SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

(Dept 16 is now hearing cases that were formerly in Dept 2)

Honorable Amber Rosen, Presiding

Felicia Samoy, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408.882.2270

DATE: 09-28-23 TIME: 9 A.M.

All those intending to speak at the hearing are requested to appear by video.

To contest the ruling, call (408) 808-6856 before 4:00 P.M.
Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E.
The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

TO CONTEST THE RULING: Before 4:00 p.m. today you must notify the:
(1) Court by calling (408) 808-6856 and
(2) Other side by phone or email that you plan to appear and contest the ruling
(California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

IN PERSON HEARINGS: **Courtrooms are again open and all litigants may appear in person** at the Downtown Superior Courthouse located at 191 N. First Street, San Jose.

VIRTUAL HEARINGS: You should **appear by video**, unless it is not possible.

To **Join Teams Meeting** -Click on the below link or copy and paste into your internet browser and scroll down to Department 16.
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

FINAL ORDERS: The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

COURT REPORTERS: The Court no longer provides official court reporters. If any party wants a court reporter, the appropriate form must be submitted. See court website for policy and forms.

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LINE #	CASE #	CASE TITLE	RULING
LINE 1	23CV414571 Motion: Judgment on Pleadings	EDGES ELECTRICAL GROUP, LLC vs DAMON WILLIAMS	Notice appearing proper and good cause appearing, the unopposed motion for Judgment on the Pleadings is granted. Plaintiff shall submit the final order.
LINE 2	18CV336932 Motion: Summary Judgment/Adjudication	Geoffrey Weigand vs Santa Clara Valley Water District	See Tentative Ruling – now posted. Court will prepare final order. Counsel are requested to check back. Parties are ordered to attend tomorrow's hearing.
LINE 3	18CV327834 Motion: Leave to File 4th amend complaint	Anupam Sahai vs Aegify, Inc	See Tentative Ruling. Plaintiff shall submit the final order.

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LINE 4	20CV368493 Motion: Set Aside Default/Judgment	Stuti Kochhar vs Meruert Berkalieva et al	Defendants have filed a second motion to set aside the default and judgment in this case. The Court finds no error and no persuasive evidence that the judgment is void. Defendants have violated Code of Civil Procedure Section 1008, a jurisdictional statute. For that reason alone, this motion should be denied. But even on the merits the motion is DENIED. Defendants declare they did not get a Statement of Damages that was served on them and that the Court at trial explicitly found was properly served on them. They impeach the credibility of the witness at trial, but it was a trial at which they did not appear, where they failed to present any contrary evidence, and at which they conducted no cross-examination. They cannot now complain that the Court credited the evidence presented at trial. The Court's judgment regarding punitive damages was both procedurally and substantively proper. It is clear from the Statement of Decision and the Judgment that the Court intended to assess punitive damages of $300,000 against each defendant. Plaintiff shall submit the final order.

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LINE 5	20CV369865 Motion: Order declare nonprofit	Parkinson's Institute vs Attorney General of the State of California et al	Having read the papers of the parties, the Court finds in favor of Petitioner. Because of the restriction on the endowed funds, they are not available to creditors. Plaintiff Almanor Ventures objects to the funds going to a non-party and requests that the Court use its powers in equity to instead direct that the funds be used to pay creditors. Even Plaintiff Almanor Ventures admits that "payment toward the liabilities would be - admittedly – absurdly nominal and de minimus." As such, the court finds that paying out the creditors would not work an equity, given that each would receive less than 1 cent. Therefore, the motion is GRANTED. Petitioner shall submit the final order consistent with its moving papers with 10 days.

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LINE 6	22CV398319 Motion: Leave to File 1st amend complaint	PATRICK CHIANG vs ASHLEY RO et al	Plaintiff seeks to file leave to amend to refile charges against The Healing Wellness Center, Inc. ("Center"), pursuant to CCP 473(a)(1). In July 2022, Plaintiff declares that he accidentally dismissed Defendant Center from the lawsuit, when he meant to enter default against it. Plaintiff attempted to set aside that dismissal under CCP 473(b) in February, 2023. The Court denied the motion finding that it was without authority to it aside since the motion was made more than six months after the dismissal occurred. See Order of April 27, 2023. Given that there is no time limit under CCP 473(a)(1), the Court GRANTS Plaintiff's unopposed motion to add Center, as indicated in the proposed FAC. Plaintiff is ordered to submit the final order and to file the FAC within 10 days of the final order.
LINE 7	22CV409340 Hearing: Petition Compel Arbitration	Sergey Armishev vs American Honda Motor Co., Inc.	This motion was initially set for 7/25/23. No amended notice was filed and so the matter was continued to today. Again, Defendant has failed to file an amended notice. Therefore, the matter is taken off calendar.
LINE 8	23CV418525 Hearing: Petition Compel Arbitration	Michael Flores vs Jonna Corporation Inc.	By stipulation of the parties this motion is continued to January 16, 2024 at 9 a.m.
LINE 9	21CV390993 Hearing: Compromise of Minor's Claim	Alejandro Perez Carrillo et al vs Ismael Cisneros et a	The GAL and attorney for the GAL shall appear at the hearing so that the Court can ensure the compromise is knowing and voluntary.
LINE 10			

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LINE 11			
LINE 12			

- oo0oo -

Calendar Line 2
Case Name: *Weigand v. Santa Clara Valley Water District*
Case No.: 18CV336932

After full consideration of the evidence, the separate statements submitted by the parties, and the authorities submitted by each party, the court makes the following rulings:

This is an action for wrongful termination and retaliation. According to the allegations of the second amended complaint ("SAC"), on November 13, 2006, plaintiff Geoffrey Weigand ("Plaintiff") began his employment as a Program Administrator for defendant Santa Clara Valley Water District ("Defendant" or "District"). (See SAC, ¶ 26.) On November 7, 2013, Plaintiff suffered a low back/chest injury while supporting a work crew with fall protection measures, was treated for the injury through District's occupational medical provider, and was returned to work. (See SAC, ¶ 27.) However, Plaintiff continued to suffer an inability and pain in standing upright and in driving, and on November 12, 2013, Plaintiff sought additional treatment. (See SAC, ¶¶ 27-28.) An MRI showed injury to his lower spine; District knew and was kept apprised of Plaintiff's condition. (See FAC, ¶ 28.)

Plaintiff returned to work with some restrictions on January 1, 2014, returning full-time in the office, in the field and on the District Emergency Response Team. (See SAC, ¶ 29.) On April 10, 2014, District declared a drought emergency which required the removal of 30 years of sediment. (See SAC, ¶ 30.) Plaintiff observed that proper testing of sediments for contamination was not being performed by District employees Ray Fields and Jerry Sparkman, and advised his unit manager that the ponds would need to be properly evaluated in order to comply with EPA regulations. (See SAC, ¶ 30.) On May 20, 2014, Plaintiff began taking sediment samples and informed his manager that he would need assistance because the specific sampling required a different tool than was given; his manager instructed Plaintiff to continue using the current tool to get the sampling done and offered Plaintiff to have coworker Steve Camp assist him. (See SAC, ¶ 31.)

On June 1, 2014, Plaintiff and Mr. Camp sampled for three hours when Mr. Camp could no longer assist Plaintiff due to pain he experienced in his arms; Plaintiff continued to sample and conduct multiple surveys. (See SAC, ¶ 32.) On June 15, 2014, Mr. Camp informed Plaintiff that he should be careful because he was upsetting District employees Ray Fields, Jerry Sparkman and Chad Grande for intervening in their project and intended to "get back" or "get even" with him. (See SAC, ¶ 33.) On June 17, 2014, Plaintiff informed his manager of these threats; however, they were dismissed as "shop talk," and Plaintiff then met with Labor Relations Officer, Michael Baratz, to document the verbal threats. (See SAC, ¶ 34.)

At the time, Plaintiff was experiencing pain in his forearms, wrists and elbows from the sampling work, and he began to wear elbow braces for which he was made fun of. (See SAC, ¶ 35.) The pain in Plaintiff's elbows continued to worsen, and Plaintiff continued to wear his elbow braces to prevent further pain when sampling. (See SAC, ¶ 36.) On July 1, 2014, the Workers Compensation Coordinator spoke with Plaintiff and suggested that Plaintiff's pain was due to mountain biking; however, Plaintiff had been mountain biking for 20 years and told the Coordinator that he had never before had a problem with his elbows due to mountain biking and that the pain was precipitated and due to his work sampling. (See SAC, ¶ 37.) On August 13, 2014, Plaintiff filed a Workers Compensation claim relating to his arms and he

went to Alliance in Santa Cruz to see Dr. Ramesh who ordered Plaintiff to physical therapy and assigned him work restrictions. (See SAC, ¶ 38.) On August 16, 2014, Plaintiff was provided with a proper work crew and appropriate tools to complete the sampling work; however, Plaintiff's pain in his elbows prevented him from being able to write, type or even hold onto a glass of water. (See SAC, ¶ 39.) On September 4, 2014, Dr. Ramesh injected Plaintiff's elbow with cortisone to give him temporary relief in order for Plaintiff to return to work; however, once the cortisone wore off, the pain grew considerably worse. (See SAC, ¶ 40.) On October 15, 2014, Dr. Ramesh issued Plaintiff's release to return to work with no restrictions; however, the work status report showed that Plaintiff had work restrictions. (See SAC, ¶ 41.) From December 2014 to January 2015, Plaintiff continued to work with restrictions in the office and the field. (See SAC, ¶ 42.) On December 16, 2014, Plaintiff received a third cortisone injection and two days later, Plaintiff saw an acupuncturist who advised against the cortisone injections. (*Id*.) After not seeing any beneficial results of the acupuncture, Plaintiff continued with the cortisone injections, receiving an additional injection on January 21, 2015. (*Id*.) On February 2, 2015, Plaintiff fell at the Stevens Creek Spillway and reported the incident to his manager and submitted a brief summary of the incident; however, despite having suffered an injury to his lower back, right hip and right knee due to the fall, he advised the Risk Manager that he did not intend to file a Workers Compensation claim and no investigation of the incident was performed. (See SAC, ¶ 43.) Plaintiff's injuries improved over time and his injuries would only recur during more strenuous work days in the field or when he had to engage in prolonged sitting or standing. (See SAC, ¶ 44.)

On May 10, 2015, the Department of Safety of Dams issued the District a violation notice that required District to complete maintenance work on Stevens Creek Spillway. (See SAC, ¶ 45.) Plaintiff anticipated the necessary work to be hard on his body due to his recent injuries and thereafter experienced significant impairment to his arms. (See SAC, ¶ 47.) On May 15, 2015, Alliance arm surgeon Dr. Kilaru ordered an MRI, found that Plaintiff had a complete tear and retraction of his left ECRB tendon and also a partial tear of his right ECRB along with extensive tendonitis in his forearm, and recommended surgery. (See SAC, ¶ 48.) On June 3, 2015, Dr. Kilaru injected Plaintiff with cortisone and restricted Plaintiff to a 10 pound lifting limit. (See FAC, ¶ 49.)

On June 6, 2015, Plaintiff signed a modified duty plan, containing arm restrictions, notified the Workers Compensation Coordinator that he was displeased with the treatment that he received with Alliance thus far and did not want to continue receiving treatment with Alliance any longer. (See SAC, ¶ 50.) On August 14, 2015, Plaintiff saw Dr. Lisa Lattanza at UCSF, who recommended surgery on his left elbow and physical therapy on his right, and informed Plaintiff that the cortisone shots he had been receiving were detrimental to the healthy arm tissue. (See SAC, ¶ 51.) On November 5, 2015, Plaintiff had surgery on his left elbow at UCSF. (See SAC, ¶ 52.)

On January 14, 2016, Plaintiff exchanged emails with District Environmental Health & Safety Manager Larry Lopez ("Lopez") regarding gaining work from home access and while Plaintiff was on TTD and disability leave, Lopez asked Plaintiff to check his emails regarding his direct report's reviews and timecard entries. (See SAC, ¶ 53.) On January 20, 2016, Plaintiff forwarded an email from Dr. Lattanza's N.P, Nick Carvelli, to District Workers Compensation Coordinator Hernan Rivero recommending that Plaintiff use voice activated software to help his right arm heal and to avoid repetitive strain injury on the damaged tendons and connective tissues. (See SAC, ¶ 54.) On February 16, 2016, Plaintiff was released to

return to work with restrictions on both arms and recommended for voice activated software to better assist Plaintiff's healing. (See SAC, ¶ 55.) On February 17, 2016, Plaintiff sought medical care due to increasing pain in his low back and hip, for which his healthcare provider, Dr. Chuck, recommended physical therapy and diagnostic injections to pinpoint which discs were causing Plaintiff pain. (See SAC, ¶ 56.) On March 4, 2016, Plaintiff injured his knee while entering the Stevens Creek Spillway for work, and reported the injury. (See SAC, ¶ 57.) Plaintiff went to Alliance, where the appointed provider, Dr. Mohammed, refused to treat Plaintiff because he did not believe that the injury was work related. (*Id*.) After seeing an alternate provider for x-rays on his right knee, Plaintiff signed a new modified duty plan based on work status reports from Dr. Lattanza and Dr. Chuck who both strongly recommended against Plaintiff walking on rough, uneven terrain, rip-rap and spillways. (See SAC, ¶ 58.) District refused to accommodate Plaintiff in his request for voice activated software despite the fact that many other District staff members were provided and utilized this software. (See SAC, ¶ 59.)

In Spring 2016, Plaintiff was asked to investigate and prepare a report relating to a chainsaw injury accident at District, and after the completing the report on April 1, 2016, District Watershed Operations and Maintenance Manager Chad Grande asked Plaintiff to modify his report to place undue blame on another employee, Feliciano Aguilar. (See SAC, ¶ 60.) Mr. Aguilar was competing for a promotion at District with a friend of Mr. Grande. (See SAC, ¶ 61.) Plaintiff refused to change his findings and reported the attempted investigation tampering to his manager. (*Id*.)

On May 3, 2016, Plaintiff received an MRI which showed several meniscal tears on his right knee. (See SAC, ¶ 62.) On May 20, 2016, Plaintiff had surgery on his knee to repair the meniscal tears, and he took two weeks medical leave for the surgery and his post-op recovery and rehabilitation needs; however, Plaintiff was required to use his sick and vacation days to take this time off as his knee surgery was denied by Workers Compensation. (See SAC, ¶ 63.) On June 1, 2016, Plaintiff returned to work with work restrictions. (See SAC, ¶ 64.) On June 8, 2016, Plaintiff signed a modified duty plan prepared by District Management Analyst/EEO Anna Noriega and Harnen Rivero that included restrictions through September 1, 2016 of no standing more than 30 minutes, no walking more than 45 minutes, no kneeling, squatting, crawling, climbing ladders, no lifting or carrying anything over 20 pounds, and no walking on even slopes or hard terrain. (*Id*.) On June 15, 2016, Lopez assured Plaintiff that there would be plenty of light duty work upon his return to work after surgery, and suggested that Plaintiff dictate typing to his direct reports and type using only one hand, and on June 17, 2016, Plaintiff had right elbow surgery to repair his ECRB tendon. (See SAC, ¶¶ 65-66.)

On July 26, 2016, Plaintiff received emails from District regarding his payroll management going forward. (See SAC, ¶ 67.) During an August 18, 2016 appointment with Dr. Chuck, Plaintiff learned that District Workers Compensation ("JT2") attorney Jeffrey D'Andre sent a letter to Dr. Chuck concerning Plaintiff and Dr. Chuck shared the letter with Plaintiff. (See SAC, ¶ 68.) Dr. Chuck aced very differently towards Plaintiff since the last visit, telling Plaintiff that he could not do anything further for Plaintiff and declared Plaintiff permanent and stationary despite Dr. Chuck's previous plans for diagnostic injection. (See SAC, ¶ 69.) On September 15, 2016, District Management Analyst II requested medical release reports from Plaintiff to provide his return to work information to his manager. (See SAC, ¶ 70.) On October 3, 2016, Plaintiff missed his appointment with Dr. Lattanza due to illness and pain in his right hand. (See SAC, ¶ 72.) On October 11, 2016, Plaintiff received a

letter from District JT2 Workers Compensation adjuster Elene Patton ("Patton") warning him that TTD benefits may be terminated for missing his scheduled follow-up with Dr. Lattanza and instructed Plaintiff to meet with Dr. Lattanza sooner than his rescheduled appointment date of October 21, 2016. (*Id*.)

On October 12, 2016, Plaintiff received a letter indicating that he would be able to work light duty and type up to three hours, using his left hand only. (See SAC, ¶ 73.) On October 24, 2016, Plaintiff received an email from Hernan Rivero, advising Plaintiff that JT2 adjuster Patton would be taking over his claims. (See SAC, ¶ 74.) On October 26, 2016, Plaintiff received new restrictions indicating that he could return to work using a splint on his right hand. (See SAC, ¶ 75.) On November 12, 2016, Plaintiff received a modified duty offer for Plaintiff to be a switchboard operator in the front lobby for which Plaintiff would receive his base pay, but his supervisor pay would not be included, and the terms and functions of the modified duty plan clearly violated his working restrictions. (See SAC, ¶¶ 76-77.) On November 16, 2016, Plaintiff sent Hernan Rivero an email informing him that the modified duty plan did not appear to comport with his accommodation needs and work restrictions, and that he wanted to consult further regarding an appropriate return to work plan. (See SAC, ¶ 78.) On November 21, 2016, Plaintiff's TTD benefits were terminated, purportedly because Plaintiff turned down the modified duty offer. (See SAC, ¶ 79.)

On November 28, 2016, Plaintiff emailed Hernan Rivero requesting additional information about the modified duty offer, but again did not receive a response. (See SAC, ¶ 80.) On November 30, 2016, Plaintiff left a voicemail with Lopez, requesting accommodations for his regular position and notifying him that the modified duty offer would violate his work restrictions. (See SAC, ¶ 81.) On December 2, 2016, District Senior Management Analyst, Government Relations Paul Randhawa ("Randhawa") sent Plaintiff an email indicating that he had taken over the RA duties from Laviena Koolstra. (See SAC, ¶ 83.) On December 3, 2016, Plaintiff saw his new physical therapist, Dr. Sabsovich, for his low back pain, and he declared Plaintiff TTD for his back pain and recommended physical therapy. (See SAC, ¶ 84.) Plaintiff's TTD was not reinstated even despite his doctor's recommendation for temporary disability. (*Id*.) On December 8, 2016, Plaintiff emailed and called Randhawa, requesting a copy of the modified duty offer sent on November 10, 2016 and a return to his supervisory position, with restrictions, as he and Lopez discussed prior to his surgery. (See SAC, ¶ 85.) Randhawa indicated he was unaware of the November 10, 2016 letter and its contents and additionally denied Plaintiff's request to return to his supervisory position, stating that there were no positions available and Plaintiff could not be accommodated. (See SAC, ¶¶ 85-86.)

On December 14, 2016, Plaintiff received a letter from JT2 adjustor Patton, indicating that Plaintiff's TTD benefits would continue to be delayed pending review of his updated medical records and that she would not be able to advise him of his TTD status until February 1, 2017. (See SAC, ¶ 87.) Since District denied Plaintiff for his recent injury, Plaintiff sought private treatment from Dr. Zachary Vaughn who confirmed by MRI that Plaintiff had a labral tear and early signs of damage to his chondral surfaces due to the tear and small lesion. (See SAC, ¶ 88.) Dr. Vaughn allowed Plaintiff to return to work and to perform work as tolerated by hip pain, and also recommended Plaintiff undergo surgical repair to forestall further damage to joint cartilage. (*Id*.) On December 24, 2016, Plaintiff received workers compensation approval for his second right hand/forearm surgery and that Dr. Lattanza indicated in her work status notes that Plaintiff could return to work with a modified duty plan, but that he would be restricted from using his right hand until his surgery date. (See SAC, ¶ 89.) On January 7,

2017, Dr. Sabsovich approved Plaintiff's return to work with restrictions of no more than 10 minutes of continuous sitting/standing, 5-9 pound lifting limit and no bending at the waist. (See SAC, ¶ 90)

On January 13, 2017, Randhawa informed Plaintiff on a phone call that if Plaintiff refused the November 10, 2016 modified duty offer, then a different position would be found and that he would likely be forced to take a permanent demotion. (See SAC, ¶ 91.) Despite Plaintiff's request and information provided to District, Randhawa refused to discuss or consider revising the modified duty offer so as to meet Plaintiff's accommodation needs as detailed by Dr. Lattanza and Dr. Sabsovich. (*Id*.) On January 20, 2017, Plaintiff informed Randhawa by email that since no revision of the modified duty plan was being attempted, his physical therapist would put him off work until after his surgery, and also asked Randhawa why Plaintiff was excluded from the process for developing the proposed modified duty plan from the outset since the issues could have been addressed earlier in the process. (See SAC, ¶ 92.) Plaintiff's request for a modified duty plan excluding use of his right hand was rejected by District and his doctor put him off of work until after his surgery; however, his TTD was still being withheld, and no further efforts by District were made to provide him with reasonable accommodations that would appropriately allow him to return to work. (See SAC, ¶ 93.) On January 27, 2017, Plaintiff forwarded a letter from his doctor to Randhawa putting him off work since no reasonable accommodations were offered to meet his work restrictions, to which the District failed to respond. (See SAC, ¶ 94.) On February 2, 2017, Plaintiff's workers compensation attorney, Marc Wiesner, convinced JT2 to reinstate his TTD and pay retroactively for 2.5 months withheld; however, JT2 only paid Plaintiff for 1.5 months and withheld one month of his TTD. (See SAC, ¶ 95.)

On February 7, 2017, Plaintiff had surgery for his right hand and forearm, and Dr. Lattanza informed District that Plaintiff would be off work with a projected return to work of March 21, 2017. (See SAC, ¶ 96.) On March 30, 2017, Randhawa informed Plaintiff that District would not accommodate Plaintiff with his previous position and that he would likely have to accept a lower level management analyst position as a permanent accommodation, and accept a lower pay grade. (See SAC, ¶ 98.) On April 10, 2017, Plaintiff's doctor sent a letter to District indicating that Plaintiff did not have any computer use restrictions and Plaintiff informed Randhawa that he wanted to return to work at his previous position. (See SAC, ¶ 99.) On April 14, 2017, District responded to Plaintiff, stating that it required more medical clarification in the form of updated work status reports and Plaintiff also asked for an updated report on Plaintiff's knee and hip. (See SAC, ¶ 100.) Randhawa then told Plaintiff that District would not be able to offer him a reasonable accommodation other than a demotion to a lower level management position at lesser pay to which Plaintiff objected, noting that his doctors released him to return to work with minimal restrictions. (See SAC, ¶ 101.) On May 2, 2017, Plaintiff received updated restrictions for his lumbar spine—30 minutes sitting and standing, 120 minutes walking, 30-39 pounds lifting above shoulder and 40-50 pounds push/pull, and sent an updated work status report to Randhawa. (See SAC, ¶ 102.) On May 5, 2017, Plaintiff emailed Randhawa, notifying him that he had sent all the work status reports that were requested, to which Randhawa stated that there was an inconsistency in medical status from Plaintiff's last visit with his new back doctor regarding the weight limit. (See SAC, ¶ 103.) On May 15, 2017, Plaintiff emailed his Union President, expressing his concern about a possible demotion or termination due to District's refusal to provide him a reasonable accommodation and his resulting forced extended leave from work. (See SAC, ¶ 104.) On May 16, 2017, Randhawa emailed Plaintiff that District's delay in returning Plaintiff to work

was due to purportedly not having received an update on Plaintiff's right knee despite the fact that Plaintiff had been allowed to return to full-duty work for nearly a year prior relative to his right knee issue. (See SAC, ¶ 105.) Plaintiff received a response from the Union that it would look into the issue. (See SAC, ¶ 106.) On May 18, 2017, the Union Vice President informed Plaintiff that District representatives stated that there was no plan to terminate or demote Plaintiff but that District was purportedly searching for a solution for him to return to work. (See SAC, ¶ 107.) On July 13, 2017, Plaintiff emailed Randhawa with updates on his low back pain to which Randhawa responded that he would forward Plaintiff's status update to Mr. Rivero. (See SAC, ¶ 108.) On July 20, 2017, Plaintiff was cleared to return to work with restrictions and informed District of his status; however, District did not respond to discuss any reasonable accommodation for a month. (See SAC, ¶ 109.) On August 5, 2017, Plaintiff experienced a flare up of pain in his forearms which led to his doctor limiting his typing hours to 5 hours for a couple of weeks. (See SAC, ¶ 110.) On the same day, Plaintiff's TTD payments were terminated. (*Id*.)

On August 22, 2017, Plaintiff was notified that District Regional Government Services reasonable accommodations coordinator Annie Chin ("Chin") would be handling Plaintiff's reasonable accommodations and Plaintiff was left in an ambiguous return to work status. (See SAC, ¶ 112.) On August 24, 2017, Plaintiff discussed his return to work status and reasonable accommodations with Chin who informed Plaintiff that she would prepare a custom medical clarification questionnaire to send to the QME Dr. Post, so that he could provide more specific work instructions. (See SAC, ¶ 113.) Plaintiff informed Chin that his work instructions were already outlined on page 66 of his QME report, his negative experience with Alliance and that he did not want to be treated there going forward. (*Id*.) Later, Plaintiff requested by email the questionnaire so that he could begin scheduling appointments with his physical therapist to get the questionnaire completed as soon as possible. (See SAC, ¶ 114.) On August 20, 2017, Chin emailed Plaintiff that she had started on the questionnaire and would have it completed and sent to him soon. (See SAC, ¶ 115.) On August 30, 2016, Chin sent Plaintiff an email offering alternate options for him to obtain an income while trying to live on the physical disability benefit from JT2; however, these options were previously attempted and determined as unacceptable or ineffective. (See SAC, ¶ 116.) After learning that the work status reporting method was now different, Plaintiff expressed concern to Chin who responded that District needed clarification because his prior reports of his injury history, work status reports, surgeries and time off were too vague. (See SAC, ¶ 117.)

On September 7, 2017, Plaintiff's forearm pain was largely resolved and his computer use restrictions at work were lifted; Chin notified Plaintiff that she would prepare a temporary modified duty plan including 5.5 hours per day, Monday through Friday, with a half hour of unpaid lunch. (See SAC, ¶ 118.) On September 11, 2017, Plaintiff emailed Chin, notifying her that his computer restrictions had been lifted per his doctor's recommendation and he asked her to revise the modified duty plan. (See SAC, ¶ 119.) Chin responded that she needed more time to analyze the doctor's note. (*Id*.)

On September 15, 2017, Chin notified Plaintiff that his request for full time work was rejected and emailed him with a revised modified duty plan containing several errors and false statements about Plaintiff's ability to return to work. (See SAC, ¶ 120.) After notifying Chin about the discrepancies and requesting further discussion, on September 18, 2017, Plaintiff advised Chin and Lopez that he would agree to the temporary modified duty plan once the errors had been corrected removed and the misstatements revised. (See SAC, ¶ 121.) Chin

emailed Plaintiff stating that his typing restrictions had been irregular; however, Plaintiff's typing restrictions had only changed once due to a temporary flare up. (See SAC, ¶ 122.) On September 22, 2017, Plaintiff signed the updated temporary modified duty plan with a start date of September 25, 2017, reiterating to Chin that he did not want to seek treatment at Alliance due to repeated issues in the past. (See SAC, ¶ 123.) On September 25, 2017, Plaintiff returned to work under his temporary modified duty plan, and on the second day of the temporary modified duty plan, Lopez and other staff members were isolating him, mocking his memory, injuries and his restrictions due to injury. (See SAC, ¶¶ 124-125.)

On September 27, 2017, Plaintiff went to his appointment with a psychotherapist at 11:00 am after informing his manager that he had a personal appointment. (See SAC, ¶ 126.) Chin reminded Plaintiff that only authorized workers compensation or FEHA related appointments were covered under his modified duty plan and that he must inform Lopez of the nature of his appointments. (*Id.*) Plaintiff spoke with Risk Manager, Mr. Cahen, apologizing for the conflict. (See SAC, ¶ 127.)

On September 28, 2017, Plaintiff traveled to the Superior Court in Redwood City to testify on behalf of District as part of his work duties, notifying Lopez and Mr. Cahen that his testimony would take more than a couple of hours in violation of his temporary modified duty plan; however, Mr. Cahen required Plaintiff to testify for more than a few hours so that he could finish his testimony. (See SAC, ¶ 128.) However, after sitting in the car to and from the trial, and going up and down from the witness stand to read exhibit binders, Plaintiff's back hip pain were exacerbated. (See SAC, ¶ 129.) The following day, Plaintiff testified again the entire day, putting his back and hip in more pain. (See SAC, ¶ 130.) On October 2 2017, Plaintiff emailed Lopez of his pain and informed him that he would see his doctor. (See SAC, ¶ 131.) After his appointment, Plaintiff's doctor declared him TTD for two weeks, and then able to return back to his temporary modified duty plan. (*Id.*) On October 3, 2017, Plaintiff emailed Lopez that he would be out sick as his low back and hip pains had been aggravated. (See SAC, ¶ 132.)

On October 13, 2017, Chin informed Plaintiff that his temporary modified duty plan was terminated due to his TTD and that he would be on unpaid leave while she waited for a functional capacity exam (FCE) and a medical clarification questionnaire. (See SAC, ¶ 133.) Plaintiff informed Chin that his workers compensation attorney would be working to get approval for an alternate FCE provider. (See SAC, ¶ 134.) On October 16, 2017, Plaintiff sent Chin a letter in response to Chin's October 13, 2017 letter that contained several errors, omissions, misstatements and mischaracterizations. (See SAC, ¶¶ 133, 135.) Lopez then suggested that Plaintiff seek mental health services and that Plaintiff was having problems relating to his marriage, family and issues with drugs and alcohol. (See SAC, ¶ 136.)

On October 19, 2017, Plaintiff submitted a written claim pursuant to Government Code section 900 to District for: District's failure and refusal to provide a reasonable accommodation; District's refusal to allow him to return to work from his medical leave; District's efforts to force his demotion into a position that was significantly less comparable to his then position and that would violate his medical restrictions and needs for accommodation for his known disabilities; District's failure and refusal to engage in a good faith interactive process with Plaintiff; District's retaliation against Plaintiff for his disabilities and need for accommodation of those disabilities; District's ongoing targeting and retaliation against Plaintiff for his participation and investigation of workplace accidents, his reports of safety

concerns in the workplace, and his refusal to alter his investigatory reports to improperly and falsely accuse another employee of misdeeds; District's failure to pay Plaintiff all wages due and owing him for periods of time he spent acting as an expert witness for District; and, District's requirement of him to participate in the defense of District as an expert witness in such a manner that violated his medical restrictions and needs for accommodation, causing a worsening of his injuries, disability and pain. (See SAC, ¶¶ 137-138.) On October 24, 2017, Plaintiff also submitted a complaint of discrimination to the California Department of Fair Employment and Housing ("DFEH") and obtained an immediate right to sue letter concerning District's conduct and treatment of him to that point. (See SAC, ¶ 139.)

On October 25, 2017, Plaintiff emailed Lopez to remind him of the many conflicts he had experienced with Alliance over the years and asked why he could not see another provider for treatment. (See SAC, ¶ 140.) On November 3, 2017, Plaintiff requested an alternate provider and asked Chin for a list of other providers. (See SAC, ¶ 141.) Plaintiff's request was ignored so Plaintiff sent an additional request that was also ignored. (See SAC, ¶¶ 141-142.)

On November 15, 2017, District asked Chin to gather information on alternate providers for Plaintiff. (See SAC, ¶ 143.) On November 16, 2017, Plaintiff provided Chin with a list of qualified providers and reminded her of his medical restrictions that he had first brought to her attention in their first meeting. (See SAC, ¶ 144.) On December 6, 2017, Plaintiff emailed Chin about the status of a provider and inquired into which of the providers on his list would be approved. (See SAC, ¶ 145.) The following day, Chin provided Plaintiff with a list of three different providers, asking him to make a selection; Plaintiff chose the Palo Alto Medical Foundation ("PAMF"), and Chin acknowledged his selection on December 14, 2017. (*Id*.) On December 16, 2017, Plaintiff received a call from Patton, informing him that a company named ITCS would call him to schedule an evaluation. (See SAC, ¶ 146.)

On December 20, 2017, Plaintiff had an evaluation at PAMF in Palo Alto, in which it was explained to Plaintiff that he was instructed to perform an evaluation designed for heavy labor and construction type jobs, making repeated maximum exertions with each leg and arm, and if Plaintiff did not meet the exertions testing limits, he would fail. (See SAC, ¶ 147.) Plaintiff informed the PAMF aid of his medical restrictions, listed all of his recent injuries and related surgeries and expressed that he was confused about why he was required to do this particular evaluation since it was neither related to nor designed to evaluate his ability or inability to perform the essential functions of his supervisor role. (See SAC, ¶ 148.) After the PAMF evaluation, Plaintiff's injuries flared up and Plaintiff has not yet wholly recovered. (See SAC, ¶ 149.)

On December 28, 2017, Plaintiff informed Chin that the PAMF evaluation violated his medical restrictions to which Chin thanked him for his concerns and without further addressing the issue, she stated that she had obtained permission to allow him to provide input on the questionnaire. (See SAC, ¶ 150.) On January 9, 2018, Chin explained that the class requirements for his job as Supervising Program Administrator would be changing to include physical requirements that Plaintiff would not be able to meet due to his restrictions that were prepared by Lopez and purportedly changing due to a Comprehensive Classification and Compensation study. (See SAC, ¶ 151.) Plaintiff's job duties were changed specifically to frustrate his return to work efforts to subvert his accommodation requests and to avoid District's obligations to provide Plaintiff reasonable accommodation and to ultimately force

him out of his job. (See SAC, ¶ 152.) Nevertheless, Plaintiff responded to Chin's email, agreeing to speak with her by telephone to discuss the new job classification and to discuss his reasonable accommodations so he could return to work. (See SAC, ¶ 153.) Chin ignored his request to discuss a reasonable accommodation and Plaintiff then sent a follow-up email outlining the impact that District's conduct and prolonged process had on his return to work with a reasonable accommodation. (See SAC, ¶ 154.) On January 23, 2018, Chin sent Plaintiff an email containing a copy of the questionnaire and a cover letter, and the following day, Plaintiff received an email from Chin with a draft of the new Senior Safety Specialist position. (See SAC, ¶ 155.) Plaintiff responded, objecting to the newly crafted job classification that would force him out of his former position due to the new physical requirements. (See SAC, ¶ 156.)

From January 26-29, 2018, Plaintiff exchanged emails with a District Human Resources staff remember regarding possible short-term disability benefits while he was on unpaid medical leave and was advised that he was not eligible. (See SAC, ¶ 158.) Plaintiff also requested the staff member to complete a CALPERS form requesting the cost of purchasing service credit for the time lost due to workers compensation injuries, and the staff member sent the form back only partially completed, delaying him from completing that process. (See SAC, ¶ 159.) On January 29, 2018, Plaintiff spoke with Chin by phone, wherein she: asked Plaintiff if he was considering early retirement from District, bullied Plaintiff, and accused Plaintiff of lying and making false statements and allegations. (See SAC, ¶ 157.) After the conversation, Plaintiff asked Chin to cease and desist any communication with him. (*Id*.)

On February 22, 2018, Chin asked for a letter of representation to discuss the issues with Plaintiff's attorney. (See SAC, ¶ 160.) Plaintiff learned that he would not be able to schedule his reevaluation with Dr. Post for over one year. (*Id*.) Given District's ongoing conduct, its refusal to return him to his job, the ongoing harassment, discrimination and retaliation he had experienced, and District's apparent campaign to oust him from his job and force him into early retirement rather than accommodate him in a suitable return to work effort, Plaintiff was left without work or income and he could no longer adequately support his family and thus was left little choice but to seek early retirement. (See SAC, ¶ 161.) On March 21, 2018, Plaintiff submitted paperwork for an early PERS retirement from District, and on March 26, 2018, he was forced to resign due to the District's intolerable conduct. (See SAC, ¶ 162.) On September 21, 2018, Plaintiff submitted an updated government tort claim to District which was acknowledged by District on September 24, 2018 as having been received. (See SAC, ¶ 163.)

On February 10, 2020, Plaintiff filed his SAC against District, asserting causes of action for:

1) FEHA violation—disability discrimination (Government Code § 12940, subd. (a);
2) FEHA violation—retaliation (Government Code § 12940, subd.(h));
3) FEHA violation—failure to provide a reasonable accommodation (Government Code § 12940, subd.(m));
4) FEHA violation—failure to engage in a timely, good faith interactive process (Government Code § 12940, subd. (n));
5) FEHA violation—failure to prevent harassment, discrimination and retaliation (Government Code § 12940, subd. (k)); and,

6) Violation of Labor Code § 1102.5.

District moves for summary judgment, or, in the alternative, moves for summary adjudication of each cause of action.

DISTRICT'S MOTION FOR SUMMARY JUDGMENT, OR, IN THE ALTERNATIVE, FOR SUMMARY ADJUDICATION

Defendant's burden on summary judgment

"A defendant seeking summary judgment must show that at least one element of the plaintiff's cause of action cannot be established, or that there is a complete defense to the cause of action. … The burden then shifts to the plaintiff to show there is a triable issue of material fact on that issue." (*Alex R. Thomas & Co. v. Mutual Service Casualty Ins. Co.* (2002) 98 Cal.App.4th 66, 72; internal citations omitted; emphasis added.)

"The 'tried and true' way for defendants to meet their burden of proof on summary judgment motions is to present affirmative evidence (declarations, etc.) negating, as a matter of law, an essential element of plaintiff's claim." (Weil et al., Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2007) ¶ 10:241, p.10-91, *citing Guz v. Bechtel National Inc.* (2000) 24 Cal.4th 317, 334; emphasis original.) "The moving party's declarations and evidence will be strictly construed in determining whether they negate (disprove) an essential element of plaintiff's claim 'in order to avoid unjustly depriving the plaintiff of a trial.'" (*Id*. at § 10:241.20, p.10-91, *citing Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1107.)

"Another way for a defendant to obtain summary judgment is to 'show' that an essential element of plaintiff's claim cannot be established. Defendant does so by presenting evidence that plaintiff 'does not possess and cannot reasonably obtain, needed evidence' (because plaintiff must be allowed a reasonable opportunity to oppose the motion.) Such evidence usually consists of admissions by plaintiff following extensive discovery to the effect that he or she has discovered nothing to support an essential element of the cause of action." (*Id*. at ¶ 10:242, p.10-92, *citing Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 854-855.)

District's arguments

District moves for summary judgment, or, in the alternative for summary adjudication of each cause of action on the grounds that: Plaintiff's complaints about his treatment in the workers' compensation system and aggravations to his injuries are barred by workers' compensation exclusivity; the first cause of action for disability discrimination lacks merit because Plaintiff cannot prove that he could perform his essential duties; the first cause of action for disability discrimination lacks merit because Plaintiff did not suffer an adverse employment action; the first cause of action for disability discrimination lacks merit because District had legitimate business reasons for all its actions and decisions with respect to Plaintiff and Plaintiff cannot overcome those reasons with evidence of pretext for a discriminatory motive; the second cause of action for retaliation lacks merit because Plaintiff cannot demonstrate that he engaged in protected activity, that he suffered and adverse employment action or that there was any causal link between any adverse employment action and any

alleged protected activity; the second cause of action for retaliation lacks merit because District had legitimate business reasons for all its actions and decisions with respect to Plaintiff and Plaintiff cannot overcome those reasons with evidence of pretext for a discriminatory motive; the third cause of action for failure to accommodate lacks merit because Plaintiff cannot prove that he could perform his essential duties; the third cause of action for failure to accommodate lacks merit because no reasonable accommodation was available that would have allowed Plaintiff to perform the essential duties of his role and he rejected even temporary reassignment to different roles consistent with his restrictions; the third cause of action for failure to accommodate lacks merit because District accommodated Plaintiff with extended leaves of absence and often exceeded its obligations under FEHA by giving him temporary work without his essential duties; the third cause of action for failure to accommodate lacks merit because Plaintiff was responsible for the breakdown of the interactive process; the fourth cause of action lacks merit because no reasonable accommodation was available that would have allowed Plaintiff to perform the essential duties of his role; the fourth cause of action lacks merit because District engaged in a good faith interactive process and Plaintiff was responsible for the breakdown of the interactive process; the fifth cause of action lacks merit because Plaintiff cannot demonstrate that he was subjected to discrimination or retaliation; the fifth cause of action lacks merit because to the extent that it asserts harassment, nothing rises to that level; the sixth cause of action for violation of Labor Code section 1102.5 lacks merit because Plaintiff did not engage in protected activity within the meaning of Labor Code section 1102.5; the sixth cause of action for violation of Labor Code section 1102.5 lacks merit because Plaintiff did not suffer any adverse employment action; the sixth cause of action for violation of Labor Code section 1102.5 lacks merit because Plaintiff cannot demonstrate any casual connection between any alleged protected activity and any alleged adverse employment action; and, the sixth cause of action for violation of Labor Code section 1102.5 lacks merit because District would have taken the same actions for legitimate independent reasons even if Plaintiff had not engaged in protected activity.

Workers' compensation exclusivity

District argues that "[a]ny questions of whether the District or JT2 provided adequate pay during workers' comp leaves or authorized appropriate medical treatment are similarly matters of workers compensation, as FEHA imposes no duty to provide medical care or pay employees who are not working." (District's memorandum of points and authorities in support of motion for summary judgment ("Def.'s memo"), p.13:20-23, citing *Wilson v. County of Orange* (2009) 169 Cal.App.4th 1185, 1193-1194.) However, *Wilson* does not concern workers' compensation whatsoever. Instead, in *Wilson*, *supra*, the plaintiff contended that the Orange County Sherriff's Department failed to make reasonable accommodation for her medical condition that necessitated that she avoid the most stressful aspects of her job, and appealed the jury's verdict in the County's favor. (See *Wilson*, *supra*, 169 Cal.App.4th at pp.1187-1188.) In affirming the jury's verdict while differentiating the situation from a motion for summary judgment, the *Wilson* court stated that whether an employer fails to provide an employee a reasonable accommodation of a disability or engage in the interactive process "are generally… questions… of fact." (*Id*. at p.1193.) *Wilson* does not support District's assertion.

Further, while District argues that "there is no evidence that the District directed how either its contracted provider (Alliance) or the provider that Weigand selected for his FCE (PAMF) provided service" (Def.'s memo, p.13:23-25), District itself fails to cite to any evidence in support of this ground for its motion. (See Def.'s separate statement of undisputed

material facts in support of motion for summary judgment, generally (failing to list the ground in the separate statement); see also Def.'s memo, p.13:14-27.) "Summary judgment law in this state, however, continues to require a defendant moving for summary judgment to present evidence, and not simply point out that the plaintiff does not possess, and cannot reasonably obtain, needed evidence." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 854.) District fails to meet its initial burden with respect to its argument as to workers' compensation exclusivity.

Finally, District moves for summary judgment or summary adjudication of portions of causes of action; however, Code of Civil Procedure section 437c, subdivision (f)(1) plainly states that "[a] motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty," unless the parties file a joint stipulation and declarations with certain requirements prior to filing the motion. (See Code Civ. Proc., § 437c, subds. (f)(1), (t).) Thus, District's motion on the ground of workers' compensation exclusivity also cannot be granted in the first instance. District's motion for summary judgment or adjudication on the ground that portions are barred by workers' compensation exclusivity is DENIED.

Overview of the Fair Employment and Housing Act (FEHA)

The Sixth District has recently stated that "California's FEHA makes it an unlawful employment practice to discharge or discriminate against employees in the 'terms, conditions, or privileges of employment' because of a physical or mental disability or medical condition." (*Zamora v. Security Industry Specialists, Inc*. (2021) 71 Cal.App.5th 1, 29-30.) "The FEHA, however, 'does not prohibit an employer from … discharging an employee with a physical or mental disability, … if the employee, because of a physical or mental disability, is unable to perform the employee's essential duties even with reasonable accommodations.'" (*Id*. at p.30, quoting Gov. Code § 12940, subd. (a)(1).) "The FEHA requires employers to make reasonable accommodations for employees with disabilities." (*Id*.) "It provides that '[i]t is an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California: [¶] … (m)(1) For an employer or other entity covered by this part to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee.'" (*Id*.) "In addition to the obligation to make reasonable accommodation for a known physical or mental disability, the FEHA makes it unlawful for an employer 'to fail to engage in a timely, good faith, interactive process with the employee … to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee … with a known physical or mental disability or known medical condition.'" (*Id*.) "Section 12940 'imposes separate, independent duties on an employer to engage in the 'interactive process' and to make 'reasonable accommodations.'" (*Id*., quoting *Moore v. Regents of University of California* (2016) 248 Cal.App.4th 216, 232.) "Regarding claims for retaliation, the FEHA makes it unlawful for an employer 'to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part.'" (*Id*. at p.31, quoting Gov. Code § 12940, subd.(h).)

***McDonnell Douglas* and burdens on summary judgment**

In *Zamora*, *supra*, 71 Cal.App.5th 1, the Sixth District articulated the burden shifting as relating to disability discrimination cases:

> "Because state and federal employment discrimination laws are similar, California courts look to pertinent federal precedent in applying California statutes." (*Trop* [*v. Sony Pictures Entertainment, Inc.* (2005)] 129 Cal.App.4th [1133] at p. 1144, citing *Guz*, *supra*, 24 Cal.4th at p. 354.) Generally, in cases alleging employment discrimination, California has adopted the three-stage burden-shifting test established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 [36 L. Ed. 2d 668, 93 S. Ct. 1817]. (*Guz*, at pp. 354–355; *Glynn v. Superior Court* (2019) 42 Cal.App.5th 47, 53 [254 Cal. Rptr. 3d 772] (*Glynn*); *Reeves v. Safeway Stores, Inc*. (2004) 121 Cal.App.4th 95, 111 [16 Cal. Rptr. 3d 717] (*Reeves*).) This test "reflects the principle that *direct evidence* of intentional discrimination is rare, and that such claims must usually be proved circumstantially. Thus, by successive steps of increasingly narrow focus, the test allows discrimination to be inferred from facts that create a reasonable likelihood of bias and are not satisfactorily explained." (*Guz*, at p. 354, italics added.)
>
> Under the first step of the *McDonnell Douglas* test, the plaintiff may raise a presumption of discrimination by presenting a "'prima facie case,'" the components of which vary depending upon the type of discrimination alleged. (*Reeves*, *supra*, 121 Cal.App.4th at p. 111.) "The elements of a disparate treatment disability discrimination claim are that the plaintiff (1) suffered from a disability or was regarded as suffering from a disability, (2) could perform the essential duties of a job with or without reasonable accommodations, and (3) was subjected to an adverse employment action because of the disability or perceived disability." (*Glynn*, *supra*, 42 Cal.App.5th at p. 53, fn. 1, citing *Sandell v. Taylor-Listug, Inc*. (2010) 188 Cal.App.4th 297, 310 [115 Cal. Rptr. 3d 453] (*Sandell*).) "A satisfactory showing to this effect gives rise to a presumption of discrimination which, if unanswered by the employer, is mandatory—it requires judgment for the plaintiff." (*Reeves*, at p. 112, citing *Guz*, *supra*, 24 Cal.4th at pp. 355–356.)
>
> Under the second step of the *McDonnell Douglas* test, "the employer may dispel the presumption merely by articulating a legitimate, nondiscriminatory reason for the challenged action. [Citation.] At that point the presumption disappears." (*Reeves*, *supra*, 121 Cal.App.4th at p. 112.) Under the third step of the test, the "plaintiff must … have the opportunity to attack the employer's proffered reasons as pretexts for discrimination, or to offer any other evidence of discriminatory motive." (*Guz*, *supra*, 24 Cal.4th at p.356.) In demonstrating that an employer's

proffered nondiscriminatory reason is false or pretextual, "'[an employee] cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent. …'" (*Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1005 [67 Cal.Rptr.2d 483] (*Hersant*).)

"'[W]e must keep in mind that the *McDonnell Douglas* test was originally developed for use at trial [citation], not in summary judgment proceedings.'" (*Arteaga v. Brink's, Inc*. (2008) 163 Cal.App.4th 327, 343–344 [77 Cal. Rptr. 3d 654] (*Arteaga*).) When seeking summary judgment or summary adjudication in an employment discrimination case, the burdens established by the *McDonnell Douglas* framework are altered. The "employer, as the moving party, has the initial burden to present admissible evidence showing either that one or more elements of plaintiff's prima facie case is lacking or that the adverse employment action was based upon legitimate, nondiscriminatory factors." (*Hicks v. KNTV Television, Inc*. (2008) 160 Cal.App.4th 994, 1003 [73 Cal. Rptr. 3d 240], citing *Guz*, *supra*, 24 Cal.4th at p. 357.) If the employer satisfies its initial burden, it """"will be entitled to summary [adjudication] unless the plaintiff produces admissible evidence which raises a triable issue of fact material to the defendant's showing. In short, by applying *McDonnell Douglas*'s shifting burdens of production in the context of a motion for summary [adjudication], 'the judge [will] determine whether the litigants have created an issue of fact to be decided by the jury.'" … Thus, "'[a]lthough the burden of proof in a [discrimination] action claiming an unjustifiable [termination] ultimately rests with the plaintiff … , in the case of a motion for summary … adjudication, the burden rests with the moving party to negate the plaintiff's right to prevail on a particular issue.'""" (*Arteaga*, at p. 344, second italics added.) "[F]rom commencement to conclusion, the party moving for summary [adjudication] bears the burden of persuasion that there is no triable issue of material fact and that [it] is entitled to judgment as a matter of law." (*Aguilar*, *supra*, 25 Cal.4th at p. 850.)

Whether judgment as a matter of law is appropriate will depend on a number of factors, including the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case. (*Guz*, *supra*, 24 Cal.4th at p. 362.) However, many employment cases present issues of intent and motive, issues not determinable on paper. Such cases "*are rarely appropriate for disposition on summary judgment*, however liberalized [summary judgment standards may] be." (*Nazir v.*

United Airlines, Inc. (2009) 178 Cal.App.4th 243, 286 [100 Cal. Rptr. 3d 296], italics added.)

Additional standards apply in disability discrimination cases. (*Wallace v. County of Stanislaus* (2016) 245 Cal.App.4th 109, 122–128 [199 Cal. Rptr. 3d 462] (*Wallace*).) "Although the same statutory language that prohibits disability discrimination also prohibits discrimination based on race, age, sex, and other factors," disability discrimination claims are "fundamentally different from the discrimination claims based on the other factors listed in section 12940, subdivision (a). These differences arise because (1) additional statutory provisions apply to disability discrimination claims, (2) the Legislature made separate findings and declarations about protections given to disabled persons, and (3) discrimination cases involving race, religion, national origin, age and sex, often involve pretexts for the adverse employment action—an issue about motivation that appears less frequently in disability discrimination cases." (*Id*. at p. 122.) The *Wallace* court noted that the Legislature made "substantial changes to the disability discrimination provisions of the Unruh Civil Rights Act (Civ. Code, § 51 et seq.) and the FEHA" in 2000 and held that while "an employer's honest but mistaken belief in legitimate reasons for an adverse employment action can preclude liability in other discrimination contexts, such as race, age or sex" (*id*. at p. 124), the statutory changes "'provide protection when an individual is erroneously or mistakenly believed to have any physical or mental condition that limits a major life activity.'" (*Wallace*, at p. 124, quoting § 12926.1, subd. (d).)

The *Wallace* court held that the trial court erred in instructing the jury that animus or ill will was required to prove discriminatory intent in a disability discrimination case. "California law does not require an employee with an actual or perceived disability to prove that the employer's adverse employment action was motivated by animosity or ill will against the employee. Instead, California's statutory scheme protects employees from an employer's erroneous or mistaken beliefs about the employee's physical condition (§ 12926.1, subd. (d).)" (*Wallace*, *supra*, 245 Cal.App.4th at p. 115.) "In short, the Legislature decided that the financial consequences of an employer's mistaken belief that an employee is unable to safely perform a job's essential functions should be borne by the employer, not the employee, even if the employer's mistake was reasonable and made in good faith." (*Ibid*.)

(*Zamora*, *supra*, 71 Cal.App.5th at pp. 31-33.)

First cause of action for disability discrimination

"[A] prima facie case of disability discrimination [is established] by showing that she "(1) suffered from a disability or was regarded as suffering from a disability, (2) could perform the essential duties of a job with or without reasonable accommodations, and (3) was subjected to an adverse employment action because of the disability or perceived disability." (*Price v. Victor Valley Union High School Dist.* (2022) 85 Cal.App.5th 231, 239; see also *Wills v. Super. Ct*. (2011) 195 Cal.App.4th 143, 159-160 (stating that "[o]n a disability discrimination claim, the prima facie case requires the plaintiff to show 'he or she (1) suffered from a disability, or was regarded as suffering from a disability; (2) could perform the essential duties of the job with or without reasonable accommodations, and (3) was subjected to an adverse employment action because of the disability or perceived disability'"); see also *Kaur v. Foster Poultry Farms LLC* (2022) 83 Cal.App.5th 320, 344 (stating that "[t]o establish discrimination under section 12940(a), an employee must show that he or she (1) suffered from a disability, (2) could perform the essential duties of the job with or without reasonable accommodation, and (3) was subjected to an adverse employment action because of the disability").)

<u>There is a triable issue as to whether Plaintiff could perform the essential duties of his position.</u>

District argues that "[f]ieldwork was essential to Weigand's job because the Watersheds unit's field operations needed to be audited for EH&S compliance to ensure workers' safety" and that Dr. Post, the QME, understood that Plaintiff's "job [was] very physically demanding" and concluded that Plaintiff might need to find "a less physically demanding job." (Def.'s memo, pp.14:21-28, 15:1-3.) District asserts that it "reasonably relied on Dr. Post's conclusion that these restriction were permanent [citation], since he was the only doctor who reviewed the full scope of Weigand's various injuries and treatment history…." (*Id*. at pp.15:17-20, 16:1-5.)

> Government Code section 12926, subdivision (f)(2) states that:
>
> > Evidence of whether a particular function is essential includes, but is not limited to, the following:
> >
> > (A) The employer's judgment as to which functions are essential.
> >
> > (B) Written job descriptions prepared before advertising or interviewing applicants for the job.
> >
> > (C) The amount of time spent on the job performing the function.
> >
> > (D) The consequences of not requiring the incumbent to perform the function.
> >
> > (E) The terms of a collective bargaining agreement.
> >
> > (F) The work experiences of past incumbents in the job.
> >
> > (G) The current work experience of incumbents in similar jobs.

(Gov. Code, § 12926, subd. (f)(2).)

"Because the determination of essential job functions is a 'highly fact-specific inquiry,' it is usually an issue of fact for the jury to decide." (Price, supra, 85 Cal.App.5th at p.242, citing *Lui v. City and County of San Francisco* (2012) 211 Cal.App.4th 962, 971 (stating that "[t]he identification of essential job functions is a 'highly fact-specific inquiry'"); see also

Hastings v. Department of Corrections (2003) 110 Cal.App.4th 963, 967, fn. 6 (stating that "the essential functions of a job are a question of fact").)

Here, District presents the declaration of Larry Lopez who states that walking on uneven terrain, carrying heavy equipment and typing were essential duties of Plaintiff's position as the EH&S Program Administrator. (See Lopez decl. in support of District's motion for summary judgment, ¶ 4.) Lopez also states that Plaintiff "routinely visited reservoirs, spillways, creeks, ponds and other locations in the field to install and inspect safety equipment, test for contaminants, and perform other physically demanding tasks… worked in box culverts and other confined spaces, ascended and descended the faces of dams, and climbed on riprap (large pieces of concrete or rock used to shore up embankments)… [and a]ll of this work was essential to Mr. Weigand's role." (*Id*. at ¶ 6.) That said, Lopez admits that "District's written job description for the role of 'Program Administrator' did not include all of these duties… [however, Lopez] never believed the 'Program Administrator' job description captured all the work that employees performed in the EH&S unit." (*Id*. at ¶ 7.) Here, while Lopez's declaration is supporting evidence of the "employer's judgment as to which functions are essential" (see Gov. Code, § 12926, subd. (f)(2)(A)), Lopez's admission that the written job description does not include certain asserted essential duties itself demonstrates the existence of a triable issue of material fact. (See Gov. Code, § 12926, subd. (f)(2)(B).)

Furthermore, District presents Plaintiff's deposition testimony in which he states that he initially started with District as a Program Administrator; however, Plaintiff was also promoted to a Supervisor Program Administrator in which he had "two new direct reports to perform the physically strenuous field functions that [Plaintiff] had been performing." (Bond decl. in support of motion for summary judgment ("Bond decl."), exh. A ("Pl. depo"), pp.32:11-25, 33:1-21.) District also presents Plaintiff's deposition before the Workers Compensation Appeals Board in which he likewise testifies that "[s]ubsequent to the promotion about a year ago, [Plaintiff's] job duties changed… [in that he now] spends more time in the office writing documents, editing documents, attending meetings, directing [his] new staff." (D'Andre decl. in support of motion for summary judgment ("D'Andre decl."), exh. A ("WC depo"), p.40:2-7.) Plaintiff also testified that "in terms of the physical work that [Plaintiff] continue[d] to do in the field… some of those… types of duties… are off [Plaintiff's] plate completely… [such as] sediment sampling, carrying heavy bags of fall protection equipment, installing protective systems in excavations, carrying heavy… 20 foot lengths of half-inch steel chain and chain binders." (WC depo, p.41:1-19.) District also presents Plaintiff's deposition testimony in which Plaintiff confirmed that the essential functions of the supervising program administrator in the environmental, health and safety unit "[n]o longer… require[d]… going out in the field, walking on uneven terrain, doing---performing various physical tasks." (Bond decl., exh. A, pp.405:22-25, 406:1-22.) When District's attorney asked Plaintiff to explain that statement, Plaintiff responded that those duties were no longer essential functions "[b]ecause we had hired two direct reports for me to go out and perform the fieldwork while I could perform higher-level work in the office." (*Id*. at pp.406:23-25, 407:1-2.) District's attorney then responded that she "underst[oo]d that that hiring was a form of accommodation… so that [Plaintiff] didn't have to do a lot of the fieldwork," which Plaintiff confirmed. (*Id*. at p.407:4-11.) However, "[a] 'reasonable accommodation' is 'a modification or adjustment to the workplace that enables the employee to perform the essential functions of the job held or desired.'" (*Shirvanyan v. Los Angeles Community College Dist.* (2020) 59 Cal.App.5th 82, 88, quoting *Furtado v. State Personnel Bd.* (2013) 212 Cal.App.4th 729, 745.) Thus, District *itself* presents at least a triable issue of material fact as to the essential functions of the position since it

provided a reasonable accommodation by hiring two direct reports so that those reports could do the fieldwork while enabling Plaintiff to perform the essential functions of the job held. As there is a triable issue as to the essential functions of the position, the motion for summary adjudication cannot be granted on this basis.

District fails to meet its initial burden as to the nonexistence of an adverse employment action

District argues that the first cause of action lacks merit because Plaintiff did not suffer an adverse employment action because it did not unilaterally change Plaintiff's job classification because there is no evidence that District conducted the classification and compensation study for the purpose of frustrating Plaintiff's return to work efforts, subvert his accommodation requests and ultimately force him out of a job, and District did not subject Plaintiff to constructive discharge because Plaintiff voluntarily resigned. (See Def.'s memo, pp.16:13-24, 17:1-12.)

In support of its assertion that it did not unilaterally change Plaintiff's job classification, District presents the following material facts: the proposed change to Plaintiff's job title and classification description reflected his actual and existing essential duties based on the classification study (see Def.'s separate statement of undisputed material facts, no. ("UMF") 64), the proposed change to Plaintiff's job title and classification as not related to Plaintiff's injuries (see UMF 65), Plaintiff served as a Program Administrator (either with or without supervisor duties) throughout his employment with District (see UMF 66); the District did not force Plaintiff to perform work outside of his usual role (see UMF 67); and, Plaintiff asserted that he would not accept any other job at the District (see UMF 68). Here, District cites to no evidence to support its material fact that it did not force Plaintiff to perform work outside of his usual role. (See UMF 67 (citing to no evidence, stating that "[t]his assertion is based on the absence of evidence to support an element of Plaintiff's claim").) As the moving defendant, District "must 'present evidence … and not simply point out that the plaintiff does not possess, and cannot reasonably obtain, needed evidence.'" (*A.G. v. County of Los Angeles* (2018) 28 Cal.App.5th 373, 376; see also *Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 854 (stating that "[s]ummary judgment law in this state, however, continues to require a defendant moving for summary judgment to present evidence, and not simply point out that the plaintiff does not possess, and cannot reasonably obtain, needed evidence").) Accordingly, as it fails to support its argument that it did not unilaterally change Plaintiff's job classification, the District fails to meet its initial burden to demonstrate that the first cause of action lacks merit because Plaintiff did not suffer an adverse employment action. The motion for summary adjudication cannot be granted on this basis.

Moreover, even if District had met its initial burden, there are triable issues of material fact as to what the essential functions of the job are (see evidence cited by Pl.'s opposing separate statement of undisputed material facts, no. 64), whether the proposed changes to Plaintiff's job title and classification were related to his injuries (see evidence cited by Pl.'s opposing separate statement of undisputed material facts, no. 65), whether Plaintiff would have accepted a transfer to a different job at the same level or a promotion (see evidence cited by Pl.'s opposing separate statement of undisputed material facts, no. 68), and whether Plaintiff voluntarily resigned to accept a promotional opportunity in the private sector or was constructively terminated (see evidence cited by Pl.'s opposing separate statement of undisputed material facts, no. 69). Plaintiff presents evidence of District withholding total temporary disability benefits from Plaintiff even though Plaintiff provided paperwork from his

doctors indicating that Plaintiff was, in fact, totally and temporarily disabled. (See Randhawa depo, p.195:15-25, 196:1-9.) Although not addressed by District, it would appear that District's actions that resulted in the deprivation of his TTD payments or the extension of his unpaid leave itself materially affects the terms or privileges of employment, thereby constituting an adverse employment action. (See *Doe v. Department of Corrections & Rehabilitation* (2019) 43 Cal.App.5th 721, 734 (stating that "[a]n 'adverse employment action' is one that 'materially affects the terms, conditions, or privileges of employment'"); see also *Bostean v. Los Angeles Unified School Dist*. (1998) 63 Cal.App.4th 95, 110 (stating that "District's action in placing Bostean on involuntary illness leave of absence without pay deprived Bostean of seven months' salary, and was tantamount to a suspension without pay"); see also *Dickinson v. Labor Servs. Co.* (S.D.Ind. Sep. 1, 2006, No. 1:04-cv-1513-SEB-JLP) 2006 U.S.Dist.LEXIS 62780, at *14 (termination of TTD benefits is an adverse employment action); see also *Smith v. Dillard Dep't Stores, Inc*. (2000) 139 Ohio App.3d 525, 531 (termination of TTD based on "return to work slip" which indicated that plaintiff could return to work under severe restrictions was an "adverse employment action").) Regardless, even if District had met its initial burden, as stated, there is also a triable issue of material fact as to whether Plaintiff voluntarily resigned or whether conditions were intolerable that he could no longer work there. (See evidence cited by Pl.'s opposing separate statement of undisputed material facts, no. 69.) While District strongly asserts that Plaintiff cannot establish that District subjected him to constructive discharge because Plaintiff's March 26, 2018 resignation letter does not mention any intolerable change in employment conditions, "on summary judgment, in ruling on a motion for summary judgment, 'the court may not weigh the plaintiff's evidence or inferences against the defendants' as though it were sitting as the trier of fact." (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 540.)

<u>There is a triable issue as to whether any adverse employment action regarding Plaintiff was based upon legitimate, nondiscriminatory business reasons.</u>

In support of its argument that District had legitimate business reasons for all its actions and decisions with respect to Plaintiff and that Plaintiff cannot overcome those reasons with evidence of pretext for a discriminatory motive, District presents three material facts: that District employees involved with Plaintiff's reasonable accommodation process were concerned about Plaintiff reinjuring himself (UMF 70); District reasonably relied on Dr. Post's conclusion that all of Plaintiff's restrictions were permanent since Dr. Post as the QME was the only doctor who reviewed the full scope of Plaintiff's various injuries and treatment history (UMF 71); and, District tried in good faith to accommodate Plaintiff's disability (UMF 72). District meets its initial burden to demonstrate that any adverse employment action was based upon legitimate, nondiscriminatory business reasons.

In opposition, Plaintiff notes that in *Wallace v. County of Stanislaus* (2016) 245 Cal.App.4th 109, the defendant county claimed that "the employee was removed from his job because of an inability to perform the job safely." (*Id*. at p.132.) The *Wallace* court reversed a judgment after a jury trial, noting that the County's argument that it "was acting according to legitimate, non-discriminatory business interests and a desire to diligently follow the law… [and] placing Wallace on leave was 'the most reasonable accommodation under the circumstances, motivated by a desire to follow the law as it relates to reasonably accommodating employees with disabilities, and to protect the health and safety of Wallace, his coworkers, and the community he served'" was "[i]n reality… arguing that it had legitimate reasons for treating Wallace differently (i.e., discriminating against him) by placing him on

leave." (*Id*. at p.133.) However, "[t]he Legislature has declared that the FEHA is intended to protect employees 'from discrimination due to an actual or perceived physical or mental impairment'… [and] intended to 'provide protection when an individual is *erroneously or mistakenly believed* to have any physical or mental condition that limits a major life activity.'" (*Id*. at p. 134 (italics original), quoting Gov. Code § 12926.1, subds. (b) and (d); see also *Wallace*, *supra*, 245 Cal.App.4th at p.115 (stating "[i]n short, the Legislature decided that the financial consequences of an employer's mistaken belief that an employee is unable to safely perform a job's essential functions should be borne by the employer, not the employee, even if the employer's mistake was reasonable and made in good faith").) "Under California law, '[w]hen an employee can work with a reasonable accommodation other than a leave of absence, an employer may not require that the employee take a leave of absence.'" (*Id*.) Here, District is likewise arguing that Plaintiff was subjected to decisions such as being put on leave without pay because District employees involved with Plaintiff's reasonable accommodation process were concerned about Plaintiff reinjuring himself. As Plaintiff argues, if District is incorrect regarding whether Plaintiff could have worked with a reasonable accommodation, because the FEHA is intended to protect employees when they are erroneously or mistakenly believed to have a physical condition that limits a major life activity, then District's actions would be considered as discriminatory. District, in reply, does not address *Wallace*. Nevertheless, Plaintiff presents evidence that: Plaintiff was able to perform the essential functions of his position, and District could have made accommodations that would allow him to return to work and yet District refused to let him return to work. (See evidence cited by Pl.'s opposing separate statement of undisputed material facts, nos. 70-72.) Accordingly, there is a triable issue of material fact as to whether any adverse employment action regarding Plaintiff was based upon legitimate, nondiscriminatory business reasons.

The motion for summary judgment, and the motion for summary adjudication of the first cause of action is DENIED.

Second cause of action for retaliation

District argues that the second cause of action for retaliation lacks merit because Plaintiff "has not alleged the sort of protected conduct actionable under section 12940(h)… suffered no cognizable adverse employment action, as discussed above in the context of his discrimination claim… [and] even if [Plaintiff] could identify protected activity and an adverse action, he cannot show causation." (Def.'s memo, p.19:1-15.)

As to the latter two arguments, District argues that the facts and reasons supporting these arguments are identical to those discussed with regards to the disability discrimination cause of action. (See Def.'s memo, p.19:5-15 (stating that "[e]ven if Weigand had engaged in protected activity within the meaning of the statute, he suffered no cognizable adverse employment action, as discussed above in the context of his discrimination claim… "[t]he City's [presumably District's] legitimate non-discriminatory reasons for its actions are the same as its legitimate non-retaliatory reasons and Weigand cannot rebut those reasons with evidence of pretext").) For identical reasons as to the first cause of action then, District fails to meet its initial burden as to the nonexistence of an adverse employment action and there is a triable issue of material fact as to whether any adverse employment action regarding Plaintiff was based upon legitimate, non-retaliatory business reasons.

As to whether Plaintiff alleged actionable protected conduct, District acknowledges that the second cause of action is based in part "on requesting accommodations and participating

(sporadically) in the District's interactive process," and contends that this does not constitute "the sort of protected conduct actionable under section 12940(h)." (Def.'s memo, p.19:1-5, citing *Nealy v. City of Santa Monica* (2015) 234 Cal.App.4th 359, 381 (stating that "protected activity does not include a mere request for reasonable accommodation").) However, soon after *Nealy*, the Legislature amended the FEHA so as to specifically include requests for accommodation as protected activity. (See Gov. Code § 12940, subd. (m)(2) (stating that "[i]t is an unlawful employment practice… [f]or an employer or other entity covered by this part to, in addition to the employee protections provided pursuant to subdivision (h), retaliate or otherwise discriminate against a person for requesting accommodation under this subdivision, regardless of whether the request was granted").) District's argument is without merit and District, in reply does not make any argument as to whether Plaintiff fails to allege actionable protected conduct.

District's motion for summary adjudication of the second cause of action for retaliation in violation of FEHA is DENIED.

Third cause of action for failure to provide a reasonable accommodation

District argues that the third cause of action for failure to accommodate lacks merit because: Plaintiff cannot prove that he could perform his essential duties as physically demanding fieldwork was an essential duty of Plaintiff's position; Plaintiff has not identified any reasonable accommodation that includes fieldwork after he went on leave in May 2016; the voice-to-text software has no bearing on his fieldwork and is thus not relevant to whether he was qualified to perform his essential duties; and, Plaintiff rejected temporary work consistent with his restrictions. (See Def.'s memo, pp.20:13-28, 21:1-28.) District's arguments all depend on its own asserted essential functions of Plaintiff's position. However, for identical reasons as stated in the first cause of action, District *itself* presents at least a triable issue of material fact as to the essential functions of the position. (See Lopez decl. in support of District's motion for summary judgment, ¶ 7 (admitting that "District's written job description for the role of 'Program Administrator' did not include all of these duties"); see also Gov. Code, § 12926, subd. (f)(2)(B); see also Bond decl., exh A, pp.32:11-25, 33:1-21 (stating that Plaintiff was promoted to a Supervisor Program Administrator in which he had "two new direct reports to perform the physically strenuous field functions that [Plaintiff] had been performing"); see also D'Andre decl., exh. A, p.40:2-7 (stating that "[s]ubsequent to the promotion about a year ago, [Plaintiff's] job duties changed… [in that he now] spends more time in the office writing documents, editing documents, attending meetings, directing [his] new staff"); see also D'Andre decl., exh. A, p.41:1-19 (stating that "in terms of the physical work that [Plaintiff] continue[d] to do in the field… some of those… types of duties… are off [Plaintiff's] plate completely… [such as] sediment sampling, carrying heavy bags of fall protection equipment, installing protective systems in excavations, carrying heavy… 20 foot lengths of half-inch steel chain and chain binders"); see also Bond decl., exh. A, pp.405:22-25, 406:1-22 (stating that the essential functions of the supervising program administrator in the environmental, health and safety unit "[n]o longer… require[d]… going out in the field, walking on uneven terrain, doing---performing various physical tasks"); see also Bond decl., exh. A, p.407:4-11 (District's attorney stating that she "underst[oo]d that that hiring [of two direct reports] was a form of accommodation… so that [Plaintiff] didn't have to do a lot of the

fieldwork"); see also *Shirvanyan v. Los Angeles Community College Dist.* (2020) 59 Cal.App.5th 82, 88 (stating that "[a] 'reasonable accommodation' is 'a modification or adjustment to the workplace that enables the employee to perform the essential functions of the job held or desired'").) As there is a triable issue as to the essential functions of the position, District's motion for summary adjudication of the third cause of action is DENIED.

Fourth cause of action for failure to engage in a timely, good faith interactive process in violation of FEHA

District first argues that the fourth cause of action lacks merit because no reasonable accommodation was available that would have allowed Plaintiff to perform the essential duties of his job. (See Def.'s memo, p.22:3-8.) As stated above, the parties dispute the essential functions of Plaintiff's job and District *itself* presents at least a triable issue of material fact as to the essential functions of the position. (See Lopez decl. in support of District's motion for summary judgment, ¶ 7 (admitting that "District's written job description for the role of 'Program Administrator' did not include all of these duties"); see also Gov. Code, § 12926, subd. (f)(2)(B); see also Bond decl., exh A, pp.32:11-25, 33:1-21 (stating that Plaintiff was promoted to a Supervisor Program Administrator in which he had "two new direct reports to perform the physically strenuous field functions that [Plaintiff] had been performing"); see also D'Andre decl., exh. A, p.40:2-7 (stating that "[s]ubsequent to the promotion about a year ago, [Plaintiff's] job duties changed… [in that he now] spends more time in the office writing documents, editing documents, attending meetings, directing [his] new staff"); see also D'Andre decl., exh. A, p.41:1-19 (stating that "in terms of the physical work that [Plaintiff] continue[d] to do in the field… some of those… types of duties… are off [Plaintiff's] plate completely… [such as] sediment sampling, carrying heavy bags of fall protection equipment, installing protective systems in excavations, carrying heavy… 20 foot lengths of half-inch steel chain and chain binders"); see also Bond decl., exh. A, pp.405:22-25, 406:1-22 (stating that the essential functions of the supervising program administrator in the environmental, health and safety unit "[n]o longer… require[d]… going out in the field, walking on uneven terrain, doing---performing various physical tasks"); see also Bond decl., exh. A, p.407:4-11 (District's attorney stating that she "underst[oo]d that that hiring [of two direct reports] was a form of accommodation… so that [Plaintiff] didn't have to do a lot of the fieldwork"); see also *Shirvanyan v. Los Angeles Community College Dist.* (2020) 59 Cal.App.5th 82, 88 (stating that "[a] 'reasonable accommodation' is 'a modification or adjustment to the workplace that enables the employee to perform the essential functions of the job held or desired'").) As there is a triable issue as to the essential functions of the position, this cannot be a basis to grant the motion as to the fourth cause of action.

District also argues that the fourth cause of action lacks merit because District engaged in a good faith interactive process and Plaintiff was responsible for the breakdown of the interactive process because District engaged with Plaintiff and addressed his concerns, Plaintiff issued ultimatums rather than seeking to negotiate, Plaintiff consistently delayed and avoided providing necessary information. (See Def.'s memo, pp.22:9-28, 23:1-12.) As a preliminary matter, District's separate statement of material facts is insufficient. California Rule of Court 3.1350, subdivision (d) states that "[t]he Separate Statement of Undisputed Material Facts in support of a motion must separately identify: (A) Each cause of action… that is the subject of the motion; and (B) Each supporting material fact claimed to be without dispute with respect to the cause of action… that is the subject of the motion." (Cal. Rule of Court 3.1350, subd.

(d)(1).) Here, in identifying each supporting material fact claimed to be without dispute as to the fourth cause of action, District's separate statement states:

> Since the facts relevant to Plaintiff's interactive process claim are closely intertwined with his discrimination claim and failure-to-accommodate claim, Defendant hereby incorporates facts 1 through 147 as though fully set forth herein.

Clearly, this does not separately identify each supporting material fact claimed to be without dispute with respect to the fourth cause of action. This makes it virtually impossible to determine what facts District is setting forth as relevant to the fourth cause of action and to determine which facts are disputed. Accordingly, the motion for summary adjudication of the fourth cause of action is DENIED on this basis.

Moreover, even if the Court were to attempt to review each of the 147 facts despite Rule of Court 3.1350, subdivision (d)(2)'s statement that "[t]he separate statement should include only material facts and not any facts that are not pertinent to the disposition of the motion," there are triable issues of material fact. With respect to the assertion that Plaintiff rejected the temporary accommodation offer in late 2016 because he considered the reception desk position embarrassing and he did not like the manager for the position, District also submits Plaintiff's deposition testimony in which he testifies that he rejected the temporary accommodation offer in late 2016 because it was a demotion and the duties violated his restrictions. (See Bond decl., exh. A, pp.200:12-25, 201:1-25, 202:1-24, 210:6-19.) With respect to Plaintiff's consistent delay and avoidance of providing necessary information, District also presents a portion of Plaintiff's deposition testimony indicating that *District* was failing to timely engage in the interactive process. (*Id*. at pp.196:24-25, 197:1-4.) With respect to the purported delay in providing requested updated forms, District presented Plaintiff's deposition testimony indicating that Plaintiff already provided District with the information it was seeking and was thus not delaying in providing updated forms. (*Id*. at pp.226:11-25, 227:1-5.) Plaintiff has also presented evidence in opposition to demonstrate the existence of a triable issue of material fact. (See evidence cited by Pl.'s opposing separate statement of undisputed material facts, nos. 28, 32-37, 58, 59, 72, 112; see also Lopez depo, pp.84:9-25, 85:1-24; see also Chin depo, pp.148:18-20, 152:14-25, 153:1-6, 180:24-25, 181:1-25, 182:1-17, 270:21-25, 271:1-10, 394:18-25, 395:1-11; see also exhs. 27, 28, 32, 34, 37, 45, 86, 88, 89, 92, 95.) Thus, even if District had met its initial burden, there are triable issues of material fact with regards to the fourth cause of action. The motion for summary adjudication of the fourth cause of action is DENIED.

Fifth cause of action for failure to prevent harassment, discrimination and retaliation

As to the fifth cause of action for failure to prevent harassment, discrimination and retaliation, District notes that "[a] failure to prevent discrimination claim is a derivative claim." (Def.'s memo, p.23:13-16.) Indeed, for reasons already stated, there are triable issues of material fact as to the alleged discrimination and retaliation. As to the issue of harassment, District may not move for summary adjudication of a portion of a cause of action absent fulfilling the requirements of Code of Civil Procedure section 437c, subdivision (t). (See Code Civ. Proc. § 437c, subds. (f)(1) (stating that "[a] motion for summary adjudication shall be granted only if it completely disposes of a cause of action"), (t).) Accordingly, the motion for summary adjudication of the fifth cause of action is DENIED.

Sixth cause of action for retaliation in violation of Labor Code section 1102.5

District argues that the sixth cause of action for violation of Labor Code section 1102.5 lacks merit because Plaintiff did not engage in protected activity within the meaning of Labor Code section 1102.5 and Plaintiff did not suffer any adverse employment action.

As to the nonexistence of an adverse employment action, District argues that "an 'adverse employment action' for the purpose of section 1102.5 has the same meaning as under FEHA… [and f]or the same reasons discussed above in the context of Weigand's FEHA claims, the lack of any such adverse action also disposes of this claim." (Def.'s memo, p.24:17-18.) However, as stated above, District fails to meet its initial burden with respect to the nonexistence of an adverse employment action and this argument likewise cannot be a basis to grant the motion as to the sixth cause of action.

As to whether Plaintiff engaged in protected activity, Labor Code section 1102.5, subdivision (b) states: "An employer, or any person acting on behalf of the employer, shall not retaliate against an employee for disclosing information, or because the employer believes that the employee disclosed or may disclose information, to a government or law enforcement agency, to a person with authority over the employee or another employee who has the authority to investigate, discover, or correct the violation or noncompliance, or for providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry, if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation, regardless of whether disclosing the information is part of the employee's job duties." (Lab. Code § 1102.5, subd. (b).) Here, Plaintiff contends that his opposing the District's failure to accommodate him, complaining to the District about its repeated delays to return him to work and bad faith in engaging in the interactive process and indicating that Plaintiff would take legal action against the District given their failure to accommodate. Indeed, District presents the deposition testimony of Annie Chin who states that she received an August 25, 2017 email from Plaintiff regarding his displeasure in handling his requests for accommodations that stated that "[t]he district can continue to play games with my life, but I will not accept anything less than the position that I held before going out on medical leave and anything less will have to be resolved in a lawsuit." (Bond decl., exh,. F ("Chin depo"), pp.105:8-25, 106:1-25, 107:1-25, 108:1-25, 109:1-25, 110:1-19.) This statement does demonstrate the existence of a triable issue of material fact as to whether Plaintiff engaged in protected activity.

Accordingly, District's motion for summary adjudication of the sixth cause of action is DENIED.

District's objections to the declaration of Thomas Gilliam, numbers 13-17 are OVERRULED.

District's objections to the declaration of Plaintiff, numbers 1-12 are also OVERRULED.

CONCLUSION

District's motion for summary judgment, and alternative motion for summary adjudication of the first through sixth causes of action are DENIED in their entirety.

District's objections to the declaration of Plaintiff, numbers 1-12 are also OVERRULED.

District's objections to the declaration of Thomas Gilliam, numbers 13-17 are OVERRULED.

the sixth cause of action for violation of Labor Code section 1102.5 lacks merit because Plaintiff did not engage in protected activity within the meaning of Labor Code section 1102.5; the sixth cause of action for violation of Labor Code section 1102.5 lacks merit because Plaintiff did not suffer any adverse employment action; the sixth cause of action for violation of Labor Code section 1102.5 lacks merit because Plaintiff cannot demonstrate any casual connection between any alleged protected activity and any alleged adverse employment action; and, the sixth cause of action for violation of Labor Code section 1102.5 lacks merit because District would have taken the same actions for legitimate independent reasons even if Plaintiff had not engaged in protected activity.

The Court shall prepare the Order.

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Calendar Line 3
Case Name: Anupam Sahai v. Aegify, Inc.
Case No.: 18CV327834

Plaintiff moves for leave to file a Fourth Amended Complaint. Defendants oppose the motion, claiming prejudice both from Plaintiff's addition of allegations that Defendant Bilugu is personally liable, under Labor Code § 558.1, and from new claims of minimum wage or overtime wage allegations under § 1194. Plaintiff asserts there is no prejudice for two reasons: (1) Plaintiff makes no claims under § 1194 and any reference to that statute was "inadvertent" and can be deleted from the Fourth Amended Complaint (Reply, pp2-3); (2) § 558.1 is a remedy that applies automatically when an employer violates § 203, such that it need not be pled as a stand alone action (Reply, p3); and (3) Defendants have been aware all along, and, at the least since January 2023, that Plaintiff is claiming that Defendant Bilugu is personally liable.

"The trial court has discretion to allow amendments to the pleadings 'in the furtherance of justice.' (Code Civ. Proc., § 473.) This discretion should be exercised liberally in favor of amendments." *Kittredge Sports Co. v. Superior Court* (1989) 213 Cal. App. 3d 1045, 1047. But leave should only be granted where "no prejudice is shown to the adverse party. …' [Citation.]" *Magpali v. Farmers Group, Inc*. (1996) 48 Cal.App.4th 471, 487. A change in legal theory and the fact that the proposed amendment may state a different cause of action "is irrelevant under *Austin, Garrett, Grudt* and *Smeltzley*. Instead, the test is whether the two pleadings relate to the same general set of facts." *Hirsa v. Superior Court* (1981) 118 Cal. App. 3d 486, 489.

The first new amendment is a new Second Cause of Action for failure to pay wages under Labor Code Section 201. Plaintiff asserts that a claim for failure to pay wages, and the facts associated with such a claim, have been pled in every prior iteration of the complaint. Defendant's objection to this amendment is that it alleges for the first time minimum wage or overtime wage violations in violation of Labor Code § 1194. In reply, Plaintiff states this was inadvertent and offers to take out all references to § 1194. The Court agrees that Plaintiff's claim of unpaid wages under § 201 is not new and that amending the complaint to add the new Second of Cause of Action would cause no prejudice to Defendant. As such, Plaintiff is allowed to amend the complaint to add this action, so long as all references to § 1194 are removed. Therefore, the following language must be removed from ¶ 52: "including but not limited to, Labor Code section 1194 and wage orders requiring employers to pay employees minimum/appropriate wages;" and the following language must be removed from ¶53: "California Labor Code § 1194(a)." Any other references to § 1194 or to minimum wage violations in the Fourth Amended Complaint must be deleted.

Plaintiff also seeks to add a new Fourth Cause of Action against Defendant Bilugu as a standalone cause of action for violations of Labor Code section 558.1. See Proposed Fourth Amended Complaint at ¶¶ 65-79 (Exh. A to Declaration of Shah). Defendants claim that this claim would prejudice them, as there were no facts previously alleged to put Defendants on notice of potential liability under Labor Code § 558.1 or that it was Defendant Bilugu who caused the labor code violations. Defendants claim they were deprived of the ability to depose Plaintiff on this issue or to issue written discovery on Plaintiff seeking the basis for this claim.

"To be held liable under section 558.1, an 'owner' . . . must either have been personally involved in the purported violation of one or more of the enumerated provisions; or,

absent such personal involvement, had sufficient participation in the activities of the employer, including, for example, over those responsible for the alleged wage and hour violations, such that the 'owner' may be deemed to have contributed to, and thus for purposes of this statute, 'cause[d]' a violation." *Usher v. White* (2021) 64 Cal. App. 5th 883, 896-897.

Here, the breach of contract and failure to pay wages claims in the TAC were against all defendants, including Defendant Bilugu in his personal capacity. The facts alleged included that Bilugu was CEO, majority shareholder of Aegify, and Chairman of the Board (¶22 of TAC), that "Bilugu and Sahai again discussed that Aegify would need to temporarily defer Sahai's salary" (¶24 of TAC), that "Aegify, through Bilugu, represented that it intended to pay Sahai's Deferred Salary" (¶27 of TAC), that "Aefigy, through Bilugu, convinced Sahai that his true and full salary would be paid at a later date" (¶28 of TAC), and that "Bilugu engaged in a systematic campaign to dilute Sahai's equity interest in Aefigy and to fraudulently transfer Aegify's assets away from Aegify" (¶30 of TAC). The allegations do not, however, include specific facts demonstrating that Mr. Bilugu was personally involved in the failure to pay Plaintiff his wages or had participation in the activities of the employer to find him liable. As such, the new cause of action does assert new facts as to Mr. Bilugu's role in the failure to pay Plaintiff's wages. Given that Defendants did conduct any discovery on whether Mr. Bilugu was personally responsible for the labor code violations (Decl. of Paul Johnson, ¶2), the Court finds that the amendment would cause prejudice to Defendants.

The Court makes no ruling on whether it is true, as Plaintiff claims, that § 558.1 need not even be pled.

Plaintiff's motion is GRANTED in part as to the Second Cause of Action (with redactions as stated) and DENIED in part, as to the Fourth Cause of Action. Plaintiff shall submit the final order within 5 days and shall file the Fourth Amended Complaint within 5 days.

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