plaintiff should communicate with other departments by e-mail. He did not prohibit her from communicating with others face-to-face. The evidence reflects only plaintiff's interpersonal deficiencies, not a discriminatory and adverse employment action.

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[10] The supervising clerk denied that any member of the clerical staff ever refused to assist plaintiff.

Overburdening

In early 1998, plaintiff complained to Schmidt about how overworked she was and said she needed assistance. The situation did not change thereafter. The existence in 2000 of the same working conditions available to plaintiff in 1998, when there is no evidence that defendant knew plaintiff suffered from a disability, is not evidence of disability discrimination.

Contrary to plaintiff's claim, there is no evidence that defendant "forced" her to work 300 hours of overtime between June 2000 and March 2001. She did work those extra hours, but she was an acknowledged perfectionist who wanted to work the extra hours. This was her established practice long before she took medical leave. In addition, she often took on projects which were beyond the scope of her job and had a tendency to drop everything to meet others' deadlines.

As plaintiff acknowledged, Flad *cautioned* her against attempting unreasonably to meet others' deadlines or trying to work 24 hours a day. He also attempted to lessen her workload by reducing both the number of city council meetings plaintiff had to attend and her supervisory responsibilities, although defendant expected all management employees to work very hard. There is *no* evidence that defendant deliberately overburdened plaintiff despite knowledge of her disability. To some degree, overwork came with the job. To a greater degree, plaintiff voluntarily overburdened herself.

Failure to Investigate

While defendant did not conduct any formal investigation of plaintiff's complaints, it addressed those which warranted attention. By the time plaintiff informed anyone of her "discomfiting" conversation with Helvey regarding retirement "inducements," Helvey had been gone for many months. Inasmuch as Helvey had not supervised plaintiff, investigation likely would have seemed futile. Helvey told Alvord to stop ignoring plaintiff. Flad told the clerical staff to answer plaintiff's telephones and to cease their rude treatment of her. In our view, nothing more was required until after

plaintiff filed her complaint with the Equal Employment Opportunity Commission, when the City Attorney's office *did* conduct an investigation.

Termination of at-home E-mail Access

After plaintiff took indefinite medical leave in March 2001, Flad became aware that she still was working. She was sending work-related e-mails from her home. Flad consequently terminated her at-home e-mail access.

The purpose of plaintiff's medical leave was to allow her to recover sufficient health to return to work. Pursuing her job duties while she was on leave was inimical to that goal. Under the circumstances, terminating plaintiff's e-mail access was anything but an adverse employment action. (*Swonke v. Sprint Inc*. (N.D.Cal. 2004) 327 F.Supp.2d 1128, 1138.)

Failure to Accommodate

If reasonable accommodation for a known physical or mental disability would enable an employee to perform the fundamental duties of her job, the employer must make that accommodation unless doing so will be unduly burdensome for the employer (Gov. Code, § 12940, subd. (m); Cal. Code Regs., tit. 2, § 7293.9), but the employer need not create a new post or push aside other employees to accommodate the disabled employee (*Hastings v. Department of Corrections* (2003) 110 Cal.App.4th 963, 972; *McCullah v. Southern Cal. Gas Co*. (2000) 82 Cal.App.4th 495, 501). Failure to accommodate a disabled employee is independently actionable as an unlawful employment practice, but it also qualifies as an adverse employment action. (*Smith v. International Brotherhood of Electrical Workers* (2003) 109 Cal.App.4th 1637, 1656-1657.)

The duty to accommodate a disabled employee does not arise, however, until the employer knows of both the employee's disability and the requested accommodation. (*Spitzer v. Good Guys, Inc*. (2000) 80 Cal.App.4th 1376, 1384.) As discussed *ante*, that Dr. Weissman considered a substantial reduction in stress to be an essential precondition

to plaintiff's return to work on June 13, 2000 establishes plaintiff's disability on that date. Defendant consequently had a duty of reasonable accommodation.

Dr. Weissman's letter required that plaintiff "avoid contacts with the public or fellow workers or work environments that produce situations that would give rise to nervousness, irritability and tension—such as, but not limited to working under close deadlines, dealing with contentious, unreasonable or otherwise exasperating members of the public or work that requires precision and attention to detail under distracting conditions." In other words, she must not face any more stress while working than she would if she were not working.

As the administrative officer of defendant's parks department, plaintiff's duties were to perform independent research, write reports and conduct specialized studies and investigations; to coordinate preparation of the budget, which required statistical research, data collection, analysis and implementation; and to appear before commissions or agencies. Her duties also could include overseeing the processing of documents such as contracts, bid schedules, resolutions or ordinances; coordinating state and federal grants and handling inquiries or complaints from the public. In short, assuming that only the first three enumerated categories of duties are the fundamental tasks of plaintiff's position, the performance of her essential job duties necessarily requires, at the least, that she pay close attention to detail under potentially distracting conditions and work under close deadlines, particularly during the budget preparation period.

Once he had received Dr. Weissman's letter, Flad met with defendant's management services director, John Nicoll, and members of the City Attorney's office to discuss the proposed restrictions. Defendant had no comparable positions which met all of Dr. Weissman's restrictions. Flad consequently wrote to plaintiff on June 16, 2000, advising her that defendant could not accommodate the restrictions and suggesting that, if her condition was indeed work-related, she file a worker's compensation claim. Plaintiff remained on medical leave. Dr. Weissman again wrote Flad on June 22, 2000, this time clearing plaintiff to return to her duties without restriction.

Inasmuch as uncontradicted evidence establishes that there was no comparable position available to which defendant could have assigned plaintiff in conformity with Dr. Weissman's restrictions, reassignment was not available as an accommodation. (*Hastings v. Department of Corrections*, *supra*, 110 Cal.App.4th at pp. 972-973.) In addition, given the nature of plaintiff's core job responsibilities, we are at a loss to understand how defendant could have restructured plaintiff's job to free her from paying close attention to detail under distracting circumstances and meeting close-at-hand deadlines. These are essential elements of conducting independent research, as well as specialized studies and investigations; of preparing reports and appearances before commissions or agencies and of coordinating budget preparation. Job restructuring therefore was unavailable as an accommodation as well.

In any event, an employer's duty is only to provide a *reasonable* accommodation, not the best one or that which the employee seeks. (*Hanson v. Lucky Stores, Inc*. (1999) 74 Cal.App.4th 215, 228; *Humphrey v. Memorial Hospitals Assn*. (9th Cir. 2001) 239 F.3d 1128, 1135-1136.) Allowing an employee a finite paid leave of absence is a reasonable accommodation where it is likely the employee will be able to return to her job in the future. (*Hanson*, *supra*, at p. 226; see also *Humphrey*, *supra*, at pp. 1135-1136.) Given plaintiff's past history, defendant reasonably could expect that she would be able to return to work after a more extended medical leave, refreshed and in need of no further accommodation. Under these circumstances, extending plaintiff's medical leave rather than implementing Dr. Weissman's proposed restrictions necessarily was *a* reasonable accommodation, albeit not the one plaintiff wanted.

Finally, plaintiff argues that defendant's failure to engage in an "interactive process" designed to identify a reasonable accommodation is enough in itself to establish defendant's liability for failure to accommodate. Plaintiff is mistaken. California fair employment law, as it existed in 2000, when plaintiff sought accommodation, did not require employers to engage in such a process. The amendment codifying the interactive process requirement in what is now subdivision (n) of Government Code section 12940 became effective January 1, 2001. (See Historical and Statutory Notes, 32E West's Ann.

Gov. Code (2005) foll. § 12940, p. 540; *California Dept. of Corrections v. State Personnel Bd.* (2004) 121 Cal.App.4th 1601, 1616.) We cannot give it retroactive effect. (*California Dept. of Corrections*, *supra*, at p. 1616.)

Plaintiff correctly notes, however, that under subdivision (k) of Government Code section 12940, once an employee informs an employer of the nature of the employee's disability and of the accommodations required, the requirement that the employer take "'positive steps'" to provide reasonable accommodation "envisions an exchange between employer and employee where each seeks and shares information." (*Auburn Woods I Homeowners Assn. v. Fair Employment & Housing Com.* (2004) 121 Cal.App.4th 1578, 1598.) The contemplated exchange could be termed an "interactive process."

The fundamental point, nonetheless, is that plaintiff has not made a prima facie showing that there existed alternative, comparable positions the essential functions of which plaintiff could have performed or how her existing job could have been restructured to accommodate Dr. Weissman's restrictions without eliminating any of the job's essential functions. In the absence of such a showing, plaintiff could not prove a *material* violation of the interactive process requirement. (Cf. *Donahue v. Consolidated Rail Corp.* (3d Cir. 2000) 224 F.3d 226, 234; *Earl v. Mervyns, Inc.* (11th Cir. 2000) 207 F.3d 1361, 1367; *Mengine v. Runyon* (3d Cir. 1997) 114 F.3d 415, 419 [all applying the federal Adults with Disabilities Act]; but see *Barnett v. U.S. Air, Inc.* (9th Cir. 2000) 228 F.3d 1105, 1113-1115 [interpreting ADA to mean that the employee does not bear the whole burden of demonstrating existence of a reasonable accommodation].) An employer need not engage in an interactive process when doing so is certain to prove futile. (*Swonke v. Sprint Inc.*, *supra*, 327 F.Supp.2d at p. 1137.)

Moreover, the trial court rejected plaintiff's proposed jury instructions on the interactive process. Plaintiff has not challenged the propriety of that ruling.

In evaluating the sufficiency of the evidence, we must rely on the instructions given the jury as opposed to legal theories which the trial court withheld. (*Null v. City of Los Angeles* (1988) 206 Cal.App.3d 1528, 1534-1535.) Inasmuch as the trial court did

not instruct the jury on defendant's duty to engage in an interactive process, plaintiff may not rely on that theory to support the failure to accommodate verdict.

CONCLUSION

There is substantial evidence that defendant believed plaintiff suffered from some sort of mental disability after her 1999 medical leave and continued to suffer from what appeared to be a stress-related disability after her June 2000 medical leave. There is, however, no substantial evidence that defendant subjected plaintiff to adverse, final, irreversible employment actions for which it had no legitimate business reasons. There also is no substantial evidence that defendant failed to offer reasonable accommodation for plaintiff's disability. Defendant consequently was entitled to judgment notwithstanding the verdict. In view of the conclusion we have reached regarding the trial court's denial of defendant's motion for judgment notwithstanding the verdict, we need not address defendant's other contentions.

DISPOSITION

The judgment is reversed, and the trial court is directed to enter judgment notwithstanding the verdict in favor of defendant on the disability discrimination and failure to accommodate causes of action. Defendant is to recover its costs on appeal.

NOT TO BE PUBLISHED

SPENCER, P. J.

We concur:

MALLANO, J. ROTHSCHILD, J.