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QUEST DIAGNOSTICS CLINICAL LABORATORIES, INC.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FE PALOMIQUE, an individual,

Plaintiff,

vs.

QUEST DIAGNOSTICS CLINICAL LABORATORIES, INC., a Delaware corporation dba QUEST DIAGNOSTICS; and DOES 1-50, inclusive,,

Defendants.

Case No. 2:17-cv-3743 AB (JPRx)

QUEST DIAGNOSTICS CLINICAL LABORATORIES, INC.'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT AGAINST PLAINTIFF FE PALOMIQUE

[*Filed concurrently with Statement of Uncontroverted Facts and Conclusions of Law; Compendium of Evidence; Proposed Judgment; and Proposed Order*]

Date: June 8, 2018
Time: 10:00 am
Courtroom: 7B

Action filed: April 4, 2017

TO PLAINTIFF AND HER ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on June 8, 2018 at 10:00 am, or as soon thereafter as the matter may be heard (if oral argument to be heard upon further notice of the Court), Courtroom 7B of the United States District Court for the Central District of California, located at the First Street Courthouse, 350 West First Street, Los Angeles, California 90012, Defendant Unilab Corporation d/b/a Quest

Diagnostics (incorrectly sued as Quest Diagnostics Clinical Laboratories, Inc.) ("Defendant" or "Quest") will and hereby does move the Court for an order granting summary judgment, or in the alternative, partial summary judgment, pursuant to Federal Rules of Civil Procedure 56 in favor and against Plaintiff Fe Palomique ("Plaintiff"). This motion is made on the grounds that Plaintiff's claims against Quest have no merit, there is no triable issue of material fact as to the legal issues raised therein, and Quest is entitled to judgment as a matter of law.

Plaintiff's First Cause of Action

1. Quest is entitled to judgment as a matter of law in its favor and against Plaintiff on the first cause of action for failure to accommodate disability in violation of the California Fair Employment and Housing Act ("FEHA") (Cal. Gov. Code § 12900, *et seq.*) because Quest offered Plaintiff available positions that accommodated her existing restrictions.

Plaintiff's Second Cause of Action

2. Quest is entitled to judgment as a matter of law in its favor and against Plaintiff on the second cause of action for failure to engage in the good faith interactive process regarding accommodation of disability in violation of FEHA (Cal. Gov. Code § 12900, *et seq.*) because Quest actively communicated with Plaintiff, Plaintiff's doctors, and the worker's compensation insurance company to determine Plaintiff's restrictions and offered Plaintiff possible accommodations.

Plaintiff's Third Cause of Action

3. Quest is entitled to judgment as a matter of law in its favor and against Plaintiff on the third cause of action for discrimination on the basis of disability in violation of FEHA (Cal. Gov. Code § 12900, *et seq.*) because Quest offered Plaintiff available positions that accommodated her existing restrictions which Plaintiff turned down.

4. Quest is entitled to judgment as a matter of law in its favor and against Plaintiff on the third cause of action for discrimination on the basis of disability in

violation of FEHA (Cal. Gov. Code § 12900, *et seq.*) because Quest had legitimate non-retaliatory reasons for its decision to terminate Plaintiff's employment, and Plaintiff has no evidence of pretext for disability discrimination.

Plaintiff's Fourth Cause of Action

5. Quest is entitled to judgment as a matter of law in its favor and against Plaintiff on the fourth cause of action for retaliation in violation of FEHA (Cal. Gov. Code § 12900, *et seq.*) because Quest had legitimate non-retaliatory reasons for its decision to terminate Plaintiff's employment, and Plaintiff has no evidence of pretext for disability discrimination.

Plaintiff's Fifth Cause of Action

6. Quest is entitled to judgment as a matter of law in its favor and against Plaintiff on the fifth cause of action for wrongful termination in violation of public policy because Quest had legitimate non-retaliatory reasons for its decision to terminate Plaintiff's employment, and Plaintiff has no evidence of pretext for the alleged adverse action.

This Motion is made following the conference of counsel pursuant to L.R. 7-3 which began on April 11, 2018, and was completed on April 23, 2018.

This Motion is based upon this Notice of Motion, Memorandum of Points and Authorities attached hereto, Statement of Uncontroverted Facts and Conclusions of Law filed concurrently herewith, Compendium of Evidence filed concurrently herewith, and Declarations and Exhibits attached thereto, along with all papers and pleadings filed by the parties herein, all papers lodged with the Court, and upon any other oral or documentary evidence that may be timely presented prior to or at the hearing of this Motion.

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Dated: May 4, 2018

Respectfully submitted,

FORD & HARRISON, LLP

By: */s/ Hilda Aguilar*
Daniel Chammas
Hilda Aguilar
Attorneys for Defendant
QUEST DIAGNOSTICS CLINICAL LABORATORIES, INC.

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I. INTRODUCTION

Defendant Unilab Corporation d/b/a Quest Diagnostics (incorrectly sued as Quest Diagnostics Clinical Laboratories, Inc.) ("Defendant" or "Quest") accommodated Plaintiff Fe Palomique ("Plaintiff") for 1 ½ years before it finally terminated her after she repeatedly refused to accept a position that abided by all of her work restrictions and maintained all of her former job duties with no decrease in pay. The only reason that Plaintiff declined to start the new position was that it was located 15 miles farther than the facility in which she preferred to work. Plaintiff, however, was not entitled to opt out of the available position that provided the accommodation because she preferred a less rigorous commute. For this reason alone, all of Plaintiff's causes of action are subject to summary judgment.

Plaintiff's primary request for a work accommodation was for Quest to stop scheduling her to work the graveyard shift. Plaintiff made this request after she worked such a shift on April 29, 2014. After making her request, she never worked another graveyard shift for the company again, as Quest accommodated this restriction until her termination on October 9, 2015. Prior to this request for an accommodation, as a clinical lab scientist ("CLS") II floater, Plaintiff's primary duty was to "float" between rapid response laboratories ("RRLs") in Arcadia, California (her home base) and Orange, California, covering all shifts of employees, including the graveyard shift. As a CLS, Plaintiff performed laboratory testing work and as a CLS floater Plaintiff was required to float to different RRLs and to work different shifts based on the needs of the company. Plaintiff was continuously accommodated and not required to work the graveyard shift—an essential function of her job—until she was terminated for refusing to work at a location that she considered to be too far from her home.

For the first 8 months of her no-graveyard-shift restriction, Quest accommodated her at the Arcadia RRL and employed her with no loss of pay, and no graveyard shift. During this time period, Plaintiff was performing the job duties

of a CLS I, with no floating responsibilities, but at the pay rate of a CLS II, which was compensated more because of the value of a floater. In January 2015, however, Quest made a significant business decision that impacted its employees and RRLs in Oakhurst, San Diego, Highland, and Arcadia. Two floater positions in Arcadia and Highland were eliminated while one open floater position in San Diego was eliminated. As a result, the remaining CLSs in these RRLs would now be required to cover for each other, including working the graveyard shifts that were previously covered by floaters. Accordingly, as of January 2015, Plaintiff's CLS job in Arcadia was eliminated and every remaining CLS position required work on the graveyard shift.

Fortunately, Quest operates a very large facility in West Hills, California (which was not a RRL), employed more than 200 CLSs, and could accommodate a CLS that did not work graveyard shifts. As a RRL, Arcadia was simply too small, with 9 total CLSs, to allow one not to pitch in and work the graveyard shift. Accordingly, in January 2015, Plaintiff was informed that her position was eliminated at Arcadia, and she was instructed to report to West Hills to commence the only available CLS position that did not require graveyard shifts.

For the next 10 months, however, Plaintiff refused to report to work at West Hills. Plaintiff did everything she could to get out of the slightly longer drive, including making a formal complaint of discrimination and unfair treatment, taking a 6-month medical leave of absence, and even presenting a doctor's note with a restriction that limited Plaintiff's commute to work to 13 miles (which was exactly the distance between Plaintiff's home and the Arcadia facility).

Quest accommodated all of these restrictions until September 30, 2015, by which time her discrimination complaint had been investigated and determined to be without merit, her doctor had declared her ready to return to work with limited restrictions, and she no longer had any driving restriction from her doctor. On September 30, 2015, Quest sent a letter to Plaintiff directing her to report to West

Hills on October 5, 2015 for a CLS position with a 9:00 am to 5:30 pm Monday through Friday work schedule earning $40.50 per hour. Plaintiff, however, did not report to work as directed and did not provide documentation to support a continued leave of absence. Plaintiff was therefore terminated on October 9, 2015.

Quest is entitled to summary judgment because it accommodated every single restriction Plaintiff presented for the nearly 18 months she requested accommodation, including that she not be scheduled to work the graveyard shift. Plaintiff bases all of her causes of action on the premise that Quest was required to permit her to work in Arcadia, but as the only employee at that location that did not work the graveyard shift. While Quest did, in fact, do that for almost a year, it was not required to do so indefinitely. The law is clear that no such accommodation is required. If Plaintiff stayed at Arcadia, but did not work the graveyard shift, then every single one of the other CLSs there would have to work even more graveyard shifts. It is well settled that it is not a reasonable accommodation to compel a disabled employee's co-workers to work harder or to be assigned to more undesirable work or shifts. And even if it were a reasonable accommodation, Quest is entitled under the law to select the reasonable accommodation for Plaintiff. And there is no reasonable dispute that asking Plaintiff to work at the West Hills location constituted a reasonable accommodation under the circumstances.

For the foregoing reasons, Plaintiff's entire complaint is subject to summary judgment.

II. STATEMENT OF FACTS

Quest is incorporated in Delaware and has laboratories in California. (Defendant Unilab Corporation d/b/a Quest Diagnostics' (incorrectly sued as Quest Diagnostics Clinical Laboratories, Inc.) ("Quest") Uncontroverted Facts, Fact No. ("UF") 1.) From 2013 to 2015, Quest's main laboratory in Southern California was located in West Hills ("West Hills"). (UF 2.) From 2013 to 2015, Quest had seven RRLs in Southern California including one RRL in Arcadia ("Arcadia) and another

RRL in Orange ("Orange"). (UF 3.) The RRLs are much smaller in size compared to West Hills. (UF 4.) On May 28, 2013, Plaintiff accepted a full time evening shift CLS II floater position based in Arcadia and earning an hourly rate of $40.50. (UF 5.) As a CLS, Plaintiff performed laboratory testing work and as a CLS floater Plaintiff was required to float to different RRLs and to work different shifts based on the needs of the company. (UF 6-7.) Plaintiff was paid a premium for being a floater over other CLSs. (UF 7.) She primarily floated between Arcadia and Orange, as needed when there were vacancies. (UF 8.)

A. Plaintiff Worked the Graveyard Shift for Three Months in Late 2013 Without Incident

During Plaintiff's three-month training period, she initially worked the day shift and then was to eight-hour evening shifts that had no set start or end time. (UF 9-10.) In October 2013, two months after completing her training, Plaintiff was first assigned to the graveyard shift. (UF 11.) Plaintiff had never worked the graveyard shift before, yet she believed that staying up late would cause her blood pressure to increase. (UF 12.) She informed her RRL Supervisor Vickie Peraza that it would be difficult for her to work the graveyard shift because of her hypertension. (UF 13.) Plaintiff later agreed to work the graveyard shift because she was told it would only be through the end of the year. (UF 14.) From October to December of 2013, she regularly worked the graveyard shift from 12:00 am to approximately 8:00 am. (UF 15.) In the three months that Plaintiff worked the graveyard shift, Plaintiff did not see a doctor and was not sure whether her hypertension played a role in any sleep deprivation she experienced. (UF 16.)

B. After Working Graveyard Shift for Three Straight Days Plaintiff Was Ill and Received A "No Graveyard Shift" Accommodation

When Plaintiff was assigned to work the graveyard shift for three consecutive days from April 27, 2014 to April 29, 2014 she did not complain about her schedule. (UF 17-19.) Plaintiff allegedly experienced dizziness and shortness

of breath at the end of her shift on April 29, 2014, later taking a sick day on April 30, 2014. (UF 19-20.) As explained below, based on the doctor's notes she submitted, Plaintiff did not work the graveyard shift at Quest on any date after April 29, 2014. (UF 28.)

Dr. Rodolfo Protacio sent a note to Quest on May 7, 2014 recommending that Plaintiff work the day shift based on "her multiple medical problems." (UF 21.) Plaintiff was directed by her manager Ms. Peraza to complete an ADA accommodation request form ("ADA form"). (UF 22.) Plaintiff and her doctor completed an ADA form on May 22, 2014 requesting an accommodation of "[n]o graveyard shift" representing that Plaintiff's limitations would persist for one day and indicating that there were no physical/mental limitations as a result of Plaintiff's disability that substantially limited one or more of Plaintiff's major life activities. (UF 23.) Plaintiff was scheduled by Ms. Peraza to work the graveyard shift in June 2014; however, after she complained to Ms. Peraza, Plaintiff was given time off with pay and another employee worked in her place. (UF 24.)

A second ADA form was submitted on August 7, 2014 requesting the same accommodation, but revised to state that the limitation would persist "at least 6 months" and listing vertigo, dizziness, and lack of sleep as limitations that would substantially limit Plaintiff's major life activities. (UF 25.) On August 9, 2014, Plaintiff applied for a CLS II day shift position in Arcadia with a Monday to Friday schedule and weekend rotations. (UF 26.) On August 12, 2014, Quest approved Plaintiff's accommodation request to remove the graveyard shift. (UF 27.) Since Plaintiff's floater positions required floating to all shifts including the graveyard shift, Senior Human Resources Generalist Gina Leathers and Director of Human Resources Business Partner Lisa Miranda discussed potential open positions that did not require working the graveyard shift to continue accommodating Plaintiff's "no graveyard shift" restriction. `(*Id.*)

C. Plaintiff Presents A Verbal Workplace Complaint and Is Accommodated After Falling At Work

On or about November of 2014, Plaintiff made a verbal complaint through Quest's Cheqline hotline that she was not being treated well and was being singled out at work; Quest requested that the complaint be put in writing. (UF 31.) On December 14, 2014, Plaintiff reported that, on the prior day, she had tripped on a mat and fell, injuring her "right lower extremity from the hip" and her left knee. (UF 32.) Plaintiff filed a worker's compensation case in connection with her December 13, 2014 injury. (*Id.*) The next day on December 15, 2014, she returned to work with restrictions that were accommodated. (UF 33-34.)

D. Plaintiff's CLS II Floater Position Is Eliminated and Quest Offers Plaintiff Comparable CLS Positions

In January 2015, Quest made a business decision to eliminate two floater positions (including Plaintiff's position), and required all CLSs in Arcadia to help cover various shifts. (UF 41, 43.) At the same time, Plaintiff was informed that there were open positions in West Hills that would allow her to retain her title and rate of pay. (UF 35.) In Arcadia there were a total of nine CLSs of which Plaintiff was the only CLS who was a floater. (UF 36.) West Hills is 28 miles from Plaintiff's home address, and is a longer commute than Arcadia, which is only 13 miles from Plaintiff's home address. (UF 37-38.) West Hills, however, has 200 CLSs and offered positions that did not require working the graveyard shift. (UF 38.) Quest also decided to eliminate one open position in San Diego, and close a RRL in Oakhurst, CA to reduce its expenses based on the needs of the company. (UF 39- 42, 44.)

E. Plaintiff Presented Written Workplace Complaints and Quest Conducted an Investigation

Plaintiff sent two emails on January 30, 2015: one email was sent at 1:35 am detailing her workplace complaints to Gina Leathers and RRL manager Mila Lopez

alleging discrimination and another email was sent at 6:17 am to Ms. Leathers alleging retaliation, containing further allegations as follows: 1) Plaintiff was cited for mistakes and infractions that were not of her doing; 2) Vickie Peraza spoke to the afternoon shift CLS and lead technician to ask about Plaintiff's mistakes; 3) Plaintiff was assigned to work 6 straight working days; 4) Plaintiff was assigned to work in Arcadia until midnight and the following day was assigned to work in Orange at 10:00 am; 5) Plaintiff was threatened to be demoted to CLS I with a pay cut and transfer to West Hills on August 14, 2014; 6) Plaintiff submitted an application for a CLS II day shift position in Arcadia which was denied; 7) four new CLS positions in Arcadia were created and not offered to Plaintiff; and 8) Vickie Peraza hired two individuals for CLS II positions. (UF 46-47.)

Gina Leathers conducted an investigation into Plaintiff's allegations and on March 3, 2015 prepared a summary of her findings. (UF 49.) On March 3, 2015, Plaintiff was informed by Ms. Leathers that the results of the investigation did not support her claims of discrimination and retaliation and that Ms. Miranda would be in contact regarding the posting in West Hills. (UF 50.)

F. Quest Offered A Comparable CLS Position to Plaintiff Before and After Plaintiff Returned from Medical Leave

On March 25, 2015, Plaintiff was reminded that her CLS II floater position was being eliminated and was offered a CLS position in West Hills to work the second shift from 4:00 pm to 12:30 am from Tuesday to Saturday. (UF 51.) From March 27, 2015 through July 16, 2015, Plaintiff was on medical leave and was released on July 17, 2015 with restrictions of 1) no repetitive bending or stooping, 2) sit or stand as needed to alleviate pain, and 3) sit down job only. (UF 52-53.) Plaintiff claims that she stopped driving to Arcadia as of her December 13, 2014 fall and that family members drove her to and from Arcadia. (UF 54.) Plaintiff did not ask her family members if they would drive her to West Hills. (UF 55.)

On July 17, 2015, Plaintiff was asked to report to work in West Hills, CA the

following Monday which she did not do. (UF 56-57.) Plaintiff was reminded that she was being offered a comparable full time CLS II position in West Hills, CA that maintained the same salary and that would accommodate Plaintiff's "no graveyard shift" restriction. (UF 57.) Further according to Quest's reduction in force policy, Plaintiff was not severance eligible due to her proximity to West Hills. (UF 57.)

G. Plaintiff Remained on Continued Leave After Presenting A 13-Miles Work Commute Restriction, But Was Again Offered The West Hills Position When The Driving Restriction Was Lifted

On July 31, 2015, Plaintiff's doctor's office placed an additional restriction limiting Plaintiff's commute to work to 13 miles. (UF 58.) The restriction was lifted by Plaintiff's doctor's office on August 28, 2015 listing only remaining restrictions of: 1) sit or stand as needed to alleviate pain, 2) sedentary/desk work only, and 3) no kneeling or squatting. (UF 59.) Plaintiff was asked to start on September 1, 2015 at West Hills to which Plaintiff responded that she does not drive. (UF 60.) Quest offered Plaintiff an administrative filing position in the Van Nuys Logistical Hub located 18.9 miles from Plaintiff's home address, based on Plaintiff's remaining restrictions requiring sedentary work; Plaintiff turned down the Van Nuys position. (UF 61-62.)

GENEX Services, LLC conducted an investigation to clarify Plaintiff's diagnosis with her doctor who noted that there was no reason why Plaintiff cannot tolerate the additional travel distance. (UF 63.) Plaintiff's doctor's note dated September 25, 2015 did not include a restriction limiting Plaintiff's commute to work. (UF 64.)

H. Quest Offered Plaintiff an October 5, 2015 Start Date and Plaintiff Failed to Appear to Work

On September 30, 2015, Quest sent a letter to Plaintiff via email and Fed Ex asking her to report to West Hills on October 5, 2015 for a CLS position with a 9:00 am to 5:30 pm Monday through Friday work schedule earning $40.50 per

hour. (UF 65.) In the September 30, 2015 correspondence, Plaintiff was informed that she had been on continued leave but did not have any documentation to support her continued leave of absence. (*Id*.) On October 5, 2015 at 3:21pm, Plaintiff sent an email to Lisa Miranda stating: "I need to work in the Arcadia office without night shifts." (UF 66.) Plaintiff did not show up to work on October 5, 2015 at West Hills and did not provide documentation to support a continued leave of absence. (*Id*.)

Plaintiff was terminated on October 9, 2015. (UF 67.) Ever since Plaintiff's 13-miles work commute restriction was removed on August 28, 2015, Plaintiff never again received any further driving restriction from her doctor. (UF 68.) From January 2015 through Plaintiff's termination date, there were no available CLS positions in Arcadia that did not require working the graveyard shift. (UF 69.)

III. APPLICABLE SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate, if the moving part shows that "there is no genuine dispute as to any material fact" where the evidence is viewed in the light most favorable to the nonmoving party. Fed. R. Civ. P. 56(a); *TYR Sport, Inc. v. Warnaco Swimwear, Inc.*, 709 F.Supp.2d 802, 807 (C.D. Cal. 2010). A fact is deemed material if it is legally necessary to the proof or the defense of a claim. *Anderson v. Liberty Lobby, Inc.*477 U.S. 242, 248 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.* A genuine dispute is deemed to be present "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* (citing *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968)).

First, the moving party must bear the burden of establishing "the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has met its burden, then the burden shifts to the opposing party to set forth facts that demonstrate a genuine triable issue. *Id.* at 322-23. The

party opposing the motion for summary judgment in carrying its burden of proving a genuine issue of material fact "must do more than simply show that there is some metaphysical doubt as to the material facts. . . . [T]he nonmoving party must come forward with specific facts showing that there is a genuine issue for trial." *TYR Sport, Inc. v. Warnaco Swimwear, Inc.*, 709 F.Supp.2d 802, 807-08 (C.D. Cal. Mar. 16, 2010 (citing *Matsushita Elec. Indus. Co., Ltd v. Zenith Radio Corp.,* 475 U.S. 574, 586- 87 (1986)). The non-movant is required to "go beyond the pleadings" and provide evidence that is specific enough to show that there is a genuine issue for trial. *Celotex*, 477 U.S. at 324; *Anderson*, 477 U.S. at 249-50.

IV. DEFENDANT IS ENTITLED TO SUMMARY JUDGMENT BECAUSE QUEST PROPERLY TERMINATED PLAINTIFF FOR REFUSING TO REPORT TO WORK AFTER SHE WAS ACCOMMODATED

As soon as Plaintiff began presenting Quest with work restrictions in April 2014, Plaintiff cannot dispute that Quest accommodated her at least until it asked her to transfer to West Hills. Plaintiff objects to the transfer, however, because she preferred to work in Arcadia, and maintains that Quest was not permitted to terminate her employment for refusing to report to work in West Hills. Plaintiff is wrong.

A. Legal Standard

To establish a prima facie failure to accommodate claim, the plaintiff must show that the plaintiff suffers from a disability covered by FEHA and defendant has failed to reasonably accommodate plaintiff's disability. *See Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 256; *Avila v. Continental Airlines, Inc.* (2008) 165 Cal.App.4th 1237, 1246-47. The employer is not required to create a position to accommodate a disabled employee. *See* 2 Cal. Code Regs. § 11068(d)(4); *see also Watkins v. Ameripride Services* (9th Cir. 2004) 375 F.3d 821, 828 (applying California Law); *Raine v. City of Burbank* (2006) 135 Cal.App.4th 1215, 1224.

"The California state FEHA regulations are virtually identical to the language

of the federal ADA. Because FEHA and the ADA are identical in their objectives of protecting the disabled, it is appropriate for this Court to look to cases arising under the ADA in interpreting FEHA's disability discrimination provisions." *Haynal v. Target Stores*, 1996 U.S. Dist. LEXIS 21935, *8 (S.D. Cal. Dec. 19, 1996). "The ADA and the FEHA differ in some ways but California courts find interpretations of the ADA persuasive when interpreting the FEHA." *Humphrey-Baker v. United Airlines, Inc.*, 2008 U.S. Dist. LEXIS 88381, *21, n.10 (C.D. Cal. Oct. 21, 2008). *Raine v. City of Burbank*, 135 Cal. App. 4th 1215, 1224 (2006) ("FEHA's accommodation requirements are modeled" on the ADA); *Frederickson v. UPS*, 1999 U.S. Dist. LEXIS 2650, *11 (N.D. Cal. Mar. 8, 1999) ("Although [federal decision] is not binding as to FEHA, the court will apply its reasoning to plaintiff's FEHA claim in light of the fact that the California legislature intentionally modeled FEHA's disability discrimination provisions on the ADA.").

B. Quest Always Accommodated Plaintiff's "No Graveyard Shift" Restriction

After Plaintiff experienced symptoms of vertigo, dizziness, and lack of sleep which she attributed to working the graveyard shift on April 29, 2014, Plaintiff never was asked to work the graveyard shift again. Quest was in communication with Plaintiff's doctor who issued a note recommending that Plaintiff work day shifts based on multiple medical conditions. (UF 21.) In response to that note, Quest by and through Plaintiff's RRL Supervisor Vickie Peraza requested that Plaintiff and her doctor complete an ADA form. (UF 22.) The ADA request form that was first submitted by Plaintiff and her doctor on May 22, 2014 was insufficient to establish that Plaintiff had a disability because it indicated that Plaintiff's condition would only last a day and that there were no physical or mental limitations that would substantially limit one or more of Plaintiff's major life activities. (UF 23.) On August 12, 2014, Quest memorialized in writing that Plaintiff's accommodation request to remove the graveyard shift from her schedule

was approved. (UF 27.) Even in the interim, while the request for accommodation remained pending, Quest continued to accommodate Plaintiff's "no graveyard shift restriction" throughout her employment until her termination date. (UF 28.)

In January 2015, Plaintiff's CLS II floater position was eliminated due to the business needs of the company and as part of a larger reduction in force. (UF 35, 41-44.) This reduction in force impacted two floater positions at two facilities. (UF 41.) Quest informed Plaintiff of the elimination of her position in or around January 2015 and reminded Plaintiff through March 25, 2015 that her position was being eliminated. (UF 35, 57.) Plaintiff was not terminated when she was informed that her position was being eliminated and continued to work at Quest in Arcadia until March 27, 2015 when she was placed on medical leave and deemed temporarily totally disabled. (UF 52.) From March 27, 2015 through July 17, 2015, Quest allowed Plaintiff to take medical leave until she was released on July 17, 2015 with restrictions of 1) no repetitive bending or stooping, 2) sit or stand as needed to alleviate pain, and 3) sit down job only. (UF 52-53.)

When she became available to work again on July 17, 2015, Quest offered her a vacant job in West Hills that could accommodate all of her restrictions. (UF 56.) Offering a disabled employee a vacant position is a reasonable accommodation, even when the vacant position pays less, if the plaintiff can no longer perform the former job's duties. *See* Cal. Gov. Code § 12926(p); 2 Cal. Code Regs. § 11065(p)(2)(N).

In *Hanson v. Lucky Stores, Inc.*, the plaintiff had limitations that prevented him from engaging in heavy lifting, pushing, and pulling with his right hand. *Hanson v. Lucky Stores, Inc.*, 74 Cal.App.4th 215, 227 (1999). The defendant offered the plaintiff a vacant part-time meat clerk position that was a 50% pay cut from his former pay as a meat cutter position which the plaintiff refused. *Id.* The plaintiff instead requested assignment to a shift in which receiving meat was not involved and requested modified equipment. *Id.* at 227. The court in *Hanson*

determined that defendant had provided a reasonable accommodation by offering a vacant position that plaintiff could perform. *Id.* at 227, 230.

Here, Quest at all times offered Plaintiff available positions that would accommodate her "no graveyard shift" restriction. Plaintiff was offered to work the same job in the West Hills location based on Plaintiff's inability to work the graveyard shift. The West Hills laboratory is a main laboratory with 200 CLS positions whereas the Arcadia laboratory only had 9 CLS positions. (UF 36, 38.) The West Hills laboratory, with a greater number of CLS positions, had openings that would not require Plaintiff to work the graveyard shift. (UF 38.) Quest offered Plaintiff open CLS positions in West Hills in January 2015 (UF 35), March 25, 2015 (UF 51), July 17, 2015 (UF 56), and September 30, 2015 (UF 65) that accommodated her "no graveyard shift" restriction. Quest also offered Plaintiff a vacant administrative filing position in Van Nuys on September 18, 2015 based on Plaintiff's doctor's note requiring sedentary work that also accommodated her "no graveyard shift" restriction. (UF 61-62.)

Plaintiff rejected the CLS day shift positions in West Hills, even though these positions maintained her salary and accommodated her no graveyard shift restriction because she did not want to drive to West Hills. Plaintiff immediately turned down the Van Nuys position considering it a demotion even though there was no discussion regarding salary. Quest reassigned Plaintiff to vacant positions in keeping with California law, since the employer is not required to create a position based on Plaintiff's preferences. Plaintiff cannot demonstrate that the positions offered were not **reasonable** accommodations where the vacancies were in existence and they met the requirements of Plaintiff's no graveyard shift restriction. For these reasons, summary judgment should be granted.

C. Plaintiff Was Not Entitled To Her Most Preferred Accommodation: Continued Employment At Arcadia Without Working Graveyard

Plaintiff responds by arguing that Quest should have allowed her to work in Arcadia without working the graveyard shift. Plaintiff contends that Quest should have swapped the graveyard shifts that would have been assigned to her in Arcadia for the day shifts or evening shifts worked by other employees in that location; *i.e.*, other Arcadia CLSs would work more graveyard shifts so Plaintiff would not have to. This argument is meritless.

First, after January 2015, there were no CLS positions in Arcadia that did not require graveyard shift. (UF 69.) After the restructuring in the company, all CLS positions in Arcadia required some work on the graveyard shift. (*Id.*) And because Plaintiff "bears the burden of proof in showing that such a vacant position exists," Plaintiff's failure to point to such a position is dispositive. *Phelps v. Optima Health, Inc.*, 251 F.3d 21, 27 (1st Cir. 2001).

Second, Quest was not required to create a job for Plaintiff in Arcadia or displace one of its current employees to open up a spot. "[T]he ADA does not impose a duty to create a new position to accommodate a disabled employee." *Wellington v. Lyon County Sch. Dist.*, 187 F.3d 1150, 1155 (9th Cir.1999). *See also McCullah v. Southern Cal. Gas Co.*, 82 Cal. App. 4th 495, 501 (2000) (under FEHA, "[t]he employer is not required to create new positions or 'bump' other employees to accommodate the disabled employee"); *Demming v. Star Transp., Inc.*, 2016 U.S. Dist. LEXIS 18900, *17, n.11 (M.D. Tenn. Feb. 16, 2016) ("an employer must consider a transfer to a vacant position to accommodate an employee, but it need not displace another employee"); *Washburn v. Gymboree Retail Stores, Inc.*, 2012 U.S. Dist. LEXIS 125378, *39 (W.D. Wash. Sep. 4, 2012) ("a position that is in fact occupied by another person is, by definition, not 'vacant.' And the Court finds no basis for concluding that the ADA contemplates requiring

an employer to bump an employee from a position he or she already holds to give that position to a disabled employee.").

Third, even if there were available CLS positions in Arcadia after July 31, 2015, Plaintiff cannot insist that she join a RRL where all CLSs are required to work graveyard shift. Quest cannot be expected to accommodate Plaintiff by requiring its employees at Arcadia to switch shifts with Plaintiff so that they work more graveyard shifts so she does not have to. It is not a reasonable accommodation to require Quest to burden its other employees and make their jobs harder. *See Rosenfeld v. Canon Bus. Solutions, Inc.*, 2011 U.S. Dist. LEXIS 115415, *42 (D. N.J. Sep. 26, 2011) ("Plaintiff contends he could have permanently swapped shifts with his co-worker Helen Osborne; Defendant could have had Helen Osborne and Plaintiff alternate working the late and early shifts or Defendant could have inquired as to whether other employees could have switched with Plaintiff. However, there were no other employees in this location, besides Helen Osborne, who held the same position as Plaintiff. **And Canon cannot reasonably force other employees to change their shifts in order to accommodate Plaintiff**.") (emphasis added); *Mineweaser v. City of N. Tonawanda*, 2016 U.S. Dist. LEXIS 37262, * (W.D.N.Y. Mar. 21, 2016) (accommodating disabled employee by pulling him off swing shift not required because that "imposes a greater burden on the remaining four operators to work less day shifts and to rotate shifts more frequently"); *Turco v. Hoechst Celanese Corp.*, 101 F.3d 1090, 1094 (5th Cir. 1996) ("[m]oving one operator to a straight day shift would place a heavier burden on the rest of the operators in the plant. And an accommodation that would result in other employees having to work harder or longer is not required under the ADA."); *Milton v. Scrivner, Inc.*, 53 F.3d 1118, 1125 (10th Cir. 1995) ("An accommodation that would result in other employees having to worker harder or longer hours is not required."); *Kallail v. Alliant Energy Corp. Services, Inc.*, 691 F.3d 925, 931 (8th Cir. 2012) (summary judgment on ADA claim granted where

"[s]hift rotation . . . enhances the non-work life of Resource Coordinators by spreading the less desirable shifts -nights and weekends - among all Resource Coordinators. If Kallail were switched to a straight day shift and not required to work the rotating shift, then other Resource Coordinators would have to work more night and weekend shifts."); *Dey v. Milwaukee Forge*, 957 F. Supp. 1043, 1052 (E.D. Wis. 1996) ("An accommodation that would result in other employees having to work harder or longer is not required under the ADA."); 29 C.F.R. §1630.2(p)(2)(v) (impact to other employees on their ability to do their duties is a relevant factor in determining the reasonableness of an accommodation); *see also U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 400 (2002) ("a demand for an effective accommodation could prove unreasonable because of its impact, not on business operations, but on fellow employees . . . .").

Plaintiff's demand that other Arcadia employees work more graveyard shifts so that she does not have to work any is unreasonable on its face and did not have to be accommodated. This demand goes from unreasonable to outrageous, however, in light of the job opening offered to Plaintiff in West Hills—a mere 15 miles further. Therefore, it is not as if Quest was telling Plaintiff that she could not work at all because everyone in Arcadia must work the graveyard shift. To the contrary, Quest was merely directing Plaintiff to work a job in West Hills that fully accommodated her restrictions, and that would not have an adverse impact on the working conditions of her fellow employees.

Accordingly, Plaintiff's preference was unreasonable and did not have to be accommodated in the precise manner that she was requesting.

D. Plaintiff's Alleged Driving Restriction Did Not Make Quest's Accommodation Any Less Reasonable

For less than a month, from July 31, 2015 through August 28, 2015, Plaintiff's doctor's office had placed a precise restriction of "no driving more than 13 miles from home to work." On August 28, 2015, however, the driving

restriction was lifted, with remaining restrictions of 1) sit or stand as needed to alleviate pain, 2) sedentary/desk work only, and 3) no kneeling or squatting remained. Plaintiff points to this as the reason that the position in West Hills was unreasonable and that she should have been permitted to work in Arcadia. Plaintiff is wrong.

Plaintiff's alleged inability or difficulty commuting to West Hills is irrelevant. First, it is widely recognized that a disabled employee's difficulty in getting to work is not something that must be accommodated. In *Limon v. Am. Red. Cross*, 2010 U.S. Dist. LEXIS 1483040, *45 (C.D. Cal. Oct. 6, 2010), decided under FEHA, the court recognized that "[a] number of courts have held that commuting to and from work is not part of the work environment that an employer is required to reasonably accommodate . . . . In so holding, the court[s] recognize that under the [ADA], activities such as commuting to and from work fall outside the scope of the job and are therefore, not within the scope of an employer's obligations under the ADA" (quoting *LaResca v. AT&T*, 161 F. Supp. 2d 323, 333-34 (D.N.J. 2001)). *See also Salmon v. Dade County School Board*, 4 F. Supp. 2d 1157, 1163 (S.D. Fla. 1998) (finding that a school district did not have to transfer an employee to a school closer to her home to accommodate her back problems because "[w]hile an employer is required to provide reasonable accommodations to eliminate barriers in the work environment, an employer is not required to eliminate those barriers which exist outside the work environment."); *Pagonakis v. Express, LLC*, 534 F. Supp. 2d 453, 463 n.11 (D. Del. 2008) (finding that "[e]mployers are not required to grant accommodations to allow an employee to commute to work because the ADA solely address discrimination with respect to any 'terms, condition or privilege of employment.'"); *Bull v. Coyner*, No. 98cv7583, 2000 U.S. Dist. LEXIS 1905, 2000 WL 224807 (N.D. Ill. Feb. 23, 2000) ("Coyner, with full knowledge of Bull's vision problems, may have been insensitive or even malicious in requiring him to work at nights. But she had no legally-imposed obligation to be

thoughtful and certainly no duty to require her employees to drive Bull on company time. Therefore, Defendants cannot be charged under the ADA with the duty of providing for Bull's transportation."); *Blickle v. Ill. Dep't of Children & Family Servs.*, 2015 U.S. Dist. LEXIS 129882, *12 (N.D. Ill. Sep. 28, 2015) ("employers are not required to provide accommodations for an employee's commute to work"); *Filar v. Chicago Sch. Reform Bd. of Tr*, No. 04 C 4679, 2007 U.S. Dist. LEXIS 1326, 2007 WL 79290, at *6 (N.D. Ill. Jan.5, 2007) ("activities that fall outside the scope of employment, such as commuting to and from a job location[, are] outside the responsibility of the employer under the ADA.") (reversed on other grounds, 526 F.3d 1054); *Cruz v. Perry*, No. 01 C 5746, 2003 U.S. Dist. LEXIS 4933, 2003 WL 1719995, at *5 (N.D. Ill. Mar. 31, 2003) ("the length of [plaintiff's] commute is the result of her choice to live in the suburbs, rather than the result of any disabling condition.").

Second, Quest did, in fact, accommodate Plaintiff's commute restrictions as long as her doctor maintained it. Plaintiff first presented a doctor's note with a restriction on driving on July 31, 2015. (UF 58.) Quest never asked her to report to West Hills during the time that this restriction was in place. (*Id*.) Moreover, during the time period that Plaintiff had the 13-miles driving restriction, there were no available positions at Quest that could accommodate Plaintiff's "no graveyard shift" restriction within 13 miles of her home. (UF 69.) "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." *See Jensen v. Wells Fargo Bank*, 85 Cal.App.4th 245, 263 (2000). However, on August 28, 2015, Plaintiff's doctor removed this driving restriction. (UF 59.) Plaintiff presented another doctor' note on September 25, 2015, still without any driving restriction. (UF 64.) Quest subsequently directed Plaintiff to report to work in West Hills. Therefore, even if Quest were required to

accommodate driving related restrictions that affected Plaintiff's ability to travel to work, Quest at all times respected Plaintiff's documented driving restrictions.

Third, Plaintiff was not driving at all—not even to Arcadia—but rather was receiving rides to work from her family. (UF 54.) Therefore, an alleged driving restriction of 13 miles was irrelevant to her ability to get to work because she was not driving to work. Plaintiff refused to go to West Hills, not because she could not drive that far, but rather because she felt it was too far for her family to drive her. (UF 55.) Plaintiff, however, never asked her family if they would drive her to West Hills (*id.*), and never considered any other alternative means of transportation to West Hills, such as an Uber, taxi, or bus (*id.*). Therefore, Plaintiffs' preference for Arcadia over West Hills was never based on a medical restriction in connection with a disability. Plaintiff was not driving at all, and could not drive herself even to Arcadia. She found it more practical to ask her family members to drive her to Arcadia rather than West Hills. This type of accommodation—permitting an employee to work closer to home so that members of her family can feasibly drive her to work—is plainly not required by the law.[1]

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[1] In any event, even if Quest were required to accommodate Plaintiff's driving restriction beyond the date that her doctor removed it, that would not change this analysis because there simply were no available jobs for Plaintiff to fill; *i.e.*, there was no reasonable accommodation that could have allowed Plaintiff to perform the essential functions of the job. Under these circumstances, because there were no available jobs at Arcadia, Quest was permitted to terminate Plaintiff's employment. *See Matthews v. Commonwealth Edison Co.*, 128 F.3d 1194, 1195 (7th Cir. 1997) ("a fired (demoted, etc.) worker who cannot do the job even with a reasonable accommodation has no claim under the Americans with Disabilities Act… The Act forbids discrimination against a 'qualified' individual 'because of the disability of such individual.' 42 U.S.C. § 12112(a). An individual who cannot perform the essential functions of the job even with a reasonable accommodation to his disability by the employer is not 'qualified,' 42 U.S.C. § 12111(8), so the Act does not come into play. It is irrelevant that the lack of qualification is due entirely to a disability.")

E. Quest Was Entitled To Select A Reasonable Accommodation For Plaintiff Even If She Preferred An Alternative

As explained above, there were not CLS positions available in Arcadia, and, even if there were, it is not a reasonable accommodation to force other employees to work more graveyard shifts to accommodate Plaintiff. But even if it were a reasonable accommodation to permit her to work in Arcadia with no graveyard shifts and to force others to work more graveyard shifts, Quest was not obligated to select that accommodation and Plaintiff is not entitled to require Quest to accommodate her in that exact fashion. "Any reasonable accommodation is sufficient to meet an employer's obligations. However, the employer need not adopt the most reasonable accommodation nor must the employer accept the remedy preferred by the employee." *Soldinger v. Northwest Airlines*, 51 Cal. App. 4th 345, 370 (1996). The Supreme Court, in fact, has specifically rejected the argument advanced here, that "the accommodation obligation includes a duty to accept the proposal the employee prefers unless that accommodation causes undue hardship on the employer's conduct of his business." *Ansonia Board of Education v. Philbrook*, 479 U.S. 60, 68 (1986). The Court held that there was "no basis in either the statute or its legislative history for requiring an employer to choose any particular reasonable accommodation." *Id.* Accordingly, Quest was permitted to insist on the accommodation of the position in West Hills, even if another reasonable accommodation of working in Arcadia was preferred by Plaintiff and was "more reasonable." *See Zatopa v. Lowe*, 2002 U.S. Dist. LEXIS 29104, *22 (N.D. Cal. Aug. 7, 2002) ("Both the Supreme Court and the Ninth Circuit have held in analogous cases that an accommodation need not satisfy the particular preferences of the disabled person in order to be held reasonable."); *Finlan v. Verizon New Eng., Inc.*, 2006 Mass. Super. LEXIS 352, *42-43 (2006) ("a qualified handicap employee has the right to a reasonable accommodation, not the right to the accommodation of the employee's choice…If there are two or more reasonable

accommodations, the employer can choose the accommodation that best suits its needs.").

F. The Time Period During Which Quest Permitted Plaintiff To Work At Arcadia Without Working Graveyard Did Not Prevent Quest From Changing The Accommodation

Any argument from Plaintiff that Quest's allowance of Plaintiff to work months in Arcadia without working the graveyard shift precludes it from finding a different accommodation is baseless. "An institution's past decision to make a concession to a disabled individual does not obligate it to continue to grant that accommodation in the future." *Wong v. Regents of the Univ. of Cal.*, 192 F.3d 807, 820 (9th Cir. 1999). *See also Leighton v. Three Rivers Sch. Dist.*, 693 Fed. Appx. 662, *2 (9th Cir. Jul. 14, 2017) ("Even accepting Leighton's representation that the District created a part-time position for him earlier, it was not obligated to do so again. An institution's past decision to make a concession to a disabled individual does not obligate it to continue to grant that accommodation in the future, nor does it render the accommodation reasonable as a matter of law.") (quoting *Wong*, 192 F.3d at 820); *Vande Zande v. Wisconsin Dep't of Admin.*, 44 F.3d 538 (7th Cir. 1995) ("And if the employer…bends over backwards to accommodate a disabled worker—goes further than the law requires—by allowing the worker to work at home, it must not be punished for its generosity by being deemed to have conceded the reasonableness of so far-reaching an accommodation. That would hurt rather than help disabled workers."); *Holbrook v. City of Alpharetta*, 112 F.3d 1522, 1528 (11th Cir. 1997) (granting summary judgment where "the City of Alpharetta's previous accommodation may have exceeded that which the law requires. We do not seek to discourage other employers from undertaking the kinds of accommodations of a disabled employee as those performed by the City of Alpharetta in Holbrook's case; indeed, it seems likely that the City retained a productive and highly competent employee based partly on its willingness to make

such accommodations"); *Walton v. Mental Health Ass'n*, 168 F.3d 661, 671 (3rd Cir. 1999) ("the unpaid leave granted to Walton exceeded the requirement of reasonable accommodation under the ADA, and MHASP's decision to discontinue the accommodation does not give her a cause of action against it"); *Robben v. Runyon*, 2000 U.S. App. LEXIS 1358, *9-10 (10th Cir. 2000) ("The fact that the defendant initially accommodated Robben but discontinued such accommodation while it re-evaluated the whole situation (and then later resumed the 'accommodation') does not aid Robben in her claim of disability discrimination."); *Schwertfager v. City of Boynton Beach*, 42 F. Supp. 2d 1347, 1365 (S.D. Fla. 1999) ("The City's decision to cease the accommodations and, instead, to reassign Schwertfager to a non-supervisory position which she had formerly shown she was able to perform, did not violate the ADA, because the City's original accommodations exceeded the level that the law requires."); *Barron v. Astrue*, 2007 U.S. Dist. LEXIS 104045, *20, n.11 (N.D. Ala. Jun. 11, 2007) ("prior accommodations do not make an accommodation reasonable or require an employer to continue that accommodation permanently... An employer is also not required to continue providing an accommodation that exceeds the requirements of the law…The court agrees with Defendant that it need not be required to continue supplying the scooter to Plaintiff simply because it has done so in the past.").

Here, as established above, permitting Plaintiff to work in Arcadia but not scheduling her any graveyard shifts, while certainly **possible**, did not meet Quest's business needs and would have created a burden on other employees and detrimentally impacted morale. (UF 30.) In addition, in January 2015, Quest formally eliminated her position, and officially required all CLSs at RRLs to "chip in" and work graveyard shifts where necessary. (UF 41-43.) Quest's decision to direct Plaintiff to a nearby facility where she would maintain the job duties of a CLS, maintain her level of pay as a "floater," and work only day shifts qualifies as a reasonable accommodation as a matter of law. Plaintiff's ability to point to Quest

bending over backward to accommodate her and exceeding what the law requires in no way estops Quest from changing course and pursuing an accommodation that is better suited for its business and other employees.[2]

V. CONCLUSION

Quest therefore respectfully requests this Court grant its Motion for Summary Judgment, or in the alternative, Partial Summary Judgment.

Dated: May 4, 2018

Respectfully submitted,

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[2] For the foregoing reasons, Plaintiff's claims for failure to engage in the good faith interactive process, disability discrimination, wrongful termination in violation of public policy, and retaliation are also subject to summary judgment.