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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

HERIBERTO LOPEZ, Plaintiff and Appellant, v. ARAMARK UNIFORM AND CAREER APPAREL, Defendants and Respondents.	B233058 (Los Angeles County Super. Ct. No. BC426591)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ramona G. See, Judge. Affirmed.

Law Offices of Gene Ramos and Gene M. Ramos for Plaintiff and Appellant.

Morgan, Lewis & Bockius, Anne Brafford and Michelle Stocker for Defendant and Respondent.

INTRODUCTION

Plaintiff Heriberto Lopez appeals from a judgment entered in favor of defendant Aramark Uniform and Career Apparel, LLC (Aramark) after an order granting Aramark's motion for summary judgment on Lopez's complaint alleging disability-related employment claims under the California Fair Employment and Housing Act (Gov. Code, § 12940 et seq.) (FEHA). We affirm.

FACTS

Aramark supplies customers with uniforms, apparel, and related items, and provides industrial laundry services. Aramark hired Lopez in 1991 as a laborer at Market Center 501, Aramark's laundry services facility in Los Angeles. The terms and conditions of Lopez's employment were governed by the collective bargaining agreement between Aramark and Unite Here Western States Regional Joint Board Local Union 52 (the Union).

In August 2006 Lopez injured his back while lifting towels during his work shift. The next day, Lopez informed his supervisor of the injury. Lopez did not take any time off work immediately following the injury. Lopez filed a claim for Workers' Compensation and received payments related to his injury.

In October 2006 an anonymous caller reported to Aramark that Lopez had threatened to bring a gun to work. Aramark hired an investigator. The investigation revealed that Lopez may have made a threatening comment about the plant manager at Market Center 501, and had made harassing and aggressive comments to several other employees. Based on the investigator's findings, Aramark terminated Lopez's employment on November 20, 2006 for violation of Aramark's workplace violence policy. Lopez promptly filed a grievance with the Union requesting reinstatement.

Pursuant to the collective bargaining agreement governing Lopez's employment, the Union was the sole collective bargaining agent for Lopez and all other production

employees at Market Center 501. When an employee filed a grievance, representatives of the Union and Aramark's plant managers were to meet and attempt to resolve the dispute. Aramark's vice president met with the Union representatives and reached an agreement that Lopez would be reinstated with no loss of seniority, benefits, or wages, and would receive all back pay from the date of his termination until his date of reinstatement. They also agreed that because of the investigation findings, Aramark would not reinstate Lopez at Market Center 501, but would transfer Lopez to Paramount Market Center 586 (Paramount), approximately 11 miles from Market Center 501. Lopez refused to sign the agreement. Mary Apodaca, an employee of Aramark, sent a letter to Lopez confirming the agreement and stating that Lopez was to report to Paramount on January 3, 2007 as a soil sorter.

When he arrived on January 3, 2007, Lopez gave his supervisor a doctor's note indicating that he could not work because he was temporarily totally disabled due to his back injury. To accommodate Lopez, Aramark granted him a leave of absence, which Aramark extended several times for over a year. Ultimately, Lopez never worked at Paramount.

In September 2007, Dr. Raymond K. Zarins conducted an agreed-upon medical examination (AME). Dr. Zarins stated in his report that plaintiff "should avoid lifting of more than 50 pounds as a single lift and more than 20 pounds repeatedly. He should avoid repetitive squatting, kneeling, crawling and climbing. He should also avoid heavy work above shoulder level." Dr. Zarins opined that based on plaintiff's description of his job, plaintiff could not perform his job duties within his work restrictions.

Dr. Satish Kadaba, Lopez's orthopedic physician, evaluated Lopez in March 2008. Dr. Kadaba stated that Lopez "is precluded from prolonged standing, walking and from repetitive bending and stooping and pushing and pulling more than 35 pounds and from lifting and carrying more than 35 pounds. He will not be able to return to his original job. He should have access to the job displacement benefits." At his deposition, Dr. Kadaba clarified that "prolonged standing" meant standing for approximately 70 to 75 percent of a shift, so that Lopez could not stand for more than 25 to 30 percent of his shift. He also

stated that the restriction precluding "repetitive" movement meant that Lopez could not perform such activities for longer than 10 to 15 minutes per hour, and that Lopez could not perform his job duties within the work restrictions. Thus, from January 3, 2007 to March 2008 Lopez was totally incapacitated from working at any job for Aramark.

In March 2008 Lopez told Aramark that he was ready to return to work but had work restrictions due to his back injury. Aramark representatives met with Lopez on multiple occasions to try to identify a job that he was physically able to perform in the event that a job became available. On March 27 or March 28, 2008 Aramark representatives met with Lopez "in the interactive process to discuss [Lopez's] medical restrictions and ability to perform any available jobs" at Paramount. Two of Aramark's employees, the shop steward and Lopez's brother, joined the meeting to help describe jobs at Paramount to Lopez. No one in the meeting could identify any jobs at Paramount that Lopez could perform within his work restrictions with or without reasonable accommodation.

In response to Lopez's request for a tour of the Paramount plant to review positions, Lopez walked through the Paramount facility on April 20, 2008 with a Union representative, Elizabeth Duarte (Duarte), and Aramark's production manager for the facility, Gregg Miron (Miron). Miron gave Lopez a full tour of the Paramount plant, and showed Lopez "all the different departments." Miron explained the job duties of each position. Lopez said that he thought he could only perform the job of distribution operator. There was only one such position, however, and Esperanza Gonzalez held it at the time of the tour and continued to do so until after Lopez filed this action. In performing the duties of distribution operator, Gonzalez rotated through several tasks during the day, including using sewing skills to repair gloves and folding coveralls into bundles, and then spent the rest of the day performing a regular distribution job which consisted of checking garment tags and hanging garments overhead.

On June 11, 2008 Aramark held another meeting with Lopez to continue discussing his ability to return to work. The participants in the meeting included Duarte, Miron, the Union shop steward, a management trainee, Aramark's senior human

resources manager Alfreda Smith (Smith), and Aramark's counsel Steve Friedman. Aramark's representatives reviewed with Lopez the work restrictions identified in the September 2007 AME report, which Lopez confirmed were unchanged and still applied.

At the June 11, 2008 meeting, Lopez stated that the only job at Paramount he could perform, with or without reasonable accommodation, was the distribution operator job that Gonzalez held. Aramark's representatives explained that at the time there were no such positions open at Paramount. They offered to continue to allow Lopez to remain on leave until a position became available, but Lopez refused to stay on leave. Lopez stated that he wanted Aramark either to give him a job immediately or terminate his employment.

According to Smith, Aramark's longstanding practice was not to terminate employees while on a medical leave due to a work-related injury. Smith stated in her declaration that Aramark would not have terminated Lopez from the payroll in June or July 2008 but for his refusal to stay on leave and his demand that Aramark put him back to work immediately.

In a letter dated July 16, 2008, Smith informed Lopez that because there were no jobs available that Lopez was able to perform, Lopez had declined Aramark's offer to remain on leave, Lopez had requested termination if Aramark could not place him in a distribution job immediately, and Lopez had been unable to return to work after a lengthy absence, Aramark had no choice but to view Lopez as having resigned. In the letter, Smith stated that Aramark would deem Lopez's resignation effective on July 18, 2008. In her declaration in support of Aramark's motion for summary judgment, Smith added that "[a]t the time of Lopez's termination, [Aramark] did not inquire to determine whether any vacancies existed at [Market Center] 501 [Lopez] could perform within his work restrictions because [Aramark] and the Union already had agreed the [he] would not work at [Market Center] 501 and would be assigned to the Paramount Market Center."

Aramark also submitted in support its motion for summary judgment the declaration of Howard Goldfarb (Goldfarb) and an attached vocational evaluation report regarding Goldfarb's assessment of Lopez's ability, within the work restrictions imposed

by Dr. Zarins, to perform the distribution operator and soil sorter jobs. Goldfarb stated that there were "no reasonable accommodations available for [Lopez] which would allow him to perform the essential functions of the position of Distribution Operator within his significant medical limitations." Goldfarb opined that given Lopez's medical limitations, Lopez was unable to perform the essential job functions of the position of soil operator. Goldfarb also stated that "[g]iven the essential requirements of the job of Distribution Operator . . . [i]t is not feasible for Mr. Lopez to perform [the job] from a seated position nor is it possible for him to perform [the job] which would allow him to alternate sitting and standing." Goldfarb concluded that the "essential job functions of the positions of Distribution Operator as well as Soil Operator cannot be accommodated given Mr. Lopez's significant medical limitations."

PROCEDURAL HISTORY

Lopez filed this action on November 20, 2009, and the operative first amended complaint on July 26, 2010. The first amended complaint alleged causes of action for violation of FEHA, specifically (1) wrongful termination in violation of public policy against discrimination on the basis of disability or requesting reasonable accommodation for the disability, or not participating in the interactive process, under FEHA and the California Constitution, article I, section 8;[1] (2) retaliation (Gov. Code, § 12940, subd. (h)); (3) disability discrimination (*id.*, subd. (a)); (4) failure to accommodate (*id.*, subd. (m)); and (5) failure to engage in interactive process (*id.*, subd. (n)).

Aramark took Lopez's deposition in August 2010. On August 31, 2010 Lopez took Smith's deposition.

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[1] On appeal, Lopez has not addressed the first cause of action, and therefore has forfeited any issues relating to this claim. (See *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1185; *McElroy v. Chase Manhattan Mortgage Corp.* (2005) 134 Cal.App.4th 388, 391-392.)

On August 30, 2010 Aramark filed a motion to strike portions of Lopez's complaint. Lopez did not oppose the motion or attend the hearing on the motion to strike.

The court originally set the trial for October 13, 2010. On May 28, 2010 the court continued the trial date to January 13, 2011, pursuant to the joint stipulation of the parties and the court's determination that there was good cause for the continuance to allow time for mediation and to complete discovery. The court continued the discovery and motion cutoff dates with the new trial date. On September 16, 2010 the court continued the trial date to March 15, 2011, pursuant to the parties' joint stipulation and ex parte application, to allow time for the court to rule on Aramark's pending motion to strike before Aramark filed its motion for summary judgment. The court again continued the discovery and motion cutoff dates with the new trial date.

On October 20, 2010 the trial court granted Aramark's motion to strike portions of the first amended complaint. Also on October 20, Aramark served Lopez with requests for admissions. Lopez never responded.

On November 24, 2010 Aramark filed a motion for summary judgment or in the alternative for summary adjudication on all remaining causes of action. In support of its motion, Aramark filed a separate statement of undisputed facts and supporting declarations, with documentary evidence. Aramark set the motion for hearing on February 9, 2011. Thus, Lopez's opposition was due January 26, 2011. Lopez did not file a timely opposition.

On December 30, 2010, Aramark moved to have its requests for admissions deemed admitted on the ground that Lopez never served responses. Lopez did not file an opposition to the motion or appear at the hearing. On January 26, 2011 the trial court granted the motion. Lopez never filed a motion under Code of Civil Procedure section 2033.300 to withdraw his admissions.

The trial court ordered the following facts, among others, deemed admitted by Lopez:

> Aramark did not terminate Lopez's employment because of his back injury or because he had requested an accommodation for his back injury.

During Lopez's employment with Aramark, Lopez did not provide any employee of Aramark with any medical documentation that altered the work restrictions imposed by Dr. Kadaba or Dr. Zarins. Lopez was totally incapacitated from working at any job from January 3, 2007 to March 2008. In March 2008, Lopez informed Aramark that he was ready to return to work but had work restrictions due to his back injury.

From January through July 2008, Lopez's medical restrictions precluded him from being able to perform the essential duties of any available job at Paramount, with or without reasonable accommodations. There were no open positions in any of Aramark's facilities from April to July 2008 that Lopez could have performed with his medical work restrictions. After his transfer to Paramount, Lopez never told Aramark he had an interest in transferring to a different facility, including Riverside, Santa Ana, or Sylmar.

During Lopez's meetings and discussions with Aramark between April and July 2008 about identifying an available job he could physically perform within the work restrictions specified by the doctors, Lopez refused Aramark's offer to extend his medical leave and remain employed, and stated that Aramark should put him back to work or terminate his employment.

In October 2006, an anonymous caller had reported a concern to Aramark that Lopez had threatened to bring a gun to work to hurt people. Aramark conducted an investigation and terminated Lopez's employment on November 20, 2006 for violation of Aramark's workplace violence policy. Lopez then filed a grievance with the Union requesting reinstatement. Aramark and the Union resolved Lopez's grievance in December 2006 by agreeing to reinstate Lopez and transfer him to Paramount. The Union was entitled to enter into the agreement with Aramark in order to resolve Lopez's grievance seeking reinstatement.

On February 2, 2011 counsel for Lopez finally made an appearance at a hearing on a motion. He filed an ex parte application to continue the discovery cutoff dates, the hearing on the summary judgment motion (including the deadline for his opposition that

had been due in January), and the trial. Aramark opposed the application on multiple grounds, including that the deadline for Lopez's opposition to the motion for summary judgment had already passed and that further discovery would not assist Lopez in responding to the motion, because the court had already granted Aramark's motion to deem its requests for admissions admitted, which conclusively resolved all material issues in favor of Aramark. The court denied the application on the ground that Lopez failed to show good cause for the continuance. The court noted that Lopez had filed his complaint on November 20, 2009, Aramark had answered on January 4, 2010, counsel for Lopez "had eleven months to conduct discovery in this case," and that the procedural history showed that Lopez "apparently waited until after Defendant Aramark had filed a motion for summary judgment on November 24, 2010 and waited until the last three months before the discovery cutoff to conduct any discovery in this case." The court also noted that "the request for continuance is untimely as plaintiff's opposition was due on January 26, 2011 and no good cause is provided for this delay." The court also continued the hearing on Aramark's motion for summary judgment from February 9, 2011 to February 23, 2011.

On February 4, 2011 Aramark filed reply papers in support of its motion for summary judgment. Aramark included in its reply the matters deemed admitted pursuant to the court's prior order.

On February 7, 2011 Aramark filed an ex parte application to continue the trial until after the February 23, 2011 summary judgment hearing. The trial court denied the application. The parties then stipulated to a one-month trial continuance to April 18, 2011. The court did not continue the discovery and motion cutoff dates, which remained as they were pursuant to the previous trial date of March 15, 2011.

On February 22, 2011, one day before the hearing on Aramark's motion for summary judgment, counsel for Lopez filed another ex parte application to continue the discovery and motion cutoff dates, the hearing on the motion for summary judgment, and the trial. Counsel for Lopez did not file a motion under Code of Civil Procedure section 473, subdivision (b), to relieve him from his failure to file timely opposition papers.

Aramark opposed the ex parte application, and the trial court denied it. On the same date, counsel for Lopez filed a declaration, to which counsel attached excerpts of Lopez's August 13, 2010 deposition, and responses by Aramark to Lopez's form interrogatories and special interrogatories. Counsel for Lopez also filed 17 evidentiary objections to Aramark's evidence, the last one objecting to the admitted facts Aramark submitted on reply.

On February 23, 2011, just prior to the beginning of the hearing on Aramark's motion for summary judgment, counsel for Lopez filed a memorandum of points and authorities in opposition to the motion and another declaration by counsel for Lopez, to which counsel attached the entire 217-page transcript of the August 31, 2010 deposition of Alfreda Smith, without indicating or marking "in a manner that calls attention to the testimony" which specific testimony might create a triable issue of fact. (Cal. Rules of Court, rule 3.1116(c); see *Hollywood Screentest of America, Inc. v. NBC Universal, Inc.* (2007) 151 Cal.App.4th 631, 643-645.) Counsel for Lopez again did not file a motion for relief from his failure to file timely opposition papers, nor did he ever file a declaration by his client. At the hearing, the trial court did not state whether it would consider Lopez's late-filed papers, nor did the trial court rule on Lopez's evidentiary objections, even though counsel for Lopez asked for rulings. The court then took the matter under submission.

The trial court granted Aramark's motion for summary judgment. In its March 11, 2011 minute order, the court stated: "Plaintiff failed to timely file his written [evidentiary] objections and has not shown good cause for not filing these objections sooner. See [California Rules of Court, rule] 3.1354(a)." The order did not state whether the trial court had considered Lopez's objections. The trial court issued a more formal written order granting Aramark's motion for summary judgment on May 11, 2011, which set forth the court's reasons for granting the motion. This order, like the previous one, did not state whether the court had considered Lopez's untimely opposition papers, nor did it rule on Lopez's evidentiary objections.

On May 11, 2011 the trial court entered final judgment. Lopez filed a notice of appeal the same day.

DISCUSSION

Lopez challenges the trial court's order granting Aramark's motion for summary judgment on procedural and substantive grounds. We conclude that none of Lopez's arguments warrants reversal of the judgment.

A. *Requirements Under FEHA*

FEHA prohibits employment discrimination on the basis of specified factors, including a person's physical disability. (Gov. Code, § 12940 et seq., hereafter § 12940.) It provides that it is unlawful for an employer to discharge an employee because the employee has a "physical disability," except when the employee's disability renders the employee "unable to perform his or her essential duties even with reasonable accommodations." (§ 12940, subd. (a)(1);[2] see *Raine v. City of Burbank* (2006) 135 Cal.App.4th 1215, 1222.) An employer must make "reasonable accommodation" for the employee's physical disability (§ 12940, subd. (m)) and, if the physically disabled employee requests reasonable accommodation, the employer must engage in a timely,

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[2] Section 12940 provides: "It is an unlawful employment practice, unless based upon a bona fide occupational qualification, . . . [¶] (a) For an employer, because of . . . physical disability, mental disability, [or] medical condition . . . of any person, . . . to discharge the person from employment . . . . [¶] . . . [¶] (h) For any employer . . . to discharge, . . . or otherwise discriminate against any person because the person has opposed any practices forbidden under [FEHA] or because the person has filed a complaint . . . under [FEHA]. [¶] . . . [¶] (m) For an employer . . . to fail to make reasonable accommodation for the known physical or mental disability of an . . . employee . . . . [¶] (n) 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."

good faith "interactive process" with the employee to determine effective reasonable accommodation (*id.*, subd. (n)). An employer cannot discharge a physically disabled employee for opposing practices forbidden by FEHA or for filing a complaint under FEHA. (*Id.*, subd. (h); see Cal. Code Regs., tit. 2, § 7293.5 et seq.)

If the physically-disabled employee cannot be "accommodated in his . . . existing position and the requested accommodation is reassignment, an employer must make affirmative efforts to determine whether a position is available. [Citation.] A reassignment, however, is not required if 'there is no vacant position for which the employee is qualified.' [Citations.]" (*Raine v. City of Burbank, supra*, 135 Cal.App.4th at p. 1223.) "[A]n employer has no affirmative duty to create a new position to accommodate a disabled employee." (*Id.* at p. 1224; see *Nadaf-Rahrov v. Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 963 ["The position must exist and be vacant, and the employer need not promote the disabled employee."]; *McCullah v. Southern Cal. Gas Co.* (2000) 82 Cal.App.4th 495, 501 ["The employer is not required to create new positions or 'bump' other employees to accommodate the disabled employee."].) FEHA "does not prohibit an employer from . . . discharging an employee with a physical or mental disability, . . . where the employee, because of his or her physical or mental disability, is unable to perform his or her essential duties even with reasonable accommodations." (§ 12940, subd. (a)(1).)

The elements of a cause of action by an employee plaintiff for physical disability discrimination under FEHA are "'(1) plaintiff suffers from a disability; (2) plaintiff is a qualified individual; and (3) plaintiff was subjected to an adverse employment action because of the disability. [Citation.]' [Citation.]" (*Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 254, fn. omitted; see *Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1006.)

B. *Standard of Review*

We review a trial court's order granting a defendant's motion for summary judgment de novo. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860.) Code

of Civil Procedure section 437c, subdivision (c), provides that a "motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." We may affirm the summary judgment "'"if it is correct on any legal ground applicable to [the] case,"'" although "before affirming on a ground not relied on by the trial court, we must afford the parties an opportunity to present their views by submitting supplemental briefs." (*Moghadam v. Regents of University of California* (2008) 169 Cal.App.4th 466, 474-475; see Code Civ. Proc., § 437c, subd. (m)(2).)

Initially, a moving defendant has the "burden of showing that a cause of action has no merit," such as by showing "that one or more elements of the cause of action . . . cannot be established," or that there is a complete defense to the cause of action. (Code Civ. Proc., § 437c, subds. (*o*), (p)(2); *Aguilar v. Atlantic Richfield Co., supra*, 25 Cal.4th at p. 854.) If the moving defendant meets that burden, "the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to that cause of action" or as to the defense proffered by the defendant. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar, supra*, at p. 849.)

To prevail on a motion for summary judgment of an action brought under FEHA, a defendant employer initially has the burden to show "either that (1) plaintiff could not establish one of the elements of the FEHA claim, or (2) there was a legitimate, nondiscriminatory reason for its decision to terminate plaintiff's employment. [Citations.]" (*Avila v. Continental Airlines, Inc.* (2008) 165 Cal.App.4th 1237, 1247.) The trial court must "decide if the plaintiff has met his or her burden of establishing a prima facie case of unlawful discrimination. If the employer presents admissible evidence either that one or more of plaintiff's prima facie elements is lacking, or that the adverse employment action was based on legitimate, nondiscriminatory factors, the employer will be entitled to summary judgment unless the plaintiff produces admissible evidence which raises a triable issue of fact material to the defendant's showing." (*Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 203; see *Hicks v. KNTV Television, Inc.* (2008) 160 Cal.App.4th 994, 1003.)

On appeal, we independently make the same determination. "'In determining whether these burdens were met, we must view the evidence in the light most favorable to plaintiff, as the nonmoving party, liberally construing [his] evidence while strictly scrutinizing defendant's.'" (*Scotch v. Art Institute of California*, *supra*, 173 Cal.App.4th at p. 1005.)

C. *Propriety of Summary Judgment*

Our review of a summary judgment is limited to the evidence properly before the trial court. (See *Physicians Committee for Responsible Medicine v. McDonald's Corp.* (2010) 187 Cal.App.4th 554, 568; *Zimmerman, Rosenfeld, Gersh & Leeds LLP v. Larson* (2005) 131 Cal.App.4th 1466, 1476.) Here, the parties presented their evidence in a procedurally unusual sequence: no timely opposition, a timely reply that included new evidence, and then an untimely opposition. The trial court failed to rule on Aramark's objection to the opposition papers counsel for Lopez filed the day of and day before the hearing. At the hearing on the motion for summary judgment, the court noted that counsel for Lopez had not filed timely opposition and had effectively waived the right to argue, but the court stated that it would allow counsel for Lopez to present oral argument. The court also stated that it "remain[ed] to be seen" what weight the court would give to Lopez's untimely opposition papers. The trial court also failed to rule on Lopez's objection to the new evidence, in form of 29 admitted facts, that Aramark submitted with its reply papers.

Thus, it is unclear from the record whether the trial court considered the evidence counsel for Lopez submitted right before the hearing, and the parties dispute whether we should consider it on appeal. Similarly, it is unclear whether the trial court considered the admitted facts Aramark submitted with its reply, and the parties vigorously dispute whether we should consider them. We conclude that either way, whether we consider or do not consider plaintiff's untimely opposition and Aramark's new reply evidence, Aramark is entitled to summary judgment.

1. If we do not consider Lopez's untimely evidence, Aramark is entitled to summary judgment.

In the absence of any opposition, the trial court's order granting Aramark's motion for summary judgment should be affirmed because Aramark met its initial burden of presenting admissible evidence that at least one of the elements necessary for plaintiff's cause of action is lacking, and that Aramark's discharge of Lopez was based on legitimate, nondiscriminatory factors. (See *Hicks v. KNTV Television, Inc.*, *supra*, 160 Cal.App.4th at p. 1003; *Caldwell v. Paramount Unified School Dist.*, *supra*, 41 Cal.App.4th at pp. 202-203.) Even where the plaintiff does not file an opposition to a motion for summary judgment, the defendant must still meet its initial burden of proof. (*Thatcher v. Lucky Stores, Inc.* (2000) 79 Cal.App.4th 1081, 1086-1087; see *CDF Firefighters v. Maldonado* (2008) 158 Cal.App.4th 1226, 1239, fn. 2 ["failure to file an opposition does not excuse" the moving party "from meeting its burden" on summary judgment].)

Aramark met its burden in this case by showing both that Lopez was not a "'qualified individual'" and that he was not "'subjected to an adverse employment action because of [his] disability.'" (*Jensen v. Wells Fargo Bank*, *supra*, 85 Cal.App.4th at p. 254.) Aramark therefore showed that "plaintiff could not establish one of the elements of the FEHA claim." (*Avila v. Continental Airlines, Inc.*, *supra*, 165 Cal.App.4th at p. 1247.)

For purposes of FEHA, a "qualified individual" is an individual who is "qualified for the position sought or held in the sense that he or she is able to perform the essential duties of the position with or without reasonable accommodation." (*Green v. State of California* (2007) 42 Cal.4th 254, 266-267.) FEHA defines what job duties are "essential" as follows: "'Essential functions' means the fundamental job duties of the employment position the individual with a disability holds or desires. 'Essential functions' does not include the marginal functions of the position." (Gov. Code, § 12926, subd. (f).)

Aramark presented evidence that it delineated the "essential functions" of distribution operator, the job Lopez told Aramark he believed he could perform. Miron toured Paramount with Lopez to provide him with an opportunity to observe employees while they performed the functions of their jobs, including the employee who held the distribution operator position. Miron also described the activities involved in the jobs during the tour and in a subsequent meeting with Lopez, a Union representative, and Lopez's brother, who was also an employee of Aramark. Aramark also submitted in support of its motion Goldfarb's report, which set forth in detail the activities required to perform Lopez's former job, soil sorter, as well as the job Lopez wanted, distribution operator.

In addition, Aramark presented evidence of the efforts it made to determine whether there were any accommodations that would enable Lopez to perform the functions of distribution operation within the limitations set by Dr. Zarins or Dr. Kadaba. Goldfarb stated in his written opinion that Lopez could not do so and that there were no reasonable accommodations that would enable Lopez to do so. In a series of meetings during April through June 2008, Aramark's managers and other employees participated in an interactive process with Lopez and his Union representatives in an effort to identify a job that Lopez could perform within his medical limitations. The evidence submitted by Aramark showed that during the meetings Lopez had opportunities to explain what he was able to do. Aramark's managers and employees determined that Lopez was not qualified to perform any of the available jobs, given the restrictions dictated by his disability.

Aramark also met its burden to produce evidence that it made reasonable accommodation for Lopez's disability, first by giving him 18 months of medical leave, and then offering to extend the leave until a position became available that Lopez could perform within the medical restrictions set by the agreed medical examiner and Lopez's physician. Both leave and reassignment can be reasonable accommodations. (See *Wilson v. County of Orange* (2009) 169 Cal.App.4th 1185, 1193-1194 ["reasonable accommodation can include providing the employee accrued leave or additional unpaid

leave for treatment"]; *Hanson v. Lucky Stores, Inc.* (1999) 74 Cal.App.4th 215, 226 ["finite leave can be a reasonable accommodation under FEHA, provided it is likely that at the end of the leave, the employee would be able to perform his or her duties"]; *Jensen v. Wells Fargo Bank*, *supra*, 85 Cal.App.4th at p. 263 [a leave of absence may be a reasonable accommodation].) Reassignment is a reasonable accommodation for a physically-disabled employee who cannot be accommodated in his original pre-injury job. (*Raine v. City of Burbank*, *supra*, 135 Cal.App.4th at p. 1223.) As noted above, although an employer "must make affirmative efforts to determine whether a position is available" at the reassignment location, the employer is not required to reassign the disabled employee if "'there is no vacant position for which the employee is qualified.' [Citations.]" (*Ibid.*) When Lopez refused the accommodation of extending his medical leave and demanded that Aramark put him to work, Lopez left Aramark with no reasonable choice but to end Lopez's employment. (See *Hanson*, *supra*, at pp. 226-227 [employer need not "'wait indefinitely for an employee's medical condition to be corrected'"].)[3]

Lopez claims the trial court erred by not ruling on his untimely evidentiary objections to Aramark's evidence. If a trial court fails to rule on evidentiary objections in a summary judgment proceeding, however, the reviewing court deems the objections overruled and the objections are preserved on appeal. (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 534.) The trial court's failure to rule on Lopez's objections is not a ground for reversing summary judgment. Although Lopez argues that the trial court abused its discretion by not "accepting and ruling on" his objections, Lopez does not argue that any of his objections should be sustained, and if so on what grounds. (See *Rickards v. United Parcel Service, Inc.* (2012) 206 Cal.App.4th 1523, 1526 & fn. 2 ["The trial court did not

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3 We need not resolve whether Lopez actually resigned or left Aramark no choice but to terminate his employment, because either way Aramark met its burden of showing that Lopez could not state a cause of action under FEHA.

rule on the parties' evidentiary objections, but no one argues on appeal that any of the evidentiary objections should have been sustained."].)

Because Aramark met its initial burden, and without any opposition from Lopez, the trial court properly granted Aramark's motion for summary judgment.

2. If we consider Lopez's untimely evidence, Aramark is still entitled to summary judgment.

If we consider the evidence Lopez filed the day before and the morning of the hearing, then Aramark is entitled to summary judgment for two reasons. First, if we consider Lopez's late-filed evidence, then we can also consider the new evidence Aramark submitted on reply, namely, the admitted facts.[4] Generally, a party moving for summary judgment may not submit new evidence on reply. (See *San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 315.) The court, however, may consider new evidence on reply where the opposing party has the opportunity to file responsive papers or otherwise respond to the new evidence. (See, e.g., *Weiss v. Chevron U.S.A., Inc.* (1988) 204 Cal.App.3d 1094, 1097-1099 [defendant moving party "expressed

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[4] We note that it is a reasonable inference from the trial court's order granting summary judgment that the court did not consider the admitted facts submitted on reply. Although the trial court's May 19, 2011 order does not comply with Code of Civil Procedure section 437c, subdivision (g), the order states that the court was granting Aramark's motion because Lopez had "failed to raise a triable issue material fact regarding" whether "there is a causal connection between plaintiff's disability and request for accommodation, on the one hand, and his termination, on the other hand," citing *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 614. The order also states that Lopez had failed to raise a triable issue of fact regarding "whether defendant provided plaintiff with reasonable accommodations and engaged in the interactive process in good faith," citing *Hanson v. Lucky Stores, Inc.*, *supra*, 74 Cal.App.4th at page 229. The trial court did refer to the admitted facts, but only in support of its decision to deny a continuance: "Even if the court had granted a continuance of the hearing on the current motion and reopened discovery, plaintiff cannot and could not raise a triable issue of material fact by bringing up new evidence in contravention to his own admissions which were deemed admitted by the court on January 26, 2011."

its willingness to continue the hearing on the summary judgment motion to enable plaintiff to review the [new reply] declaration, depose the declarant, and present further substantive opposition"]; cf. *Alliant Ins. Services, Inc. v. Gaddy* (2008) 159 Cal.App.4th 1292, 1308 [trial court did not abuse its discretion by considering a supplemental declaration by plaintiff on reply where "the trial court allowed defendant the opportunity to testify at the hearing on the preliminary injunction, and he did"].)[5] If we consider Lopez's untimely opposition, which Lopez filed almost three weeks after Aramark's reply and which barely mentioned the admitted facts submitted on reply,[6] then Lopez had the opportunity to respond to the new evidence, and we can also consider the admitted facts.

The admitted facts conclusively prove that Aramark is entitled to summary judgment. Lopez admitted there was no merit to his claims under FEHA by admitting that (1) "[i]n March 2008, plaintiff informed defendant that he was ready to return to work but had work restrictions due to his back injury"; (2) "[f]rom January through July

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5 The cases Aramark claims stand for the proposition that new evidence is always acceptable on reply are distinguishable. *King v. United Parcel Service, Inc.* (2007) 152 Cal.App.4th 426 involved the issue of whether the trial court could consider evidence that the moving party submitted with the motion but did not specifically reference in the separate statement, not whether the trial court could grant summary judgment based on new evidence submitted on reply. (*Id.* at pp. 437-438; see *Varshock v. Department of Forestry & Fire Protection* (2011) 194 Cal.App.4th 635, 653 [citing *King* and ruling that the trial court did not abuse its discretion "in considering facts not specifically included in [the moving party's] separate statement when it ruled on the motion"].) In *Wall Street Network, Ltd. v. New York Times Co.* (2008) 164 Cal.App.4th 1171, the court approved consideration of an amended declaration submitted on reply because the original declaration had omitted an express statement that the declarant was competent to testify, the amendment merely cured this defect by setting forth her competence, and the opposing party "never identified any prejudice from [the amended declaration's] admission." (*Id.* at pp. 1182-1183.)

6 Lopez in his memorandum of points and authorities did not mention the admitted facts or discuss why they did not support if not compel summary judgment, nor did Lopez refer to the admitted facts at the hearing. Lopez's only reference to the admitted facts was his evidentiary objection No. 17.

2008 plaintiff's medical restrictions precluded him from being able to perform the essential duties of any available job at Paramount, with or without reasonable accommodations"; (3) "[t]here were no open positions in any of defendant's facilities from April to July 2008 that plaintiff could have performed with his medical work restrictions"; and (4) "[d]efendant did not terminate plaintiff's employment because of his back injury or because he had requested an accommodation for his back injury." The admitted facts also established that Lopez was not a "'qualified individual'" and that he was not "'subjected to an adverse employment action because of [his] disability.'" (*Jensen v. Wells Fargo Bank, supra*, 85 Cal.App.4th at p. 254.) These facts were conclusively established, and the court could not consider any evidence that contradicted them. (See Code Civ. Proc., § 2033.410, subd. (a);[7] *Joyce v. Ford Motor Co.* (2011) 198 Cal.App.4th 1478, 1489; *Monroy v. City of Los Angeles* (2008) 164 Cal.App.4th 248, 259-260.)

Second, Lopez's late-filed evidence did not create a triable issue of material fact.[8] Lopez argues that there are triable issues of fact regarding whether the union agreement precluded Aramark from giving Lopez his former job back (because Lopez did not sign the agreement), and that because that agreement was nearly two years old, "[a] reasonable inference can be drawn that the purpose and term of the union agreement was no longer in effect on March 28, 2008, when the interactive process began." Lopez, however, does not point to any evidence that supports his argument, such as evidence that the employee he allegedly threatened no longer worked at Market Center 501, or that the

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[7] Code of Civil Procedure section 2033.410, subdivision (a), provides: "Any matter admitted in response to a request for admission is conclusively established against the party making the admission in the pending action, unless the court has permitted withdrawal or amendment of that admission under Section 2033.300."

[8] Lopez did not argue in his untimely opposition that defendant had not met its initial burden. Lopez stated that his "brief memorandum of points and authorities is submitted to point out the material issues of fact," and to request again a continuance of the hearing.

union agreement had expired or violated his rights under the collective bargaining agreement. Thus, Lopez did not "produce[] admissible evidence which raises a triable issue of fact material to the defendant's showing" that there were no jobs available to Lopez at Market Center 501. (*Caldwell v. Paramount Unified School Dist.*, *supra*, 41 Cal.App.4th at p. 203.)

Lopez claims that there was a triable issue of material fact regarding whether he could perform the essential duties of an available job with or without reasonable accommodation. Lopez, however, does not point to any evidence he presented that shows he could have performed the essential duties of any of the available jobs with or without reasonable accommodation. Aramark presented evidence that Lopez stated that the only job at Paramount that he could perform, with or without reasonable accommodation, was the distribution operator job, which was not available. Aramark also presented a declaration from an expert stating that the "essential job functions of the positions of Distribution Operator as well as Soil Operator cannot be accommodated given Mr. Lopez's significant medical limitations." Lopez offered no contradictory expert declaration or other evidence that he could perform an available job with or without accommodation.

Lopez also suggests, citing *Crocker v. Runyon* (6th Cir. 2000) 207 F.3d 314, that there was a "triable issue of fact about Lopez's ability, with or without accommodation, to perform the essential functions of an available position" because Aramark "relied on a dated medical report, September 27, 2007, at the time of [Lopez's] termination, to determine that he could not perform an available job," and that a "reasonable inference can be made that such reliance was not made in good faith." *Crocker*, a case involving a failure to hire claim against the United States Postal Service under the federal Rehabilitation Act, does not support Lopez's argument that an employer's bad faith can be inferred from the date of a medical report alone. The *Crocker* court stated: "Even if the . . . medical opinions were demonstrably flawed, the Postal Service's reasonable reliance upon them is not discriminatory. [Citation.] So long as the Postal Service relied on those opinions in good faith in determining that Crocker could not do the job, the

failure to hire him was justified. [Citation.] Moreover, Crocker offered no proof that he was physically capable of performing the job at the time he was not hired." (*Id.* at p. 319.) Lopez points to no evidence from which we can infer that Aramark's reliance (in March through June 2008) on the September 2007 medical report by Dr. Zarins and the March 2008 medical report by Dr. Kadaba (Lopez's orthopedic doctor) was not in good faith. Indeed, at the June 11, 2008 meeting, Lopez confirmed that Dr. Zarins' work restrictions were still applicable. And like the plaintiff in *Crocker*, Lopez offered no proof that he was physically capable of performing any available job in the Spring of 2008.

Lopez cites as evidence of Aramark's discriminatory intent a statement by Miron that Lopez could not return to work unless he were 100 percent healthy. Such a requirement is a violation of FEHA "because it permits an employer to avoid the required individualized assessment of the employee's ability to perform the essential functions of the job with or without accommodation." (*Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 49, fn. 11.) This evidence, however, is not sufficient to avoid summary judgment. First, it does not refute the evidence that Lopez was not a qualified individual, a prerequisite to a FEHA claim. (See *Avila v. Continental Airlines, Inc.*, *supra*, 165 Cal.App.4th at p. 1247; *Jensen v. Wells Fargo Bank*, *supra*, 85 Cal.App.4th at p. 254.) Second, the inference Lopez seeks to draw from the evidence contravenes the conclusively admitted fact that "[d]efendant did not terminate plaintiff's employment because of his back injury or because he had requested an accommodation for his back injury."

Finally, Lopez contends that there were triable issues of material fact regarding whether Aramark fulfilled its duty reasonably to accommodate Lopez, whether Aramark engaged in the interactive process in good faith, and whether Aramark discharged Lopez in retaliation for his seeking accommodation for his disability. In Lopez's briefs on appeal, as in his untimely memorandum of points and authorities in opposition to the motion, Lopez offers only brief conclusory statements in support of his claim that there were triable issues of material fact on these claims. These conclusory assertions are

"inadequate to tender a basis for relief on appeal." (*Osgood v. Landon* (2005) 127 Cal.App.4th 425, 435; see *Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6 ["[a]lthough our review of a summary judgment is de novo, it is limited to issues which have been adequately raised and supported in [appellant's] brief"].) "The absence of cogent legal argument or citation to authority allows this court to treat the contentions as waived. [Citations.]" (*In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 830; see *Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 958 [""'"When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived."'"]; see also Cal. Rules of Court, rule 8.204(a)(1).)

D. *Denial of Request for Continuance*

Lopez contends that the trial court abused its discretion in denying Lopez's ex parte requests for a continuance of all discovery and summary judgment deadlines, and the trial date, in order to give Lopez an opportunity to conduct further discovery. Code of Civil Procedure section 437c, subdivision (h), "mandates a continuance of a summary judgment hearing upon a good faith showing by affidavit that additional time is needed to obtain facts essential to justify opposition to the motion." (*Cooksey v. Alexakis* (2004) 123 Cal.App.4th 246, 253-254.) A party opposing a motion for summary judgment may request a continuance "at any time on or before the date the opposition response to the motion is due." (Code Civ. Proc., § 437c, subd. (h).) "A good faith showing that further discovery is needed to oppose summary judgment requires some justification for why such discovery could not have been completed sooner." (*Cooksey*, *supra*, at p. 257.) Lack of diligence may be a ground for denying a continuance of a summary judgment hearing. (*Ibid.*)

Lopez acknowledges that he did not comply with the timeliness requirements in Code of Civil Procedure section 437c, subdivision (h). Lopez's deadline for filing his opposition was January 26, 2011, 14 days prior to the original February 9, 2011 hearing date. (*Id.*, § 437c, subd. (b)(2).) Although in early February the trial court continued the

hearing to February 23, 2011 to accommodate the court's scheduling needs, the court did not extend the deadlines for filing the opposition or for any other matter.

The trial court acted within its discretion in denying Lopez's untimely ex parte applications. (See, e.g., *Ambrose v. Michelin North America, Inc.* (2005) 134 Cal.App.4th 1350, 1353-1354 [no abuse of discretion to deny motion for continuance of summary judgment hearing where motion was filed after deadline for filing the opposition]; *Tilley v. CZ Master Assn.* (2005) 131 Cal.App.4th 464, 490-491 [no abuse of discretion to deny late-filed motion for continuance].) The trial court properly found that Lopez's untimely filings of the applications for a continuance were due to Lopez's lack of diligence in proceeding with discovery from November 2009, when Lopez filed his complaint, to January 26, 2011, when Lopez's opposition to Aramark's motion for summary judgment was due. (See *Cooksey v. Alexakis, supra*, 123 Cal.App.4th at p. 257.)

Moreover, as the trial court noted, Lopez was not prejudiced by the denials of a continuance. "Any matter admitted in response to a request for admission is conclusively established against the party making the admission in the pending action[.]" (Code Civ. Proc., § 2033.410, subd. (a).); see *Applera Corp. v. MP Biomedicals, LLC* (2009) 173 Cal.App.4th 769, 788.) An admission precludes a party from introducing evidence contrary to its response to a request for admission, thus "'setting at rest a triable issue so that it will not have to be tried.' [Citation.]" (*Mardirossian & Associates, Inc. v. Ersoff* (2007) 153 Cal.App.4th 257, 271.) Absent a motion for relief from the deemed admissions under Code of Civil Procedure section 2033.300, which counsel for Lopez never gave any indication he intended to or ever would file, Lopez's binding admissions would take precedence over any discovery Lopez might subsequently take and submit in opposition to Aramark's motion.

DISPOSITION

The judgment is affirmed. Aramark shall recover its costs on appeal.

SEGAL, J.*

We concur:

PERLUSS, P. J.

ZELON, J.

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* Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.