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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

JOHN H. ROBINSON, Plaintiff and Appellant, v. VERIZON CORPORATE RESOURCES, GROUP LLC, Defendant and Respondent.	B262886 (Los Angeles County Super. Ct. No. BC501426)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard Rico, Judge. Affirmed.

Shegerian & Associates and Carney Shegerian, for Plaintiff and Appellant.

Jones Day, Nathaniel P. Garrett, Steven Zadravecz and Mark E. Earnest, for Defendant and Respondent.

Plaintiff John Robinson filed an employment discrimination action alleging Verizon Corporate Resources (Verizon) terminated him on the basis of his disability and race. Robinson further alleged Verizon failed to reasonably accommodate his disability, and failed to engage in an interactive process to identify any such accommodation.

Verizon filed a motion for summary judgment arguing Robinson could not prevail on any of his claims because the undisputed evidence demonstrated that: (1) Robinson's permanent physical restrictions precluded him from performing the essential functions of the position he had held; and (2) although Verizon attempted to accommodate Robinson by placing him in a temporary office position, he voluntarily retired from the company. The trial court granted the motion and entered judgment in favor of Verizon. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. Events Preceding the Filing of Robinson's Complaint

1. Summary of Robinson's work history and medical restrictions

In 1978, Verizon's predecessor, General Telephone & Electronics Company (GTE), hired plaintiff John Robinson to serve as a "lineman." After holding numerous positions within the company, Robinson became a "special equipment installer" (SEI) in 2007. As an SEI, Robinson was responsible for traveling to business customer sites to repair high-speed data circuits and data equipment. Robinson, who worked out of the "San Fernando yard" with four other SEIs, received his job assignments through "repair tickets" that identified the equipment that needed to be fixed, the customer's address and the location of the customer's equipment. When conducting repairs, Robinson was occasionally required to descend manholes, climb on ladders, bend over, squat and lift objects that weighed more than 20 pounds. Although SEIs generally worked alone, they were permitted to request assistance from other SEIs or, if necessary, from other Verizon specialists known as "cable technicians."

In December of 2010, Robinson injured his back while working on a repair. After a physical examination, Robinson was placed on temporary "modified" work duty that included the following work restrictions: limited standing and walking; no stooping or

bending; no kneeling or squatting; no climbing; and no pulling lifting or pushing objects in excess of five pounds. In light of these restrictions, Verizon and Robinson agreed it would be unsafe for him to continue working in the field as an SEI. During his recuperation, Verizon temporarily assigned him to perform "light duty" office work.

On February 3, 2011, Robinson's physician, Edward Haronian, issued a "Disability Status Report" recommending that Robinson's work restrictions be modified to prohibit only certain forms of climbing and lifting more than 20 pounds. After receiving the recommended modification, Robinson spoke with Linda Ledesma, his local supervisor, and requested that he be permitted to resume his SEI field duties. Ledesma agreed to speak with Chris Reynolds, the area manager, about the issue. Reynolds then called Robinson to discuss the matter further. Robinson assured Reynolds his new restrictions did not prohibit any form of physical activity other than "climbing poles and heavy lifting." Reynolds agreed to allow Robinson to resume his SEI field work with restrictions that precluded lifting more than 20 pounds, and climbing telephone poles; all other forms of climbing were permitted.

On March 14, 2011, Robinson met with his local supervisor, Alfonso Wolf to discuss the modified restrictions. Robinson told Wolf that although his restrictions prohibited him from climbing on telephone poles and handling 28 or 32 foot ladders, he was still able to climb short distances and descend into manholes. On March 21st, Wolf sent Robinson a memorandum summarizing their conversation entitled "Engagement of Interactive Process/Modified Duty Assignment." The memo stated that Robinson and Wolf had "engaged in the interactive process to discuss if any reasonable accommodations could be made to enable [Robinson] to perform the essential functions of a [SEI] due to . . . medical limitations/restrictions recommended by [Robinson's] physician of '20 pound weight limit and no climbing.' . . . . It was determined that a temporary modified work assignment performing some of the SEI responsibilities of accessing building terminals, working on [high-capacity] circuits and changing out cards by working in a bucket truck and asking for help when needed will be provided . . . as of January 3rd, 2011."

The memorandum further stated that the "modified work assignment [wa]s temporary in nature to allow [Robinson] to continue to work during [his] healing/rehabilitation process. We discussed that a [SEI's] work consists of occasionally climbing and lifting . . . up to 80 pounds. Accessing building terminals, working on [high-capacity circuits] and changing out cards are only a part of what a [SEI] is responsible for. Not performing climbing work or lifting ladders or manhole lids is not meeting the essential function of a [SEI]. Based on the needs of the business you will be allowed to continue to work in a modified duty capacity, but this is not permanent and dependent upon the demands of service could end at any time." Robinson was satisfied with Verizon's accommodations, and felt that he had been treated fairly.

Approximately one year later, in March of 2012, physician Gerald Schmitt reexamined Robinson and concluded that he "ha[d] reached the point of maximum medical improvement," and that his physical limitations should be declared "permanent and stationary." Schmitt further concluded that as a result of his permanent condition, Robinson should be prohibited from "repetitive bending, stooping, and twisting"; "repetitive squatting or crawling"; "lifting or carrying greater than 20 pounds"; and "climbing . . . ladders or poles."

In May of 2012, Colleen Flanagan and Brandi Phillips, who worked in Verizon's human resources department, notified Chris Reynolds that Robinson's medical condition had been changed to permanent status, and that his restrictions had been expanded to preclude all forms of climbing and various other activities. Phillips, Flanagan and Reynolds discussed whether Robinson could continue to work as an SEI in light of the modifications. Flanagan and Philips then advised Reynolds to meet with Robinson to discuss any possible accommodations.

2. Robinson's incident with Alfonso Wolf and reassignment from his SEI position

On May 8, 2012, Robinson was assigned to fix a malfunctioning data circuit. After conducting a preliminary investigation, Robinson suspected the malfunction was

caused by a defective "repeater" located underground. Because SEIs were not responsible for repairing "repeaters," Robinson called his dispatch to request the help of Jeff Stangl, a "cable technician" whom Alfonso Wolf supervised. Although Wolf authorized Robinson's help request, Stangl told Robinson that Wolf was angry about the request, and planned to travel to the work site. When Wolf arrived, he yelled at Robinson for having failed to open the manhole cover while waiting for Stangl. More specifically, Wolf yelled that Robinson was "too lazy to even open up the manhole," and that he would not allow his cable technicians to "do Robinson's job [for him]."

Following the incident, Robinson lodged a complaint with his current supervisor, Mike Caudill, asserting that Wolf had "yelled and screamed and humiliated" Robinson for requesting the aid of a "cable tech[nician]," which was a standard SEI request. Robinson also complained to Wolf's immediate supervisor, Chris Joseph, and Robinson's former supervisor Linda Ledesma.

Two days after the incident, area manager Chris Reynolds traveled to the San Fernando yard to speak with Robinson about the changes to his medical status and his work restrictions. During the meeting, Robinson told Reynolds he wanted to continue working as an SEI. Reynolds, however, told Robinson that he could not continue in his role as a SEI, and directed him to turn in his tools. Reynolds also informed Robinson that he had been temporarily reassigned to Verizon's Monrovia office, where he would be provided an office job and an opportunity to search for alternative employment within the company.

The following day (Friday, May 11), Robinson traveled to the Monrovia office. Upon his arrival, he was informed that his assigned contact, Cherrie Pollack, was not present. The office manager told Robinson she was not aware he had been reassigned to the Monrovia location. Robinson waited for Pollack to arrive, but she did not return to the office that day. On Monday, May 14th, Robinson went back to the Monrovia office and met with Pollack. She informed Robinson that he had been assigned to work on the "help desk," but the employee who was supposed to train him had been injured in a car accident earlier that morning. As a result, there was no one available to train him.

During the following two days (May 15th and 16th), Pollack attempted to obtain Robinson a log-on for the office's computer system. While awaiting further directions, Robinson was given a password providing him access to a database of Verizon's internal job postings. Robinson searched the database, but was unable to locate any postings in Southern California. During this time period, the individual who was supposed to train Robinson on his "help desk" duties remained out of the office due to his injuries.

On Thursday, May 17th, Robinson contacted Verizon and requested medical leave for a mental health condition. Verizon granted the request, and then granted several extensions that continued his leave until January of 2013. On November 5, 2012, Robinson suffered a heart attack. At the time of his heart attack, Robinson knew his current retirement benefits would cover 90% of his future medical care costs. He was also aware, however, that his union intended to renegotiate these benefits in March of 2013.

On November 30, 2012, Robinson informed Verizon that he was retiring. His decision to retire was based in part on: (1) his belief that his heart attack had rendered him incapable of returning to work; (2) his desire to secure 90% coverage of his medical care costs; (3) the favorable interest rate that Verizon would use at that time to calculate his pension payment. Following his retirement, Verizon paid Robinson a lump sum pension benefit of approximately $600,000.

B. Summary of Robinson's Complaint

After retiring from the company, Robinson filed a complaint alleging several claims under the Fair Employment and Housing Act (Gov. Code §§ 12900, et. seq.[1]) (FEHA), including: discrimination on the basis of a disability; discrimination on the basis of race; failure to accommodate his disability; failure to engage in the interactive process; retaliatory termination; and failure to prevent discrimination. He also alleged a claim for wrongful termination in violation of public policy.

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1 Unless otherwise noted, all further statutory citations are to the Government Code.

In the "General Allegations" section of his complaint, Robinson alleged that on May 8, 2012, Wolf had subjected him to "disrespectful and demeaning" behavior by calling him "lazy" for not descending into a manhole. According to the complaint, at the time Wolf made the comment, he was aware that Robinson was under work restrictions that precluded him from moving a manhole cover. The complaint further alleged that shortly after Robinson had reported the incident to his supervisors, Chris Reynolds informed him Verizon "was not going to honor his restrictions any longer," and that he was "being transferred to the help desk in Monrovia," where he would have "30 days to find another job with Verizon." Robinson alleged that after spending several days in the Monrovia office "with nothing to do," he "suffered a nervous breakdown, which led to a major depression order" that forced him to retire.

On his disability discrimination claim, Robinson alleged that: (1) his physical restrictions were "a motivating factor in [Verizon's decision to] terminat[e] . . . his employment" as a SEI; and (2) Verizon had "imposed physical requirements (e.g., climbing poles and ladders, lifting manhole covers etc.) that were unnecessary for him being able to perform his job duties."

On his claim for failure to accommodate, Robinson alleged Verizon had "wholly failed to attempt any reasonable accommodation of [his] known disability. Instead, [Verizon] used [Robinson's] disability and his need to take medical leave as an excuse for termination of [his] employment." His claim for failure to engage in the interactive process similarly alleged that Verizon "wholly failed to engage in a timely, good-faith interactive process with Plaintiff to accommodate [his] disability. Instead, [Verizon] demoted Plaintiff and constructively terminated his employment in part because of his disability and his need to take medical leave." Robinson's "retaliatory termination" claim repeated the allegations in his disability discrimination claim, asserting that "his disability was a motivating factor in [Verizon's] constructive termination of his employment," and that he had been "retaliate[d] against . . . for complaining of discrimination or harassment on the basis of [his] physical disability."

His remaining three claims alleged that Robinson's race was a "motivating factor" in Verizon's decision to terminate him, that Verizon failed to take any corrective action to protect Robinson from discriminatory conduct and that his termination was in violation of public policy.

C. Verizon's Motion for Summary Judgment

1. Summary of Verizon's motion and its supporting evidence

In October of 2014, Verizon filed a motion for summary judgment or, in the alternative, summary adjudication, seeking dismissal of each of Robinson's claims.

a. Discrimination based on disability

Verizon argued it was entitled to judgment on Robinson's disability discrimination claim because the undisputed evidence established that the work restrictions his physician had recommended in March of 2012, which prohibited Robinson from all forms of climbing, lifting more than 20 pounds and repetitive bending stooping or squatting, rendered him incapable of fulfilling the essential duties of the SEI position. In support, Verizon provided its official job description of a SEI, which stated that the "basic duties" of the position included "handl[ing] and climb[ing] ladders and poles, crawl[ing] under dwellings, work[ing] in attics, underground, and in other confined areas." Verizon also provided a "job analysis" that Robinson's disability claim administrator had prepared in May of 2011. The analysis stated that the "essential functions" of the SEI position included "descend[ing] into manholes to access equipment"; "climb[ing] ladders to access equipment"; "lifting," "carrying," "kneeling" and "twisting and bending of the neck." The analysis also stated that the essential functions of the position required "bending, stooping, squatting [and] twisting at the waist." Verizon submitted excerpts of Robinson's deposition testimony showing that he had reviewed both documents, and agreed that they accurately portrayed the job duties of a SEI.

Verizon also provided copies of multiple medical evaluations that Robinson's physicians had written before he filed his lawsuit. Each evaluation included a description of Robinson's job duties that was based on information he had personally provided to his

physicians. An evaluation from Edwin Haronian, prepared in February of 2011, reported that Robinson had said his duties as a SEI included "sitting with his neck and back bending over in a fixed position for prolonged periods of times . . ., repetitive crawling, bending, stooping squatting, kneeling, twisting, turning, forceful pushing and pulling, . . . lifting and carrying up to 20 pounds, ascending and descending stairs ladders." A second evaluation from physician Gerald Schmitt, prepared in June of 2011, similarly reported that Robinson had said his job duties "require[d] crawling underneath structures, climbing into attics and lofts, lifting manhole covers, climbing telephone poles, carrying and climbing ladders[,] . . . . repetitive lifting up to 80-100 pounds, bending, stooping, squatting, kneeling, twisting, turning, pushing, pulling, crawling, climbing . . . [and] prolonged sitting, standing and walking as well as other awkward positions to perform his duties." As with the job description documents, Verizon provided excerpts of Robinson's depositions showing that he had reviewed these medical evaluations, and testified that they accurately reflected his job duties.

Verizon also provided a copy of a "Disability Report" that Robinson had submitted to the federal Social Security Administration (SSA) as part of an application for disability benefits. In the job description portion of the report, Robinson stated that he had spent three hours a day "stooping," two hours a day "kneeling," two hours a day "crouching," one hour a day "crawling" and one hour a day "climbing." He also reported that he was required to carry and lift large objects two hours a day, and that he was "frequently" required to lift objects weighing 50 pounds or more. Verizon provided deposition testimony from Robinson confirming that he had submitted these statements to the SSA, that the information he had provided was "completed accurately to the best of [his] abilities" and that he had verified the information before submitting it.

Verizon argued that, considered together, the job descriptions, the physician evaluations, the disability reports and Robinson's deposition testimony demonstrated as a matter of law that the essential functions of the SEI position included many of the activities Robinson was medically restricted from performing.

Verizon also argued that Robinson could not prevail on his disability discrimination claim because the undisputed evidence demonstrated he had not been terminated from the company, but rather had voluntarily retired. Verizon contended that although Robinson's complaint had characterized his departure from the company as a "constructive discharge," he had identified no facts showing that he had been subjected to working conditions that forced him to retire from the company.

In support, Verizon relied on portions of Robinson's deposition in which he admitted that after being removed from his SEI position, he was placed in a temporary position at the help desk in the Monrovia office. Robinson also admitted Chris Reynolds had informed him he would be given time to search for alternative employment within the company. Robinson testified that after four days of traveling to the Monrovia office, he requested (and was granted) medical leave. After obtaining several extensions to his medical leave, Robinson elected to retire in November of 2012. Robinson also acknowledged that during his time at the Monrovia office, Cherrie Pollack had repeatedly tried to get him a functioning log-in, and provided a password to a database listing Verizon's job openings. Robinson further acknowledged that although he had not been given any work to do during his time at the Monrovia office, the employee who was supposed to train him on his new job duties had been absent due to a car accident that occurred shortly after Robinson had been reassigned to the office.

In addition, Verizon provided a declaration from Chris Reynolds, who stated that he had made the decision to remove Robinson from the SEI position, and place him in the Monrovia office. Reynolds explained that he had decided to transfer Robinson to a temporary office position so that he could "evaluate alternative jobs within Verizon or talk to his doctor about revised restrictions." Reynolds further stated that he had intended to follow up with Robinson "a few weeks after this transfer to discuss his status." Robinson, however, began a medical leave on May 17, and subsequently retired from the company.

Verizon argued that the testimony of Reynolds and Robinson demonstrated Robinson had not been "constructively discharged" or otherwise terminated from his

position as a SEI, but rather had elected to take a medical leave from the company shortly after being placed in the Monrovia office, and then voluntarily retired.

b. Failure to accommodate or engage in the interactive process

Verizon also argued the undisputed evidence demonstrated that it had not failed to offer Robinson a reasonable accommodation, nor had it refused to engage in the interactive process. Verizon contended it was not required to allow Robinson to remain in his SEI position with modified work duties because the evidence showed he was no longer physically qualified to perform the essential functions of the job. Verizon further contended the evidence showed that after removing Robinson from his SEI position, the company had sought to accommodate him by placing him in a temporary office position where he was permitted to search for permanent employment within the company. Verizon asserted that Robinson then effectively terminated the accommodation process by retiring from the company while on medical leave.

In support of these arguments, Verizon relied on portions of Reynolds's declaration stating that the company's human resources department had notified him of the changes to Robinson's physical restrictions on May 9, 2012. According to Reynolds, he initiated the interactive process the next day by meeting with Robinson to discuss possible accommodations. Reynolds asserted that during their conversation, Robinson said "he wanted to continue as a SEI, but neither he or I could suggest any accommodation that would allow him to perform the essential job duties of a SEI in the field without violating his new restrictions." Reynolds also stated that although Robinson had expressed interest in being reassigned to several other positions, the company had no vacancies in any of the positions he had referenced. Reynolds explained that due to the absence of any immediate, permanent accommodation, he elected to transfer Robinson to a temporary position at the Monrovia office, and give him time to identify alternative positions within the company. Shortly thereafter, Robinson requested a medical leave, and then announced his retirement while on leave.

Verizon also relied on Robinson's own deposition testimony, in which he admitted that he had met with Reynolds on May 10th to discuss the changes to his medical restrictions. Robinson confirmed that he had initially requested to stay in the SEI position, and that he had mentioned several potential reassignment positions. Robinson further testified, however, that he was unsure whether Verizon had vacancies in any of the positions he had referenced. Robinson also admitted that four days after being temporarily assigned to the Monrovia office, he requested and was granted a medical leave before ultimately announcing his retirement.

Verizon argued that Reynolds and Robinson's testimony confirmed that: (1) Reynolds had met with Robinson to discuss accommodations; (2) neither party was able to identify an immediate, permanent accommodation; (3) Verizon attempted to provide a temporary solution; and (4) Robinson had terminated the accommodation process by taking a medical leave, and then retiring from the company.

c. Robinson's remaining claims

Verizon argued that Robinson's claim for retaliation, which alleged he had been terminated for complaining about Wolf's discriminatory conduct toward him on May 8, 2012, failed because there was no evidence Chris Reynolds had any knowledge of the incident with Wolf at the time he reassigned Robinson to the Monrovia office. In support, Verizon relied on a statement in Reynolds's declaration asserting that, as of May 10, 2012, he had no knowledge of the Wolf incident. Verizon further asserted that even if Robinson could establish Reynolds was aware of the complaints Robinson had made against Wolf, his retaliation claim failed because the evidence showed the company had not terminated him. Rather, the evidence showed he had voluntarily retired from the company shortly after being placed in a temporary accommodation.

Verizon argued Robinson could not prevail on his claim for racial discrimination because he had not identified any fact that gave rise to an inference of racial discrimination. In support, Verizon provided excerpts from Robinson's deposition in which he stated that the sole reason he believed he had been discriminated against on the

basis of his race was because he knew the company had allowed three other SEIs, two Caucasians and one Hispanic, to remain in their positions with restrictions that excused them from climbing. Robinson admitted, however, that he did not know whether any of these three individuals had additional restrictions that prohibited them from repetitive bending, stooping, kneeling or crawling. According to Verizon, the mere fact Verizon may have accommodated other SEIs with a narrower range of restrictions did not raise an inference of racial discrimination.

Finally, Verizon argued that Robinson's remaining claims—which alleged Verizon had failed to stop the discriminatory conduct of its employees and terminated Robinson in violation of public policy—were each derivative claims predicated on a finding of wrongful discrimination. Verizon argued that because Robinson could not establish any such discriminatory conduct, these derivative claims likewise failed.

2. Robinson's opposition

a. Disability discrimination claim

In his opposition, Robinson argued that summary adjudication was improper on his disability discrimination claim because there were disputed factual issues regarding the essential functions of the SEI position. Although Robinson did not dispute his medical restrictions precluded him from climbing, lifting more than 20 pounds and repetitive bending, twisting, squatting and twisting, he contended that his duties as an SEI rarely required him to engage in any of those activities. In support, Robinson provided a declaration stating that the equipment he had serviced as a SEI was "most often located in areas accessible by standing on the ground, without the aid of a tall ladder." His declaration also asserted that he was "seldom" required to "climb ladders, climb poles, or lift objects over 20 pounds to complete [his] job as an SEI." According to Robinson, "[o]n the rare occasions [he] was require[d] to climb or lift items heavier than 20 pounds, [he] could call [a] supervisor, another SEI, or another Verizon technician to help . . . achieve [his] task for the customer."

Robinson also argued that whether Verizon had subjected him to employment conditions that amounted to a constructive discharge was a question of fact that should be determined by a jury. Robinson contended the following evidence was sufficient to support a finding that Verizon had maintained "intolerable working conditions" that would compel a reasonable employee to resign: (1) Wolf had "taunted" Robinson about his disability by "call[ing] him lazy for failing to lift a manhole cover in violation of those restrictions"; (2) Verizon employee Charles Stangl, who was present when Wolf yelled at Robinson, failed to intervene or file a grievance on Wolf's behalf; (3) when Robinson complained to supervisors about Wolf's conduct, he was "relieved of his position and shoved aside to a spare office that did not provide him with a job."

In support of his arguments, Robinson cited to statements in his declaration describing his dispute with Wolf and the events that had followed. The declaration stated that shortly after Robinson had requested Charles Stangl's assistance, Wolf arrived at the work site and began yelling at Robinson for not descending "into the manhole to test the circuit prior to requesting assistance." According to Robinson, Wolf told him that cable technicians were not responsible for doing Robinson's job, that Robinson was "lazy" and that Wolf would not allow Robinson "to cause him to lose [Wolf's] job." Robinson asserted that in response to these comments, he had reminded Wolf that he was under physical restrictions, and that Wolf "did not need to humiliate [Robinson] about opening a manhole."

According to Robinson's declaration, Chris Reynolds traveled to the San Fernando yard two days later and spoke with Wolf. After their conversation had ended, Reynolds approached Robinson and told him to go into the conference room. Reynolds then informed Robinson that Verizon would "no longer accommodate [his] work restrictions," and that he was being transferred to the Monrovia office, where he would have "30 days to find a job." Robinson stated that during his four days at the Monrovia location, he was never provided a job assignment or an operational log-in.

Robinson argued that his interactions with Wolf, his subsequent interactions with Reynolds and his experiences at the Monrovia office were sufficient to support an

inference that Verizon had removed him from his SEI position based on his disability, and then effectively forced him to quit his job.

b. Failure to accommodate and failure to engage in the interactive process

Robinson also argued that his declaration demonstrated there were disputed factual issues regarding whether Verizon had made a reasonable effort to accommodate his disability or engage in the interactive process. First, Robinson argued his declaration showed there was a factual dispute whether the physical activities he was restricted from performing qualified as essential functions of the SEI position, or were merely marginal functions that could be addressed through modified work duties.

Second, Robinson argued that even if his disability did preclude him from performing the essential functions of his position, Verizon's pronouncement that he would be given 30 days to find a new job was not a reasonable accommodation, nor was it sufficient to discharge its duty to engage in the interactive process. According to Robinson, "[m]erely requiring [him] to look for work, without help, [wa]s not a form of accommodation."

c. Retaliation claim

On his claim for retaliation, Robinson argued that a jury could reasonably infer he had been terminated because of the complaints he made to his supervisors about Wolf's discriminatory behavior. In support, Robinson relied on a statement in his declaration asserting that he had seen Reynolds and Wolf having a conversation immediately prior to his removal from his SEI position. Robinson's declaration further stated that "on information and belief, [he] believe[d] that Wolf and Reynolds were discussing [his] employment at Verizon." According to Robinson, the fact that he saw Wolf speaking with Reynolds shortly before he was removed from his SEI position "leads to the inference that Wolf . . . used Reynolds to retaliate against [Robinson]."

d. Racial discrimination, failure to prevent discrimination and wrongful termination

On his racial discrimination claim, Robinson argued that he had established a prima facie case of discrimination because: (1) it was undisputed that he was African American; (2) his declaration demonstrated that he was qualified for the SEI position; and (3) he was removed from the SEI position. He further contended there were factual issues regarding whether Verizon's purported reasons for removing him from the position (his physical restrictions) were pretext for discrimination. Robinson asserted that pretext could be inferred from the timing of his removal from the SEI position, which occurred two days after his dispute with Wolf, and Reynolds' subsequent refusal to engage in the interactive process or to offer any form of reasonable accommodation.

Finally, Robinson argued that because he had established the existence of disputed issues of material fact regarding whether he had been discriminated against on the basis of his disability and race, there was no basis to dismiss his claims that Verizon had failed to prevent discrimination against him or that his termination violated public policies prohibiting discrimination in the workplace.

3. The trial court's order granting the motion for summary judgment

After a hearing, the court issued an order granting Verizon's motion for summary judgment. On Robinson's disability discrimination claim, the court concluded that the evidence conclusively established Robinson was unable to "perform the essential duties of an SEI." In support, the court cited Verizon's job description, the "job analysis" that had been prepared by Robinson' disability claim administrator, the physician reports that contained Robinson's description of his SEI job duties and the "Disability Report" Robinson had submitted to the SSA. The court explained that although Robinson now alleged he was rarely required to "bend, stoop, crawl or climb," these statements were insufficient to establish a disputed factual issue regarding whether such "actions were . . . duties of an SEI."

The trial court also found Robinson had failed to establish a triable issue of material fact regarding whether he was "constructively discharged on account of his disability." The court explained that the fact "Wolf [had] unfairly . . . called plaintiff 'lazy' regarding plaintiff's request for assistant [sic] opening a manhole on [May 8, 2012] does not show that Verizon discriminated against plaintiff on account of plaintiff's disability. Wolf's actions did not affect the fact that plaintiff was unable to perform the essential duties of an SEI and Verizon's actions after plaintiff's restrictions became permanent. For instance, Verizon further tried to accommodate plaintiff after [May 10, 2012] by assigning him temporarily to a light duty position doing office work at the Monrovia call center and issuing plaintiff a password so he could access Verizon's job posting to look for other job positions. . . . The fact there were some problems with the transition does not equate to conditions so 'intolerable' as to show constructive discharge. [¶] Also, within one week, plaintiff then requested and was granted medical leave four times," and then voluntarily retired from the company.

The court concluded that Robinson's second and third claims for failure to accommodate and failure to engage in the interactive process failed for similar reasons. Specifically, the court found that the evidence established Verizon had attempted to accommodate Robinson by providing him a temporary office assignment, and allowing him time to look for alternative employment options. Robinson, however, left the temporary position after only four days, and then retired without any further communications regarding other possible accommodations.

On Robinson's fourth claim for "retaliatory termination for complaining of discrimination," the court similarly concluded that "the evidence does not show that plaintiff was constructively terminated due to any complaints about Wolf. Instead, plaintiff's permanent restrictions prevented him from performing the duties of an SEI. Then while plaintiff was temporarily reassigned, plaintiff went on medical leave and then retired while on leave. There is no evidence that there was any retaliatory animus on the part of Verizon or causation between a complaint by plaintiff and any adverse action by Verizon."

The court also found Robinson failed to establish any triable issue regarding his racial discrimination claim because there was no evidence Verizon had committed any act that raised an inference of racial discrimination, nor was there any evidence he had suffered an adverse employment action based on his race. Finally, the court dismissed Robinson's derivative claims for failure to prevent discrimination and termination in violation of public policy, concluding that both claims were dependent on proving his discrimination claims. On December 19, 2014, the court entered judgment in favor of Verizon.

DISCUSSION

A. Standard of Review

"A motion for summary judgment is properly granted only when '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.' [Citation.] We review a grant of summary judgment de novo and decide independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law. [Citation.]

"When a defendant moves for summary judgment in a situation in which the plaintiff would have the burden of proof at trial by a preponderance of the evidence, the defendant may, but need not, present evidence that conclusively negates an element of the plaintiff's cause of action. [Citation.] As an alternative to the difficult task of negating an element, the defendant may present evidence to 'show[ ] that one or more elements of the cause of action . . . cannot be established' by the plaintiff. [Citation.] A defendant 'has shown that the plaintiff cannot establish at least one element of the cause of action by showing that the plaintiff does not possess, and cannot reasonably obtain, needed evidence: The defendant must show that the plaintiff does not possess needed evidence, because otherwise the plaintiff might be able to establish the elements of the cause of action; the defendant must also show that the plaintiff cannot reasonably obtain needed evidence, because the plaintiff must be allowed a reasonable opportunity to oppose the motion. . . .' [Citations.] A defendant can satisfy its initial burden to show an absence of evidence through 'admissions by the plaintiff following extensive discovery to

the effect that he has discovered nothing' [citation], or through discovery responses that are factually devoid. [Citations.]

"Only after the defendant's initial burden has been met does the burden shift to the plaintiff to demonstrate, by reference to specific facts, not just allegations in the pleadings, there is a triable issue of material fact as to the cause of action. [Citation.] On review of an order granting summary judgment, we view the evidence in the light most favorable to the opposing party, liberally construing the opposing party's evidence and strictly scrutinizing the moving party's." (*Chavez v. Glock, Inc.* (2012) 207 Cal.App.4th 1283, 1301-1302.)

"'"As with an appeal from any judgment, [on review of a summary judgment] it is the appellant's responsibility to affirmatively demonstrate error and, therefore, to point out the triable issues the appellant claims are present by citation to the record and any supporting authority. In other words, review is limited to issues which have been adequately raised and briefed." [Citation.]' [Citations.]" (*Bains v. Moores* (2009) 172 Cal.App.4th 445, 455.) "[D]e novo review does not obligate us to cull the record for the benefit of the appellant in order to attempt to uncover the requisite triable issues." (*Ibid.*)

B. Verizon is Entitled to Judgment on Robinson's Discrimination Claims

1. Procedures used to assess discrimination claims under FEHA

"In employment discrimination cases under FEHA, plaintiffs can prove their cases in either of two ways: by direct or circumstantial evidence." (*DeJung v. Superior Court* (2008) 169 Cal.App.4th 533, 549 (*DeJung*).) "Direct evidence is evidence which, if believed, proves the fact of discriminatory animus without inference or presumption. Comments demonstrating discriminatory animus may be found to be direct evidence if there is evidence of a causal relationship between the comments and the adverse job action at issue." (*Id.* at p. 550.) "Where a plaintiff offers direct evidence of discrimination that is believed by the trier of fact, the defendant can avoid liability only by proving the plaintiff would have been subjected to the same employment decision

without reference to the unlawful factor." (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 67.)

Where a plaintiff seeks to prove his or her discrimination claim through circumstantial evidence, "California courts [apply] the three-stage, burden-shifting test the United States Supreme Court established in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792." (*Swanson v. Morongo Unified School District* (2014) 232 Cal.App.4th 954, 964 (*Swanson*); see also *Guz v. Bechtel Nat. Inc.* (2000) 24 Cal.4th 317, 354 (*Guz*).) "This so-called *McDonnell Douglas* test reflects the principle that direct evidence of intentional discrimination is rare, and that such claims must usually be proved circumstantially. Thus, by successive steps of increasingly narrow focus, the test allows discrimination to be inferred from facts that create a reasonable likelihood of bias and are not satisfactorily explained." (*Guz, supra,* 24 Cal.4th at p. 354.)

"At trial, the *McDonnell Douglas* test places on the plaintiff the initial burden to establish a prima facie case of discrimination. This step is designed to eliminate at the outset the most patently meritless claims, as where the plaintiff is not a member of the protected class or was clearly unqualified, or where the job he sought was withdrawn and never filled. [Citation.] While the plaintiff's prima facie burden is 'not onerous' [citation], he must at least show '"actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were "based on a [prohibited] discriminatory criterion. . . ." [Citation]." [Citation.]' [Citation.]

"The specific elements of a prima facie case may vary depending on the particular facts. [Citations.] Generally, the plaintiff must provide evidence that (1) he was a member of a protected class, (2) he was qualified for the position he sought or was performing competently in the position he held, (3) he suffered an adverse employment action, such as termination, demotion, or denial of an available job, and (4) some other circumstance suggests discriminatory motive. [¶] If, at trial, the plaintiff establishes a prima facie case, a presumption of discrimination arises. [Citation.] . . . . [¶] The burden [then] shifts to the employer to rebut the presumption by producing admissible evidence,

sufficient to 'raise [ ] a genuine issue of fact' and to 'justify a judgment for the [employer],' that its action was taken for a legitimate, nondiscriminatory reason. [Citations.] [¶] If the employer sustains this burden, the presumption of discrimination disappears. [Citations.] The plaintiff must then have the opportunity to attack the employer's proffered reasons as pretexts for discrimination, or to offer any other evidence of discriminatory motive." [Citations.] . . . . The ultimate burden of persuasion on the issue of actual discrimination remains with the plaintiff." (*Guz, supra*, 24 Cal.4th at pp. 354-355.)

"'[W]e must keep in mind that the *McDonnell Douglas* test was originally developed for use at trial [citation], not in summary judgment proceedings. "In such pretrial [motion] proceedings, the trial court will be called upon to 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. . . ."'" (*Arteaga v. Brink's, Inc.* (2008) 163 Cal.App.4th 327, 343-344 (*Arteaga*).)

2. Verizon is entitled to judgment on Robinson's claim for disability discrimination

Robinson's disability discrimination claim alleges that Verizon removed him from his SEI position based on the permanent physical restrictions that his physician imposed in March of 2012.

a. Robinson has identified no direct evidence of disability discrimination

Robinson initially argues that he provided direct evidence showing that he was removed from his SEI position based on his disability. More specifically, Robinson contends he provided evidence showing that Alfonso Wolf "call[ed] [him] 'lazy' because

he was working with restrictions." According to Robinson, "[t]he summary judgment should be reversed because a jury could find that Verizon equated 'disabled' with 'lazy'."

Although it is undisputed that Wolf called Robinson "lazy" during their dispute on May 8th, there is no evidence that Wolf called him lazy "because he was working with restrictions." Rather, as stated in Robinson's own declaration, Wolf called him "lazy" for having failed to open a manhole cover before Stangl arrived at the work site. The mere fact Wolf called Robinson "lazy" is not direct evidence that he was removed from his position based on his disability. Instead, the relevancy of this evidence is predicated on an inference that the term "lazy" was meant to refer to his physical restrictions. Robinson effectively acknowledges this in his appellate brief, arguing that "a jury could find that Verizon equated 'disabled' with 'lazy'." "Direct evidence" of discrimination, however, is evidence which "proves the fact of discriminatory animus without inference or presumption." The fact Wolf called Robinson "lazy" does not qualify as direct evidence of discriminatory animus predicated on his disability.[2]

b. Robinson cannot establish a prima facie case of disability discrimination because the undisputed evidence demonstrates he could not perform the essential functions of a SEI

Robinson alternatively contends there are triable issues of fact whether he can prevail on his disability discrimination claim under the *McDonnell Douglass* burden-shifting framework. "On a disability discrimination claim, the prima facie case requires the plaintiff to show 'he or she (1) suffered from a disability, or was regarded as suffering from a disability; (2) could perform the essential duties of the job with or without reasonable accommodations, and (3) was subjected to an adverse employment action

[2] Moreover, in both his appellate brief and the statement of disputed material facts he filed in the trial court, Robinson asserted that although his physical restrictions prohibited him from lifting more than 20 pounds, this did not preclude him from removing manhole covers because SEIs "always" removed manhole covers by using a "machine" or a "lightweight tool that made the cover 'very light.'" Accordingly, based on Robinson's own admissions, Wolf's comment that he was "lazy" for having failed to remove a manhole cover did not even relate to an activity that Robinson was physically restricted from performing.

because of the disability or perceived disability.' [Citation.]" (*Wills v. Superior Court* (2011) 195 Cal.App.4th 143, 159-160; see also *Arteaga, supra*, 163 Cal.App.4th at p. 347.)

The trial court found Robinson could not satisfy the second element of his prima facie case because the evidence established that his permanent physical restrictions rendered him incapable of performing the essential functions of the SEI position. (See § 12940, subd. (a)(1) [FEHA does not prohibit discharging an employee with a physical disability "where the employee, because of his or her physical . . . disability, is unable to perform his or her essential duties even with reasonable accommodations"]; see also *Green v. State* (2007) 42 Cal.4th 254, 267 [to establish a FEHA claim of disability discrimination, plaintiff must "demonstrate that he or she was 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"].) On appeal, Robinson does not dispute that his physical restrictions permanently precluded him from: (1) climbing ladders or poles; (2) lifting or carrying more than 20 pounds; and (3) repetitive bending, stooping, twisting, squatting or crawling. He disputes, however, whether the parties' evidence conclusively demonstrates that these activities fall within "the scope of the 'essential functions' of his job."[3]

FEHA defines "essential functions" to mean 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." (§ 12926, subd. (f).) "Evidence of whether a particular function is essential includes, but is not limited to, the following: (A) The employer's judgment as to which functions are essential. (B) Written

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3 In his appellate brief, Robinson argues that the "[m]edical opinions" of his physicians are not "[c]onclusive" as to whether his restrictions precluded him from performing the essential functions of the SEI position. In other words, he asserts Verizon cannot rely on medical opinions to prove that the activities he is restricted from performing qualify as essential functions of the job. Robinson does not, however, challenge his physicians' evaluation of his medical conditions, nor does he deny that he was permanently restricted from climbing ladders or poles, lifting or carrying more than 20 pounds and repetitive bending, stooping, twisting, squatting or crawling.

job descriptions prepared before advertising or interviewing applicants for the job. (C) The amount of time spent on the job performing the function. . . ." (§ 12926. subd. (f)(2).) Although the determination of a job's essential duties is a question of fact (see *Lui v. City and County of San Francisco* (2012) 211 Cal.App.4th 962, 971), the issue may be resolved by summary judgment "when only one reasonable conclusion can be drawn from the undisputed foundational facts." (*Weber v. Langholz* (1995) 39 Cal.App.4th 1578, 1583; *see also Hastings v. Department of Corrections* (2003) 110 Cal.App.4th 963, 967, fn. 6 (*Hastings*) [although "the functions of a job are a question of fact," employer was nonetheless entitled to summary judgment because the plaintiff failed to "present any relevant facts that dispute . . . employer's [evidence describing essential functions of the job]"]; see *Nealy v. City of Santa Monica* (2015) 234 Cal.App.4th 359, 374 (*Nealy*) [affirming summary judgment where the evidence conclusively established that plaintiff's physical disability rendered him incapable of performing essential functions of the job].)

Verizon has provided a substantial amount of evidence indicating that the essential functions of the SEI position included many of the physical activities that Robinson was restricted from performing. First, Verizon's official job description and a "job analysis" that Robinson's disability claims administrator prepared prior to the lawsuit state that the "basic" and "essential" duties of a SEI include "handl[ing] and climb[ing] ladders and poles"; "crawl[ing] under dwellings"; "work[ing] . . . underground . . . and in other confined areas"; "descend[ing] into manholes to access equipment"; "lifting," "carrying," "kneeling" and "twisting and bending of the neck." At his deposition, Robinson reviewed both documents and confirmed that they accurately portrayed the job duties of a SEI.

Second, Verizon provided multiple medical evaluations showing that Robinson told two different physicians his SEI job duties required him to "bend[] over in a fixed position for prolonged periods of times"; "crawl[] underneath structures"; "carry[] and climb[] ladders"; and "repetitive crawling, bending, stooping squatting, kneeling,

twisting, [and] turning." At his deposition, Robinson reviewed these medical evaluations, and testified that they accurately portrayed his job duties.

Third, a disability report Robinson submitted to the SSA as part of an application for disability benefits states that his SEI job duties required him to spend three hours a day "stooping," two hours a day "kneeling," two hours a day "crouching," one hour a day "crawling" and one hour a day "climbing." He also reported that he was required to carry and lift large objects for two hours a day, and was "frequently" required to lift objects weighing 50 pounds or more. At his deposition, Robinson confirmed the representations he had made in the report were accurate. He also admitted that his duties as an SEI had required him to use ladders, descend into manholes, "occasionally crawl" "bend over" "squat" "sit" and "lift objects that weigh more than 20 pounds."

Robinson, however, argues that the declaration he provided in support of his opposition to the motion for summary judgment raises disputed issues of material fact whether the evidence summarized above accurately reflects the essential functions of his SEI duties. His declaration states, in relevant part, that: (1) the equipment he worked on was "most often . . . accessible by standing on the ground, without the aid of a tall ladder"; and (2) he was "seldom required to climb ladders, climb poles, or lift objects over 20 pounds to complete [his] job as an SEI." Robinson contends these statements show there is a factual dispute whether any of the activities he was precluded from performing were, in fact, essential functions of a SEI.

We reject this argument for two reasons. First, although Robinson's declaration asserts he was rarely required to climb or lift objects weighing more than 20 pounds, the declaration does not address Verizon's evidence that his duties as a SEI required other activities that he was precluded from performing, including repetitive bending, stooping, twisting, squatting and crawling. As Division Eight of this District recently explained in a case addressing analogous circumstances, "[t]he fact that one essential function may be up for debate does not preclude summary judgment if the employee cannot perform other essential functions." (*Nealy, supra*, 234 Cal.App.4th at p. 374 [employer entitled to summary judgment where employee's evidence only related to one "essential function"];

see also *Hastings, supra*, 110 Cal.App.4th at p. 967, fn. 6 [employer entitled to summary judgment where plaintiff failed to "present any relevant facts that dispute the [employer's] evidence [regarding] . . . the essential job functions"].) In this case, Robinson has cited no facts that contradict the evidence Verizon provided showing the SEI position required repetitive bending, squatting and twisting. Nor has he disputed that his medical restrictions prohibited him from performing such acts.[4]

Moreover, the statements in Robinson's declaration asserting that he was rarely required to climb or lift objects weighing more than 20 pounds are in conflict with his prior deposition testimony. "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, inadmissible, or evasive. [Citation.]' [Citation.]." (*Preach v. Monter Rainbow* (1993) 12 Cal.App.4th 1441, 1451.) In his deposition, Robinson confirmed the accuracy of a disability report he had written that included the following statements: (1) he was "frequently" required to carry objects weighing over 50 pounds; (2) he spent two hours a day lifting large objects; and (3) he spent one hour a day climbing. He also confirmed the accuracy of a job description that listed climbing ladders and lifting and carrying objections weighing more than 20 pounds as basic functions of the SEI job. He confirmed the accuracy of similar information appearing in his medical evaluations. In light of this deposition testimony, the trial court was permitted to disregard directly contradictory statements in his declaration asserting that he was rarely required to perform such activities.

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[4] In his appellate brief, Robinson states that "bending, stooping and crawling were not essential functions of an SEI." In support, he cites two pages in the record that contain evidence indicating that: (1) SEIs are rarely required to climb on telephone poles; (2) SEIs are rarely required to lift manhole covers, which is done with a machine; and (3) as an SEI, Robinson was rarely required to climb ladders or poles, or lift more than 20 pounds. These pages contain no evidence regarding bending, stooping, or crawling.

In sum, the trial court did not err in granting Verizon summary judgment on Robinson's disability discrimination claims because the evidence conclusively demonstrates his physical restrictions precluded him from performing the essential functions of the position from which he was removed.[5]

3. Robinson failed to make a prima facie showing of racial discrimination

The trial court also concluded that Robinson could not make a prima showing that Verizon removed him from his SEI position on the basis of his race. Because Robinson has provided no direct evidence of racial discrimination, we rely on the *McDonnell Douglass* framework.

"Although the specific elements necessary to establish a prima facie case [of racial discrimination] may vary depending on the underlying facts, '[g]enerally, the plaintiff must provide evidence that (1) he was a member of a protected class, (2) he was qualified for the position he sought or was performing competently in the position he held, (3) he suffered an adverse employment action, such as termination, demotion, or denial of an available job, and (4) some other circumstance suggests discriminatory motive.'" (*Horne v. District Council 16 Internat. Union of Painters & Allied Trades* (2015) 234 Cal.App.4th 524, 534 [citing *Guz*, *supra*, 24 Cal.4th at pp. 354-355.) As explained above in relation to Robinson's disability discrimination claim, Robinson failed to make a prima facie showing that he was qualified to serve as an SEI. Rather, the evidence conclusively demonstrates his physical restrictions precluded him from performing various functions that were essential to the position.

Nor has Robinson identified any circumstance suggesting that Verizon's decision to remove him from the SEI position was in fact based on his race. In his deposition, Robinson testified that the sole reason he believed Verizon had discriminated against him

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5 Because we conclude that Robinson cannot establish he was qualified for the SEI position, we need not review the trial court's determination that Verizon is also entitled to judgment on the discrimination claim because Robinson provided no evidence showing that his decision to retire from the company "was [the result of a] constructive[] discharge[] on account of his disability."

on the basis of his race was because he knew the company had allowed three other non-African American SEIs to continue working in their positions with restrictions that excused them from climbing. Robinson admitted, however, that he did not know whether any of these three SEIs were, like him, also permanently prevented from repetitive stooping, bending, kneeling or crawling. The fact that Verizon may have accommodated other individuals who had a narrower set of physical limitations than Robinson is not sufficient to establish a prima facie claim for racial discrimination.[6]

C. Verizon Is Entitled to Judgment on Robinson's Claims for Failure to Accommodate and Failure to Engage in the Interactive Process

In his second and third causes of action, Robinson alleged Verizon breached its duty to provide a reasonable accommodation for his disability (§ 12940, subd. (m)), and failed to engage in the interactive process (§ 12940, subd. (n)).

1. The undisputed evidence establishes Robinson cannot prevail on his claim for failure to accommodate

a. Summary of law governing claims for failure to accommodate

"A reasonable accommodation is a modification or adjustment to the work environment that enables the employee to perform the essential functions of the job he or she holds or desires. [Citation.] FEHA requires employers to make reasonable accommodation for the known disability of an employee unless doing so would produce undue hardship to the employer's operation. [Citation.] The elements of a reasonable accommodation cause of action are (1) the employee suffered a disability, (2) the employee could perform the essential functions of the job with reasonable

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6 In his appellate brief, Robinson provides an alternative theory in support of his racial discrimination claim, asserting that the fact Wolf called him "lazy" is sufficient to raise an inference of racial discrimination. According to Robinson, Wolf's use of the term "lazy" could "be considered a pejorative term for his . . . his race." Robinson did not raise this argument in the trial court, and has therefore forfeited it on appeal. (*Schultz v. Workers' Compensation Appeals Board* (2015) 232 Cal.App.4th 1126, 1134 ["issues not raised in the trial court are generally forfeited for purposes of appeal"].)

accommodation, and (3) the employer failed to reasonably accommodate the employee's disability." (*Nealy, supra,* 234 Cal.App.4th at p. 373.)

"Generally, '"[t]he employee bears the burden of giving the employer notice of the disability. [Citation.] This notice then triggers the employer's burden to take 'positive steps' to accommodate the employee's limitations. . . . [¶] . . . . The employee, of course, retains a duty to cooperate with the employer's efforts by explaining [his or] her disability and qualifications. [Citation.] Reasonable accommodation thus envisions an exchange between employer and employee where each seeks and shares information to achieve the best match between the employer's capabilities and available positions." [Citation.]' [Citation.] [¶] FEHA does not obligate an employer to choose the best accommodation or the specific accommodation a disabled employee or applicant seeks. [Citation.] It requires only that the accommodation chosen be 'reasonable.' [Citation.] Although FEHA does not define what constitutes 'reasonable accommodation' in every instance, examples provided in the statute itself and the regulations governing its implementation include job restructuring, part-time or modified work schedules or 'reassignment to a vacant position.' [Citations.]

"If the employee cannot be accommodated in his or her 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.' [Citation.]" (*Raine v. City of Burbank* (2006) 135 Cal.App.4th 1215, 1222-1223 (*Raine*).)

Once an employer has shown he or she is disabled (or that there is a material factual dispute regarding the existence of a disability), "an employer cannot prevail on summary judgment on a claim of failure to reasonably accommodate unless it establishes through undisputed facts that (1) reasonable accommodation was offered and refused; (2) there simply was no vacant position within the employer's organization for which the disabled employee was qualified and which the disabled employee was capable of performing with or without accommodation; or (3) the employer did everything in its power to find a reasonable accommodation, but the informal interactive process broke

down because the employee failed to engage in discussions in good faith." (*Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 263 (*Jensen*).)

b. The evidence establishes that Verizon was not required to modify Robinson's SEI duties, and that Robinson's conduct terminated the accommodation process

Robinson asserts two alternate theories regarding the manner in which Verizon failed to accommodate his disability. First, he contends there are disputed issues of material fact whether Verizon could have modified his SEI job duties to accommodate his permanent physical restrictions. As explained above, however, the evidence conclusively establishes that Robinson's physical restrictions precluded him from performing essential functions of the SEI position. As a result, any modification to his job duties would necessarily require Verizon to excuse him from performing some of the essential functions of the position. "[E]limination of an essential function is not a reasonable accommodation. . . . [An] employee's [reasonable accommodation claim] consists, in part, of showing he or she can perform the essential functions of the job with accommodation, not that an essential function can be eliminated altogether to suit his or her restrictions. [Citation.] The examples of reasonable accommodations in the relevant statutes and regulations include reallocating nonessential functions or modifying how or when an employee performs an essential function, but not eliminating essential functions altogether. FEHA does not obligate the employer to accommodate the employee by excusing him or her from the performance of essential functions." (*Nealy*, *supra*, 234 Cal.App.4th at p. 375.) Because Verizon has established Robinson was incapable of performing the essential functions of the SEI position, the fact that it refused to leave him in the position with modified job duties cannot serve as the basis for a failure to accommodate claim.

Alternatively, Robinson contends there are triable issues of fact whether Verizon made reasonable efforts to reassign him into a vacant position for which he was qualified. In his declaration, Robinson asserts that he informed Reynolds he was interested in reassignment to three other positions: central office technician (also known as the

equipment maintainer), engineering pre-fielder and facility inspector. In his response to Verizon's statement of undisputed facts, however, Robinson admits Verizon had no vacancies in any of those positions during the relevant time period. Moreover, it is undisputed that: (1) the "equipment maintainer" position requires several of the physical activities that Robinson was precluded from performing as the result of his medical restrictions ; and (2) although the positions of "facilities inspector" and "engineer pre-fielder" had existed at Verizon's predecessor (GTE), Verizon had subsequently eliminated both positions. Thus, the undisputed evidence shows that reassigning Robinson into any of the positions he identified to the company did not qualify as a "reasonable" accommodation. (*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"]; *Raine, supra,* 135 Cal.App.4th at p. 1223, 1224 ["a reassignment . . . is not required if 'there is no vacant position for which the employee is qualified'"; "California law is emphatic that an employer has no affirmative duty to create a new position to accommodate a disabled employee"]; § 12926, subd. (p) ["'Reasonable accommodation' may include . . . reassignment to a *vacant* position"] [emphasis added].)

To the extent Robinson is asserting Verizon should have done more to aid him in finding a suitable alternative position, we conclude that the evidence establishes his own conduct prohibited the company from doing so. (See *Jensen, supra,* 85 Cal.App.4th at p. 256 [summary judgment appropriate on reasonable accommodation claim where the evidence establishes "the informal interactive process broke down because the employee failed to engage in discussions in good faith"]; *Nadaf-Rahrov v. Neiman Marcus Group, Inc*. (2008) 166 Cal.App.4th 952, 986 [""[l]iability for failure to provide reasonable accommodations ensues only where the employer bears responsibility for the breakdown""].) The undisputed evidence shows that during Robinson's meeting with Chris Reynolds on May 10th, Robinson identified only two possible accommodations: remaining in his SEI position with modified job duties, or reassignment to one of three alternative positions. As discussed above, neither of those requests qualified as a

reasonable accommodation. As a temporary alternative, Reynolds elected to assign Robinson to a help desk position at the Monrovia office, where he would be provided access to a database showing all of the job vacancies within Verizon. (See *Jenson, supra*, 85 Cal.App.4th at p. 264. ["A temporary position . . . represents . . . a way to put a disabled employee on hold while the attempt to locate a permanent position is ongoing"].) According to Reynolds's declaration, he had intended to "follow up" with Robinson regarding his status a few weeks after the initial transfer. That did not occur, however, because Robinson requested medical leave four days after the transfer, and then announced his retirement during his leave period.

Robinson does not dispute any of the following facts regarding the events that occurred after his temporary transfer to the Monrovia office: (1) on his second day of work at the Monrovia office, Cherrie Pollack informed Robinson he had been assigned a position at the help desk; (2) the individual who was supposed to train Robinson on his help desk duties was absent from the office because of injuries sustained in a car accident; (3) during the trainer's absence, Pollack repeatedly attempted to obtain a log-in for Robinson that would give him access to the Monrovia computer system; (4) Robinson was provided a password to a database showing Verizon's internal job postings; (5) after four days at the Monrovia office, Robinson requested and was granted medical leave; (6) at Robinson's request, Verizon extended his medical leave through January of 2013; (7) in November of 2012, Robinson announced he was retiring from the company; (8) Robinson did not contact Verizon regarding alternative accommodations at any point after the May 10th meeting with Reynolds.

It is therefore undisputed that Robinson was in fact provided a temporary placement in the Monrovia office. Although Robinson contends he was not given any work to do during his four days at the office, he acknowledges that Pollack told him why that occurred: the employee who was supposed to train him was injured in a car accident shortly after Robinson was transferred to Monrovia. Moreover, Pollack made repeated efforts get Robinson a functioning log-in, and did provide a functioning password to the Verizon job's database. To the extent Robinson was dissatisfied with his experience at

the Monrovia office, there is no evidence he ever communicated that dissatisfaction to Verizon. Instead, as Robinson admits, he requested a medical leave after four days, and then retired without any further communications regarding other possible accommodations. We conclude these facts demonstrate Verizon cannot be held liable for failure to accommodate because Robinson's own conduct effectively terminated the process of arranging reasonable accommodations. (*King v. United Parcel Service, Inc*. (2007) 152 Cal.App.4th 426, 443 [summary adjudication of reasonable accommodation claim proper where the evidence establishes the employee is responsible for the breakdown in the interactive process]; *Jensen, supra*, 85 Cal.App.4th at p. 263.)[7]

2. Robinson failed to establish any disputed issue of material fact regarding whether Verizon failed to engage in the interactive process

"'Under FEHA, an employer must engage in a good faith interactive process with the disabled employee to explore the alternatives to accommodate the disability.' [Citations.] FEHA requires an informal process with the employee to attempt to identify reasonable accommodations, not necessarily ritualized discussions. [Citation.]" (*Nealy, supra,* 234 Cal.App.4th at p. 379.) "Once initiated, the employer has a continuous obligation to engage in the interactive process in good faith. [Citation.] 'Both employer and employee have the obligation "to keep communications open" and neither has "a

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[7] Robinson contends summary adjudication of his accommodation claim is improper because the evidence shows Verizon offered him no aid in identifying an alternative position within the company. In support, Robinson relies on a statement in his declaration asserting that Reynolds told him he had "30 days to find a new job . . . [and] . . . was to report to the Monrovia office find [sic] a new job." According to Robinson, "merely requiring Robinson to look for work, without help, is not a form of accommodation." There is no evidence, however, that Robinson ever asked Verizon to assist him in finding a new position, or that the company refused to provide any such assistance. Instead, as explained above, the evidence shows that Robinson requested a medical leave four days after his transfer, and then retired without any further communications regarding his accommodations or his future at the company. Given these facts, Reynolds's statement that Robinson would have 30 days to find an alternative position is, in the absence of efforts by Robinson to use the time available and if necessary, seek additional time or assistance, not sufficient to support a finding that Verizon failed to reasonably accommodate him.

right to obstruct the process." [Citation.] "Each party must participate in good faith, undertake reasonable efforts to communicate its concerns, and make available to the other information which is available, or more accessible, to one party. Liability hinges on the objective circumstances surrounding the parties' breakdown in communication, and responsibility for the breakdown lies with the party who fails to participate in good faith." [Citation.]' [Citation.]" (*Swanson, supra,* 232 Cal.App.4th at pp. 971-972.)

"To prevail on a claim for failure to engage in the interactive process, the employee must identify a reasonable accommodation that would have been available at the time the interactive process occurred. [Citation.] 'An employee cannot necessarily be expected to identify and request all possible accommodations during the interactive process itself because """[e]mployees do not have at their disposal the extensive information concerning possible alternative positions or possible accommodations which employers have. . . ."""' [Citation.] But the employee should be able to identify specific, available reasonable accommodations through the litigation process, and particularly by the time the parties have conducted discovery and reached the summary judgment stage." (*Nealy, supra,* 234 Cal.App.4th at p. 379.)

Our prior analysis makes clear that Verizon is entitled to judgment on Robinson's claim for failure to participate in the interactive process. First, Robinson has never identified a specific accommodation that Verizon could have provided to him at the time he was removed from the SEI position. Throughout the litigation Robinson has articulated only two possible forms of accommodation: (1) remaining in his SEI position with modified job duties (see § 12926, subd. (p) ["reasonable accommodation" may include "job restructuring"); and (2) reassignment to one of three other positions. (See *id.* ["reasonable accommodation" may include "reassignment to a vacant position"].) As explained above, however, neither of these accommodations were "reasonable" because Verizon has conclusively shown that Robinson could no longer perform the essential duties of the SEI position, and that the company had no vacancies in any of the three alternative positions he had identified. At this stage in the proceedings, Robinson's

failure to identify a specific, reasonable accommodation is grounds for dismissal of his claim for failure to engage in the interactive process.

Second, as also discussed above, the undisputed evidence shows Robinson's own conduct caused the breakdown in the interactive process. Specifically, the evidence shows that four days after receiving his temporary assignment, he took a medical leave and then retired without ever contacting Verizon to discuss alternative accommodations.

D. Robinson Has Failed to Demonstrate the Trial Court Erred In Dismissing his Remaining Claims

Robinson also argues the trial court erred in entering judgment on his claims for "failure to prevent discrimination" and "retaliatory employment termination." In his appellate brief, Robinson argues that both claims are subject to the "same legal analysis—and much the same evidence—discussed in the context of disability discrimination." Thus, Robinson essentially argues that because the court erred in dismissing the disability discrimination claim, we should also reverse the court's dismissal of his retaliation and failure to prevent discrimination claims. We have concluded, however, that Verizon is entitled to judgment on the disability discrimination claim. As a result, Robinson has identified no basis for reversing the trial court's judgment on his derivative claims for retaliation or failure to prevent discrimination.[8]

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[8] On his retaliation claim, Robinson's appellate brief also argues that he "alleged that his employment was terminated because he took time off because of his disability. Verizon did not negate liability for retaliatory employment termination." Robinson's brief, however, does not cite any evidence in the record that supports these assertions. "'[A] reviewing court is not required make an independent, unassisted study of the record in search of error or grounds to support the judgment.' [Citations.] It is the duty of counsel to refer the reviewing court to the portion of the record which supports appellant's contentions on appeal. [Citation.]" (*Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115.) In this instance, Robinson's conclusory assertions that he was terminated for taking disability leave, and that Verizon failed to negate liability for retaliatory termination, are insufficient to preserve any claim of error regarding the retaliation claim.

Robinson presents a similar argument regarding his wrongful termination claim, asserting that "[b]ecause Verizon did not show that there was no genuine issue of material fact concerning plaintiff's claims alleging disability discrimination, failure to accommodate, and failure to engage in the interactive process, summary adjudication of [the wrongful termination] cause of action should also be reversed." Having rejected Robinson's argument that the trial court erred in granting judgment on his discrimination, accommodation and interactive process claims, we find no basis to reverse its judgment on Robinson's wrongful termination claim.

DISPOSITION

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

ZELON, Acting P. J.

We concur:

SEGAL, J.

GARNETT, J.*

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