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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

PAUL McCORKENDALE, Plaintiff and Appellant, v. COUNTY OF LOS ANGELES, Defendant and Respondent.	B271173 (Los Angeles County Super. Ct. No. BC568577)

APPEAL from a judgment of the Superior Court of Los Angeles County. Susan Bryant-Deason, Judge. Affirmed.

Smaili & Associates, Jihad M. Smaili and Adam K. Obeid for Plaintiff and Appellant.

Peterson, Bradford, Burkwitz and Avi Burkwitz for Defendant and Respondent.

Plaintiff and appellant Paul McCorkendale appeals from the summary judgment entered in favor of his former employer, defendant and respondent County of Los Angeles, in his action for physical disability discrimination and related causes of action. We conclude: (1) there are no triable issues of material fact as to any of McCorkendale's claims; and (2) there was no prejudicial error in the trial court's decision not to continue the hearing on the motion for summary judgment. Accordingly, we affirm.

FACTS AND PROCEDURAL HISTORY

1. Temporary Employment with the County

The County of Los Angeles first hired McCorkendale in March 2009 as a temporary employee. The civil service rules governing County employment differentiate between permanent and temporary positions. Unlike a permanent employee with an indefinite term of service, a temporary or recurrent worker serves only for a set term. At the end of the term, the employment relationship expires. The County may also release temporary employees at any time prior to the term end date according to civil service rules.

McCorkendale worked as a temporary employee handling weed abatement from 2009 to 2014, serving five separate consecutive terms. Each year, McCorkendale signed a "Temporary Employee Notice" acknowledging that his employment could not exceed twelve continuous months and that he could be released from service at any time.

At the end of each term, McCorkendale was released from employment. The County routinely released McCorkendale from service prior to his term end date, ranging from a few days to a few weeks early. After a short break in service, the County rehired McCorkendale for a subsequent term. At no time was

McCorkendale employed as a permanent employee. This pattern of service, release, and rehire ended in 2014 when the County decided not to bring McCorkendale back after his term ended.

2. McCorkendale's County Employment from 2009 to 2013

McCorkendale worked in the position of temporary Senior Weed Abatement Worker in the Department of Agricultural Commissioner/Weights and Measures for the duration of his employment with the County. Throughout his five terms, McCorkendale's job duties included leading a weed clearance crew to clear properties of grass, weeds, and other debris, and inspecting properties for compliance with the Fire Code.

Several County employees managed McCorkendale within a chain of command. Mary Anne Nolan was his direct supervisor, and she reported to the Deputy Agricultural Commissioner.[1] Dan Papilli served as Deputy Agricultural Commissioner spanning McCorkendale's first term through part of his final term, at which point Aniko Pomjanek occupied that position. Commissioners Papilli and Pomjanek reported to Bureau Chief Ray Smith during all relevant times. Smith was in charge of the hiring and rehiring of permanent and temporary Senior Weed Abatement Workers, including McCorkendale. Smith based these decisions on the department's needs as well as the particular employee's performance over the previous year.

In 2009, the first year of his employment, McCorkendale suffered a work-related job injury. A worker's compensation case was opened for him. McCorkendale suffered another injury that year and was placed on work restrictions for approximately two

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[1] Nolan died while this action was pending; she was not deposed and did not submit any declarations.

weeks. In 2013, McCorkendale was off of work for approximately six weeks due to a hamstring injury. It is undisputed that the County accommodated each of McCorkendale's injuries, and there was no reduction in his job duties or pay when he returned from each injury.

3. McCorkendale's Final Term with the County

McCorkendale's final term with the County began on April 8, 2013 and was set to end on April 7, 2014. In September 2013, Deputy Commissioner Papilli retired and Pomjanek replaced him.

A. Vehicle Collision and Aftermath

On October 10, 2013, McCorkendale was injured in a motor vehicle accident while driving a County vehicle. Nolan, his direct supervisor, was a passenger in the vehicle and lost consciousness during the accident. That day, McCorkendale completed a County-required collision report, which included a drawn diagram and written narrative of the accident.

Four days later, McCorkendale filed a claim for worker's compensation benefits for injuries he sustained to his neck, back, chest, and shoulder during the accident. McCorkendale retained an attorney to pursue his worker's compensation case.

The County placed McCorkendale on work restrictions as of October 24, 2013. The County accommodated McCorkendale's injuries by providing modified duties consistent with his medical restrictions, and memorializing these modifications and restrictions in a series of Transitional Assignment Agreements. These work restrictions and modified duties continued for six months. The County also provided McCorkendale with medical leave pursuant to the Family and Medical Leave Act. The County compensated him for time spent at doctor's appointments.

On October 28, 2013, there was a dispute concerning McCorkendale's collision report that began when Pomjanek asked McCorkendale to make changes to his report. It is undisputed that Pomjanek sought specific modifications to the report, and it is undisputed that McCorkendale refused to make the changes. What is disputed is whether there was anything improper in Pomjanek's request or if, to the contrary, it was McCorkendale who was being unreasonable in refusing to make the changes.

Specifically, Pomjanek testified at deposition that McCorkendale wrote "a pretty good narrative, but he didn't use the same numbering system as he used for the diagram. I wanted him to refer back to his diagram by putting numbers for the vehicles in his narrative." Pomjanek also wanted McCorkendale to include in his narrative that the other vehicle hit the County vehicle at an angle, as it appeared in McCorkendale's drawn diagram. In contrast, McCorkendale testified that Pomjanek had directed him to change his report to match Nolan's, although he could not identify any specifics as to how. He refused to make any modifications to the report because the accident was no longer fresh in his mind and the instructions on the form had stated that it must be filled out within 24 hours of the accident.[2] He also testified that his attorney had instructed him not to fill out any accident-related forms without first conferring with him.

After McCorkendale refused to make the requested changes, Pomjanek reported his "rude and insubordinate"

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[2] In a subsequently-filed declaration, he explained his belief that any "substantive changes" to the report more than 24 hours after the accident would have constituted fraud.

behavior to Bureau Chief Smith. McCorkendale was not disciplined for this incident.

B. Other Work-Related Issues

On October 28, 2013, Pomjanek sent an e-mail to Nolan, stating, "This might be just a restatement of what you already know, but please document how [McCorkendale's] work restrictions were observed. Document his industrial work status, your instructions for him of what he could or could not do. Also, document what work he performed during his work restrictions. As you probably know, his work activities are modified and he is allowed to lift/carry/push/pull no more than 10 pounds. As of now, these restrictions are extended til November 7. Please let me know how can you accommodate these restrictions. Please keep your documentations low key and do not discuss that with [McCorkendale]. If you have questions, please let me know." (Paragraph indentions omitted.) McCorkendale would ultimately characterize this e-mail as an order that Nolan "single Plaintiff out, document everything against him, and to keep it 'low key,' in a clear effort to retaliate against him for having requested to speak to his attorney before making changes to his report."

McCorkendale testified that, in accordance with these instructions, his activities were monitored, in what he believed was an effort by management to find cause to terminate his employment. McCorkendale testified that he was questioned on a weekly basis about his whereabouts and activities, and that the County did not do this to any of its uninjured employees. He also detailed one occasion in which Pomjanek mistakenly thought McCorkendale was the driver of a speeding County vehicle, another when Pomjanek questioned his estimate of a clearance job only to find McCorkendale was correct, and another where

Pomjanek questioned why McCorkendale had stopped at a Jack in the Box restaurant during work hours.

McCorkendale also testified that Pomjanek made light of his disability by asking how he was doing in "a mocking sort of way, not really caring how [he] was by the way that she'd speak," and showing with "her body language" that she did not believe he was injured. He further testified that his direct supervisor Nolan and another coworker warned him that he was being "watched."

C. End of Employment

In addition to Pomjanek's complaint about McCorkendale's "rude and insubordinate behavior" arising out of his refusal to make changes to his accident report, Bureau Chief Smith stated in his declaration that Human Resources staff had previously reported to him that McCorkendale had been "rude and arrogant" in his interactions with them. McCorkendale was not disciplined for these incidents. Former Deputy Agricultural Commissioner Papilli declared that beginning in 2012, he noticed that McCorkendale was "difficult [to work with], stubborn, sarcastic and arrogant." Based on these personal observations, Papilli told Smith in early 2013 that he would not recommend hiring McCorkendale on a permanent basis if such a position were to become available.

The County released McCorkendale from employment on March 27, 2014, 11 days prior to his set term end date. The County did not extend McCorkendale an offer to return for a subsequent term. Bureau Chief Smith's declaration states that four other temporary employees were also released in March 2014, and only two were offered temporary positions for the following term. Although McCorkendale telephoned and asked if

he would be brought back, he did not formally reapply for this, or any other, position with the County.

4. McCorkendale's Complaint and Pretrial Proceedings.

McCorkendale filed his operative First Amended Complaint on June 5, 2015. McCorkendale alleged six causes of action, only three of which he continues to pursue on appeal: (1) disability discrimination under the Fair Employment and Housing Act ("FEHA"); (2) failure to prevent discrimination under FEHA; and (3) retaliation under Labor Code sections 6310, 6400 and 6402.[3]

5. Summary Judgment and Appeal

The County filed its motion for summary judgment on October 27, 2015. The County relied on declarations submitted by Deputy Commissioners Papilli and Pomjanek, Bureau Chief Smith, and deposition testimony of those individuals and McCorkendale to argue that there was no evidence of adverse employment action or retaliation. McCorkendale opposed the County's motion with his own declaration, a declaration by his counsel, and various exhibits.

Prior to opposing the County's motion for summary judgment, McCorkendale moved ex parte to shorten time to hear his upcoming motions to compel discovery compliance. As part of his summary judgment opposition, McCorkendale requested a continuance or denial of the County's summary judgment motion pursuant to Code of Civil Procedure section 437c, subdivision (h) [motion may be continued or denied if party shows justification for why evidence cannot be produced]. While the continuance

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[3] McCorkendale no longer pursues his causes of action for age discrimination under FEHA; refusal to accommodate disability; and wrongful termination in violation of FEHA.

request in McCorkendale's opposition to the summary judgment motion did not specifically identify any missing information, counsel's declaration in support implied that it was based on the County's failure to produce McCorkendale's performance reviews, and the declarations of other employees McCorkendale believed were present when Pomjanek asked him to change his accident report.

A hearing was held on the summary judgment motion on January 6, 2016. The court focused on the issue of whether there had been any adverse employment action cognizable under FEHA, and concluded that there had not. The court was not inclined to continue the summary judgment motion. On February 22, 2016, the trial court entered summary judgment in favor of the County. The court did not expressly deny McCorkendale's continuance request, but impliedly did so by granting the summary judgment motion.

McCorkendale filed a timely notice of appeal.

DISCUSSION

We first review the procedural issue of McCorkendale's request for a continuance. Finding no error, we will turn to the merits of the summary judgment motion.

1. No Prejudicial Error in the Denial of McCorkendale's Request for Continuance

McCorkendale contends that the trial court erred when it denied his request to continue the summary judgment hearing to enable him to conduct discovery. Specifically, McCorkendale had outstanding motions to compel certain responses from the County. We review this decision for abuse of discretion. (*Knapp v. Doherty* (2004) 123 Cal.App.4th 76, 100.)

Code of Civil Procedure section 437c, subdivision (h) mandates a trial court continue a summary judgment hearing where the opposing party submits an affidavit, in good faith, that states: (1) that the facts to be obtained are essential to opposing the motion; (2) that there is reason to believe such facts may exist; and (3) the reasons why additional time is needed to obtain these facts. (*Cooksey v. Alexakis* (2004) 123 Cal.App.4th 246, 253-254.) Specifically, the declaration must establish why the discovery sought could not have been completed sooner. (*Id*. at pp. 255-257.) If the requesting party does not submit an affidavit, or if the affidavit does not conform to the statutory requirements, then the trial court is no longer required to grant the continuance. (*Park v. First American Title Co.* (2011) 201 Cal.App.4th 1418, 1428.) At that point, it falls within the court's discretion to "determine whether the party requesting the continuance has nonetheless established good cause therefor." (*Lerma v. County of Orange* (2004) 120 Cal.App.4th 709, 716.)

Here, we conclude that the trial court did not err when it declined to grant McCorkendale a continuance. The affidavit submitted by McCorkendale's counsel states only that the County did not provide his performance reviews and that, although McCorkendale believed other employees were present when Pomjanek asked him to change his report, the County did not provide declarations from those witnesses. Counsel's declaration does not explain why the missing discovery is essential to McCorkendale's opposition, nor does it explain why this information could not have been obtained earlier. Therefore the trial court was not bound by statute to grant a continuance. (*Cooksey v. Alexakis, supra,* 123 Cal.App.4th at p. 251 ["appellant failed to make a good faith showing as to what facts essential to

oppose summary judgment may have existed and why such facts could not have been discovered sooner."].)

Whether to grant a continuance was left to the court's discretion, and we find no abuse. McCorkendale first filed suit on January 5, 2015, but he delayed over nine months to serve his first discovery requests on October 22, 2015. The parties had known about their February 10, 2016 trial date for over five months at this point. As a result, we conclude that McCorkendale had an opportunity to pursue discovery of these facts sooner, but failed to diligently do so.

Additionally, the court did not abuse its discretion in denying a continuance because the facts sought were not essential to McCorkendale's opposition. McCorkendale's performance reviews relate to whether he was performing his duties – an issue unrelated to the basis on which summary judgment was granted. Similarly, the witnesses to the conversation between Pomjanek and McCorkendale regarding changing his report potentially could have confirmed either Pomjanek's or McCorkendale's recollection of the dispute. But this, too, is unrelated to the rationale on which summary judgment was ultimately granted.

2. Summary Judgment Was Correctly Granted

McCorkendale challenges the order granting summary judgment for the County, arguing that he has raised triable issues of material fact as to his FEHA claims for physical disability discrimination, failure to prevent discrimination, and retaliation under the Labor Code.

A. Standard of Review

" 'A defendant is entitled to summary judgment if the record establishes as a matter of law that none of the plaintiff's

asserted causes of action can prevail.' [Citation.] The pleadings define the issues to be considered on a motion for summary judgment. [Citation.] As to each claim as framed by the complaint, the defendant must present facts to negate an essential element or to establish a defense. Only then will the burden shift to the plaintiff to demonstrate the existence of a triable, material issue of fact. [Citation.]" (*Ferrari v. Grand Canyon Dories* (1995) 32 Cal.App.4th 248, 252.) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) We review orders granting or denying a summary judgment motion de novo. (*FSR Brokerage, Inc. v. Superior Court* (1995) 35 Cal.App.4th 69, 72; *Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 579.)

"[T]he burden of a defendant moving for summary judgment only requires that he or she negate plaintiff's theories of liability as alleged in the complaint; that is, a moving party need not refute liability on some theoretical possibility not included in the pleadings. [Citations.] [¶] Furthermore, ' " ' "[t]he [papers] filed in response to a defendant's motion for summary judgment may not create issues outside the pleadings and are not a substitute for an amendment to the pleadings." ' " [Citation.]' [Citation.] An opposing party's separate statement is not a substitute for amendment of the complaint. [Citation.] Similarly, ' " '[d]eclarations in opposition to a motion for summary judgment "are no substitute for amended pleadings." . . . If the motion for summary judgment presents evidence sufficient to disprove the plaintiff's claims, . . . the plaintiff

forfeits an opportunity to amend to state new claims by failing to request it.' " [Citations.]' [Citation.]" (*Hutton v. Fidelity National Title Co.* (2013) 213 Cal.App.4th 486, 493.)

We exercise "an independent assessment of the correctness of the trial court's ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law." (*Iverson v. Muroc Unified School Dist.* (1995) 32 Cal.App.4th 218, 222.)

B. Cause of Action for Physical Disability Discrimination Under FEHA

McCorkendale's first cause of action alleges that the County violated FEHA by unlawfully discriminating based on his physical disability. He alleges that, as a result of his disability, the County refused to engage in the interactive process, refused to accommodate his disability, discriminated against him, harassed him, terminated his employment, and refused to rehire him. By the time of his opposition to the summary judgment motion – after County had established that it had engaged in the interactive process and accommodated his disability by placing him on work restrictions – McCorkendale argued that this cause of action was based only on three types of adverse employment action: termination, failure to rehire, and harassment.[4]

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[4] McCorkendale identified the same three wrongs at the hearing, when the trial court specifically asked him to identify the adverse employment actions on which he relied. In his opening brief on appeal, the third alleged adverse action had changed from "harassment" to "retaliation." Retaliation under FEHA was not alleged in this cause of action. We therefore do not address it.

FEHA makes it unlawful for an employer "to refuse to hire or employ a person . . . or to discharge the person from employment" because of physical disability. (Gov. Code, § 12940, subd. (a).) Under FEHA, a claim of disability discrimination is assessed using a three-stage burden-shifting analysis. (*Moore v. Regents of the University of California* (2016) 248 Cal.App.4th 216, 234.) Initially, the plaintiff must make a prima facie showing of discrimination. (*Ibid.*) This requires the plaintiff to provide evidence that (1) he suffered from a disability, (2) he was otherwise qualified to do his job, with or without reasonable accommodation, and (3) he was subjected to adverse employment action because of the disability. (*Castro-Ramirez v. Dependable Highway Express, Inc.* (2016) 2 Cal.App.5th 1028, 1037.) The threshold for an adverse employment action is met " 'when the employer's action impact[s] the "terms, conditions, or privileges" of the plaintiff's job in a real and demonstrable way.' " (*Wilson v. Murillo* (2008) 163 Cal.App.4th 1124, 1134.) Once the plaintiff establishes a prima facie case, a presumption of discrimination arises. (*Ibid.*) The burden then switches to the employer to rebut the presumption by producing evidence sufficient to raise a genuine issue of fact that the action was taken for a legitimate, nondiscriminatory reason. (*biId.*) If the employer meets that burden, the presumption of discrimination disappears, and the plaintiff must then show the employer's reasons are pretextual, or offer other evidence of discriminatory motive. (*Ibid.*)

Here, the trial court granted summary judgment on the basis that there were no actionable adverse employment actions. We consider each of the three alleged actions taken by the County: termination, failure to rehire, and harassment.

1) Termination

The County released McCorkendale from employment 11 days before his term end date in 2014. He argues that this early release constitutes a termination, and therefore an adverse employment action. We conclude, however, that the County did not terminate McCorkendale; rather, his term of employment naturally expired.

The County hired McCorkendale each year as a temporary employee with a fixed employment term end date. But the record shows that McCorkendale was routinely released prior to the end of his term. For example, the County released McCorkendale 25 days early in 2011, 26 days early in 2012, and 11 days early in 2013. McCorkendale does not dispute this.[5] We conclude the 11-day early release at issue does not constitute an adverse employment action because such early release is consistent with

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[5] Moreover, Smith's declaration states that five temporary employees, including McCorkendale, were released from the Weed and Pest Abatement Divisions in March 2014. This suggests that McCorkendale's release on March 27, rather than April 7, was a release simultaneous with the other temporary employees and not an early release. McCorkendale has offered no evidence to the contrary. Indeed, at the hearing on summary judgment, McCorkendale's counsel took the position that, months before McCorkendale was released from employment, Smith had called Human Resources and asked whether the County should wait until McCorkendale's term expired or terminate him immediately; Human Resources told him to wait. While McCorkendale believed this supported his argument that Smith had made the decision to terminate his employment several months earlier, it establishes that County did, in fact, decide to allow McCorkendale to work out his term.

the "terms, conditions, [and] privileges" of McCorkendale's employment, and therefore McCorkendale's FEHA claim based on termination fails. (Gov. Code, § 12940, subd. (a).)

2) Refusal to Rehire

McCorkendale next contends that, as the result of improper physical disability discrimination, he suffered the adverse employment action of a failure to rehire.

The parties believe the issue of whether a failure to rehire constitutes an adverse employment action under FEHA is governed by *Touchstone Television Productions v. Superior Court* (2012) 208 Cal.App.4th 676. But *Touchstone* is concerned not with FEHA, but with the common law cause of action for wrongful termination in violation of public policy. (*Id.* at p. 678.) That, as *Touchstone* holds, there is no cause of action for wrongful failure to rehire in violation of public policy does not address the question of whether a failure to rehire is actionable under FEHA.

Other cases have addressed the very issue. In *Kelley v. The Conco Companies* (2011) 196 Cal.App.4th 191, the plaintiff, an apprentice ironworker, suffered harassment at the defendant's worksite and reported it. Thereafter, the plaintiff was suspended from his union for unrelated reasons, and could no longer seek jobs from the defendant. Once he was reinstated by the union, he was told to never call or return to the defendant, because there was no work for him there. (*Id.* at p. 200.) He brought suit alleging retaliation under FEHA, specifically relying on the employer's failure to rehire him after he had complained about harassment. The Court of Appeal rejected this argument. The court conceded that a failure to *hire* constitutes an adverse employment action, but a failure to *rehire* is not actionable. The

plaintiff could not establish an adverse employment action because he had never sought employment with defendant. "He cannot show that [defendant] discriminated against him by failing to hire him for a job for which he did not apply." (*Id.* at p. 212; see also *Jackson v. Kaplan Higher Educ., LLC* (E.D. Cal. 2015) 106 F.Supp.3d 1118, 1132-1133 [when plaintiff had no statutory right to reinstatement, her status was no different than that of any other job applicant].)

Here, McCorkendale had no statutory right to reinstatement; he simply hoped that he would be rehired after his term naturally expired. Legally, as a former employee, he was no different than any other applicant for the job, and he could claim FEHA protections if the County failed to hire him because of his disability. However, he never applied for the job. As such, there was no actionable failure to hire him.

3) Harassment

FEHA declares harassment on any improper basis to constitute an unlawful employment practice. (Gov. Code, § 12940, subd. (j)(1).) Not every act of harassment is actionable, however. Instead, in order to constitute actionable harassment, the harassment must "be sufficiently severe or pervasive so as to alter the conditions of employment and create an abusive working environment. [Citations.]" (*Dickson v. Burke Williams, Inc.* (2015) 234 Cal.App.4th 1307, 1312.) Harassment is not actionable if it is occasional, isolated, sporadic of trivial; the plaintiff must show a concerted pattern of harassment of a repeated, routine or generalized nature. (*Thompson v. City of Monrovia* (2010) 186 Cal.App.4th 860, 877.)

Common personnel management decisions do not constitute harassment. " 'We conclude, therefore, that the

Legislature intended that commonly necessary personnel management actions such as hiring and firing, job or project assignments, office or work station assignments, promotion or demotion, performance evaluations, the provision of support, the assignment or nonassignment of supervisory functions, deciding who will and who will not attend meetings, deciding who will be laid off, and the like, do not come within the meaning of harassment. These are actions of a type necessary to carry out the duties of business and personnel management. These actions may retrospectively be found discriminatory if based on improper motives, but in that event the remedies provided by the FEHA are those for discrimination, not harassment. Harassment, by contrast, consists of actions outside the scope of job duties which are not of a type necessary to business and personnel management. This significant distinction underlies the differential treatment of harassment and discrimination in the FEHA.' [Citation.]" (*Reno v. Baird* (1998) 18 Cal.4th 640, 646–647.)

McCorkendale claims that Pomjanek mocked, targeted, and tracked him following the accident that resulted in his medical restrictions and worker's compensation claim. He argues that this alleged harassment was severe enough to affect the conditions of his employment. Drawing all reasonable inferences in favor of McCorkendale, we conclude as a matter of law that the acts of which he complains, even when taken together, were not severe enough to qualify as actionable harassment.

McCorkendale emphasizes that he was tracked by Pomjanek, who had asked Nolan to document compliance with McCorkendale's work restrictions. This tracking resulted in Pomjanek once falsely accusing McCorkendale of speeding –

when someone else was driving the vehicle assigned to McCorkendale – and she quickly withdrew the accusation when she determined the truth. McCorkendale points to a handful of other incidents in which he believes he was more closely tracked than other employees, but tracking McCorkendale and verifying his compliance with his light duty restrictions are simply personnel management decisions not actionable as harassment.

McCorkendale also claims that Pomjanek's "body language" and "demeanor" mocked his disability, but these assertions do not go so far as to suggest that the conditions of his employment were materially affected in any way. Instead, these were mere isolated incidents that do not establish a concerted pattern of repeated harassment.

4) Conclusion – Physical Disability Discrimination

Because McCorkendale did not allege an actionable adverse employment action, his cause of action for physical disability discrimination fails. We therefore need not address the County's argument that none of the actions it took against McCorkendale were motivated by physical disability discrimination.

We also observe that, as this litigation proceeded, it became clear that McCorkendale had no factual basis to assert that anything the County did was based on physical disability discrimination. While McCorkendale had originally pleaded that the County failed to rehire him because of his injury, he testified at deposition that the improper motivation behind the County's action was actually retaliation for his pursuit of a workers' compensation claim and his refusal to change his report.[6]

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[6] His sole evidence of physical disability discrimination is a journal entry from Pomjanek, dated March 24, 2014, in which she

Retaliation for filing a workers' compensation claim and refusing to alter a collision report may be actionable in other ways (e.g., Lab. Code, § 132a [providing a remedy within the workers' compensation process for retaliation for pursuing a workers' compensation claim]; *Nosai-Tabor v. Sharp Chula Vista Medical Center* (2015) 239 Cal.App.4th 1224, 1235 [a termination premised on an employee's refusal to violate the law may support a claim for wrongful termination in violation of public policy].) However, such retaliation is not unlawful physical disability discrimination. McCorkendale never sought to amend his complaint to pursue a cause of action which more closely fit his deposition testimony, and instead continued to try to put the square peg of retaliation for pursuit of a workers' compensation claim and refusal to alter his report into the round hole of physical disability discrimination. We consider a summary judgment motion against the allegations of the complaint, and

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documents a conversation with Nolan. Nolan had wanted to know if McCorkendale was going to be invited back for another year. Pomjanek wrote: "I told her that he should consider looking for another job because his position was temporary. [¶] She stated that she wished I knew [McCorkendale] in the past before he was injured because I would have liked him then. I told her that his injury has nothing to do with anything." McCorkendale believes his journal entry demonstrates that Nolan believed Pomjanek was treating McCorkendale differently because he was injured. The language does not support the inference; we read it to instead mean that Nolan recognized that McCorkendale's personality had changed in recent months. In any event, the journal entry also contains Pomjanek's contemporaneous refutation of any implication of disability discrimination.

McCorkendale forfeited any right to amend by failing to request it.

For similar reasons, we need not address whether triable issues of fact exist regarding the propriety of Pomjanek's request that McCorkendale change his accident report. Without an adverse employment action, such a request, even if improper, is not actionable under FEHA.

C. Cause of Action for Failure to Prevent Discrimination Under FEHA

Pursuant to FEHA, an employer must "take all reasonable steps necessary to prevent discrimination and harassment from occurring." (Gov. Code, § 12940, subd. (k).) To present a viable claim for failure to prevent discrimination, a plaintiff must first establish an underlying actionable discrimination claim. (See *Trujillo v. North County Transit Dist*. (1998) 63 Cal.App.4th 280, 289.) As discussed in the preceding section, McCorkendale failed to raise a triable issue of fact that the County discriminated against him on the basis of a physical disability. Having found as a matter of law that McCorkendale's discrimination claim cannot prevail; his claim for failure to prevent discrimination consequently fails as well.

D. Cause of Action for Retaliation Under the Labor Code

Because we conclude McCorkendale's current characterization of his fourth cause of action is not supported by the actual allegations of his complaint, we set forth the relevant language in the pleadings: "Plaintiff is informed and believes and thereon alleges that as a consequence of reporting his injury, of seeking redress under the Workers' Compensation Act due to fear of his personal and medical safety and well-being, and

complaining about his injury and working conditions, Defendant took retaliatory action against Plaintiff by failing to conduct a good faith interactive process aimed at reuniting Plaintiff with his job, failing to determine the essential functions of Plaintiff's job, forcing Plaintiff to continue to work while injured, and ultimately discharging him from employment and refusing to rehire Plaintiff. This conduct constitutes, at the least, a violation of *Labor Code* [section] 6310 which embodies a public policy against retaliatory terminations, and, *Labor Code* [section] 6400 and [section] 6402 prohibiting employment in unsafe environments." The next paragraph reads: "Defendant unlawfully retaliated against Plaintiff after he engaged in protected activity after being injured on the job, such as without limitation, filing or intending to file for workers' compensation benefits due to safety concerns and requesting accommodation, and, complaining about his injury and harassment." The only mention of FEHA in the cause of action is a request for attorney fees.

As alleged, the cause of action is meritless. Labor Code section 6400 and 6402 simply require the provision of safe workplaces; McCorkendale does not allege any way in which his workplace was unsafe. Although his injury arose while on duty, it occurred when his stopped vehicle was struck by that of another driver, he does not suggest any way in which this was the fault of the County for not providing a safe workplace. The allegation of the complaint that he was forced to continue to work while injured is unsupported by the record, which showed his injuries and work restrictions were fully accommodated.

Thus, the sole statutory basis for this cause of action is Labor Code section 6310. McCorkendale relies on subdivisions

(a)(1) and (2), which provide, "(a) No person shall discharge or in any manner discriminate against any employee because the employee has done any of the following: [¶] (1) Made any oral or written complaint to the division, other governmental agencies having statutory responsibility for or assisting the division with reference to employee safety or health, his or her employer, or his or her representative. [¶] (2) Instituted or caused to be instituted any proceeding under or relating to his or her rights or has testified or is about to testify in the proceeding or because of the exercise by the employee on behalf of himself, herself, or others of any rights afforded him or her."

To the extent McCorkendale sees these as catch-all provisions which provide a remedy for any employee discriminated against for making "any oral or written complaint to . . . his or her employer" or "because of the exercise by the employee . . . of any rights afforded him or her," he is mistaken. The "rights" protected by Labor Code section 6310 "clearly refers to 'rights' under the [California Occupational Safety and Health] Act." (*Division of Labor Enforcement v. Sampson* (1976) 64 Cal.App.3d 893, 897.) McCorkendale has not alleged he was discriminated against for complaints about health and safety or exercising any rights under the Occupational Safety and Health Act. Thus, Labor Code section 6310 provides no remedy on the facts of this case.

Perhaps aware of this, McCorkendale's legal characterization of this cause of action has morphed away from the Labor Code. In his opposition to the summary judgment motion, and repeated on appeal, McCorkendale took the position that this cause of action was actually alleging retaliation under FEHA; moreover, that FEHA retaliation provides a statutory

remedy not only for retaliating against a person who exercised FEHA rights (Gov. Code, § 12940, subd. (h)), but instead, encompasses all public policies protected by the tort remedy of wrongful termination in violation of public policy. Even if we were to broadly construe McCorkendale's complaint as alleging a cause of action for retaliation under FEHA, he has provided no authority for the proposition that FEHA provides a statutory remedy for what is, in effect, wrongful retaliation in violation of public policy.

DISPOSITION

The judgment is affirmed. McCorkendale is to pay the County's costs on appeal.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

GRIMES, J.