SEAN M. KNEAFSEY (SBN 180863)
skneafsey@kneafseyfirm.com
THE KNEAFSEY FIRM, INC.
800 Wilshire Blvd., Suite 710
Los Angeles, California 90017
Phone: (213) 892-1200
Fax: (213) 892-1208

JEREMY PASTERNAK (SBN 181618)
jdp@pasternaklaw.com
LAW OFFICES OF JEREMY PASTERNAK
A Professional Corporation
445 Bush St., Sixth Floor
San Francisco, CA 94108
Phone: (415) 693-0300
Fax: (415) 693-0393

Attorneys for Plaintiff FE PALOMIQUE

UNITED STATES DISTRCT 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-03743-AB-JPR [Hon. Andre Birotte Jr.] **PLAINTIFF FE PALOMIQUE'S OPPOSITION TO MOTION FOR SUMMARY JUDGMENT** Date: June 8, 2018 Time: 10:00 a.m. Courtroom: 7B Complaint Filed: April 4, 2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

I. INTRODUCTION

In focusing on the "reasonableness" of different types of accommodation, Defendant ignores Plaintiff's theory of this case. As is demonstrated in the Statement of Facts below, and in Plaintiff's Statement of Material Facts, Plaintiff Palomique's managers were resistant to accommodating her from the start, due to some perceived "morale" issue that accommodating her might create among her co-workers. The accommodation she required (simply not working the occasional graveyard shift) was actually *approved* by the human resources personnel tasked with evaluating such matters, but was *reversed* because of this "morale" concern, not because of any reason that would qualify as a bona fide hardship under the law.

This bad faith continued. After the situation became fraught because of the ongoing disagreement with respect to this matter, management and HR began taking an adversarial approach, looking for "openings" to terminate Ms. Palomique, within the very accommodations "process" that was ongoing. Ultimately, when she disputed a proposed alternative "accommodation" that would not medically work for her, she was terminated for "job abandonment."

II. THE FACTS OF THE CASE

A. Ms. Palomique's Initial Employment and Medical Difficulties with the Graveyard Shift

Ms. Palomique began her employment with Defendant in May, 2013. As referenced in a later email to her supervisor, her offer letter had stated: ". . . your position will be full time evening shift (30 hours per week) and will be based in Arcadia, California."[1] (PFN 1; Ex. 1; Palomique Decl., ¶ 2). Contrary to Defendant's reference to her as a "floater," she was rarely required to work a

[1] On one prior occasion, in mid-October, 2013, Ms. Palomique had been asked to work the graveyard shift. (PFN 2; Palomique Decl., ¶ 3). Privately concerned about health issues, she expressed resistance, and noted this language; she was not asked again until late-April, 2014. (PFN 3; Palomique Decl., ¶ 3).

graveyard shift, and generally worked the "evening" shift, with the exception of a few months at the end of 2013 and a few days in April, 2014. (PFN 4; Palomique Decl., ¶ 3; *see also* Defendant's Fact Nos. ("DFN") 14, 15).

As noted in Defendant's Motion, Plaintiff did have some concerns about how the graveyard shifts might affect her medical condition. (DFN 12.) The issue really arose in late April, 2014, when Ms. Palomique experienced dizziness, chest pains, and shortness of breath, and had to be taken to urgent care by her husband. (PFN 5; Palomique Decl., ¶ 5). After stroke was ruled out, Ms. Palomique was diagnosed with vertigo and informed that her blood pressure was abnormally high. (PFN 6; Palomique Decl., ¶ 5). On May 19, 2014, Ms. Palomique was diagnosed with uncontrolled blood pressure and received a recommendation that she not work graveyard shifts, indicating as much on a Request for Americans with Disability Act (ADA) Accommodation form. (PFN 7; Ex. 2; Palomique Decl., ¶ 6). Ms. Palomique faxed this form to Gina Leathers in Quest's Human Resources Service Center ("HRSC") on or about May 23, 2014. (PFN 8; Ex. 2; Palomique Decl., ¶ 6). Ms. Leathers's primary function is handling accommodation issues. (PFN 9; Ex. 39 at 75:24-76:2). The way HR functions work at Quest is to have areas of "excellence" or "expertise"; essentially, specialists. (PFN 10; Ex. 39 at 23:22-24:7).

Management was resistant to this from the start. Just days later, on May 29, 2014, Ms. Palomique saw her work schedule for the next week and realized that her supervisor, Vickie Peraza, had once again scheduled her to work the graveyard shift. (PFN 11; Palomique Decl., ¶ 7). Ms. Palomique e-mailed Ms. Peraza, stating "I'm sorry but I can't work on that graveyard schedule. I don't want to get sick again. I hope you understand." (PFN 12; Ex. 3; Palomique Decl., ¶ 7). Despite knowing that Ms. Palomique was rushed to the emergency room the last time that she had worked graveyard shifts, Ms. Peraza replied, "you will have to find someone to trade with you. Your request has not yet been approved by HR and you are

expected to work as scheduled." (PFN 13; Ex. 3; Palomique Decl., ¶ 7).[2]

Sometime in June or July, 2014, Ms. Leathers called Ms. Palomique and asked for a new ADA form with more detail. (PFN 15; Palomique Decl., ¶ 8). Ms. Palomique obtained one, in which her physician indicated that it would be "better for the patient to work on day shift" and stating that she needed this accommodation for "at least 6 months for recovery." (PFN 16; Ex. 5; Palomique Decl., ¶ 8). Ms. Palomique faxed the form to Ms. Leathers that day. (PFN 16; Ex. 5; Palomique Decl., ¶ 8).

Around the same time (that is, early August), Ms. Peraza called Ms. Palomique into her office for a meeting, at which she criticized Ms. Palomique for "performing below par", and stated that Ms. Palomique's co-workers did not like her or her work performance and did not want to work with her. (PFN 17; Palomique Decl., ¶ 9). Ms. Peraza then went on to suggest that Ms. Palomique should be transferred to another facility and would provide no explanation other than "you just have to be transferred." (PFN 18; Palomique Decl., ¶ 9).

B. Ms. Palomique's Accommodation is Initially Approved by HRSC; Thereafter Other Management Secures Its Reversal.

Within a matter of days after receiving her doctor's note, Ms. Palomique's request for accommodation was approved by Ms. Leathers in HRSC. (PFN 19; Ex. 6; Kneafsey Decl., ¶ 44). Ms. Peraza was apparently informed of the decision, but rather than moving forward with the accommodation, she instead emailed HR representative Lisa Miranda and her own supervisor, Ms. Lopez. She wrote:

> Mila and Lisa
>
> We lost the favor of the accommodation request for Fe.
>
> She cannot be scheduled to work the graveyard shift.

[2] Ms. Miranda testified (incorrectly) that this request was not sufficient to necessarily flag Ms. Peraza that there was a potential accommodations issue or even sufficient to notify HRSC. (PFN 14; Ex. 39 at 164:20-165:12).

> This is very unfortunate and will create a severe moral [sic] problem at Arcadia. In addition, I expect other employees to try and do the same.[3]

(PFN 20; Ex. 6; Kneafsey Decl., ¶ 44).[4]

Ms. Miranda understood this to mean that Ms. Peraza thought a morale problem might be created by other employees having to "pick up the slack" for those times that Ms. Palomique could not work the graveyard shift. (PFN27; Ex. 39 at 130:15-131:1).[5] As to others "follow[ing] suit," Ms. Miranda understood Peraza thought other employees might try to get an accommodation not to work graveyard shifts. (PFN 29; Ex. 39 at 129:18-130:2).

Ms. Miranda testified that she had no responsibility for accommodation matters and testified that she simply defers to the subject matter experts in the HRSC. (PFN 30; Ex. 39 at 27:6-12). She testified that in no way does she determine what accommodations will and will not be granted. (PFN 31; Ex. 39 at 38:24-39:5). She even went so far as to testify she has no functional relationship to the process, and her only place is to be notified "as an FYI." (PFN 32; Ex. 39 at

---

[3] Ms. Miranda acknowledges that the language Ms. Peraza used struck her (Ms. Miranda) as adversarial. (PFN 21; Ex. 39 at 121:18-122:5; 122:23-123:4). At the same time, this caused her no concern. (PFN 22; Ex. 39 at 140:5-12). Nor did she seem concerned that Ms. Peraza had been critical of Ms. Palomique's attendance. (PFN 23; Ex. 39 at 81:13-15).

[4] Management's and Ms. Miranda's "view" on this was mixed. On the one hand, Ms. Miranda was clear that she ultimately understood there to be a medical issue, and did not doubt its veracity. (PFN 24; Ex. 39 at 103:21-25; 104:1-4). At the same time, it is clear she and Ms. Peraza suspected or "felt" this might also be an issue of personal preference. *See* Ex. 37, referring to a contention that Ms. Palomique "didn't want to work graveyards." (PFN 25; Ex. 39 at 118:3-118:23). At this point at least Ms. Miranda believed it to be a matter of "preference." (PFN 26; Ex. 39 at 118:24-119:14).

[5] Ms. Lopez testified: "Well, the graveyard shift is not the favorite shift of anyone, and that's why everybody was asked to help out in any way. And they had to rotate." (PFN 28; Ex. 40 at 55:20-56:5).

28:22-29:13). Ms. Lopez's testimony was similar; she had simply been trained to turn these matters over to HR; she is not even familiar with the term "good faith interactive process." (PFN 33; Ex. 40 at 26:2-22).

Nevertheless, upon receipt of this email granting the accommodation, there began a lobbying effort within management, and specifically including Ms. Miranda, to turn HRSC – again, the subject-matter-experts – around on their decision. Three days later, Ms. Miranda emailed Ms. Peraza and Ms. Lopez, telling them that she had spoken with Ms. Leathers and had turned her around. (PFN 34; Ex. 7; Ex. 39 at 126:11-128:3).

As is evident from her emails, the position Ms. Miranda took with Ms. Leathers is that because Ms. Palomique had been hired as a "floater", a "substantial" portion of her job was to fill in for other shifts. (PFN 35; Ex. 7; Ex. 39 at 126:11-128:3). But as is set forth above, to this point, well into her employment, Ms. Palomique had hardly worked any graveyard shifts. But far more importantly, Ms. Miranda admits that at the time she was having the accommodation reversed she had *no idea* how many graveyard shifts Ms. Palomique worked during that year. (PFN 36; Ex. 39 at 144:22-24). Nor did she care; she cannot even remember asking that question of anyone. (PFN 37; Ex. 39 at 144:22-145:6).

C. Management Denies Accommodation to Ms. Palomique at Arcadia *Without* Going through HRSC.

In the meantime, even before the reversal was secured, Ms. Miranda and Ms. Peraza had been taking matters into their own hands. On August 13, 2014, the day after the accommodation had been granted but two days before she managed to have it reversed, Ms. Miranda called Ms. Palomique and informed her that there was an opening for a CLS-I position at the Company's West Hills facility. (PFN 38; Palomique Decl., ¶ 10). Ms. Palomique understood this would result in not only a demotion for Ms. Palomique, but a significant decrease in pay as well. (PFN 39; Palomique Decl., ¶ 10). Ms. Palomique requested a letter containing the specifics

of the job, but was never provided one. (PFN 40; Palomique Decl., ¶ 10).

Also in the meantime, and before receiving approval of her accommodations request, Ms. Palomique had been making her own efforts to address the situation. She applied for a day-shift CLS-II position at the Arcadia facility. (PFN 41; Palomique Decl., ¶ 11). Ms. Peraza denied the application, and provided no substantive reason other than to say that the day-shift position would still require the ability to work graveyard shift. (PFN 42; Palomique Decl., ¶ 11). Confused, Ms. Palomique responded that the posting did not mention needing to work graveyard shift. Ms. Peraza responded "it is there somewhere." (PFN 43; Palomique Decl., ¶ 11).

On August 15, 2014 (later the same day the accommodation was revoked) the in-house recruiter, Marissa Stubbs, emailed that one of the positions to which Ms. Palomique had applied would require a graveyard shift every other weekend. (PFN 44; Ex. 8; Ex. 39 at 142:21-143:7). In other words, just one shift out of ten, as confirmed by Ms. Miranda's testimony. (PFN 45; Ex. 39 at 171:24-172:8; 199:15-200:6).

Even accepting management's prior rationale to revoke the accommodation, i.e., the "floater" concept, Ms. Miranda confirmed that this position was not a floater position, but was a "Regular CLS" position. (PFN 46; Ex. 39 at 175:16-176:7). In fact, the job posting described it as a "day shift;" the possibility of working graveyard was not even thought important enough to reference. (PFN 47; Ex. 39 at 200:7-201:6). And yet there was apparently no discussion of simply modifying; Ms. Miranda admits she has no idea whether or not giving somebody a different shift can constitute an accommodation. (PFN 48; Ex. 39 at 45:13-18).

The matter was not further referred to HRSC and Ms. Leathers was – perhaps strategically – left off of the email exchange between the other managers. (PFN 49; Ex. 8; Ex. 39 at 168:12-15; Kneafsey Decl., ¶ 46). And to Ms. Miranda's knowledge, Ms. Stubbs was doing nothing to help Ms. Palomique find a job other

than simply monitoring what she was applying to. (PFN 50; Ex. 39 at 173:22-174:4).

It is clear why additional steps were not taken: Ms. Miranda testified that as of August 2014, *every single CLS at Arcadia worked the graveyard shift.* (Ex. 39 at 185:21-186:1.) As is set forth above, she had already heard the managers she supported express their concern about "morale" regarding "picking up the slack." As is discussed below, there are sufficient facts from which a jury could conclude that management did not want to accommodate simply because it might make their jobs as managers more difficult, or out of some misguided sense of "fairness."

On August 19, 2014, Ms. Palomique learned that the company had posted a CLS-II job opening at Arcadia. This position was for the "second shift" (from 3:00 p.m. to 11:30 p.m.) (PFN 51; Palomique Decl., ¶ 11). This position was at the Arcadia location where she worked. (PFN 52; Palomique Decl., ¶ 11). This position was not offered to Ms. Palomique, and for the time being, she remained in her position. (PFN 53; Palomique Decl., ¶12).

As before, Ms. Palomique was thereafter subjected to reprimand. On October 23, 2014, Ms. Peraza questioned the volume of her work, and continued in a meeting to inform her that her coworkers did not like her. (PFN 54; Palomique Decl., ¶ 13). She asked her co-workers about the matter; they denied the contention. (PFN 55; Palomique Decl., ¶ 13).

A few days later, on October 29, 2014, Ms. Palomique learned that management had been asked about her (Ms. Palomique's) work performance, and directed her to report any mistakes that Ms. Palomique made. (PFN 57; Palomique Decl., ¶14).

D. Ms. Palomique Is Not Allowed to Apply for Arcadia Positions and is Retaliated Against.

As referenced above, Ms. Palomique was aware of the jobs posted in Arcadia in August, 2014. (PFN 58; Palomique Decl., ¶ 11). In or around January 2015, Ms.

Palomique was told that her job was being eliminated on account of the "float" aspect of the job (working in Orange County on occasion) was being eliminated. (PFN 58; Palomique Decl., ¶ 11). However, this function had not been utilized for over a *year* at this point, and the job had never been eliminated (Ms. Palomique had in fact *never* "floated" to Orange from December 2014 until she was terminated). (PFN 59; Ex. 39 at 201:18-202:10; 211:20-212:14; Palomique Decl., ¶ 15). And yet at the same time, Ms. Palomique was not being allowed to apply for Arcadia jobs (where she already worked) because "everyone" at Arcadia worked some graveyard shifts. (PFN 60; Ex. 39 at 201:18-202:10).

Ms. Palomique was left in a Catch-22: 1) she was being told that the "float" aspect of her job to work graveyard was a must, despite the fact it had hardly ever come up; 2) she was not allowed to apply for other jobs because "everyone" at Arcadia worked graveyard; and 3) the job she had held for well over a year was being eliminated because of the other "float" aspect; 3) therefore she would have to transfer to another location; because 4) again, "everyone" at Arcadia worked some graveyard shifts. In short, things lined up perfectly for Ms. Peraza to force Ms. Palomique to work at another facility (and become someone else's "problem"). This is not mere speculation; Ms. Miranda testified that part of the reason to move Ms. Palomique to West Hills was to deal with this "morale" problem. (Ex. 39 at 215:16-216:13).[6]

On January 30, 2015, Ms. Palomique sent e-mails to Ms. Lopez and Ms. Leathers complaining of, among other things, that she had attempted to apply at Arcadia but had been refused, and that others had been hired. (PFN 61; Ex. 10 and 11; Palomique Decl., ¶16). Less than two weeks later, contrary to a separate restriction Ms. Palomique had, she was scheduled to work by herself. Ms. Palomique was surprised and e-mailed Ms. Peraza, reminding her that she was

[6] Ms. Miranda even volunteered the concept that accommodating Ms. Palomique in Arcadia would have been "really unfair" to the other CLS's. (Ex. 39 at 221:17-21).

unable to work alone. (PFN 62; Ex. 12; Palomique Decl., ¶17). That same day, a co-worker informed Ms. Palomique that she had been instructed by Ms. Peraza to "keep an eye" on Ms. Palomique, specifically with respect to her hours. (PFN 63; Palomique Decl., ¶ 18). Ms. Palomique memorialized this in an email to Ms. Leathers (PFN 64; Exhibit 13). There was no response. (PFN 65; Palomique Decl., ¶ 18).

E. Ms. Palomique is Told She Must Transfer to West Hills

On March 25, 2015, Ms. Lopez, Ms. Peraza, and Ms. Miranda called Ms. Palomique and told her that there was a position for her at West Hills. (PFN 66; Palomique Decl., ¶ 19). Ms. Miranda's email to the other managers memorializing the call references various positive-sounding statements made in that call to Ms. Palomique; however, its true intent appears in the last line: "I am doubtful she will take the position." (PFN 67; Ex. 14; Ex. 39 at 218:8-18; Kneafsey Decl., ¶ 47). This email makes clear management's intention to deem Ms. Palomique to have "resigned" if she did not take the position in West Hills, and Ms. Miranda admitted at her deposition to that intent. (PFN 68; Ex. 14; Ex. 39 at 218:8-18; 224:15-225:15; Kneafsey Decl., ¶ 47).

Ms. Palomique was concerned. She had not been told the schedule at West Hills and was mindful of the no-graveyard restriction, had not been told what the actual position would be, and was concerned that it was farther away; because of her injuries she already was having to be driven to work. (PFN 69; Palomique Decl., ¶19). Ms. Palomique reiterated that she would have to check with her doctor, with whom she had an appointment on March 27, 2015, and made clear – as was referenced by Ms. Miranda's email -- that she would have to ask him about the commute issue. (PFN 70; Ex. 14; Ex. 39 at 218:8-18; 224:15-225:15; Kneafsey Decl., ¶ 47).

On March 27, 2015, Ms. Palomique was informed by her physician that she had a tear on her knee and right hip; it was recommended that she go on leave,

which was continued at subsequent appointments. (PFN 71; Palomique Decl., ¶ 20). The initial extensions expired as of July 17, 2015. As before, management tried to "jump" at the moment to lock Ms. Palomique into a position they already presumed she did not want. Despite having already expressed her "doubt" that she thought Ms. Palomique would take the position, on July 17, 2015, Ms. Miranda wrote, "we understand that you are clear to return to work. That's great news!" (PFN 72; Ex. 18; Palomique Decl., ¶ 21). In reply, Ms. Palomique again noted that Arcadia positions had been filled without notice. (PFN 73; Ex. 19; Palomique Decl., ¶ 22). Ms. Miranda had no real explanation for why she did not discuss this with Ms. Palomique; her testimony was only that, "It was irrelevant." (PFN 74; Ex. 39 at 236:7-237:10).

Ms. Palomique had a follow-up appointment with her doctor on July 31, 2015, where she was told that she could not drive long distances due to her injuries, and was given a Work Status Form memorializing this restriction (specifically, over thirteen miles) through late August. (PFN 75; Ex. 20; Palomique Decl., ¶ 23).[7] Ms. Palomique submitted the form to Ms. Miranda that same day. (PFN 76; Ex. 21; Palomique Decl., ¶ 23).

At this point, Ms. Miranda was clearly in adversarial mode. She responded by email asking Ms. Palomique if she had seen her doctor at the Santa Ana office or the Beverly Hills office. (PFN 78; Ex. 21; Palomique Decl., ¶ 24). When asked at deposition why she had asked that question, Ms. Miranda responded that, "maybe was it more than 13 miles." (PFN 79; Ex. 39 at 242:3-11). More specifically, Ms. Miranda testified that she has asked the question about where Dr. Phillips had seen Ms. Miranda [sic] "because I believe we needed clarification on the 13-mile

[7] Ms. Miranda was clear that as of this point in time, mid-July 2015, if Ms. Palomique needed some additional time that would be fine. (PFN 77; Ex. 39 at 239:13-240:9).

restriction"[8] and that, "we would have Travelers contact him." (PFN 80; Ex 39 at 243:2-18). Travelers was the Company's workers' compensation insurer. (PFN 82; Ex. 39 at 243:19-22).

Thereafter, Aurora Martinez from Travelers took the affirmative step of calling Ms. Palomique's doctor's office; she reported to Ms. Miranda that Ms. Palomique had asked for the doctor's note with that restriction. (PFN 83; Ex. 39 at 244:8-245:5). Ms. Miranda surmised that this person was the physician himself. (PFN 84; Ex. 39 at 244:25-255:5).[9] Of course, as a human resources professional, Ms. Miranda knows this could not be true. Doctor-patient confidentiality would absolutely prohibit such a communication, and Ms. Miranda admitted knowing as much. (PFN 85; Ex. 39 at 247:22-24; 247:25-248:15). Further, Ms. Miranda understands that Ms. Aurora works in the interest of the insurance company and against the employee. (PFN 86; Ex. 39 at 245:16-246:8).

When Ms. Palomique visited Dr. Phillips' office on August 28, 2015, a staff member informed her that someone had called the day before and had "questioned the driving restriction" and had asked "What if on her day off she drove to Las Vegas?" (or words to that effect). (PFN 87; Palomique Decl., ¶ 25). The doctor then prepared another note which did not include the driving restriction. (PFN 88; Ex. 22 Palomique Decl., ¶ 25). It is not clear if this was meant to retract it; the restriction had been imposed just a month before, and there had been no material change in Ms. Palomique's condition. (PFN 89; Ex. 21 and 22; Palomique Decl., ¶ 25). Moreover, Ms. Miranda acknowledged that this second note 1) was addressing a different matter, namely desk work, and 2) that she may have just assumed that the

[8] Of course, this ignores the possibility that somebody might have simply given her a ride, which was, in fact, the case. (PFN 81; Palomique Decl., ¶ 19).

[9] Later in her testimony, Ms. Miranda admitted that she had no idea who had provided this information to Aurora and that as far as she knew, it was simply whoever had answered the phone. (Ex. 39 at 247:9-16).

driving restriction was "lifted." (PFN 90; Ex. 39 at 253:18-254:16). Of course, the source of that assumption was presumably the call from Traveler's to the doctor (given that was the intention behind that call).

The following day, August 29, 2015, Ms. Palomique e-mailed the updated Work Status Form to Ms. Miranda. (PFN 91; Ex. 22; Ex. 23; Palomique Decl., ¶ 26). Her cover email made her point of view clear: "Hi Lisa, Right away the HR jump with joy when the driving restriction was lifted because a lawyer called questioning it." (PFN 92; Ex. 23; Palomique Decl., ¶ 26). Ms. Miranda feigned ignorance, writing back that they were not regulating how she got to work.[10] (PFN 93; Ex. 23; Palomique Decl., ¶ 27). In that same email she instructed Ms. Palomique to appear for work at the West Hills location beginning September 1, 2015. (PFN 95; Ex. 23; Palomique Decl., ¶ 27).

Of course, Ms. Palomique was not able to drive to the West Hills facility. On September 1, 2015, she sent an email to Dr. Phillips explaining the situation with respect to the mysterious phone call and asking him to look into the matter. (PFN 96; Ex. 24; Palomique Decl., ¶ 28). On September 3, 2015, Ms. Leathers sent a letter to Ms. Palomique stating that she needed some additional information relating to her request for an accommodation and scheduled a telephone call for September 9, 2014. (PFN 97; Ex. 25; Palomique Decl., ¶ 29).

Ms. Palomique summarized that call in a September 11, 2015 email to Ms. Leathers, which confirms that she explained: 1) that she could not drive to West Hills because of the pain from her injuries; 2) that although she tried to report for work at the Arcadia facility, Ms. Peraza did not want to accommodate her there (despite an Arcadia CLS employee having resigned); and 3) what she knew of the mysterious phone call. (PFN 98; Ex. 26; Palomique Decl., ¶ 30). Just three days

[10] This was silly. Ms. Miranda knew from past experience that difficulties with a commute fell within those items that could be accommodated. (PFN 94; Ex. 39 at 51:2-53:8).

later, Ms. Palomique discovered *another* job opening for a CLS-II in Arcadia with varying hours. (PFN 99; Ex. 27; Palomique Decl., ¶ 31).

On September 18, 2015, Ms. Miranda e-mailed Ms. Palomique stating that the Company had found administrative filing work for Ms. Palomique to do "within 25 miles" from her home in Van Nuys. (PFN 100; Ex. 28; Palomique Decl., ¶ 32). Ms. Palomique was disappointed that not only was her work restriction not being accommodated, but that she now was apparently being demoted into a clerical position; she made her feelings clear in a follow-up email in which she also noted that four CLS employees had been hired in Arcadia since her accommodation issue had arisen and that one CLS employee resigned in Arcadia recently. (PFN 101; Ex. 28; Palomique Decl., ¶ 32). Ms. Miranda replied:

> There is a CLS position available in the Arcadia lab; however, it requires work on the overnight shift and you have told us that you cannot work those shifts. We have gone to great lengths to identify positions within a radius of 25 miles that will enable you to contribute to the organization. There is bona fide work for you waiting at our Logistics hub that meets all of your work restrictions. Do not underestimate the value that this has to the organization.
>
> Are your [sic] refusing to work?

(PFN 102; Ex. 28; Palomique Decl., ¶ 32).

As discovery has revealed, not long before sending this email, there was an email among other management, written by Ms. Leathers (who, ironically, was supposed to be in charge of finding accommodations) discussing terminating Ms. Palomique for "job abandonment." (PFN 103; Ex. 29; Ex. 39 at 258:2-12; Kneafsey Decl., ¶ 48). Though she was not "on" this email, the matter was clearly discussed with Ms. Miranda, who in the context of informing other management that Ms.

Palomique had objected to the Van Nuys position, had asked, "Do we have a letter to address this issue." (PFN 104; Ex. 38; Ex. 39 at 257:9-258:2). Ms. Miranda confirmed at her deposition that termination for "job abandonment" was probably the nature of "the letter" she was referring to. (PFN 105; Ex. 39 at 258:17-259:11).

On September 22, 2015, Ms. Palomique sent a pointed response, reviewing her view of events, but most importantly noting the still-vacant position at Arcadia and that she felt that the ongoing events were retaliatory. (PFN 106; Ex. 30; Palomique Decl., ¶ 33).

F. Ms. Palomique's Termination

On September 30, 2015, Ms. Miranda sent Ms. Palomique a "confirming" letter noting that Ms. Palomique's leave had not been continued, and that therefore she was expected to show up for work in West Hills on October 5, 2015. (PFN 107; Ex. 31; Palomique Decl., ¶ 34).

Early on October 5, 2015, Ms. Palomique sent the following e-mail to Ms. Miranda in response and reading in pertinent part:

> I need to work in the Arcadia office without night shifts. I know you want a doctor's note and I'm working on that, but do you really need a doctor's note again? I already sent you one with a driving restriction.

(PFN 108; Ex. 32; Palomique Decl., ¶ 35). Ms. Miranda responded via e-mail simply stating, "Please refer to the letter that was Fed-Ex'd to you." (PFN 109; Ex. 32; Palomique Decl., ¶ 35). This was a reference to the September 30, 2015 letter, Ex. 31 (PFN 110; Ex. 39 at 265:15-24). Ms. Palomique sent a second email, which noted in part: "It was only after my health and medical issues prevented me from doing the graveyard shift that all the difficulties started." (PFN 111; Ex. 33; Palomique Decl., ¶ 35).

There was no response, but internally, Ms. Miranda forwarded this to Ms. Leathers and a human relations employee, writing, "Needless to say, Fe did not

show up to our facility this morning and it doesn't look like she will. Do we give it another day before sending a letter out or do we nip this in the bud right away?" (PFN 112; Ex. 33; Kneafsey Decl., ¶ 49). The next day, Ms. Leathers sent a letter to Ms. Palomique stating that because she did not report to work on October 5, 2015, "[w]e have accepted this as your voluntary resignation with Quest Diagnostics as of October 6, 2015." (PFN 113; Ex. 34; Palomique Decl., ¶ 36).

On October 8, 2015, Ms. Palomique sent e-mailed Ms. Leathers:

> I just got your letter about my failure to show up at work and I am very surprised. I already gave my previous doctor's note with a driving restriction to Lisa Miranda. It's not clear to me why the driving restriction was not included in my last doctor's note. All I am told is that an attorney who was not my attorney called the doctor about it and that the case manager at the insurance company doesn't want the restriction. All of this is strange and a mystery to me. I am still trying to sort this out. Lisa also knew that I was trying to get the driving restriction issue straightened out. I e-mailed her on October 5. Maybe you were not aware of all of this.
>
> Anyway, I can't drive to West Hills and I can't work night shifts.
>
> I did not resign and am not resigning from Quest Diagnostics.
>
> I would be very happy to have a conversation about this and try to sort this out.

(PFN 114; Ex. 35; Palomique Decl, ¶ 37).

Management ignored this. (PFN 115; Palomique Decl., ¶ 37).

On October 19, 2015, Ms. Palomique received an "Employment Termination

Notice" with an effective date of "10/09/2015." (PFN 116; Ex.38; Palomique Decl., ¶ 38). That day, Ms. Palomique sent one last e-mail to Ms. Leathers:

> I got this termination letter today. I did not "abandon" my job. It's only been eleven days since my last email, and like I said, I wanted to straighten out any confusion. Nobody called me after that.
>
> No contact.
>
> I guess there is nothing I can do about firing me, but it is not fair or right to say I "abandoned" my job, because I did not do that.

(PFN 117; Ex. 36; Palomique Decl., ¶ 38).

Ms. Palomique did not receive any response or further communication from anyone at the Company. (PFN 118; Palomique Decl., ¶ 38).

III. ARGUMENT

A. Ms. Palomique Suffered from a Disability as that Term is Defined by California Law.

Defendant's Motion does not challenge that Plaintiff was "disabled" as that term is used in this context or that she was entitled to FEHA protections on that basis. In any event, she was, as she had a condition affecting a "major life activity" which by definition can include working. *See* California Government Code § 12926(m)(B).

B. FEHA Generally is More Protective of Employee Rights than is Federal Law.

Defendant argues at section IV.A of its brief that this Court may look to the ADA for guidance on Plaintiff's FEHA claims. This is only partly true. The plain text of FEHA recognizes that "Although the [ADA] provides a floor of protection, this state's law has always, even prior to passage of the [ADA], afforded additional protections." California Government Code § 12926.1(a). The California Courts

have consistently affirmed that FEHA offers more substantive protections than the ADA. *See Green v. State of California*, 42 Cal.4th 254, 265 (2007) (emphasizing that the legislature intended to provide plaintiffs with broader substantive protection under the FEHA); *Colmenares v. Braemar Country Club, Inc.*, 29 Cal.4th 1019, 1026 (2003) (noting the California legislature's "intent 'to strengthen California law where it is weaker' than the ADA, that is, in the non-FEHA statutes, 'and to retain California law when it provides more protection for individuals with disabilities than' the ADA, that is, in the FEHA.")

C. Defendant's Argument that it "Always" Accommodated the "No-Graveyard Restriction" Misses the Point of Plaintiff's Claims.

Defendant's first substantive argument is that Plaintiff was "always" accommodated in the sense that after she received the no-graveyard-shift restriction, she never actually worked one again. That may be true in a vacuum, but it misses the thrust of this case, which is really about the final events in October, that is, Plaintiff's termination. After all, that is the event which actually caused "injury."

As is demonstrated above, the internal communications within the organization demonstrate that there was resistance to Plaintiff's accommodations from the start, based on a misguided concern that her co-workers in Arcadia would be jealous or the like, that this could affect "morale," and that others might seek similar accommodation. Ms. Miranda even went so far as to have the HRSC "expert" reverse the no-graveyard accommodation after it was deemed reasonable. It may be that thereafter there was no need to have Ms. Palomique work the graveyard shift, but this 1) only goes to show that it was not actually an "essential" function of the job and/or that there was no undue hardship in providing the accommodation and 2) does not change the fact that management – rather than approaching this in the true "good faith" required (and discussed below) – sought to manipulate the process to end Ms. Palomique's employment.

D. It Cannot Be Said that as a Matter of Law Continuing the Arcadia Accommodation Was Not "Reasonable."

As a threshold matter, "Ordinarily, the reasonableness of an accommodation is an issue for the jury." *Prilliman v. United Air Lines, Inc.*, 53 Cal. App. 4th 935, 983-954 (1997). *See also Nadaf-Rahrov v. Neiman Marcus Group, Inc.*, 166 Cal. App. 4th 952, 985 (2008).

Defendant nevertheless argues that allowing Ms. Palomique not to work graveyard shifts at Arcadia was unreasonable because it would create a hardship for her coworkers. First, under FEHA, shift adjustments are reasonable accommodations as a matter of law. California Government Code §12926(p)(2) states that "Reasonable accommodation" may include "Job restructuring, part-time or modified work schedules . . ." Obviously, such adjustments under FEHA will create some level of hardship on co-workers.

Defendant attempts to argue that an inconvenience or hardship to coworkers is a basis to deny accommodation. On its face, this is obviously an overstatement of the law. Many accommodations necessarily impact other employees to some extent. For example, FEHA specifically states that an "employee with a disability is entitled to preferential consideration of reassignment to a vacant position over other applicants and existing employees." Cal. Code Regs., tit. 2, § 11068. FEHA also permits the "redistribution of non-essential job functions in a job with multiple responsibilities," which may require other employees to take over additional tasks. Cal. Code Regs. tit. 2, § 11065, subd. (p)(12).

FEHA sets forth a five-factor test for determining whether an accommodation is an "undue hardship." California Government Code § 12926(u). The factors all assess the financial impact of an accommodation on the overall resources of the business and its business operations. *See* Cal. Code Regs. tit. 2, § 11065, subd. (r). Though one of the five factors refers to the accommodation's impact on other

employees, it is only within this larger context of the impact on the employer. [11] Defendant has cited not a single FEHA case for its proposition (which itself is contrary to the authorities cited above). Even so, the cases cited by Defendant acknowledge this. *See Milton v. Scrivner*, Inc., 53 F.3d 1118, 1125 (10th Cir. 1995) (accommodations would slow down production schedule); *Turco v. Hoechst Celanese Chem. Group*, 101 F.3d 1090, 1094 (5th Cir. 1996) (changing Plaintiff's schedule would impact all schedules and the business).

Defendant's other citations present cases where the burden of forcing a small number of employees to cover shifts was an undue hardship on business operations. *See Rosenfeld v. Canon Bus. Solutions, Inc.*, 2011 U.S.Dist.LEXIS 115415, at *42 (because only one other employee worked at Rosenfeld's location in the same position, moving one employee to particular shifts unduly burdened business operations); *Mineweaser v. City of N. Tonawanda*, 2016 U.S.Dist.LEXIS 37262, at *31 (W.D.N.Y. Mar. 21, 2016) (only four other employees could work Mineweaser's shifts, thereby "imposing a greater burden" on the limited number of other employees and the business).[12]

Quest is a huge corporation with multiple laboratories, there were some nine other technicians at the Arcadia location, all of whom worked graveyard from time

---

[11] In assessing "undue hardship," employers must show that the accommodation requires more than "de minimus cost," further illustrating the emphasis on finances, not other employees. *TWA v. Hardison* (1977) 432 U.S. 63, 84.

[12] The remaining cases cited by Defendant referenced hardship to co-workers, but the decisions turned on the fact that the plaintiffs could not perform essential functions. *See Dey v. Milwaukee Forge*, 957 F.Supp. 1043, 1052 (E.D.Wis. 1996) (although providing Dey with a stool was not an undue burden, he could not perform numerous essential duties such as bending and lifting); *Kallail v. Alliant Energy Corporate Servs.*, 691 F.3d 925, 931-932 (8th Cir. 2012) (it was an undue burden to change Kallail's schedule because the court found the rotating schedule to be an essential function, as it was required in the job description (not so in this case) and the rotating schedule served the operational purpose of familiarizing employees with the area).

to time anyway, only a couple employees worked graveyard at any given time, and Ms. Miranda admitted that she did not even know how many graveyard shifts Plaintiff would otherwise have worked. Defendant has not made any showing that there would be any serious effect on business operations, and on these facts a jury could find to the contrary in any event.

Here, Defendant has argued solely how the change of Plaintiff's schedule would impact other employees, not the business, as FEHA - which provides greater protections than the ADA for disabled employees - and Defendant's proposition requires.

We anticipate Defendant to argue that working the graveyard shift is an essential function. But 1) Miranda testified that this was only one shift out of ten, 2) Ms. Palomique did not perform it for a year, and 3) Ms. Leathers originally agreed to this accommodation. Based on those facts alone this cannot be decided as a matter of law.

E. "Morale" Is Not a Basis to Deny an Accommodation

The facts also make clear that the resistance to accommodating Ms. Palomique in Arcadia had nothing to do with the reasonableness of the request or any undue hardship in terms of co-worker time, but was simply based on concerns regarding "morale" (or that others might seek similar accommodations). The Courts have repeatedly held this is not undue hardship. For example: "We have held, however, that resentment by other employees who are concerned about 'special treatment' for disabled co-workers is not a factor that may be considered in an 'undue hardship'." *Cripe v. City of San Jose*, 261 F.3d 877, 892-893 (9th Cir. 2001) (citing *Wellington v. Lyon County Sch. Dist.*, 187 F.3d 1150, 1156-57, holding that resentment by other employees is not a legitimate consideration when determining whether an accommodation should be made for a disabled employee). The *Cripe* Court reversed summary judgment on this basis.

The *Wellington* Court held: "Finally, Wellington might establish at trial that although the safety position was not actually created, the reason that the School District did not follow through on its initial decision to do so was Wellington's disabled status and the feared adverse reaction of his fellow employees. This too, if proven, could provide a basis for a reasonable jury's concluding that the School District failed to make a reasonable accommodation." *Wellington v. Lyon County Sch. Dist.*, 187 F.3d 1150, 1156-57 (9th Cir. 1999).[13]

Similarly, here, a jury could find that the real reason (because it was the stated reason) management did not continue to accommodate Ms. Palomique was the "morale" issue, not the actual effect on workplace functions. There is at the very least a triable issue in this regard.

F. A Jury Could Find that Defendant Was Responsible for a Breakdown in the Interactive Process and Therefore the Resulting Failure to Accommodate.

Under FEHA, once on notice of a disability, the employer has a duty to engage in a "good faith interactive process" to determine what accommodations might allow the employee to retain her employment. California Government Code §12940(n). This statute provides an independent basis for liability separate and apart from liability based on a failure to accommodate. *Gelfo v. Lockheed Martin Corp.*, 140 Cal.App.4th 34, 61 (2006).[14]

---

[13] *Wellington* is cited with approval in Defendant's brief at page 14. In that section, Defendant also cites several cases to the effect that an employer is not required to create a "new position" or "bump" a coworker from their job. But as Ms. Palomique noted repeatedly, there *were* jobs that opened up at Arcadia but that management simply chose not to give to Plaintiff.

[14] Indeed, California law is clear that an employer who fails to engage an employee in an "interactive process" to determine what accommodations are required and how they can be provided is barred from arguing undue hardship after the fact. *See Claudio v. Regents of University of California*, 134 Cal.App.4th 224, 248 (Cal. App. 2005). In this respect, we note that even the Company's own bought-and-paid for

The California Courts have long recognized that for this process to work, "[b]oth sides must communicate directly, exchange essential information and neither side can delay or obstruct the process." *Jensen v. Wells Fargo Bank*, 85 Cal.App.4th 245, 261 (2000). Further, "When a claim is brought for failure to reasonably accommodate the claimant's disability, the trial court's ultimate obligation is to 'isolate the cause of the breakdown ... and then assign responsibility' so that '[l]iability for failure to provide reasonable accommodations ensues only where the employer bears responsibility for the breakdown.' [Citation.]" *Id.* Further, "an employer cannot prevail at the summary judgment stage if there is a genuine dispute as to whether the employer engaged in good faith in the interactive process." *Id.*

Here, regardless of the issues pertaining to team morale at Arcadia, it is clear – and at the very least a jury could find – that management was seeking to get rid of Ms. Palomique. Their internal communications demonstrate that they were offering her a job (in West Hills) that they suspected she would not want. They wrote about sending her "a letter", i.e., a termination letter and Ms. Miranda on more than one occasion asked if they could do so. She wrote of her desire to "nip this in the bud." Management jumped to ask Ms. Palomique, "are you refusing to work," again, obviously out of a desire to have a basis for termination. All of this was in service of and connected to orchestrating the West Hills "offer" to as to secure a basis for termination, even assuming that the "floater" position in Arcadia was actually eliminated, despite the fact that the "float" to Orange County function that supposedly was behind the elimination had not actually been used for a year.

And, of course, there is this issue of the doctor's note. Again, management hoped Ms. Palomique would reject the West Hills offer. When she instead presented a doctor's note precluding that travel, management immediately attempted

---

"investigation" concluded that management failed in its duty to conduct a good faith interactive process.

to "litigate" the matter, when Ms. Miranda challenged the office at which Ms. Palomique had seen her physician. Then, Ms. Miranda, through the Traveler's adjuster, took the extraordinary step of contacting Ms. Palomique's doctor in an effort to have the restriction removed. It is not clear that even happened; the two notes (Exhibits 21 and 22) appear to address wholly different matters. Moreover, Ms. Palomique was protesting to the end that she could get a new note, that she had already provided one with the driving restriction, and that she wanted to sort this out. Instead – consistent with the intent and desire to "send a letter" and "nip this in the bud" previously expressed – Ms. Miranda and Ms. Leathers seized on this second note to demand attendance in West Hills and move as quickly as possible to termination.

Based on these facts, a jury is entitled to find that management was responsible for the "breakdown in the process."

Similarly, Defendant's arguments that Plaintiff was not entitled to her "preferred" accommodation are irrelevant; if what happened occurred in bad faith – and based on these facts a jury may so find – the that argument (and the law supporting it) has no bearing. The same is true with respect to Defendant's argument that management merely "changed" the accommodation.

G. Defendant's "Commute" Authorities Have No Application to this Case.

Defendant argues that "commute" problems need not be accommodated. This is not an accurate statement of the law in this jurisdiction. The Ninth Circuit has expressly held that an employer had an obligation to accommodate an employee's inability to get to work on time or at all due to the employee's recognized disability. *Humphrey v. Memorial Hospitals Ass'n*, 239 F.3d 1128, 1135 (9th Cir. 2001). This was expanded upon when the Court later held that under the ADA, employers have an obligation "to accommodate an employee's limitations in getting to and from work." *Livingston v. Fred Meyer Stores, Inc.*, 388 F. App'x 738, 740 (9th Cir.

2010). The *Livingston* opinion was cited with approval to similarly hold in *Ravel v. Hewlett-Packard*, 228 F. Supp. 3d 1086, 1093-1094 (E.D.Cal. 2017). Footnote 2 of the *Ravel* decision in fact explicitly dispenses with two of the cases relied upon by Defendant, *LaResca v. Am. Tel. & Tel.*, 161 F. Supp. 2d 323 (D. N.J. 2001) and *Salmon v. Dade Cty. Sch. Bd.*, 4 F. Supp. 2d 1157 (S.D. Fla. 1998), as they do not "supersede Ninth Circuit precedent." *Id.* at 1094, fn. 2. The *Bull* case is distinguishable, as in that instance the employee was being driven by fellow employees on the City payroll. *Bull v. Coyner*, 2000 U.S.Dist.LEXIS 1905, at *3 (N.D.Ill. Feb. 17, 2000, No. 98 C 7583).

The one FEHA case cited by Defendant is *Limon v. Am Red Cross*, 2010 U.S. Dist. LEXIS 1483040 (C.D. Cal 2010). However, it relied on *LaResca*, which, again, was rejected by the Court in *Ravel*; it is in any event not an appellate decision. Again, not one of Defendant's cases supersede Ninth Circuit precedent.

And again, Defendant's legal argument misses the point. The facts indicate that management assigned Ms. Palomique to West Hills so as to set her up for termination. And this is not a situation where the employee asked to be accommodated in her present job with respect to commute difficulties. Ms. Palomique was asking not to be transferred because of the negative implications for her health. Nor do the facts of the case fit the Defendant's law. After all, they did not actually deny the accommodation request; rather they contacted the doctor to have it removed and only then terminated Ms. Palomique, not on the basis that they could not accommodate her restriction, but on the ostensible basis that she did not have one. Moreover, even before they had the restriction removed, they were accommodating Ms. Palomique by simply allowing her leave time. Had they in good faith actually engaged with Ms. Palomique and given her time to sort the matter out (or not sought removal of the restriction in the first place, that is a temporary accommodation that could have been (because it already had been) provided.

H. Defendant's Arguments Ignore the Retaliation and Discrimination Causes of Action.

Defendant's focus on parsing the accommodation issues also ignores Plaintiff's third and fourth causes of action, for Discrimination and Retaliation in violation of FEHA. Even were Defendant's arguments regarding hardship to co-workers applicable to the FEHA claims (again, they are not) that would still have no bearing on the issue of motive in the termination itself. Again, the internal communications show management was trying to engineer and certainly desired a termination. That is sufficient to show discriminatory and retaliatory intent, separate and apart from the accommodation issues. For the same reasons (and also those with respect to accommodation) the common-law cause of action for Wrongful Termination in Violation of Public Policy also survives Defendant's Motion. *See Tameny v. Atlantic Richfield Co.*, 27 C3d 167, 172 (1980).

IV. CONCLUSION

Based on the forgoing facts and authorities, Plaintiff respectfully requests that Defendant's Motion be denied in its entirety.

DATED: May 18, 2018 THE KNEAFSEY FIRM

/s/ Sean M. Kneafsey

By _____
Sean M. Kneafsey
Attorneys for Plaintiff Fe Palomique