4th Civil No.

G043054

IN THE

Court of Appeal

STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

LINDA WILLS,

Plaintiff and Appellant,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ORANGE,

Defendant and Respondent.

APPEAL FROM SUPERIOR COURT OF ORANGE COUNTY
O.C.S.C. No. 30-2008-00114482 (Honorable Joseph DiLoreto, Judge of the Los Angeles County Superior Court, presiding by assignment of the Judicial Council of the State of California)

APPELLANT'S OPENING BRIEF

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Court of Appeal Case Number: G043054

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RESPONDENT/REAL PARTY IN INTEREST: Superior Ct., County of Orange

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Check one): [✔] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE

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1. This form is being submitted on behalf of the following party *(name)*: Linda Wills

2. a. [✔] There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. [ ] Interested entities or persons required to be listed under rule 8.208 are as follows:

	Full name of interested entity or person	Nature of interest *(Explain)*:
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(2)		
(3)		
(4)		
(5)		

[ ] Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: May 14, 2010

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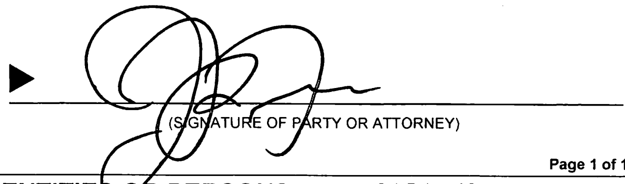

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I. INTRODUCTION.

The California Fair Employment and Housing Act (FEHA) prohibits discrimination by an employer on the basis of several protected categories, including mental disability. (Gov. Code, § 12940, subd. (a).) The primary issue presented by the instant appeal, and never before addressed in a published opinion by the Courts of the State of California, is whether or not conduct resulting from a disability is considered to be part of the disability under FEHA, rather than a separate basis for a decision by an employer to terminate an employee.

For nine years, Plaintiff and Appellant Linda Wills ("Wills") was a model employee of the Defendant and Appellee Superior Court for the State of California, County of Orange ("Defendant" or "OCSC"). Wills also happens to suffer from bipolar disorder, a disability that she was originally diagnosed with in 1997 and one that is specifically recognized and protected by FEHA. On January 11, 2008, Wills was fired because of conduct caused by her bipolar disorder. Defendant was aware of Wills's disability before it decided to fire her, indeed Wills was on medical leave due to her bipolar disorder at the time most of the conduct that led to her termination occurred.

Defendant urges, however, that the cause of the conduct that led to Wills's termination is immaterial and that employers in this state have the right to separate the disability-related conduct from its cause when making adverse employment decisions. Defendant's position is at odds with the overwhelming weight of authority addressing the subject (including the Ninth Circuit's interpretation of FEHA). Moreover, it is bad public policy and contrary to the statutory intent of FEHA for it would effectively render nugatory the rights afforded to those who suffer from behavioral disabilities.

Linda Wills was fired because of conduct caused by her bipolar disorder. "[C]onduct resulting from a disability is considered to be part of the disability, rather than a separate basis for the termination." (*Humphrey v. Memorial Hospitals Ass'n* (9th Cir. 2001) 239 F.3d 1128, 1139–1140.) Accordingly, "where an employee demonstrates a causal link between the disability-produced conduct and the termination, a jury must be instructed that the employee was terminated on the impermissible basis of her disability." (*Gambini v. Total Renal Care, Inc.* (9th Cir. 2007) 486 F.3d 1087, 1093.) This is due to the fact that, "if the law fails to protect the manifestations of [a] disability, there is no real protection in the law because it would protect the disabled in name only." (*Id*. at 1095, citing *School Board of Nassau County, Florida v. Arline* (1987) 480 U.S. 273, 279 [107 S.Ct. 1913, 94 L.Ed.2d 307] [hereinafter *Arline*].)

Dismissing these and other similar authorities, Defendant moved for summary judgment of Wills's claims, asserting, *inter alia*, that it had a legitimate nondiscriminatory reason for terminating Wills's employment because it was entitled to disregard the cause of the conduct at issue. Unfortunately, the Superior Court below agreed and granted summary judgment in favor of Defendant. It is from that summary judgment that Wills' brings the instant appeal. Accordingly, the core issue presented by this appeal is whether or not conduct resulting from a disability is considered to be part of the disability, rather than a separate basis for the termination, or if, as Defendant contends, an employer may disregard the cause of the conduct at issue and fire someone because they suffer from a mental disability.

A second issue presented by the instant appeal is whether or not Wills exhausted her administrative remedies prior to filing suit. Defendant urges, and the Superior Court below employed, a harsh and unduly severe interpretation of exhaustion doctrine that elevates form over substance. It is

also at odds with California law. The order granting summary judgment in favor of Defendant found that Wills failed to exhaust her administrative remedies because the Department of Fair Employment and Housing (DFEH) did not check the discrimination box on the form used when it prepared Wills's administrative charge.[1] On that basis, the Superior Court below disregarded all of the evidence that Wills communicated to the DFEH that she wanted to "file a disability discrimination complaint," that she had been "terminated because of [her] disability," that "the OCSC's reasons for termination were all caused by [her] disability," and that she had "endured a history of discrimination and harassment at the OCSC on the basis of disability."

Also disregarded was the fact that Defendant was undisputedly on notice of the disability discrimination claims being asserted against it as part of the administrative process by Wills, as evidenced by the fact that the Court devoted most of its nine page response to that form—with the wrong box checked—attempting to refute charges of disability discrimination. Instead, the Superior Court below determined that Wills failed to exhaust her administrative remedies because the DFEH did not check the box marked "disability" on its form.

This hyper-technical interpretation is at odds with the law governing the doctrine of the exhaustion of administrative remedies. The appropriate question is whether or not the defendant was on notice and had an opportunity to participate in the administrative process. (*Cole v. Antelope Valley High School District* (1996) 47 Cal.App.4th 1505, 1511.) Further, the issue of whether or not a plaintiff has exhausted her administrative remedies must "be construed liberally in favor of plaintiff, it must be

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[1] In Wills's DFEH charge (III AA 722), the box on the form designated "DENIAL OF FAMILY/MEDICAL LEAVE" is checked, but the box designated "DISABILITY" is not.

construed in light of what might be uncovered by a reasonable investigation." (*Nazir v. United Airlines, Inc*. (2009) 178 Cal.App.4th 243, 268.)

This is not the standard employed by the Superior Court below. The trial court ignored all of this evidence and the applicable law and instead seemingly concluded that Wills failed to exhaust her administrative remedies because the DFEH checked the wrong box on the form. Accordingly, Wills respectfully urges that the Court reverse this clear error.

Finally, as this is an appeal from a summary judgment entered in favor of Defendant, it must be reversed in that, at a bare minimum, triable issues of material fact exist sufficient to require that the case proceed to a jury trial. The Superior Court below appeared to reverse the applicable standard on summary judgment motions and seemingly drew inferences in favor of the moving Defendant, construing all evidence it its favor. Aside from the broader policy issues implicated by the instant action, this is not a case appropriate for disposition by summary judgment and the disputed issues of material fact must be resolved by a jury.

Accordingly, for the foregoing reasons, Wills respectfully requests that Court reverse the Summary Judgment granted in favor of Defendant and remand the action to the Superior Court for further proceedings.

II. STATEMENT OF FACTS.

A. Factual Background.

After serving as a model employee of the Defendant for more than nine years, Appellant Linda Wills was unceremoniously fired on January 11, 2008. This adverse employment action occurred after more than four months of investigation into alleged "misconduct," which consisted exclusively of three specific incidents. It is undisputed that the behavior in question was directly caused by Wills's bipolar disorder, a mental disability afforded protection under FEHA, and occurred mostly while Wills was

absent from the workplace on approved medical leave. It is further undisputed that Defendant had notice of Wills's disability at the time it issued its Notice of Intent to Discharge.

1. Wills Has a Protected Disability.

Wills was first diagnosed with bipolar disorder in 1997. Bipolar disorder is a mental disability often characterized by mood swings between depressive and manic states. (VI AA 1430:12–14.) A relatively common mental disability, bipolar disorder is diagnosable in approximately one percent of the population. Most individuals with bipolar disorder can be treated with proper psychiatric care and medication and lead normal, productive lives. (VI AA 1490; VII AA 1499:11–1502:22.)

When an individual experiences a manic episode, however, he or she becomes anxious, irritable, and aggressive; and engages in conduct quite out of the ordinary for his or her usual behavior patterns as a result of significantly impaired judgment. Additionally, during a manic episode, the individual afflicted with the disability experiences delusional and grandiose ideas bordering on psychosis with substantially impaired memory of the events and thoughts accompanying the manic phase. Further, when an individual experiences a manic episode, he or she often requires new or adjusted medication and may require hospitalization to re-balance the chemical issues causing the episode or to remove any triggering stimulus from the patient's environment. These episodes are relatively brief, and once proper treatment modalities are determined, the patient can again be symptom-free for years. (VII AA 1504:11–1506:24, 1508:21–1511:22.)

2. Wills Was an Employee of Defendant.

i. Employment History.

After earning a Bachelor's Degree from California State University, Fullerton in 1999, Wills applied for, and was offered a job as a Court Processing Specialist with Defendant. As a benefit of employment, Wills

received healthcare coverage through Kaiser Permanente and immediately began seeing the head of Kaiser's Orange County psychiatry department, Dr. David Chandler. Dr. Chandler has been Wills's treating physician for her bipolar disorder for over ten years. (VI AA 143117–20; VII AA 1524.)

Because of her disability, Wills required, and was granted, multiple leaves to receive medical treatment. Whenever a leave was required, Dr. Chandler would personally provide the paperwork to Defendant and Wills would discuss the need for the leave and her disability with her direct supervisor. (VI AA 1432:13–1446:13.)

ii. Conduct Caused by Disability that Led to Termination.

On July 3, 2007, Wills reported to the Anaheim Police Department for video arraignments as part of her job responsibilities. That day, she made a joke to one of the six-foot-tall, armed, uniformed officers, Officer Gardetto, that she might put him on her "Kill Bill" list (a reference to the popular Quentin Tarantino movie she saw the night before on television) for not answering the phone to let her in. Officer Gardetto did not express any concern to Wills that her comments might have been inappropriate and neither Gardetto nor his fellow officers or supervisors took any protective action in response to these comments. (VI AA 1448:13–1450:7.) The comment was made in jest and was clearly interpreted that way by Officer Gardetto at the time. (VI AA 1449:21–1450:7; VII AA 1526.)

Unbeknownst to Wills at the time, she was experiencing the behavioral anomalies typical of the early stages of a manic episode—also known as a "hypomanic" state. (VII AA 1506:23–1507:1, 1512:18–1513:9, 1524–26.) Within six days she was ordered by Dr. Chandler to take a medical leave, ultimately leading to extensive psychiatric hospitalization through July and August 2007 and intensive treatment with Dr. Chandler. (VII AA 1524–26.) Defendant approved this medical leave. (VI AA 1362–

63; I AA 163.) While she was out on leave in the throes of a severe manic episode, she sent six rambling emails from her personal email account to several recipients, including some of her coworkers at the court. (III AA 521–22, 541–563; VI AA 1451:17–1452:6.) She also forwarded a joke ringtone that included several obscenities to several recipients including one personal cell phone of a coworker. (III AA 520, 655 [note objection at VII AA 1570].) None of these communications included threats of violence of any kind, let alone any threat against a court employee.

3. Egregious Misconduct by Other Employees of Defendant Who Were Not Terminated.

Defendant has encountered threatening behavior or threats of violence from its employees before. Of particular significance here, on June 19, 2007, Wills was cornered in an elevator with a clique of co-workers known animosity towards her. When another coworker, a friend of Wills, approached, Wills joked to her friend that, "I'm not waiting for [her]." (VI AA 1458:22.) After her friend entered the elevator and the doors had closed, effectively depriving Wills of an opportunity to remove herself from the situation, a member of the clique, who has admitted to being hostile to Wills, threatened Wills by saying to another member of the clique, "You want me to hold her so you can beat her up?" (Also recalled by witnesses as, "Oh. That's messed up. I say you kick her ass." and "If you want us to hold her down while you hit her …") (VI AA 1458:25–1459:2; III AA 699, fn. 5 [Independent Counsel Report].)

Wills feared for her safety after this incident and reported it to her supervisors immediately. (VI AA 1459:2–1461:24; 1469:23–1470:3 [deposition of Independent Counsel].) Defendant retained independent investigating counsel who evaluated Defendant's response and eventually determined that Defendant took no effective action in response to this complaint. (III AA 703.) Despite the undisputed fact that this behavior

made Wills afraid, none of the behavior of those employees was found to be "incompatible" their continued employment. (VII AA 1475:11–22.)

Other incidents include another employee that one of Wills's supervisors testified "got out of control a few times with other staff members, raising her voice, being volatile, and got in arguments with several other staff members, [enough] to cause the other staff members to be afraid." (VII AA 1484:11–16.) That employee was not subject to any discipline either. (VII AA 1484:18–1486:4.)

Finally, even the evidence presented by Defendant in support of its motion for summary judgment showed three additional incidents of "threatening" behavior reported during the last nine years, without a single termination among them. The declaration of Defendant's supervisor Susan Rohde in support of the motion identifies three employees who engaged in similar conduct. (I AA 154–55.) Of these three, one was served with a notice of intent to discharge, but subsequently resigned; one was given a 10-day suspension; and one was given a notice of intent to discharge, but there is nothing in the declaration confirming that the notice was enforced and not rescinded. (I AA 155.)

Accordingly, out of the five additional instances of threats or threatening behavior during Wills's employment, only one of them resulted in enforced discipline, and that was a 10-day suspension. Linda Wills is Defendant's ***only*** employee to be terminated based on allegations of making threats.

4. Defendant Knew of Wills's Disability.

While Wills had extensive discussions with supervisors and co-workers regarding her disability throughout her employment (including discussion with supervisors when she requested leave), Defendant disputes the facts surrounding these communications. (See, e.g., VII AA 1610–12.)

This establishes a disputed issue of material fact as to whether Defendant was aware of Wills's disability prior to the events of July 2007.

However, it is undisputed that Defendant received formal, written notice of the nature and extent of Wills's disability from Dr. Chandler prior to issuing its Notice of Intent to Terminate. (VII AA 1710–1711.)

Wills was cleared by Dr. Chandler to return to work on August 31, 2007. When she returned however, she found that Defendant had placed her on administrative leave to investigate her behavior while she was in a manic and/or hypomanic state. (VI AA 1462:17–1463:17; III AA 519.) A meeting was held on September 12, 2007, and Wills appeared, providing a letter from Dr. Chandler explicitly discussing the diagnosis of bipolar disorder and explaining that Wills was not a danger to anyone and that she was fully able to return to work. (VI AA 1490.) Accordingly, it is undisputed that Defendant had notice of Wills's bipolar disorder disability by no later than September 12, 2007. (VII AA 1710–1711.)

5. Wills was Terminated Because Her Disability was "Incompatible" with Employment.

Defendant issued a Notice of Intent to Terminate on October 5, 2007 (the "Notice"), citing three events: the "Kill Bill" incident, the emails sent while Wills was on leave, and the ringtone sent to the private cell phone of a coworker also while Wills was on leave. (III AA 518–82.) The Notice stated that these actions allegedly constituted poor judgment, an abuse of Defendant's resources by Wills and that they were "incompatible" with employment. (III AA 518, 523.)

In support of its moving papers, Defendant's supervisors admitted that Wills was terminated solely for this conduct. (I AA 140–41, 156, 164.) It is also undisputed that Wills was not terminated because she posed any actual threat or potential threat, or because of job performance. (VII AA 1711–12.) Defendant argued extensively that the three instances of conduct

described above require Wills be terminated from employment, ***irrespective of whether the conduct was caused by her mental disability***. (E.g., VIII AA 1850:11 ["Employees can be terminated for disability-related misconduct under the FEHA"]; VII AA 1703:18–19 ["the fact that Wills suffered from a disability is of no consequence."].)

Dr. Chandler confirmed that every allegation of misconduct set forth in the Notice of Intent to Discharge was a "direct result" of bipolar disorder. (VII AA 1514:6–1515:1.)

6. Wills Exhausts Administrative Remedies.

Defendant terminated Wills effective January 11, 2008. (VI AA 1279:6–13.) In late January 2008, Wills contacted the DFEH with the intent of filing a disability discrimination complaint against Defendant. Wills was interviewed by DFEH officials and later received a written complaint for her to sign, which was prepared by the DFEH. (VII AA 1517:16–27.) At this time, Wills was not represented by counsel. (VII AA 1518:14–16.)

Wills asked why the complaint did not explicitly state "disability discrimination" on its face and the DFEH officials explained that they would not be investigating her claim of disability discrimination because they had contacted Defendant, who informed them that she was terminated for misconduct. (*Id.*) Thereafter, in late February 2008, Wills received a notice of non-investigated complaint from the DFEH—based on her initial intake interview—which stated that she was entitled to a right-to-sue on her disability discrimination claim. (*Id.*; VII AA 1520–22.) At that point, Wills retained counsel and instructed her attorney to request a right-to-sue letter. (VII AA 1518:14–16.)

Defendant responded to the DFEH charge with extensive written argument and evidence concerning Wills's allegation of disability discrimination. (VI AA 1375–83.) Defendant's written response

demonstrated that it was clearly on notice as to the disability discrimination issue in the DFEH complaint and that it was fully participating in the administrative process.

The DFEH issued a right-to-sue letter dated July 23, 2008. (III AA 724–25.)

B. Procedural History.

After exhaustion of administrative remedies and receipt of the right-to-sue letter, Wills filed this action in Orange County Superior Court on November 7, 2008. (I AA 1–19.) As the OCSC itself was a named defendant, the case was ordered re-assigned to the Honorable Joseph E. Di Loreto of the Los Angeles County Superior Court by the Judicial Council on November 24, 2008. (I AA 20–21.)

Defendant filed its motion for summary judgment on August 20, 2009 (I AA 55–59 [Notice of Motion]), which Judge Di Loreto granted on November 3, 2009. (VIII AA 1905–1909.) Final judgment thereon was issued November 30, 2009. (VIII AA 1919–21.) Wills's notice of appeal was timely filed December 17, 2009. (VIII AA 1924–25.)

III. STATEMENT OF APPEALABILITY.

This appeal is taken from the final judgment of the trial court pursuant to Code of Civil Procedure, section 904.1, subdivision (1), following granting of Defendant's motion for summary judgment.

IV. STANDARD OF REVIEW.

As an appeal of a summary judgment, the standard of review for all issues herein is *de novo*. (*Deveny v. Entropin, Inc.* (2006) 139 Cal.App.4th 408, 418–419, quoting *Colarossi v. Coty U.S., Inc.* (2002) 97 Cal.App.4th 1142, 1149.) Accordingly, the reviewing court undertakes the same analysis as the trial court and must resolve all doubts as to whether any material, triable, issues of fact exist in favor of Appellant, the party opposing summary judgment. (*Id*. at 419, citing *Dawson v. Toledano*

(2003) 109 Cal.App.4th 387, 392; quoting *Cochran v. Cochran* (2001) 89 Cal.App.4th 283, 287.)

V. LEGAL ARGUMENT.

The primary issue presented by the instant appeal is whether or not under California law conduct caused by a disability can serve as an independent basis for an adverse employment action or whether, as recognized by practically every Federal Court that has decided the issue, conduct resulting from a disability is considered to be part of the disability, rather than a separate basis for the termination. Further, the Superior Court below seems to have applied a severe, drastic and incorrect standard in determining that Wills had failed to exhaust her administrative remedies. As set forth herein, Defendant's motion for summary judgment should have been denied and the case allowed to proceed to a jury trial.

A. Termination for Conduct Caused by a Disability is the Same as Termination for the Disability Itself.

The California Fair Employment and Housing Act (FEHA) establishes a person's freedom from employment discrimination based on disability as a civil right. (Gov. Code, § 12921.) Discrimination based on a disability is against public policy (Gov. Code, § 12920) and constitutes an unlawful employment practice (Gov. Code, § 12940). FEHA expressly covers mental illness as a disability. (Gov. Code, § 12940, subd. (a).) Bipolar disorder is recognized as mental illness deserving of protection under the law. (Gov. Code, § 12926.1, subd. (c) ["Physical and mental disabilities include, but are not limited to … bipolar disorder … ."].)

It is undisputed that Wills suffers from bipolar disorder. (VI AA 1430, 1490; VII AA 1703.) It is also undisputed that Wills was terminated due to conduct caused by her bipolar disorder disability. (VII AA 1712.) Moreover, there is no dispute that Defendant was aware of Wills's

disability at the time it made the decision to terminate her employment. (VII AA 1710–1711.)

According to the Ninth Circuit Court of Appeals—the only Court to have issued a published opinion on the matter under FEHA—and all other courts that have addressed the issue on all fours, "conduct resulting from a disability is considered to be part of the disability, rather than a separate basis for the termination." (*Humphrey*, 239 F.3d at 1139–1140 [analyzing claims for disability discrimination based on mental disability under both the ADA and FEHA].)

Defendant, for its part, refuses to accept *Humphrey* and similar precedent, claiming that it was allowed to terminate Wills for the conduct at issue despite or irrespective of her disability. Defendant is wrong and Defendant's argument to the trial court that the law compelling such a conclusion is neither "logical, nor sensible" (I AA 80) would necessarily result in a rule of law that individuals with behavioral disorders are *per se* unemployable and not entitled to protection under FEHA. Nothing could be further from the legislative intent behind the statute.

1. Wills Established a *Prima Facie* Case for Disability Discrimination

California law analyzes disability claims under a three-step framework: First, the plaintiff has the initial burden of establishing *prima facie* case of discrimination; The employer must then offer a legitimate nondiscriminatory reason for the adverse employment decision; Assuming that the employer meets their burden, the plaintiff then bears the burden of proving the employer's proffered reason was pretextual. (*Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 196–197.)

A plaintiff can establish a *prima facie* case by showing that she: suffers from a disability; is a "qualified individual;" and was subjected to an adverse employment action because of the disability. (*Brundage v.*

Hahn (1997) 57 Cal.App.4th 228, 236.) The burden of proving a *prima facie* case of discrimination is "not onerous." (*Heard v. Lockheed Missiles & Space Co.* (1996) 44 Cal.App.4th 1735, 1752.)

Ms. Wills established her *prima facie* case before the trial court. Wills suffers from bipolar disorder, a recognized disability under California law (Gov. Code, § 12940, subd. (a)). (6 AA 1430; VII AA 1703.) There was no competent evidence provided by the Defendant that Ms. Wills was not qualified to hold the job that she had held for nine years. As the trial court noted, "***There is no evidence that the quality or quantity of plaintiff's work product was deficient***. The Anaheim Police Department's demand that plaintiff no longer be assigned to the video arraignment court at the North Justice Center does not compel a conclusion that plaintiff was unqualified for any other assignment." (VIII AA 1914, emphasis added.)

Moreover, as discussed above, it was never disputed that Wills was terminated solely because of conduct caused by her disability. Defendant admitted in its undisputed facts that Wills's conduct was the sole basis for termination. (I AA 98 [UF No. 16].) Defendant provided no evidence in support of its summary judgment motion to controvert Wills's evidence in opposition thereto that all conduct described in Defendant's Notice of Intent to Discharge was a "direct result" of her disability. (I AA 104–108 [UF Nos. 33–50]; VI AA 1295–1304 [Opposition to UF Nos. 33–50]; VII AA 1514:6–1515:1 [Dr. Chandler's Deposition Testimony, cited in Appellant's Separate Statement in Opposition to the Motion at AUF No. 17 (VI AA 1364–1365)].)[2]

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[2] In response to Additional Undisputed Fact ("AUF") No. 17 set forth in Wills's separate statement in opposition to the motion, Defendant merely objects that Dr. Chandler's opinion that the conduct at issue was caused by Wills's bipolar disorder is "[i]mmaterial to this motion" because an employer can terminate employees for misconduct regardless of whether it was caused by a disability. (VII AA 1712.) Defendant then attempts to

"[C]onduct resulting from a disability is considered to be part of the disability, rather than a separate basis for the termination." (*Humphrey*, 239 F.3d at 1139–1140.) Accordingly, Wills met her burden to establish a *prima facie* case and the burden was shifted to Defendant to establish "a legitimate nondiscriminatory reason for the adverse employment decision." (*Brundage*, 57 Cal.App.4th at 236.)

Defendant admits that it was aware of Wills's disability prior to its decision to terminate her employment (VII AA 1710–1711 [AUF No. 14]) and that the conduct that formed the basis for its decision to terminate was caused by her disability (VII AA 1712 [AUF No. 17]), but nonetheless insists that it has no liability because there was a "legitimate nondiscriminatory reason" for its decision. Specifically, Defendant argues that irrespective of whether or not her conduct was caused by her disability, Wills's conduct was "incompatible" with further employment. Defendant

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incorporate evidence from other filings before the trial court in the alternative: "To the extent that this fact becomes relevant because the Court adopts the Ninth Circuit approach, it is disputed, as outlined in the [Defendant's] opposition to Wills' summary adjudication [*sic*]." (*Id.*)

Defendant's reference to other sources not cited in the separate statement is inappropriate and "need not be considered by the court." (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group Rev. #1 2009) ¶ 10:95.2, p. 10-35, citing *Artiglio v. General Electric Co.* (1998) 61 Cal.App.4th 830, 840–841. See also, *United Community Church v. Garcin* (1991) 231 Cal.App.3d 327, 337 ["This is the Golden Rule of Summary Adjudication: if it is not set forth in the separate statement, ***it does not exist***."], quoting Zebrowski, *The Summary Adjudication Pyramid* (Nov. 1989) 12 L.A. Lawyer 28, 29, superseded by statute on other grounds as noted in *Certain Underwriter's at Lloyd's of London v. Superior Court* (1997) 56 Cal.App.4th 952, 957, fn. 4.)

Having failed to provide opposing evidence to AUF No. 17, it is properly established against Defendant. However, the trial court did not expressly rule on this basis, but held that the alleged conduct alone was sufficient for termination, regardless of cause. (VIII AA 1909 ["plaintiff's conduct, threats of violence, was of a nature that did not require accommodation."].)

further contends that even though the conduct at issue was undisputedly caused by Wills's bipolar disorder disability, it is entitled to disregard the cause and focus exclusively on the conduct. (See, e.g., Opposition to AUF No. 17 [VII AA 1712].) As set forth herein, Defendant, and the trial court, in granting the summary judgment motion for the same reasons, are wrong.

i. **Humphrey v. Memorial Hospitals Association*: Conduct Resulting from a Disability is Considered to be Part of the Disability and Not a Separate Basis for Termination.***

Carolyn Humphrey was fired from her job as a medical transcriptionist because of conduct, tardiness and absenteeism, caused by a mental illness. She subsequently brought suit under the ADA ***and FEHA***. As here, there was no dispute that Humphrey was fired because of certain conduct or that said conduct was caused by her mental illness. As here, the employer argued that even though Humphrey was fired for that certain conduct resulting from a disability, it was allowed to terminate her employment nonetheless—contending that there was a distinction between the two. The trial court granted the employer summary judgment against Humphrey on her ADA and FEHA claims and the Ninth Circuit reversed, recognizing that, "conduct resulting from a disability is considered to be part of the disability, rather than a separate basis for termination." (*Humphrey*, 239 F.3d at 1139.) *Humphrey*, therefore, holds that under FEHA, firing someone because of conduct caused by their disability is the same thing as firing them because of the disability itself—there is no distinction between the two. Firing someone because of a disability is a violation of FEHA. (See, e.g., CACI No. 2500.)

Defendant will attempt to distinguish *Humphrey* on the grounds that it is a Ninth Circuit case and therefore not binding on this Court. Nonetheless, it is well settled that "because the FEHA provisions relating to

disability discrimination are, in fact, based on the ADA, and other federal law decisions interpreting federal antidiscrimination laws are relevant in interpreting the FEHA's similar provisions." (*Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 948. See also *Etcheverry v. Tri-Ag Service, Inc.* (2000) 22 Cal.4th 316, 320 ["While not bound by decisions of the lower federal courts, even on federal questions, they are persuasive and entitled to great weight"].) Further, *Humphrey* is a FEHA case and the only published opinion specifically addressing this issue under FEHA. Accordingly, Wills urges this Court to expressly adopt *Humphrey* and conclude that an employer discharges an employee because of her disability when it discharges her for conduct caused by her disability.

ii. **Gambini v. Total Renal Care, Inc.*: Termination for Misconduct Including Threats and Acts of Violence is Still Discriminatory when a Causal Link Between the Misconduct and the Disability is Established.***

Stephanie Gambini also suffered from bipolar disorder and was terminated as a result of outbursts and inappropriate behavior caused by that disability. Specifically, Ms. Gambini threatened her superiors after receiving a negative review and committed several acts of violence and property destruction at the workplace. She also expressed suicidal thoughts:

> When she had finished reading the performance plan, Gambini ***threw it*** across the desk and in ***a flourish of several profanities*** expressed her opinion that it was both unfair and unwarranted. Before ***slamming the door*** on her way out, Gambini ***hurled several choice profanities*** at Bratlie. There is a dispute about whether during her dramatic exit Gambini warned Lovell and Bratlie that ***they "will regret this,"*** but Bratlie did observe Gambini ***kicking and throwing things*** at her cubicle after the meeting. Back at her cubicle, Gambini tried unsuccessfully to call Fletcher

> to tell her about how upset the meeting made her feel and about her ensuing ***suicidal thoughts***.

(*Gambini*, 486 F.3d at 1091–1092 [emphases added].)

Just as here, Gambini's employer was on notice of her disability but chose to terminate her employment anyway. Gambini sued and lost when the trial court refused to instruct the jury that, "conduct resulting from a disability is part of the disability and not a separate basis for termination." (*Id*. at 1093.) The Ninth Circuit reversed, concluding that "where an employee demonstrates a causal link between the disability-produced conduct and the termination, a jury must be instructed that the employee was terminated on the impermissible basis of her disability." (*Id*. at 1093.) This is because, "***if the law fails to protect the manifestations of her disability, there is no real protection in the law because it would protect the disabled in name only***." (*Id*. at 1095, citing *Arline*, 480 U.S. at 279, emphasis added.)[3]

Erroneously and inexplicably, the trial court below attempted to distinguish *Gambini* by concluding that it "did not concern threats in the workplace." (VIII AA 1917.) If a disputed conversation about a "Kill Bill" list and rambling emails about conversations with God can be considered threatening (VII AA 1594 [UF No. 2]; VII AA 1603 [UF No. 10]), then Gambini's direct threat that her supervisors "will regret this" as part of a profanity-laced tirade that included kicking and throwing is just as bad, if not worse. Accordingly, while Wills does not concede that her conduct can

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[3] As the Supreme Court in *Arline* notes, discussing the Rehabilitation Act of 1973: "[The law] reflected Congress' concern with protecting the handicapped against discrimination stemming not only from simple prejudice, but also from 'archaic attitudes and laws' and from 'the fact that the American people are simply unfamiliar with and insensitive to the difficulties confront[ing] individuals with handicaps.'" (*Arline*, 480 U.S. at 279, quoting Sen.Rep. No. 93-1297, p. 50 (1974), reprinted in 1974 U.S. Code Cong. & Admin. News, p. 6400 [latter alteration in original].)

be or was considered "threatening" to the same degree as Gambini's, at a minimum, her conduct must be considered a protected manifestation of her disability as Gambini's was, and not a separate basis for termination.

Before the trial court, Defendant attempted to dismiss *Gambini* as non-controlling federal authority that is further inapplicable because it dealt with Washington State disability law, not FEHA. However, "the Washington state handicap laws, … are similar to the ADA and the FEHA." (*Humphrey*, 239 F.3d at 1136, fn. 12, citing *Schmidt v. Safeway, Inc.* (D.Or. 1994) 864 F.Supp. 991, 996; *Prilliman*, 53 Cal.App.4th at 949, fn. 3; *Sanders v. Arneson Prod. Inc.* (9th Cir. 1996) 91 F.3d 1351, 1354, cert. denied, (1997) 520 U.S. 1116 [117 S.Ct. 1247, 137 L.Ed.2d 329]. See also *Bowen v. Ziasun Technologies, Inc.* (2004) 116 Cal.App.4th 777, 790 [recognizing that the Ninth Circuit's application of a federal law, or its interpretation of a similar law from another state, is persuasive when interpreting a California law].) Accordingly, *Gambini* is extremely persuasive in that it construes a statutory framework that is practically identical to FEHA, is based on *Humphrey*, a FEHA case, and because California courts look at Federal case law interpreting similar laws from other states.

Moreover, ***the California Department of Fair Employment and Housing expressly endorses*** **Gambini** for the proposition that, "[c]onduct resulting from a disability 'is part of the disability and not a separate basis for termination,'" and uses *Gambini* as an example of how similar incidents should be handled.[4]

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[4]DFEH 2008 Case Analysis Manual Update, Chapter 5, ¶ I.3., pp. 95–97 (2008), *available at* http://www.dfeh.ca.gov/DFEH/Publications/CaseAnalysisManual2008Updt/Chapter%205%20Disability.pdf (as of May 14, 2010).

Although not controlling, both the Ninth Circuit, in interpreting FEHA and laws similar to FEHA, and the California Department of Fair Employment and Housing, the state agency charged with enforcing FEHA, have concluded that "conduct resulting from a disability 'is part of the disability and not a separate basis for termination.'" Accordingly, although there is no published opinion similarly concluding and no opinion of any sort disagreeing with this conclusion, Wills urges the Court to take this opportunity to clarify the point and recognize the protections that can and must be afforded to the disabled. Any result to the contrary will disembowel the rights of the disabled under California law.

iii. **Dark v. Curry County*: Termination for Misconduct Caused by Disability is Discrimination Based on Disability—The "Criminal or Egregious" Exception is Extraordinarily Narrow*.**

In yet another recent example, *Dark v. Curry County* (9th Cir. 2006) 451 F.3d 1078, the Ninth Circuit characterized the state of the law as:

> While courts have indeed 'recognized a distinction between termination of employment because of misconduct and termination of employment because of a disability,' *Collings v. Longview Fibre Co.,* 63 F.3d 828, 832 (9th Cir. 1995) (citation omitted), there is an important caveat. '[W]ith few exceptions, conduct resulting from a disability is considered to be part of the disability, rather than a separate basis for termination.' *Humphrey v. Mem'l Hosps. Ass'n,* 239 F.3d 1128, 1139–40 (9th Cir. 2001).

(*Dark*, 451 F.3d at 108 [alterations and internal quotations in original].)

Dark holds that there are two possible exceptions to the rule that conduct caused by a disability cannot be separated from the disability itself for the purposes of employment discrimination: (1) where the disability is alcoholism or addiction to illicit drugs (*id*. at 1084, fn. 3, citing *Humphrey*

and 42 U.S.C. § 12114(c)(4)); and (2) where the conduct is criminal or egregious (*id.*).

As explained in *Dark*, the "criminal or egregious" exception is reserved for definitive acts of egregious conduct. The court noted that "***Attempting to fire a weapon*** at individuals is the kind of egregious and criminal conduct which employees are responsible for regardless of any disability." (*Id*., quoting *Newland v. Dalton* (9th Cir. 1996) 81 F.3d 904, 906, emphasis added. See also *Macy v. Hopkins County Sch. Bd. of Education* (6th Cir. 2007) 484 F.3d 357, 367-368 [termination appropriate where employee is ***convicted of criminal charges*** for the misconduct at issue].)

This analysis from *Dark* delineates the important distinctions between the instant action and the other federal law Defendant attempted to analogize to the trial court below. So long as there is a causal nexus between the conduct at issue and the employee's disability, the employee cannot be subject to adverse employment action unless: (1) the employee's disability is drug or alcohol addiction and the conduct is getting high or drunk on the job; or (2) the employee's conduct is egregious and criminal—such as trying to shoot someone.[5] There is no conceivable stretch of the evidence before the trial court to suggest either of these exceptions here.[6]

Instead, Defendant did not consider the possibility that Wills's conduct could be protected and produced no evidence in opposition to Appellant's Additional Undisputed Material Facts in opposition to

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[5] The only direct occurrence of the "criminal or egregious" exception to disability discrimination under the FEHA that is readily apparent in the case law is *Ross v. RagingWire Telecommunications, Inc.* (2008) 42 Cal.4th 920, 926 ("The FEHA does not require employers to accommodate the use of illegal drugs.").

[6] Nonetheless, the Superior Court below did hold that "plaintiff's conduct, threats of violence, was of a nature that did not require accommodation." [VIII AA 1917.]

summary judgment establishing her disability (VII AA 1703–1705 [AUF Nos. 1–5], 1706 [AUF No. 7], 1708 [AUF No. 10] & 1710 [AUF No. 13]); arguing these facts are "immaterial to this motion"), and that it was the cause of her alleged misconduct forming the basis for termination (VII AA 1712 [AUF No. 17]; erroneously arguing, "an employer can terminate an employee for misconduct, even if that misconduct is a result of a disability, the fact that Wills suffered from a disability is of no consequence.").

It is anticipated that Defendant will argue here, as it did in the proceedings below, that *Humphrey*, *Gambini* and cases similarly decided are isolated and bizarre. Defendant will also likely argue that adoption of a similar rule here would create absurd results and lead to the slipperiest of slopes. As explained by *Dark*, however, that is simply not the case. It is possible to have a reasonably crafted and sensible approach that protects the rights of the disabled and still protects employers from conduct that is criminal or the result of drug or alcohol abuse. Wills posits that the absurd result is not adoption of this standard but rather the failure to recognize that any result to the contrary will leave those who suffer from mental disabilities without equal protection under the law.

iv. ***Federal Law Is In Sync with*** **Humphrey, Gambini, *and* Dark.**

Throughout the federal jurisprudence, courts uniformly hold that antidiscrimination law "does not contemplate a stark dichotomy between 'disability' and 'disability-caused misconduct,' but rather ***protects both***." (*McKenzie v. Dovala* (10th Cir. 2001) 242 F.3d 967, 974, quoting *Nielsen v. Moroni Feed Co*. (10th Cir. 1998) 162 F.3d 604, 608 and *Den Hartog v. Wasatch Acad*. (10th Cir. 1997) 129 F.3d 1076, 1088, emphasis added. See also, *Sedor v. Frank* (2d Cir. 1994) 42 F.3d 741, 746 [noting that, even under the more stringent requirements of the Rehabilitation Act, "[t]he causal relationship between disability and [adverse employment] decision

need not be direct, in that ***causation may be established if the disability caused conduct that, in turn, motivated the employer to discharge the employee*** … ."], emphasis added; *Hatzakos v. Acme American Refrigeration, Inc.* (E.D.N.Y. July 6, 2007) 2007 WL 2020182, *7–8 ["plaintiff may establish that the employment decision was motivated by his disability by 'demonstrating that ***the disability caused conduct*** that, in turn, motivated the employer's decision.'"], emphasis added, quoting *Gonzalez v. Rite-Aid of New York, Inc*. (S.D.N.Y. 2002) 199 F.Supp.2d 122, 130, also citing *Stratton v. Department for the Aging* (2d Cir. 1997) 132 F.3d 869, 878.)

Accordingly, "[i]t appears that every other circuit save one that has addressed the issue has held that an employee may recover under the ADA if the employee's disability was a 'motivating factor' in the employer's decision, and the employee need not establish that he or she was fired 'solely' because of his or her disability." (*Macy*, 484 F.3d at 363, n. 2 [citing cases from ***nine different circuits***].)

As recognized by the Ninth Circuit in *Humphrey* and *Gambini*, and as instructed by the United States Supreme Court in *Arline*, this vast majority of federal circuits recognize that failing to protect the manifestations of a disability protects the disabled in name only. As held by the Tenth Circuit: "To permit employers carte blanche to terminate employees with mental disabilities on the basis of any abnormal behavior would largely nullify the ADA's protection of the mentally disabled." (*McKenzie*, 242 F.3d at 1087.)

In light of the overwhelming weight of federal authority, there can be no doubt that *Humphrey*, *Gambini*, and *Dark* are in accord with jurisprudence throughout the nation, and consistent with the precedent of the Supreme Court. As such, and given the extraordinarily analogous facts

of these cases, they are extremely persuasive as proper applications of the provisions of federal law similar to the FEHA.

v. FEHA is Broader and More Liberal than the ADA.

While much of the case law on point is federal law construing the ADA (with the noted exception of *Humphrey*, which construes FEHA), these opinions are instructive in determining similar provisions of FEHA. (See *Etcheverry*, 22 Cal.4th at 320; *Prilliman*, 53 Cal.App.4th at 948.) However, these federal decisions are the beginning of the analysis, not the end. FEHA's protections for employees with disabilities are even more expansive than those provided by federal law.

"[T]he protections provided employees by FEHA are broader than those provided by the ADA. [citations omitted]. To further the societal goal of eliminating discrimination, ***the statute must be liberally construed to accomplish its purposes and provide individuals with disabilities the greatest protection***." (*Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 60, emphasis added. See also Gov. Code, § 12993, subd. (a) ["The provisions of this part shall be construed liberally for the accomplishment of the purposes of this part."]; *Colmenares v. Braemar Country Club, Inc.* (2003) 29 Cal.4th 1019, 1026 [discussing the legislative intent of amendments to FEHA in detail and concluding that the purpose was to "'to strengthen California law where it is weaker' than the ADA," and "'retain California law when it provides more protection for individuals with disabilities than' the ADA"], quoting Stats. 1992, ch. 913, § 1, p. 4282.)

Accordingly, Wills' rights under FEHA extend at least as far as, and properly beyond, those recognized by *Humphrey, Gambini* and *Dark*. This fact, combined with the Department of Fair Housing and Employment's recognition of *Gambini* and the proposition that "conduct resulting from a

disability is considered to be part of the disability, rather than a separate basis for the termination," leaves no doubt that this is the correct interpretation of FEHA. Given the evidence presented in that Defendant terminated Wills because of conduct that was the direct result of her protected disability, there remains, at a minimum, a disputed issue of material fact as to whether her termination was in violation of FEHA.

2. The Conduct Resulting in Termination Was Caused by Bipolar Disorder.

Every instance of alleged misconduct set forth as a basis for termination by Defendant was reviewed by Wills's treating physician, David Chandler, M.D.—the head of psychiatry at Kaiser Orange County—who determined that the conduct at issue was a "direct result of her illness." (VII AA 1514:6–1515:1.) Defendant provided no evidence to contradict this fact in support of its motion for summary judgment. As noted above, Defendant's attempt to incorporate evidence by reference to other sources was improper and cannot constitute a showing of evidence in opposition to Wills's definitive evidence in support of the Additional Undisputed Fact. (See *supra* footnote 2.)

Therefore, this element of Wills's discrimination claim was indisputably established at the trial court level.

3. Whether or Not the Conduct Cited by Defendant is Reasonably Considered "Threats" or "Threatening" is a Jury Question.

While Defendant did not dispute several of the facts establishing triable issues as to practically every claim before the trial court, the question of whether or not the conduct by Wills could reasonably be considered "threats" or "threatening" as characterized in the Notice of Intent to Discharge (III AA 518–524) was strongly contested.

i. Evidence Regarding the "Kill Bill" Incident was Contradictory and Inconsistent.

In response to Defendant's Undisputed Facts Nos. 3, 4, 5, 6 & 7, supporting the allegation that the "Kill Bill" incident at the Anaheim Police Department constituted a threat,[7] Wills provided contradictory and impeaching evidence showing inconsistencies in the testimony offered by Defendant. (VII AA 1594–1599.) Defendant's response relied most significantly on hearsay testimony. (*Id*.)

ii. Evidence Regarding Emails with Defendant's Other Employees was Controverted.

Likewise, when Defendant raised evidence to support its claim that Wills's rambling emails sent during medical leave were "threatening," (e.g., UF No. 11) Wills provided controverting evidence that the recipients were not frightened by any content of the emails, but simply did not understand what they meant. (VII AA 1603 [instead of being frightened of feeling threatened by the emails, the one employee who reported them to supervisors "didn't know what she [Wills] meant at all."], citing to VI AA 1423.)

iii. Evidence Regarding the Forwarded Ringtone was Incomplete, Inconsistent, and Irrelevant as Wholly Speculative.

In response to Defendant's Undisputed Fact No. 9, Wills raised the deposition testimony of Defendant's supervisor who allegedly received the complaints about the ringtone, which contradicted the declarations offered in support. (VII AA 1601.) Moreover, the declarations were undisputedly based on incorrect information (supervisor's speculation that the voice on the ringtone was Wills), which Defendant now acknowledges is incorrect.

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[7] The identical undisputed facts appear at other points throughout Defendant's separate statements in support of each request for summary adjudication. Wills raised the identical objections and controverting evidence to each.

Accordingly, all of the evidence provided by Defendant in support of the contention that Wills engaged in threats or threatening conduct is at least in question, if not completely contradicted. At oral argument on the motion, counsel for Wills again pointed out that if this case comes down to whether or not the conduct cited by Defendant was reasonably interpreted as a threat, which must be a jury question. (RT 24:12–17.) Disregarding the existence of a disputed issue of material fact on the subject (even though objections were not sustained to all of it [RT 26:16–28:6]), the trial court erred by simply ruling that threats of violence do not require accommodation without addressing the contradictions in the evidence necessitating judgment by a jury. (VIII AA 1917.)

4. Even if the Conduct At Issue was Reasonably Interpreted as Posing an Actual Threat (an Allegation Not Set Forth in Defendant's Notice of Intent to Terminate), Wills's Termination Based Thereon Constitutes Discriminatory Disparate Treatment.

As noted above, Defendant's assertion that it may terminate employees for conduct regardless of whether that conduct is caused by a protected disability is not, nor should it be, the law. (See, e.g., *Humphrey*, 239 F.3d at 1139.) Defendant's improper termination of Wills's employment is also properly analyzed as a disparate enforcement of its allegedly neutral "established written policies," (VIII AA 1915). This is an analysis the trial court did not undertake, despite being urged to do so by Wills (VII AA 1274:10–23).

Under the disparate treatment theory, discrimination may be shown by circumstantial evidence of how the employer treated nondisabled employees under similar circumstances. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354–355 [endorsing the "*McDonnell Douglas* test" for claims of discrimination pursuant to the FEHA], citing, *inter alia*,

McDonnell Douglas Corp. v. Green (1973) 411 U.S. 792 [93 S.Ct. 1817, 36 L.Ed.2d 668].) Specifically, circumstantial evidence offering a "permissible inference" of disparate treatment may overcome an employer-defendant's showing of a legitimate, nondiscriminatory reason for the adverse employment action. (*Id*. at 362.)

In opposition to summary judgment, Appellant provided extensive evidence to the trial court of Wills's disparate treatment by Defendant. (See, e.g., VI AA 1285–1287 [Opposition to UF No. 17].)

Wills was physically threatened by other employees of Defendant and informed her supervisors that she was frightened for her safety. The supervisors held a meeting with Wills and the offenders, but nothing was done. (III AA 705 [Report by the Independent Counsel investigating the incident that "a reasonable person would have taken offense" and it was "not appropriate in the workplace," and further that the supervisors' conduct in responding to her complaints was "not effective"].) None of the employees who threatened Wills were disciplined. (VI AA 1475:11–22.)

One of Wills's supervisors testified in deposition that, in an unrelated set of incidents, another employee engaged in the same misconduct attributed to Wills, specifically, getting "out of control a few times with other staff members, raising her voice, being volatile, and got in arguments with several other staff members, [enough] to cause the other staff members to be afraid." (VI AA 1484:13–16.) That employee was not subject to any discipline. (VII AA 1483:21–22, 1484:18–1486:4.)

Additionally, Defendant offered the declaration of supervisor Rohde in support of its motion, which stated that in the last nine years she was aware of three employees who engaged in similar conduct, but only one was actually disciplined, and that discipline was a 10-day suspension. (I AA 155.)

Thus, the trial court had before it evidence of six of Defendant's employees who had committed acts that allegedly caused other coworkers to be fearful for their safety over the nine-year period that Wills worked for the Defendant. Only one—Wills—was terminated. Most of the others escaped discipline of any kind. Wills was the only one with a disability.

This evidence created at least a triable issue as to whether a permissible inference of discrimination could be found by a fact finder. However, the trial court below did not even address the subject in its final order (although objections to a portion of the Rohde declaration were sustained at the hearing [RT 26:24–27:4]), let alone issue findings or rulings thereon. It merely concluded that "plaintiff's conduct, threats of violence, was of a nature that did not require accommodation." (VIII AA 1917.)

Accordingly, evidence was presented to the Superior Court below that Wills was treated differently than other non-disabled employees, who were not subjected to any discipline despite engaging in conduct practically identical, if not more egregious, than that engaged in by Wills. This evidence is sufficient to create a disputed issue of material fact sufficient to require a jury determination of Defendant's proffered "legitimate non-discriminatory" motive. The Superior Court below, without explanation, refused to consider the significance of this evidence or factor it into its order granting summary judgment in favor of Defendant. Wills respectfully suggests that reversal is appropriate on this basis alone.

5. It was Undisputed that Defendant had Notice of Wills's Disability Prior to Termination.

As noted above (section II.4.), it is clearly a disputed issue for the jury as to whether or not Defendant had notice of Wills's disability prior to her severe manic episode in July of 2007. It is undisputed, however, that

Defendant had full and complete knowledge of her disability before making the decision to fire her.

Wills set forth an additional undisputed fact in opposition to Defendant's motion for summary judgment that Defendant had full and complete knowledge of Wills's disability as of September 12, 2007—well before her termination in January 2008. (VI AA 1363–1364 [AUF No. 14].) In response, Defendant admitted that this fact was undisputed. (VII AA 1710–1711 [Response to AUF No. 14].)[8] Accordingly, this element of Wills's discrimination claim was also indisputably established.

6. Wills Requested Accommodation of her Disability by Defendant—She Requested that She Not Be Terminated Because of her Disability.

The Superior Court below incorrectly determined with some significance that Appellant "did not make any request for an accommodation." (VIII AA 1917.) At a minimum, the evidence before the trial court demonstrated the existence of a triable issue of material fact as to whether Wills requested accommodation of her disability. Wills provided extensive evidence of her requests for accommodation as well as Defendant's admissions that she was not accommodated. It is undisputed that Wills was the subject of a months-long investigation leading up to her termination. This investigation resulted entirely from Wills's desire to have her disability accommodated by Defendant. During this time, Wills repeatedly asked that Defendant accommodate her disability by allowing her to return to work (See, e.g., VI AA 1524–1528 [*Skelly* response], III AA 519 [discussing the investigatory meeting], VI AA 1490 [letter from Dr. Chandler seeking accommodation]).

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[8] Defendant again improperly attempts to incorporate other sources by reference (while contradicting the initial response that AUF No. 14 is "Undisputed"). Even the additional sources referenced fail to dispute AUF No. 14.

Moreover, in opposition to Defendant's separate statement in support of the motion, Wills provided the deposition testimony of one of her supervisors ***admitting*** that Defendant failed to accommodate her disability in another incident prior to termination because it was going to fail her from a probationary promotion solely for taking medical leave. (VI AA 1293 [Opposition to UF No. 30 and evidence cited therein—including Wills's supervisor's admission that she was forcibly demoted due to her medical leaves alone], citing to VI AA 1480:22–1481:13].) Accordingly, the evidence created a triable issue of a material fact regarding whether or not Defendant legally accommodated Wills's disability.

i. Demand for Accommodation is Not a Requisite Element of a Discrimination Claim.

Aside from its error in concluding that Wills never requested an accommodation, the trial court erred in confusing the accommodation issue with the termination issue. Termination and failure to accommodate are two distinct forms of violation pursuant to FEHA, can be alleged independently one another and even must have separate damages findings by a trier of fact. (See Gov. Code, § 12940, subd. (a) [statutory violations for discrimination, including discharge]; § 12940, subd. (m) [statutory violations for failure to accommodate]; *Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 705 [noting that remand would be appropriate where the jury damages findings for pre-termination failure to accommodate and termination itself appeared to overlap].)

The Superior Court below appeared to confuse the significance of a request for accommodation to a termination claim when it distinguished the instant action from *Humphrey* because it did not find evidence of a request for accommodation, and finding that "plaintiff's conduct, threats of violence, was of a nature that did not require accommodation. Nor did she request accommodation." (VIII AA 1917.) In the next sentence, the trial

court concluded "For all of these reasons, each of plaintiff's theories under FEHA fail as a matter of law." (*Id.*) Accordingly, the trial court inappropriately linked the issues of accommodation and termination to one another despite the fact that they are separate causes of action. Request for accommodation is not an element of a termination claim under FEHA. (See, e.g., *Avila v. Continental Airlines, Inc.* (2008) 165 Cal.App.4th 1237, 1247 ["To establish a prima facie case for disparate treatment discrimination, plaintiff must show (1) he suffers from a disability, (2) he is otherwise qualified to do his job, (3) he suffered an adverse employment action, and (4) the employer harbored discriminatory intent."].) Because request for accommodation is not an element of a termination under FEHA, the trial court erred to the extent it granted summary judgment against Wills on the termination claim on that basis.

ii. Triable Issues of Material Fact Prevent Summary Adjudication of Failure to Accommodate Cause of Action.

Aside from her discrimination causes of action, Wills also maintained a separate and distinct causes of action based on Defendant's failure to accommodate her disability. (I AA 32:21–33:28.) As set forth above, triable issues of material fact preclude summary adjudication of this cause of action in favor of Defendant. (See, *supra* this section, citing VI AA 1524–1528; III AA 519; VI AA 1490; VI AA 1293, 1480:22–1481:13.)

B. Ms. Wills Exhausted Her Administrative Remedies Because All Claims Alleged in the Lawsuit Would Have Been Discovered by Reasonable Investigation of Her DFEH Charge, For Which She Received a Right-to-Sue Letter.

The Superior Court below also found that Wills failed to exhaust her administrative remedies and on that basis granted Defendant's motion for summary judgment. As set forth herein, that decision was in error as it

employed an incorrect, unduly harsh and draconian interpretation of the doctrine of exhaustion of administrative remedies.

1. DFEH Charge Must, "not only be construed liberally in favor of plaintiff, it must be construed in light of what might be uncovered by a reasonable investigation."

Defendant's primary argument regarding exhaustion of administrative remedies in its summary judgment papers was—literally—the DFEH checked the wrong box on the form when it prepared Ms. Wills's charge (III AA 722). Based on that one check box, Defendant argued, successfully to the trial court below, that it was entitled to an absolute defense of failure to exhaust administrative remedies.

Defendant's argument asks this Court to ignore all the facts and circumstances of the case, the written narrative provided on that form, and to ignore the rest of the evidence and instead to exclusively look at which box was checked on a form by the DFEH.

Defendant's demand for a tortured, constrained, and contrived reading of the DFEH charge is contrary to California law, the analogous federal law construing interpretation of EEOC charges, and the facts.

"[T]he specific words of the charge of discrimination need not presage with literary exactitude the judicial pleadings which may follow." (*Baker v. Children's Hospital Medical Center* (1989) 209 Cal.App.3d 1057, 1064, quoting *Sanchez v. Standard Brands, Inc.* (5th Cir. 1970) 431 F.2d 455, 465–466 [and citing *Sanchez* as the "leading case on the standard under which the allegations of the EEOC charge limit the scope of a subsequent action." (*Id*. at 1063.)].) Accordingly, where "it is reasonable that an investigation of the allegations in [an] original DFEH complaint would lead to [discovery of the allegations in the subsequent lawsuit]," the subsequent lawsuit "is not barred by the exhaustion doctrine." (*Baker*, 209 Cal.App.3d at 1065.)

In *Baker*, an African-American employee filed a DFEH charge that he was the victim of racial discrimination when his employer failed call him for certain on-call work. (*Id.* at 1060.) In the subsequent lawsuit, the plaintiff added additional claims of harassment, differential treatment, biased evaluations, denial of equal opportunities for pay raises and promotions, and engaging in racial epithets. (*Id.* at 1060–1061.) After reviewing the record on appeal of the trial court's order of summary judgment in favor of the defendant, the Court of Appeal framed the issue before it:

> Here, it is undisputed that appellant filed a timely claim with the DFEH and that the DFEH issued a right to sue letter. ***The question is whether appellant can maintain the instant action for alleged incidents of discrimination which were not specifically enumerated in his complaint before the DFEH***.

(*Id*. at 1062, emphasis added.)

The answer to that question was and is here, "Yes." The court reversed the summary judgment ruling and held that the DFEH investigation of the original charge reasonably would have revealed the facts and circumstances surrounding the additional judicial claims. (*Id.* at 1065.) Noting agreement with the federal "like or related" rule under *Sanchez*, *Baker* held that administrative remedies are exhausted for the purposes of a FEHA claim so long as any additional judicial claims "could be characterized as describing 'a chain of related actions.'" (*Id*., quoting *Oubichon v. North American Rockwell Corporation* (9th Cir. 1973) 482 F.2d 569, 571. See also, *Okoli v. Lockheed Technical Operations Co.* (1995) 36 Cal.App.4th 1607, 1614 ["[W]hen an employee seeks judicial relief for incidents not listed in his original charge … , the judicial complaint nevertheless may encompass any discrimination ***like or reasonably related*** to the allegations of the … charge, including new acts

occurring during the pendency of the charge … ."], quoting *Oubichon*, *supra*, at 571, fn. omitted.)

The principles in *Baker* were recently affirmed and expanded in *Nazir v. United Airlines, Inc*. (2009) 178 Cal.App.4th 243, 268. In *Nazir*, which is on all fours with the case at bar, the plaintiff submitted expansive but informal pre-complaint communications to the DFEH describing harassment and retaliation that he endured from his employer on the basis of his ethnicity and Muslim religion. (*Nazir*, 178 Cal.App.4th at 265.) The plaintiff told the DFEH personnel filling out the complaint form that he was retaliated against, but the DFEH did not include that claim in the written charge. (*Id*. at 265, fn. 12.) The DFEH also did not include any claim for harassment in the written charge. (*Id*. at 266.) After several months, the DFEH concluded there was no FEHA violation and issued a right-to-sue. (*Id*. at 265–266.) The trial court summarily adjudicated the plaintiff's harassment claims in the employer's favor under the exhaustion doctrine because the DFEH charge did not say that the plaintiff was being harassed. (*Id*. at 264.)

On appeal, the employer argued, in pertinent part, that the trial court had been correct and the plaintiff failed to exhaust administrative remedies because "the factual statement in the … DFEH complaint makes no reference to being harassed; and … harassment is not 'like or related to' discrimination." (*Id*. at 266.) Citing a respected secondary authority on employment law,[9] *Baker*, and the authorities therein, the Court of Appeal concluded that the law in California did not support the employer's position

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[9] *Id*. at 266, quoting Chin, et al., Cal. Practice Guide: Employment Litigation (The Rutter Group 2009) § 16:195 *et seq.*, p. 16–27 ("Plaintiffs may proceed on claims not explicitly set forth in a charge of discrimination if the claim is 'like or reasonably related to the EEOC charges' and could reasonably be expected to ***grow out of an EEOC investigation*** of the charge.").

and reversed the trial court. Noting that liberal construction of DFEH charges is particularly important "because they are often drafted by claimants without the assistance of counsel,"[10] the court held: ***"We discern from the above that what is submitted to the DFEH must not only be construed liberally in favor of plaintiff, it must be construed in light of what might be uncovered by a reasonable investigation."*** (*Id*. at 268, emphasis added.)

Nazir then noted that California courts apply the same standard when reviewing which ***parties*** are properly named in a subsequent judicial complaint. (*Id*., citing *Cole v. Antelope Valley High School District* (1996) 47 Cal.App.4th 1505.) In *Cole*, the plaintiff brought a lawsuit against his employer and three of its officials. While two of its officials were not mentioned in any way in the proceeding DFEH charge, a third was not named as a party in the charge (a Mr. Rossi), but mentioned in the charge narrative. After all three officials won on summary judgment, the *Cole* court reversed summary judgment as to Mr. Rossi because, "if there had been an administrative investigation, Mr. Rossi would have been put on notice of the charges, and would have had an opportunity to participate." (*Id*., quoting *Cole*, 47 Cal.App.4th at 1511.)

Finally, *Nazir* noted that this standard is also supported by the jurisprudence of the United States Supreme Court. (*Id*. at 269, citing *Federal Express Corporation v. Holowecki* (2008) 552 U.S. 389 [128 S. Ct. 1147, 170 L.Ed.2d 10] [holding that EEOC administrative remedies are exhausted so long as the complainant made a request for the agency to act, regardless of if a formal charge was filed by the agency].) Therefore, *Nazir* ruled that the complainant exhausted administrative remedies adequately to support a subsequent judicial complaint if the complainant (1) made "a

[10] *Id*. at 267, quoting Chin, et al., *supra*.

request for the DFEH 'to act;'" and (2) such request alleged sufficient facts "that a thorough DFEH investigation would uncover a great many of the particulars" alleged in the subsequent complaint. (*Id.*)[11]

The instant action is directly analogous to the arc of precedent that extends from the United States Supreme Court through *Baker* and *Nazir*. Here, as in *Nazir* and *Baker*, it is undisputed that Wills filed a DFEH charge and received a right-to-sue letter. The question posed by the *Baker* court is therefore squarely before this Court: Can Wills "maintain the instant action for alleged incidents of discrimination which were not specifically enumerated in [her] complaint before the DFEH"?

Under the principles articulated above, the answer must be, "Yes." The "wrong box" argument advanced by Defendant attempts to take advantage of the archetypal purposeless procedural technicality[12] and serves no policy of the FEHA administrative remedies system. When taken as a whole, the Wills DFEH charge clearly alleges "discrimination" in the narrative and sets forth all the basic facts of the pleading in this action. Specifically, that Wills was not permitted to return to work after taking a medical leave. (III AA 722.) All other claims presented in the operative pleading are like or related to the discrimination set forth in the charge.

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[11] The *Nazir* complainant also filed two later charges with the DFEH, but the court held that the initial charge was sufficient itself; even though the case was additionally supported by the later charges. (*Nazir*, 178 Cal.App.4th at 269.)

[12] As observed by the Supreme Court, hyper-technical procedural arguments like the Defendant's "wrong box" argument, which persuaded this trial court, "serve no purpose other than the creation of an additional procedural technicality. Such technicalities are ***particularly inappropriate*** in a statutory scheme in which ***laymen, unassisted by trained lawyers***, initiate the process." (*Love v. Pullman Co.* (1972) 404 U.S. 522, 526–27 [92 S.Ct. 616, 30 L.Ed.2d 679].) Wills was not represented by counsel in preparation of her DFEH charges. (VII AA 1518.)

Moreover, as in *Nazir*, it is undisputed that Wills communicated to the DFEH that she wanted to "file a disability discrimination complaint," that she had been "terminated because of [her] disability," that "the OCSC's reasons for termination were all caused by [her] disability," and that she had "endured a history of discrimination and harassment at the OCSC on the basis of disability." (VII AA 1517:16–23.) Wills's declaration as to these facts alone is enough to create a triable issue of fact under *Nazir*.

But, the Court need not stop there. Wills's declaration is corroborated by the Notice of Non-Investigated Complaint issued by the DFEH, which specifically details that on "January 24, 2008" Wills met with DFEH official "D. REID" "for the purpose of filing a charge of discrimination" and that her allegation on the basis of "DISABILITY" has "not been accepted for investigation." (VII AA 1521.) At a minimum, this is definitive proof, presented to the trial court, that the DFEH was informed of Wills's disability discrimination claims, and that no additional administrative remedies were available to her on these claims. Following the receipt of the Non-Investigated Complaint notice, Wills did receive a right-to-sue letter from the DFEH (III AA 724–725), and this lawsuit followed receipt of that letter. (I AA 1–19.)

Defendant has never disputed these facts. It simply argues that because the "family/medical leave" box was checked, and not the "disability" box on the complaint form (which was completed by DFEH officials while Wills was not represented by counsel), Wills is not entitled to a hearing on the merits.[13] As set forth above, Defendant's theory is not

[13] Defendant's separate statement of undisputed material facts in support of its motion for summary judgment and/or adjudication does not even set forth as an undisputed fact that the operative pleading included allegations not like or related to the DFEH charge. Instead, it merely alleges that

supported by the law. Instead, the complete narrative of Wills's DFEH charge, along with the competent evidence of what she communicated to the DFEH are properly considered in determining the scope of allegations that may be pursued in court.

In its order granting summary judgment pursuant to the exhaustion doctrine, the Superior Court below essentially endorsed the "wrong box" argument, and ruled: "Plaintiff's claim to DFEH made no mention of disability discrimination or hostile work environment but limited itself to denial of leave under the FMLA." (VIII AA 1913.) The trial court acknowledged the evidence that Wills had pre-complaint communications with the DFEH on a broader scope than reflected in the charge itself, but apparently accords this no weight when compared to the problem of the "wrong box." (VIII AA 1913–1914.) The trial court erred in accepting the "wrong box" argument over the substantive facts before it. This error of law directly resulted in summary judgment, which must be reversed.

2. The Public Policy Behind the DFEH Administrative Framework Would Not be Served by Extending the Exhaustion Doctrine Here, Because It Is Undisputable that No Investigation or Further Administrative Remedies Would Occur

The purposes of the DFEH charge vis-à-vis the rights of the putative defendant are well established. "The purpose of the charge is to supply fair notice of the ***facts***, sufficient to permit investigation." (*Hobson v. Raychem*

"Wills received a single right to sue from the DFEH, based on a charge of discrimination she filed in February 2008, which charged the OCSC with violating the Fair Employment and Housing Act only on the basis of 'denial of family/medical leave'" (I AA 98 [UF No. 19], 103 [UF No. 32], 116 [UF No. 78], 125 [UF No. 110], 134 [UF No. 133], 136 [UF No. 137]), because that is the box that was checked on the form. (Appellant disputed by competent evidence each of these "undisputed facts" in its opposing separate statement. [VI AA 1287–88 (UF No. 19), 1294 (UF No. 32), 1320–21 (UF No. 78), 1339 (UF No. 110), 1352 (UF No. 133), 1355–56 (UF No. 137).].)

Corp. (1999) 73 Cal.App.4th 614, 630, emphasis added, superseded on other grounds by statute as noted in *Bryan v. United Parcel Service, Inc.* (N.D. Cal. 2004) 307 F.Supp.2d 1108, 1112–1113 [*Hobson* used the former, more limited, definition of disability].)

The touchstone is whether or not the defendant was on notice and had an opportunity to participate in the administrative process. (*Cole*, 47 Cal.App.4th at 1511 [holding that plaintiff had exhausted administrative remedies against defendant even though defendant was not named in the caption of DFEH charge because defendant had notice and an opportunity to participate]; *Couveau v. American Airlines* (9th Cir. 2000) 218 F.3d 1078, 1082 [administrative remedies deemed exhausted despite the fact that defendant was not specifically named in charging documents but clearly had notice of claims against it that were "like or reasonably related to" charge filed].)

In order to have exhausted her administrative remedies, the complainant need only to "undertake by reasonable means to make the additional claims known to the DFEH." (*Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718, 1730.) "Essentially, if an investigation of what ***was*** charged … would necessarily uncover other incidents that were not charged, the latter incidents could be included in a subsequent action." (*Okoli*, 36 Cal.App.4th at 1615.)

Here, Wills undertook all reasonable means to make all of her disability discrimination claims known to the DFEH—whether or not the DFEH included them in its charge. In turn, Defendant was on notice of all claims "like, or reasonably related to" the DFEH charge. The DFEH charge says Wills was "discriminated" against. (III AA 722.) The charge then relayed the facts that Wills was not permitted to return to work after returning from medical leave, but instead placed on administrative leave pending an investigation. *Id*. The investigation mentioned resulted in

termination. These are the essential facts at the core of the allegations in the operative pleading in this action. (I AA 1–19.) At a minimum, Defendant was on notice that Wills asserted allegations related to discrimination, her medical leaves, and the investigation following her last leave. Defendant explicitly knew that the investigation it itself conducted related solely to Wills's bipolar disorder because it received Dr. Chandler's letter (VI AA 1490) at the outset of the investigation (VII AA 1710–1711)—four months before the DFEH charge was filed.

All of the rest of the allegations in the complaint on file in this action relate to "discrimination" on the basis of Wills's bipolar disorder. Moreover, Defendant obviously understood that Wills's administrative claim was a disability discrimination complaint, because that is the only issue that their exhaustive, nine-page response to the DFEH charge discusses. (VI AA 1375–1383.) Under these facts and circumstances, Defendant had notice of every pertinent aspect of Wills's judicial complaint—or at least sufficient information such that the investigation thereof would reasonably lead to every pertinent aspect of the judicial complaint—in her DFEH charge.

Beyond the rights of the charged employer, "exhaustion of administrative remedies furthers a number of important societal and governmental interests, including: (1) bolstering administrative autonomy; (2) permitting the agency to resolve factual issues, apply its expertise and exercise statutorily delegated remedies; (3) mitigating damages; and (4) promoting judicial economy." (*Rojo v. Kliger* (1990) 52 Cal.3d 65, 86.) Nothing about the "wrong box" argument or anything else Defendant has claimed that Wills should have done to exhaust administrative remedies would serve these ends.

Having Wills sign the uninvestigated complaint form—as Defendant argued was required before the trial court—would not in any way assist the

DFEH "with respect to these additional theories of violation of the Fair Employment and Housing Act, to pursue the 'vital policy interests embodied in [the Act], i.e., the resolution of disputes and elimination of unlawful employment practices by conciliation. [Citations.]'" (*Martin*, 29 Cal.App.4th at 1730, quoting *Yurick v. Superior Court* (1989) 209 Cal.App.3d 1116, 1123.) The DFEH had already determined that it would not investigate the uninvestigated complaint, and there were no additional administrative remedies that would be forthcoming from anything that Wills did regarding that charge.

Regardless, after the initial charge was filed with the DFEH and after the notice of uninvestigated complaint was issued, the DFEH did issue a right-to-sue letter. Only then, after exhausting administrative remedies and receiving a right-to-sue letter as required, was the lawsuit filed.

Because there was no possibility of any further administrative remedies or participation by the parties in pre-lawsuit resolution, there is no reason for Defendant to insist that Wills needed to jump through meaningless administrative hoops to have her case heard. Moreover, there is no public policy served by forcing plaintiffs into the tight constraints advocated by Defendant. To the contrary, the DFEH was established to protect employees and help reduce discrimination, not to protect employers with daunting, complex, and seemingly contradictory technicalities.

3. The Undisputed Evidence Shows Defendant was on Notice of All Claims Brought in the Lawsuit and had the Opportunity to Participate Throughout the Administrative Claims Process.

As discussed above, the critical analysis in determining that administrative remedies were exhausted is whether or not the employer had notice of the claims and the opportunity to participate in the administrative process. (See, e.g., *Cole*, 47 Cal.App.4th at 1511.) Here, the evidence before the trial court was definitive that Defendant: (1) had notice of

Wills's disability discrimination claims; (2) had the opportunity to participate in the administrative process regarding the disability discrimination claims; and (3) actually did participate—extensively—in the administrative claims process. (See, e.g., VI AA 1375–1383.)

The clearest evidence of the notice Defendant had is its response to the DFEH claims, which spends nine pages arguing, "the Court did not retaliate against Wills or discriminate against her on the basis of disability." (VI AA 1375.) Accordingly, there is no dispute that Defendant was aware of the claims being made against it in the administrative process and that those claims included allegations of discrimination on the basis of Wills's bipolar disorder. Defendant was sufficiently aware of the claims so as to dispute them in its response. That is all the law requires and accordingly, Wills sufficiently exhausted her administrative remedies. Accordingly, the order of the Superior Court below granting summary judgment on this basis must be reversed.

C. While the Trial Court Drew Inferences in Favor of Defendant in Ruling on Its Motion, All Evidence and Inferences Reasonably Drawn Therefrom Must Be Construed in Favor of Wills.

In addition the errors of substantive law discussed herein, the trial court erred in applying the procedural law of summary judgment motions. As discussed pertaining to standard of review, this Court must make all reasonable inferences from the evidence presented in favor of Appellant and must resolve any doubts as to whether a triable issue of material fact exists in favor of Appellant. (*Deveny*, 139 Cal.App.4th at 419, citing *Dawson*, 109 Cal.App.4th at 392; quoting *Cochran*, 89 Cal.App.4th at 287. See also, *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 [all of the evidence and the inferences reasonably drawn therefrom must be viewed "in the light most favorable to the opposing party."].)

At a minimum, based on the express findings in its order, the trial court erred in applying the law of summary judgment motions as follows:

(1) In granting summary judgment on the exhaustion doctrine the court ruled that Wills's DFEH charge "limited itself to denial of leave under the FMLA." (VIII AA 1913.) This means that the court adopted the "wrong box" argument and failed to give weight to the narrative of the charge, the knowledge of the disability discrimination claim reflected in Defendant's response to the charge, or the extensive evidence that, as it acknowledges, "plaintiff did discuss discrimination with some representative of the DFEH." (*Id.*) Under the applicable law, discussed above, the reasonable inference from this evidence in favor of Wills is that she did communicate her disability discrimination claims to the DFEH and that Defendant was aware of the claim throughout the administrative process. The trial court impermissibly drew the opposite inference.

(2) The trial court held that "[w]hether or not plaintiff intended [any of the conduct for which she was terminated] as jokes, they were in violation of established written policies of her employer." (VII AA 1915.) In so holding, the trial court completely ignored the evidence, in the form of Dr. Chandler's deposition testimony, that all of the conduct at issue, whether intended as a joke at the time or not, was the "direct result" of her disability. The only reasonable inference to be drawn from the evidence was the opinion offered by Dr. Chandler because there was no evidence to the contrary. The court erred to the extent its ruling ignored this fact and concluded, "there is no competent evidence that defendant's stated reasons for adverse employment action were pretext" (*id.*), because the stated reasons for termination were expressly due to disability.

(3) The trial court acknowledged that there was indisputable evidence that Defendant was aware of Wills's disability well prior to her termination, having received Dr. Chandler's letter September 12, 2007

(VIII AA 1916), and even acknowledges evidence "that plaintiff may have discussed her condition with one coworker." (VIII AA 1915.) However, the trial court appeared to ignore this direct evidence that Defendant was on notice of the disability at the time it first issued a notice of intent to terminate and simply does not address how the relevant law applies to these facts.

(4) The trial court further ***weighed*** the evidence in favor of each party regarding harassment endured by Wills and found that it "does not rise to the pervasive and severe level that is actionable." (VIII AA 1917.) Weighing of evidence and making this kind of determination is the exclusive province of the jury.

(5) In addition, the trial court found that it was "beyond dispute that the Anaheim Police Department took [Wills's] statements [regarding "Kill Bill"] seriously as a potential threat." (VIII AA 1917.) However, this issue was hotly disputed, including Wills's testimony that Officer Gardetto (the only officer that actually heard the alleged comments) laughed at her comment (VI AA 1449:21–1450:7; VII AA 1526), and extensive testimony from the supervising officer that, for example, it was complete "speculation" in the department's view as to whether any threat had been made (VI AA 1409:22–1410:16 [e.g., "Whether it was a threat or not, you know, had yet to be determined." "… there was no reason to believe that she was going to follow through on something like that."]), and that there was no need for additional department resources to be used to protect against any supposed threat posed by Wills (VI AA 1407:21–1408:2). The reasonable inference here is the opposite of the one the trial court made—specifically, that the Anaheim Police Department did not take the comments as a threat. The trial court drew all inferences in favor of Defendant on this issue, and ignored the directly contradictory evidence

that established a triable issue of material fact as to whether any of Wills's alleged conduct can be called threatening.

Even without the substantive infirmities in the trial court's order, these procedural mistakes alone resulted in prejudicial error requiring reversal. At a minimum, there are doubts on any of these matters as to whether a material, triable issue exists, and these doubts must be resolved in favor of Wills for the purposes of this Court's review.

IV. CONCLUSION.

For the foregoing reasons, the Court should reverse the Summary Judgment granted in favor of Defendant and remand the action to the Superior Court for further proceedings.

Dated: May 14, 2010

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CERTIFICATE OF COMPLIANCE/WORD COUNT

Pursuant to California Rules of Court, rule 8.204, subdivision (c)(1), I certify that the attached document was prepared using Microsoft Word 2008 for Mac and that, based on this software's word count feature, the text of this brief, including footnotes and headings but not including tables, contains 13,811 words.

Dated: May 14, 2010

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