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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

HOWARD SMITH,

Plaintiff and Appellant,

v.

SPACE EXPLORATION
TECHNOLOGIES
CORPORATION,

Defendant and Respondent.

B289189

(Los Angeles County
Super. Ct. No. BC486475)

APPEAL from a judgment of the Superior Court of Los Angeles County. Ann I. Jones, Judge. Affirmed.

Matern Law Group, Matthew J. Matern, Dalia Khalili and Debra J. Tauger for Plaintiff and Appellant.

Cooley, Summer J. Wynn and Rebecca L. Tarneja for Defendant and Respondent.

In this disability discrimination case, plaintiff Howard Smith alleged he was wrongfully terminated from his employment with Space Exploration Technologies Corporation (SpaceX), in violation of the Fair Employment and Housing Act (FEHA) and public policy. SpaceX obtained summary judgment on the basis that Smith did not, in fact, suffer from a legally cognizable disability. In light of Smith's ever-changing theories of recovery and binding admissions in discovery, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. Smith's Employment

Because we will ultimately conclude that the dispositive issue is Smith's lack of disability, we provide only a broad overview of his employment with SpaceX.

Smith was hired by SpaceX as a Development Operations Technician, also called a Test Technician, and started work in May 2011. His employment was terminated a few months later, on August 19, 2011. Smith was an "at will" employee.

A. The Players

Joe Fitzgerald was a Lead Test Technician; he scheduled the daily activities of a team of test technicians, including Smith. Smith believes that Fitzgerald was his direct supervisor; Fitzgerald disagrees, testifying that nobody reported directly to him. SpaceX's Human Resources Compliance Manager testified that Fitzgerald was not a manager. Instead, Rick Cortez was the Development Operations Manager, who supervised both Smith and Fitzgerald (among many others). Jerry Fielder was a Vice President of Human Resources. Lead Technician Fitzgerald, Operations Manager Cortez, and VP of HR Fielder each played a role in the events leading to Smith's termination, but the decision to fire Smith was Fielder's.

B. *SpaceX's View of the Pre-Termination Facts*

SpaceX would take the position, in moving for summary judgment, that Smith's performance as a Test Technician was incompetent. Moreover, SpaceX had concluded Smith was a disruptive presence in the workplace, frequently talking to his coworkers about, and attempting to involve them in, his personal problems. At the time, Smith was in bankruptcy, his marriage was in trouble, and his children were the subject of dependency proceedings due to his prior use of methamphetamine.¹ While Smith concedes the personal problems, he disagrees with SpaceX's characterization of his work and his interpersonal interactions.²

No SpaceX employee gave Smith any sort of written warning or documented counseling regarding his performance or workplace behavior.³ However, Fitzgerald testified to giving

¹ The record is ambiguous as to whether Smith used methamphetamine while employed by SpaceX. Smith strongly denies it.

² Although Smith generally disagrees with SpaceX's characterization of his behavior, he concedes certain facts. For example, he admits that Fitzgerald once told him to "leave his personal issues at the door." He also admitted at deposition that, when his wife gave him her old cell phone, he asked his coworkers if there was any way to "get into" it, so that he could view his wife's contacts.

³ At this point, it is necessary to mention, and discount, the so-called Leguizamo letter. Smith testified at deposition that he asked a coworker, Leonard Leguizamo, to write him a personal letter of recommendation, because he thought it would help with his marital dispute. Specifically, Smith's therapist had told him

Smith numerous verbal warnings. Cortez testified that he also verbally told Smith to keep his personal issues to himself. Fielder testified to a meeting in which Smith was told that if he did not improve, he could lose his job. Fielder said Smith was appreciative of the chance to improve. Fielder told Smith to check in with Fitzgerald regularly to confirm that he was meeting expectations.

According to Fielder, when he told Smith that he needed to stop being a distraction to his coworkers, Smith responded that he was planning to see a doctor and get a prescription, which he thought would help his performance. Fielder told Smith that, since Smith worked with machinery and expensive hardware, Smith would have to bring Fielder a doctor's note saying that he was cleared to work while taking his medication. Smith agreed to do so. Smith was, during this time, diagnosed with Attention Deficit Hyperactivity Disorder (ADHD). There is some dispute as to whether Smith ever actually told Fielder his diagnosis (Smith says that he did, Fielder does not recall), but it is undisputed that Smith gave Fielder a copy of his prescription and doctor's note releasing him to work without restrictions.

C. *Smith's Contrary View*

Smith agrees that he met with Fielder, told Fielder about his diagnosis, gave Fielder his prescription and release for work, and agreed to check in regularly with Fitzgerald. However,

that his wife was uneasy and that job security might help her feel better about the relationship. Smith asked Leguizamo to write him the letter for his personal use – to ease his wife's mind – not for work purposes. Given these concessions, Smith's repeated reliance on Leguizamo's letter as "the only written evaluation of Plaintiff's performance at SpaceX" is disingenuous.

Smith believes he was told to check in with Fitzgerald only because he was taking a controlled substance for his ADHD – he was simply directed to report on how he was doing. Smith does not believe the directive was in any way performance-related. When he was ultimately terminated, he claims that he was blindsided, because he had never been told of any issues with his performance or his behavior at SpaceX.

D. *Smith's Last Day of Work*

Smith had been advised by his physician to make certain that he took his medication with food and drink. On August 19, 2011, the day he was fired, he took his medication on an empty stomach. Smith thereafter suffered severe abdominal pain.⁴ He was at SpaceX at the time, preparing to do some work in a mock-up space capsule. He collapsed in pain in the capsule. He called Fitzgerald for help. Fitzgerald asked how he could help, and Smith asked for food. Fitzgerald brought him food, and stayed with him in the capsule until he felt well enough to move. Smith was then escorted to a “meditation room,” where he was given an opportunity to rest until he felt better. After about 45 minutes, Smith said he felt “right as rain” and was ready to return to work.

Smith's employment was terminated later that day. Fielder was the one who fired Smith; Cortez and Fitzgerald were also present. Fielder's testimony was that morning, Cortez had

⁴ There is no medical testimony in the record as to causation, and, as we shall discuss, Smith's theory of the cause of his abdominal pain changed as the case progressed. Nonetheless, it is undisputed that he took his medication without food against medical advice, and his pain was subsequently alleviated by food. The inference that the stomach pain was caused by taking the medication without food is a reasonable one.

told him that Smith had been found sleeping in the capsule. Fielder believed this was “totally inappropriate” and “in light of everything else and the status of his improvement over time, that warranted termination.” Fielder testified that he had not been told that Smith had been ill that morning. He agreed that sleeping in the capsule was a “contributing factor” to Smith’s termination, but he had also been concerned that Smith’s performance had not significantly improved.⁵

2. *Smith’s Complaint*

The operative complaint is Smith’s first amended complaint. In it, he asserts two causes of action against SpaceX: (1) violation of FEHA; and (2) wrongful termination in violation of public policy. The FEHA cause of action alleges multiple violations of FEHA, including disability discrimination, failure to take all reasonable steps to prevent discrimination, failure to accommodate a disability, failure to engage in the interactive process, and retaliation.

The complaint alleges that Smith was discriminated against on the basis of two disabilities: ADHD and depression. The complaint suggests that Smith’s abdominal pain on his last day of work was caused by an increase in his medication and the fact that he took the increased dose simultaneously with vitamins containing calcium and zinc; unlike Smith’s summary judgment opposition, his complaint makes no mention of taking medication

⁵ Smith does not contend it would have been wrongful to terminate him for sleeping in the capsule even if he, in fact, was not sleeping but was ill. (*Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1005 [it is not enough if the employer’s decision was wrong or mistaken, the plaintiff can only prevail if it was discriminatory].)

on an empty stomach against doctor's advice. Smith alleges that he was terminated "due to 'poor work performance'" — the quotation marks apparently intended to allege pretext as opposed to facts. As to specific allegations of disability discrimination, Smith alleges that (1) Fitzgerald made false reports to Fielder that Smith had a lack of concentration; and (2) SpaceX did not give him sufficient time to adjust to his prescription, which he alleged could take up to six months. In his wrongful termination in violation of public policy cause of action, Smith specifically claimed that he was terminated because he complained about SpaceX's acts of discrimination.

3. *Pretrial Discovery*

Smith made some significant admissions in discovery. In response to a contention interrogatory asking him to "Name and describe each disability alleged in the PLEADINGS," Smith identified only ADHD, and made no mention of depression, which he had alleged in his complaint. Similarly, at deposition, he testified that he does not think he has ever been diagnosed as suffering from depression.

As to ADHD, Smith testified at deposition that it did not "cause [him] to lose focus or not be able to concentrate for long periods of time." He testified that he "didn't have a medical condition that required any work restrictions."

In answering an interrogatory which asked how any disability or condition may have "contributed to the occurrence of the INCIDENT," Smith explained, "ADHD medication and vitamins caused Plaintiff to [have] an adverse reaction."

When asked, by interrogatory, if he needed any accommodation to perform any function of his job, and to describe the needed accommodations, he responded, "Smith needed time

to adjust to the dosage increase of his medication and after job assignments [*sic*] to allow for him to adjust to the medication.”

But, at deposition, he testified that the only work modification he ever told SpaceX he might need is possible time off to see his physician, and he conceded SpaceX never refused a request to take time off to see his doctor or therapist. He added that Fitzgerald “was very supportive.” Smith testified that Fielder was also “encouraging,” and had said, “ ‘We here at SpaceX want you to make use of the benefits, and we want you to be the best person you can be.’ ”⁶

4. *SpaceX’s Motion for Summary Judgment*

In light of Smith’s discovery concessions, SpaceX’s motion for summary judgment argued not only that SpaceX had a legitimate, nondiscriminatory reason to terminate Smith (inadequate job performance and behavior distracting of other workers), but that Smith could not even establish a *prima facie* case of disability discrimination because he did not suffer at all from a disability cognizable under FEHA. Specifically, SpaceX argued that: (1) Smith could not rely on depression, because he

⁶ As to the issue of engaging in the interactive process, Smith testified that Cortez came to him and said he had heard Smith had ADHD and had obtained some medication for it. Cortez told him, “ ‘Okay. I want you to come if you have any problems with it at all.’ ” Cortez “[a]bsolutely” expressed that his door was always open to any concerns Smith might have about needs to modify his job as the result of his diagnosis, and Smith never went to Cortez to express such a need. It is not clear if Smith’s complaint sought to allege disability harassment. To the extent that it did, Smith testified that no one at SpaceX ever used a negative term to describe ADHD, and volunteered, “Everyone was very supportive and very courteous. Fine group of people to work with.”

had omitted it from his contention interrogatory response; (2) as to ADHD, Smith conceded at deposition that it did not impact his work (or any other major life activity); and (3) a stomachache caused by Smith's own failure to take his medication with food is not a disability under FEHA.

5. *Smith's Opposition*

Smith opposed SpaceX's motion on all grounds. Specifically, he argued a triable issue of fact existed as to whether he was disabled. Although he briefly mentioned depression and ADHD, his argument was largely focused on the stomachache he suffered on his last day of work. Arguing that it was both temporarily disabling and, at least in part, a "side effect[]" of the medication he was taking, he argued that the stomachache constituted a disability under the law.

Smith also took the position that he was terminated because SpaceX had previously had an employee who was placed on medical leave. As soon as Smith suffered his disabling stomachache, SpaceX management became concerned that he, too, would require medical leave and they did not want that to happen again. Smith's evidence of management's supposed concerns consisted of two statements to which Smith testified at deposition, what we refer to throughout this opinion as "the Fitzgerald hearsay statement" and "the Cortez hearsay statement."

A. *The Fitzgerald Hearsay Statement*

Smith testified that, on the way out the door after Fielder had terminated his employment, he and Fitzgerald had a conversation. Smith testified, "He pretty much told me that it was out of his hands, it was out of his control, and he was pretty much doing what he was told to do. And he said that he noticed

that there was a lot of improvement, and he said that this type of thing had happened before with someone that was in my position, and the company just didn't want to get stuck with the liability of me going out on some medical leave."

Counsel then characterized this testimony as, "[I]t sounded like you were saying that he was telling you that one of the things he understood was the company didn't want a repeat of someone like you going out on medical leave."⁷ Smith agreed with the characterization.

B. *The Cortez Hearsay Statement*

At deposition, Smith was asked why he believed he was fired because of a concern he might go out on medical leave. He responded, "I overheard conversations that Rick Cortez had with other people in regards to the person that had my position prior to me, went out on, like, a personal medical leave or something. And he was still on the company payroll, and they didn't want that to happen again."

The deposition excerpts in the record do not indicate that Smith was ever asked when he overheard the conversations involving Cortez, where they took place, to whom Cortez had been talking, and who was the "they" that did not want this to happen again.⁸

⁷ The record is not clear whether it was Smith's or SpaceX's counsel who was speaking.

⁸ In his separate statement of facts, Smith cited to his testimony of the Fitzgerald and Cortez hearsay statements for the proposition that "Plaintiff's superiors told Plaintiff, during the termination meeting, that Defendant was terminating Plaintiff because he was ill and because Defendant did not want to accommodate Plaintiff." Setting to one side whether the

6. *SpaceX's Reply*

In reply, SpaceX reasserted that there was no triable issue of fact that Smith suffered from a disability because there is no admissible evidence that his ADHD caused him any impairment, and Smith could not bootstrap a stomachache into an actionable disability.

As to the Fitzgerald and Cortez hearsay statements, SpaceX's argued that they were not admissible.

7. *Hearing*

The court issued a tentative ruling in favor of SpaceX, and proceeded to a lengthy hearing on the summary judgment motion. The argument began with the issue of whether there was a triable issue of fact that Smith suffered from a disability under FEHA.

testimony is admissible, we believe the deposition testimony does not support Smith's characterization in his separate statement. Neither of the statements were made "during the termination meeting" – according to Smith's testimony, Fitzgerald's was a private statement on the way out the door after the meeting, and the Cortez statement was not identified in time and place at all. Similarly, Smith's summary judgment opposition states, "Fielder had also previously dealt with an employee with ADHD, but did not want to deal with another such accommodation." For this, Smith cites to his Disputed Material Fact 57, which states only that "Fielder had also previously dealt with an employee [at SpaceX] with ADHD," and cites to Fielder's testimony in which he discussed multiple employees whose disabilities SpaceX had accommodated, including one employee who had attention deficit disorder and a personality disorder. The testimony does not support the argument in Smith's opposition that Fielder "did not want to deal with another such accommodation."

Smith conceded that a disability is not cognizable under FEHA unless it limits a major life activity, but argued that working is a major life activity and his stomachache rendered him unable to work. He also argued that depression and ADHD “fall under the definition of disability under the FEHA.” The trial court was concerned that there was no evidence that Smith ever informed SpaceX of any depression diagnosis, so cautioned Smith not to argue ADHD and depression together. Smith then chose to focus on the ADHD diagnosis and the medication that had been prescribed for it. Smith’s argument circled back to the stomachache, which he argued was a side effect of the medicine SpaceX knew he had been taking for his ADHD. The trial court responded that transitory gastrointestinal problems are not a disability under FEHA. The court acknowledged that a medication’s side effects can be a disability, but not solitary events occasioned by noncompliance with medical orders when the plaintiff returned to normal shortly after having been given food and an opportunity to rest. Smith disagreed, arguing that “a severe stomach ache can still constitute a disability”

Changing direction, Smith relied on the Fitzgerald and Cortez hearsay statements to argue that SpaceX terminated him because it did not want to accommodate his ADHD. Smith argued that this raised a triable issue of fact both that he had a disability and that he was terminated for it. When the court replied that the evidence is that Smith’s ADHD never manifested in any limitations, so could not constitute a disability, Smith argued that he could proceed on a theory that he was *perceived* as disabled, even if he might not have been. The court pointed out that this was a new theory which had not been raised in Smith’s opposition papers, but nonetheless asked Smith to identify

evidence that he was perceived as having had “a durational disability” of disabling ADHD. Smith could only identify evidence that he told SpaceX he had ADHD, which the court pointed out had been accompanied by a doctor’s note saying he was released to work with no restrictions.

SpaceX argued that Smith did not raise a triable issue of fact that he was disabled. SpaceX further argued that the perceived disability theory was not raised in Smith’s summary judgment opposition, but the theory was nonetheless unsupported by the record. SpaceX also argued that there is no evidence raising a triable issue of fact that Smith was terminated because SpaceX did not want to accommodate his disability. The court then turned to the evidence on which Smith relied – the Fitzgerald and Cortez hearsay statements – and allowed the parties to argue, in great detail, SpaceX’s objections to these statements.

Smith made a final argument that he had been fired one month after SpaceX learned he had ADHD. The court responded, “Well, this is your newly they perceived him as being disabled for which we can’t cite to any evidence in the record supporting that contention other than the fact that he had received a prescription and a note from the doctor saying there were no work limitations. That’s the evidence.”

8. *Ruling*

The court granted summary judgment.

In the course of the briefing on the motion, both parties had submitted evidentiary objections. The court first sustained SpaceX’s objections and overruled Smith’s.

Turning to the merits of the motion, the court found dispositive the issue of whether Smith had a disability cognizable

under FEHA. As to depression and ADHD, the court was persuaded by Smith's deposition testimony that the depression and ADHD did not affect him (and that depression had been omitted in his answer to the contention interrogatory). Smith's main argument was that the stomachache on his final day of work had been disabling; the court first noted that the idea that the stomachache was a side effect of his medication was purely speculative, as there had been no medical evidence to that effect. Moreover, even if the stomachache was causally related to the medication, a failure to properly take one's medication does not constitute a disability. Finally, the court held that FEHA excludes mild conditions, such as non-chronic gastrointestinal issues, from its definition of disability. While FEHA has no durational requirement, a condition which requires nothing more than a day off does not impact a major life activity sufficient to amount to a disability. Because there was no triable issue of fact that Smith was disabled, all of his causes of action failed.

9. *Judgment and Appeal*

Judgment was entered in favor of SpaceX. Smith filed a timely notice of appeal.

10. *Briefing on Appeal*

On appeal, Smith argues the trial court erred because he raised a triable issue of fact of disability. First and foremost, though, he argues that he raised a triable issue of fact of *perceived* disability – a theory not pleaded in his complaint and not argued in his opposition papers in the trial court. He argues the evidence of a perceived disability is found in the Fitzgerald and Cortez hearsay statements. He also adds a third statement, not previously addressed in any detail in his summary judgment papers – a supposed adoptive admission of Fielder, which we

discuss below. Essentially, assuming we consider Smith's perceived disability argument, Smith's effort to establish a perceived disability rests on the admissibility of three hearsay statements that the court ruled were inadmissible. We discuss the correctness of the court's ruling below.

Second, Smith argues that he raised a triable issue of fact on actual disability – again arguing that he was disabled due to depression, ADHD, and his stomachache.

Smith finally asserts that he raised a triable issue that he was terminated because of his disability, and that each of his causes of action has merit. We need not reach all of these issues because we conclude the trial court was correct, and there is no triable issue of fact that Smith suffered from a disability.

In addition to his arguments on the merits of the summary judgment motion, Smith separately argues the court erred by its blanket rulings on the evidentiary objections. Observing that when a party interposes dozens of meritless objections, individualized consideration of the objections is not required (*Cohen v. Kabbalah Centre Internat., Inc.* (2019) 35 Cal.App.5th 13, 21), we will instead address, individually, the only objections relevant to our disposition on appeal.

DISCUSSION

1. *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.)⁹

“In a motion for summary judgment, the complaint limits the issues. A plaintiff opposing such a motion cannot defeat it by proffering new, unpleaded theories or issues. [Citations.]” (*Ignat v. Yum! Brands, Inc.* (2013) 214 Cal.App.4th 808, 820.)

“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.)

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.)

“In determining whether any triable issue of material fact exists, the trial court may, in its discretion, give great weight to admissions made in deposition and disregard contradictory and self-serving affidavits of the party. [Citations.] ‘In reviewing motions for summary judgment, the courts have long tended to treat affidavits repudiating previous testimony as irrelevant,

⁹ We discuss the unique burden shifting procedure on summary judgment for FEHA claims in Part 2, below.

inadmissible, or evasive. [Citation.]’ [Citation.] The rule is equally applicable to a conflict between the affidavit and the deposition testimony of a single witness.” (*Preach v. Monter Rainbow* (1993) 12 Cal.App.4th 1441, 1451.)

In reviewing objections to evidence offered in conjunction with summary judgment, our standard of review depends on the nature of the objection. “De novo review is proper where evidentiary objections raise questions of law, such as whether or not a statement is hearsay. [Citations.] In contrast, evidentiary objections based on lack of foundation, qualification of experts, and conclusory and speculative testimony are traditionally left to the sound discretion of the trial court.” (*Alexander v. Scripps Memorial Hospital La Jolla* (2018) 23 Cal.App.5th 206, 226.)

2. Disability Discrimination under FEHA

FEHA prohibits employers from discriminating on the basis of disability. (Gov. Code, § 12940, subd. (a).)

“Under the three-part test developed in *McDonnell Douglas Corp. v. Green*, [1973], 411 U.S. 792: ‘(1) The complainant must establish a prima facie case of discrimination; (2) the employer must offer a legitimate reason for his actions; (3) the complainant must prove that this reason was a pretext to mask an illegal motive.’ [¶] If the employee establishes a prima facie case, the employer is required to offer a legitimate, nondiscriminatory reason for the adverse employment action. The employer’s burden at this stage is to go forward with additional evidence; it does not take on a burden of persuasion. If the employer produces substantial evidence of a legitimate, nondiscriminatory reason for the adverse employment action, the presumption of discrimination created by the prima facie case ‘ “simply drops out of the picture” ’ and the burden shifts back to the employee to

prove intentional discrimination. “[T]he plaintiff may establish pretext “either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer’s proffered explanation is unworthy of credence.” ’ ” (*Morgan v. Regents of the University of California* (2000) 88 Cal.App.4th 52, 68-69, citations omitted.)

We are here concerned with the first prong of the test: whether Smith can establish a prima face case of disability discrimination. First we discuss whether he has an actionable disability. We then turn to the theory he first raises on appeal – that SpaceX perceived that Smith had a disability even if he was not actually disabled.

3. No Triable Issue of Fact of Actual Disability

At various times, Smith has claimed his disability as depression, ADHD and a medication-induced stomachache. We start our analysis of Smith’s claimed disability with Government Code section 12926, subdivision (j)(1), which defines “[m]ental disability” to include “[h]aving any mental or psychological disorder or condition, such as intellectual disability, organic brain syndrome, emotional or mental illness, or specific learning disabilities, that limits a major life activity.” For the purposes of this definition, “a mental or psychological disorder or condition limits a major life activity if it makes the achievement of the major life activity difficult.” (*Id.* at subd. (j)(1)(B).) Major life activities include working. (*Id.* at subd. (j)(1)(C).) “‘Limits’ shall be determined without regard to mitigating measures, such as medications, assistive devices, or reasonable accommodations, unless the mitigating measure itself limits a major life activity.” (*Id.* at subd. (j)(1)(A).) It is not sufficient to simply allege a disability; a plaintiff must demonstrate that the disability makes

the achievement of work, or some other major life activity, difficult. (*Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 47.)

In addition, an employee can have a mental disability within the meaning of FEHA if the employer regards or treats the employee as having or having had, a mental condition that makes achievement of a major life activity difficult. (Gov. Code, § 12926, subd. (j)(4).) In other words, a perceived disability constitutes a disability within the meaning of FEHA.

FEHA regulations explain that “ ‘Mental disability’ includes, but is not limited to, emotional or mental illness, intellectual or cognitive disability (formerly referred to as ‘mental retardation’), organic brain syndrome, or specific learning disabilities, autism spectrum disorders, schizophrenia, and chronic or episodic conditions such as clinical depression, bipolar disorder, post-traumatic stress disorder, and obsessive compulsive disorder.” (Cal. Code Regs., tit. 2, § 11065, subd. (d)(1).)

Disability does not include “conditions that are mild, which do not limit a major life activity, as determined on a case-by-case basis. These excluded conditions have little or no residual effects, such as the common cold; seasonal or common influenza; minor cuts, sprains, muscle aches, soreness, bruises, or abrasions; non-migraine headaches, and minor and non-chronic gastrointestinal disorders.” (Cal. Code Regs., tit. 2, § 11065, subd. (9)(B).)

The trial court granted summary judgment on the basis there was no triable issue of material fact that Smith had a disability cognizable under FEHA. We address Smith’s theories of actual disability in order: depression, ADHD and medication-induced stomachache.

A. *Depression*

As moving party, SpaceX argued that Smith could not pursue depression as a theory for disability, as he did not identify it in his response to the contention interrogatory. We agree. “Admissions or concessions made during the course of discovery govern and control over contrary declarations lodged at a hearing on a motion for summary judgment. [Citations.]” (*Visueta v. General Motors Corp.* (1991) 234 Cal.App.3d 1609, 1613.) In response to the interrogatory, Smith identified ADHD as the only disability at issue. There is no indication that he attempted to amend his interrogatory response. (See Code Civ. Proc., § 2030.310.) We agree with the trial court that, from that point onward, depression was no longer at issue.

B. *ADHD*

In support of its motion for summary judgment, SpaceX submitted the report of its doctor, who had performed a psychological examination of Smith and concluded he did not have ADHD, but had simply been experiencing transitory symptoms relating to the stressors in his life. Smith’s own doctor’s report indicated a diagnosis of ADHD, thus sufficient to raise a triable issue of fact regarding diagnosis, but there is no admissible evidence that his ADHD limited “a major life activity” such that it would constitute a disability under FEHA. (Gov. Code, § 12926, subd. (j)(1)(B).)

On appeal, Smith suggests that he need not meet this burden because ADHD constitutes a FEHA disability as a matter of law, without a showing of its impact on an employee’s work. For this, he cites to non-FEHA authority. (*In re Joseph H.* (2015) 237 Cal.App.4th 517, 535 [in a criminal prosecution of a 10-year-old who murdered his father, the defendant argued his confession

was involuntary due to his age “and the fact that he suffers from ADHD and other mental disabilities”]; *Forest Grove Sch. Dist. v. T. A.* (2009) 557 U.S. 230, 233 [in a case under the federal Individuals with Disabilities Education Act, a hearing examiner found that the school district did not adequately test the child in “all areas of suspected disability, including ADHD”].) That ADHD may be considered a disability in some non-FEHA settings does not assist Smith’s argument that he is disabled under FEHA. FEHA requires limitation of a major life activity. Smith also cites to a document on the website of the National Institute of Mental Health, but this was not before the trial court and he has not sought judicial notice of it on appeal; we therefore decline to consider the document.

Turning to whether Smith’s ADHD limited a major life activity, Smith relies on his summary judgment declaration, in which he said: “My ADHD made it more difficult for me to work than most of my co-workers because I had trouble focusing, concentrating, and controlling my impulses while performing tasks.” But this was contradicted, in large part, by Smith’s prior deposition testimony, in which he testified that ADHD did not “cause[] him to lose focus or not be able to concentrate for long periods of time.”¹⁰ Similarly, Smith’s complaint had alleged that

¹⁰ On appeal, Smith argues that there is no contradiction, and that taking his testimony as a whole, it simply means that he was able to focus when he was taking his ADHD medication. At oral argument, he expanded on this theory, suggesting that when he answered “no” to the question “Does your ADHD cause you to lose focus or not be able to concentrate for long periods of time?” he was simply referring to the *present*, when he was taking medication which controlled his ADHD symptoms. The question appears on page 164 of Smith’s deposition; the record does not

Fitzgerald “made false reports” to Fielder about Smith’s lack of concentration – an allegation which implies Smith’s ADHD did not, in fact, cause him to have a lack of concentration. As we have explained, a plaintiff cannot defeat summary judgment by changing theories from his complaint or relying on a declaration which contradicts his deposition testimony. (*Ignat v. Yum! Brands, Inc.*, *supra*, 214 Cal.App.4th at p. 820; *Preach v. Monter Rainbow*, *supra*, 12 Cal.App.4th at p. 1451.)

On appeal, Smith ignores those parts of his declaration to which objections were sustained as contradicted by his deposition (trouble focusing and concentrating) and relies instead on the remaining representation that his ADHD caused him to have difficulty in controlling his impulses. But SpaceX objected to this as an improper opinion. We agree that Smith is qualified to testify as to the symptoms he experienced – i.e., a loss of impulse control. (See *Minick v. City of Petaluma* (2016) 3 Cal.App.5th 15, 32.) But Smith is not qualified to testify that his symptoms were caused by ADHD – particularly when SpaceX provided medical testimony that they were not. (*Id.* at p. 33.)

Recognizing his lack of causation evidence, Smith attempts to fill the void by citing to a *Psychology Today* blog post for the proposition that impulsivity is a “core symptom” of ADHD. Smith has not sought judicial notice of this website, and it is not properly before us. We conclude Smith has failed to raise a

include the pages immediately before or immediately after. However, the question immediately following (for which no answer appears in our record), is “Did you require breaks in your workday in order to regain focus as a result of your ADHD?” This indicates that the line of questioning was concerned with Smith’s experience at SpaceX, not his experience with ADHD at the time of the deposition.

triable issue of fact that his ADHD limited a major life activity and therefore constituted a disability under FEHA.

C. *Medication-Induced Stomachache*

In one sense, Smith's main theory has always been *not* that his disability was ADHD alone, but that his disability was the medication-related stomachache on the day he was fired. We observe that, although Smith's complaint alleged his stomachache was caused by an increased dose combined with vitamins, Smith takes the position, on appeal, that it was caused by a combination of the increased dose and his own failure to eat.¹¹

Smith is correct that a FEHA disability may result from side effects of medication. (*Halsey v. JP Morgan Chase Bank* (N.D. Cal. 2009) 2009 WL 3353459, *4.) Similarly, he is correct that, under FEHA, there is no specific durational requirement that a condition must meet in order to constitute a disability. (*Diaz v. Fed. Express Corp.* (C.D. Cal. 2005) 373 F.Supp.2d 1034, 1052.) That, however, is a far cry from authority that a non-chronic stomachache, caused by a one-time failure to properly manage medication, constitutes a FEHA disability.

It does not, as a matter of law. We find the applicable regulation controlling. That regulation specifically excludes from the definition of disability "conditions [that] have little or no residual effects, such as . . . minor and non-chronic gastrointestinal disorders." (Cal. Code Regs., tit. 2, § 11065, subd. (9)(B).) Case law is in accord. "[T]he term 'disability' may

¹¹ The only medical evidence in the record on appeal is that his vitamins would have had no effect on Smith's response to his medication. This may be why Smith no longer pursues this theory on appeal.

incorporate a condition of only temporary duration, but that . . . condition must have at least a minimal duration within the time period relevant to the claim that is sufficient to constitute an actual limitation of a major life activity, as opposed to simply the need to take a day off.” (*Ellis v. City of Reedley* (E.D. Cal. 2007) 2007 WL 1098571, *11.)

Moreover, Smith’s concession that his stomachache was caused, at least in part, by his failure to adhere to his doctor’s advice to take his medication with food is fatal to his case. The stomachache was not a “side effect” of his ADHD medication; the stomachache was the result of Smith’s failure to properly manage his medication. This is not a disability; this is an employee mistake. (*Brundage v. Hahn* (1997) 57 Cal.App.4th 228, 239 [when an employee fails to meet job expectations due to the employee’s failure to control a controllable disability, the employer is not required to offer a second chance to properly manage it].)

4. *No Triable Issue of Fact of Perceived Disability*

At the hearing on the summary judgment motion – not in his papers – Smith argued, for the first time, that he was wrongfully terminated not for an actual disability, but because SpaceX perceived him to have a disability. The trial court rejected this argument as an inappropriate last-minute change in theory. The trial court was correct; in any event, this theory is without evidentiary support.

A. *Unpleaded Theory We Cannot Reach*

The complaint serves to delimit the scope of the issues before the court on a motion for summary judgment. A party cannot successfully resist summary judgment on a theory not pleaded by raising the theory for the first time at the hearing on

the summary judgment motion. (*Bosetti v. United States Life Ins. Co. in City of New York* (2009) 175 Cal.App.4th 1208, 1225.)

The trial court disregarded Smith's perceived disability theory, as it was raised at best for the first time, not in the complaint or summary judgment opposition papers, but at the hearing on the summary judgment motion. On appeal, Smith provides a list of citations to the record in which he purportedly made the argument in his opposition. These are citations to a single line in his opposition, in which he notes that FEHA applies to perceived disabilities, and references to the evidence on which he *now* relies to support his perceived disability argument, which he was then citing as evidence for other propositions. Smith can point to no place in his opposition in which he actually argued that his evidence raises a triable issue that he was terminated because SpaceX perceived him to have a disability. Moreover, as we have observed, the perceived disability theory was never pleaded in Smith's complaint. Having not pleaded it and not developed it in opposition to summary judgment, Smith could not raise the theory for the first time at the hearing on summary judgment. The trial court was correct to decline to address this theory.

B. *Perceived Disability is Unsupported by Admissible Evidence*

Even if we were to conclude Smith's perceived disability theory is properly before us, it is wholly unsupported by admissible evidence. When he first raised the theory at the hearing on summary judgment, he relied on the Fitzgerald and Cortez hearsay statements. On appeal, he adds a supposed adoptive admission by Fielder. We briefly address each statement.

Preliminarily, Smith implicitly acknowledges that the three statements are, in fact, hearsay, as they are out-of-court statements offered for the truth of the matter asserted. (Evid. Code, § 1200.) Smith argues, however, that they are nonetheless admissible as they satisfy the requirements for one or more exceptions to the hearsay rule.

1. Fitzgerald Hearsay Statement is Inadmissible

Smith testified that, on the way out of the termination meeting, Fitzgerald told him, in reference to Smith's termination, "that it was out of his hands, it was out of his control, and he was pretty much doing what he was told to do. And he said that he noticed that there was a lot of improvement, and he said that this type of thing had happened before with someone that was in my position, and the company just didn't want to get stuck with the liability of me going out on some medical leave."

Smith's testimony on its face is hearsay. (Evid. Code, § 1200.) Moreover, it encompasses a second level of hearsay, in that Fitzgerald was purportedly telling Smith something that some unidentified person had told Fitzgerald. It is therefore inadmissible unless both statements satisfy exceptions to the hearsay rule. (Evid. Code, § 1201.) Smith argues Fitzgerald's statement to him is admissible as an admission of a party opponent. (Evid. Code, § 1222.) But when the opposing party is an entity, the proponent of the hearsay must establish that the speaker was authorized to speak on behalf of the entity on the topic of the statement. (*Morgan v. Regents of the University of California, supra*, 88 Cal.App.4th at p. 70.) Fitzgerald was simply a lead technician; the record does not support an inference that Fitzgerald had any authority to fire Smith or speak on the issue on the company's behalf. Nor has he established an

exception with respect to whatever unknown speaker allegedly told the information to Fitzgerald. Smith suggests several times that the unknown speaker had to have been either Cortez or Fielder; but this claim, without any evidentiary support, is speculative.

We reach a similar result with respect to Smith's alternative argument that the statement is admissible as a prior inconsistent statement. (Evid. Code, § 1235.) To be sure, prior inconsistent statements may be relied upon in opposition to a motion for summary judgment, when the statements predate (and are inconsistent with) discovery responses submitted in connection with the motion. (*Colarossi v. Coty US Inc.* (2002) 97 Cal.App.4th 1142, 1151.) But, even if we assume the statement is inconsistent with Fitzgerald's deposition testimony, the failure to identify the second speaker precludes Smith from establishing that statement is inconsistent with something the unknown speaker said in discovery.

2. Cortez Hearsay Statement is Inadmissible

The same analysis is more compelling with respect to the Cortez hearsay statement. There, Smith testified, "I overheard conversations that Rick Cortez had with other people in regards to the person that had my position prior to me, went out on, like, a personal medical leave or something. And he was still on the company payroll, and they didn't want that to happen again." Having not identified the "other people" with whom Cortez was speaking, and whether it was Cortez or one of these others who made the statement, Smith cannot establish the statement was either an admission of SpaceX or a prior inconsistent statement.

3. Fielder Adoptive Admission is Inadmissible and is Legally Insufficient

For the first time on appeal, Smith relies on a so-called adoptive admission of Fielder, the Human Resources Vice President. Smith testified that when Fielder fired him, Smith asked for a second chance, saying he had learned from his mistake and knew to take his medication with food. “I said, ‘You’re firing me because of a bellyache? Please don’t. I don’t think it’s a good idea. I’m really – I’m really uncomfortable with this.’” Smith testified that Fielder responded, “I’m sorry. We already initiated the paperwork. It’s already done.” Smith argues that Fielder’s failure to disagree with Smith’s statement was an admission that Fielder, in actuality, was firing Smith “because of a bellyache.” (Evid. Code, § 1221.) Fitzgerald has failed to establish that the circumstances were such that Fielder’s silence was an adoptive admission rather than an attempt to defuse a tense situation. Even if we considered the statement to be an admission that Smith was fired for a stomachache, that statement would be insufficient to establish a triable issue that Smith was fired for an actual or perceived disability. As we have discussed at length above, Smith’s stomachache was not a disability.

5. ***Absent Disability, Smith’s Complaint Fails***

Although Smith alleged a single cause of action for disability discrimination under FEHA, it encompassed multiple violations: disability discrimination, failure to take all reasonable steps to prevent discrimination, failure to accommodate a disability, failure to engage in the interactive process to determine accommodation, and retaliation. Each of these theories depends on the existence of a disability cognizable

under FEHA. As Smith was not disabled within the meaning of FEHA, each of these FEHA theories fails.¹² The same is true of his cause of action for wrongful termination in violation of public policy, which was based on disability discrimination.

DISPOSITION

The judgment is affirmed. Smith is to pay SpaceX's costs on appeal.

RUBIN, P. J.

WE CONCUR:

MOOR, J.

KIM, J.

¹² Smith argues that he could pursue a cause of action for retaliation if he was retaliated against for opposing conduct he believed to be discriminatory, even if it turns out that the conduct was not. Here, he suggests that SpaceX failed to reinstate him in retaliation for his complaints against the termination he perceived to be unlawful. The contrary is true: SpaceX failed to reinstate him because it had terminated his employment for a lawful reason, and saw no need to reinstate an employee it perceived to be incompetent.