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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

OMAR RODRIGUEZ,  
Plaintiff,

v.

UNITED PARCEL SERVICE,  
INC., DOES 1 through 5, inclusive,  
Defendants.

NO. EDCV-09-1776-RHW

**ORDER DENYING, IN PART,  
AND GRANTING, IN PART,  
DEFENDANT’S MOTION FOR  
SUMMARY JUDGMENT**

Before the Court is Defendant’s Motion for Summary Judgment (ECF No. 35). A telephonic hearing on the motion was held on May 6, 2011. Plaintiff was represented by Julia Haus. Defendant was represented by Elizabeth Brown.

In his complaint, Plaintiff is asserting four claims under the California Fair Employment and Housing Act (FEHA): (1) disability discrimination; (2) failure to engage in the interactive process; (3) failure to accommodate; and (4) retaliation. Plaintiff is seeking compensatory and punitive damages.

Defendant moves for summary judgment based on the following arguments:

- (1) Plaintiff’s claims are barred by the one-year statute of limitations;
- (2) Plaintiff was not a “qualified” individual with a disability;
- (3) Plaintiff cannot show that UPS took any action against him because of his disability;
- (4) Plaintiff obstructed the interactive process by not responding to UPS’s request for information;
- (5) Plaintiff cannot identify any reasonable accommodation that the interactive process would have produced;

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1 (6) Plaintiff cannot show a *prima facie* case of retaliation because he has  
2 no evidence of any retaliatory animus or causal connection between  
3 his protected activity and any adverse action;

4 (7) UPS provided a legitimate, non-retaliatory reason in not returning  
5 Plaintiff to work in January, 2007;

6 (8) Plaintiff cannot show “clear and convincing evidence” of oppression,  
7 fraud, or malice “on the part of an officer, director, or managing  
8 agent,” as required by the California statute for the jury to award  
9 punitive damages.

10 The Court agrees with Defendant that Plaintiff cannot establish a *prima facie*  
11 *case* of retaliation because he has not presented evidence of retaliatory animus or  
12 causal connection between his protected activity and an adverse employment  
13 action. The FEHA makes it unlawful “for any employer . . . to discharge, expel, or  
14 otherwise discriminate against any person because the person has opposed any  
15 practices forbidden under [FEHA] or because the person has filed a complaint . . .  
16 under this Act.” Cal. Gov. Code § 12940(h). Plaintiff argues that a reasonable  
17 jury could find retaliation based in that Defendant required Plaintiff to resign in  
18 order to settle the workers’ compensation claim because he requested an  
19 accommodation. Such an inference would be too speculative for the jury to infer  
20 retaliation on the part of Defendant. As such, the Court grants summary judgment  
21 in favor of Defendant with respect to Plaintiff’s claim of retaliation under the  
22 FEHA.

23 Likewise, the Court agrees with Defendant that Plaintiff has not presented  
24 clear and convincing evidence of oppression, fraud, or malice on the part of an  
25 officer, director, or managing agent of UPS. *See* Cal. Civ. Code § 3294.<sup>1</sup>

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26  
27 <sup>1</sup>a) In an action for the breach of an obligation not arising from contract,  
28 where it is proven by clear and convincing evidence that the defendant has been

1 With respect to the statute of limitations issue, California courts have  
2 instructed that the one-year statute of limitations should be “construed liberally” in  
3 order to “carry out the purposes of the FEHA to safeguard the employee’s right to  
4 hold employment without experiencing discrimination. *Richards v. CM2 Hill, Inc.*,  
5 26 Cal 4<sup>th</sup> 798, 820 (2001). Further, the FEHA limitations period “should be  
6 interpreted so as to promote the resolution of potentially meritorious claims on the  
7 merits.” *Id.* Courts have recognized that there is good reason to view a failure  
8 over time to reasonably accommodate a disabled employee as a single course of  
9 conduct, as reasonable accommodation is often an “ongoing process” rather than a  
10 single action. *Id.* at 821.

11 Here, as set forth on the record, the Court finds triable issues of fact exist  
12 regarding when Plaintiff signed his complaint. As such, the Court denies  
13 Defendant’s Motion for Summary Judgment based on this argument.

14 With respect to the remaining FEHA claims, the Court finds that there are  
15 triable issues of fact about Plaintiff’s ability, with or without accommodation, to  
16 perform the essential functions of an available vacant position that would not be a  
17 promotion, *see Nadaf-Rahrov v. Neiman Marcus Group, Inc.*, 166 Cal. App. 4<sup>th</sup>  
18 952, 963 (2008), and that there are triable issues of fact regarding whether  
19 Defendants were responsible for the breakdown in the interactive process, *see id.* at  
20 986. As such, the Court denies Defendant’s Motion for Summary Judgment on  
21 Plaintiff’s FEHA claims for disability discrimination, failure to accommodate, and  
22 failure to engage in the interactive process.

23 Accordingly, **IT IS HEREBY ORDERED:**

24 1. Defendant’s Motion for Summary Judgment (ECF No. 35) is

25 \_\_\_\_\_  
26 guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual  
27 damages, may recover damages for the sake of example and by way of punishing  
28 the defendant.

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1 **GRANTED**, in part, and **DENIED**, in part.

2 2. The Court **grants** summary judgment in favor of Defendant on  
3 Plaintiff's claim for retaliation under FEHA, and Plaintiff's claim for punitive  
4 damages. The Court **denies** summary judgment on Plaintiff's FEHA claims for  
5 disability discrimination, failure to accommodate, and failure to engage in the  
6 interactive process.

7 3. The jury trial currently set for July 18, 2011, is **reset** to Tuesday, **June**  
8 **28, 2011**, in Riverside, California. Counsel shall appear at 8:30 a.m. Jury selection  
9 shall begin at 9:00 a.m.

10 4. A pretrial conference is set for **June 21, 2011**, at 1:30 p.m. in Riverside,  
11 California.

12 5. Exhibit lists and witness lists shall be filed and served, and exhibits  
13 made available for inspection (or copies provided), on or before **May 16, 2011**.  
14 The witness list shall include identification of each witness's testimony. Where  
15 feasible, all exhibits identified in depositions shall be pre-marked with the exhibit  
16 numbers that will be used at trial.

17 Objections to such lists and any accompanying briefs shall be filed and  
18 served on or before **May 26, 2011**. Objections shall be heard at the pretrial  
19 conference. Copies of the exhibits to which there are objections shall be provided  
20 to the Court on or before **May 26, 2011**.

21 In accordance with Local Rule 83.1(g), each party shall bring to trial and any  
22 other hearing on the merits, photocopies of their relevant pre-marked exhibits for  
23 the Court, opposing counsel, and testifying witness, unless it is not possible to do  
24 so because of the nature of an exhibit. It is recommended that these photocopies be  
25 organized into separate binders.

26 6. All unresolved substantive or evidentiary issues that may foreseeably  
27 arise during trial shall be addressed by motions *in limine* to be filed and served on  
28 or before **May 16, 2011**. Responses shall be filed and served on or before **May 26,**

1 **2011.** Such motions will be addressed and resolved at the pretrial conference.

2 Challenges to the admissibility of expert opinion testimony shall be made by  
3 motion *in limine* and shall be heard at the pretrial conference. If the party  
4 challenging expert testimony anticipates that an evidentiary hearing shall be  
5 required, the party shall so advise the Court and opposing counsel in conjunction  
6 with the filing of its motion *in limine*. The party shall describe the nature of the  
7 evidence to be presented and provide an estimate of the amount of time required  
8 for the hearing.

9 7. Designation of substantive, as opposed to impeachment, deposition  
10 testimony shall be by highlighting and shall be served on or before **May 16, 2011**.  
11 Cross-designations by highlighting in a different color shall be served on or before  
12 **May 26, 2011**. Objections to any designated deposition testimony shall be filed  
13 and served on or before **June 2, 2011**, and shall be heard and resolved at the  
14 pretrial conference. Copies of designations to which there are objections shall be  
15 provided to the Court on or before **June 2, 2011**,

16 8. A joint Pretrial Order shall be filed on or before **June 13, 2011**, and a  
17 copy e-mailed to the Court at *whaleyorders@waed.uscourts.gov*.

18 The list of exhibits contained in the joint Pretrial Order shall reflect the  
19 exhibit marking scheme described above. In preparing the joint Pretrial Order, the  
20 parties shall confer regarding duplicate exhibits and determine which party will  
21 submit such exhibits for trial.

22 9. Prior to **June 13, 2011**, the parties shall confer regarding jury  
23 instructions. On or before **June 13, 2011**, the parties shall jointly file a complete  
24 set of jury instructions that contain copies of each instruction on which the parties  
25 agree and copies of each instruction that is disputed (i.e., a copy of each party's  
26 proposed version, if any, of an instruction on which they do not agree). All  
27 instructions shall be short, concise, understandable, and neutral statements of the  
28 law. Argumentative instructions shall not be submitted or given. To be complete,

1 the joint set of instructions must include instructions addressing the elements of  
2 each claim or defense, and a proposed verdict form. Instructions need not be  
3 submitted on issues that are not unique to this case, such as standard opening and  
4 closing instructions. Two copies of each proposed instruction, one cited and one  
5 uncited, shall be filed and a copy e-mailed to the court at  
6 *whaleyorders@waed.uscourts.gov*.

7 On or before **June 13, 2011**, each party shall file and serve a legal  
8 memorandum addressing any objections the party has regarding any instructions  
9 proposed by any other party. In their memoranda, the parties shall identify the  
10 specific portion of any proposed instruction to which they object and shall  
11 concisely state the basis for the objection. If any of the proposed instructions are  
12 modified versions of model instructions, the parties shall identify the modification  
13 and legal authority for the modification. Objections asserting that an instruction  
14 sets forth an incorrect or inappropriate statement of law shall cite specific legal  
15 authority supporting the objection. Failure to file an objection and supporting  
16 memorandum may be construed as consent to the adoption of an instruction  
17 proposed by another party. Any objection or proposed instruction for which a  
18 good faith basis does not exist may result in sanctions. The party proposing a  
19 disputed instruction may file a memorandum responding to any other party's  
20 objections, but must do so on or before **June 20, 2011**.

21 10. Trial briefs shall be filed and served on or before **June 20, 2011**.

22 **IT IS SO ORDERED.** The District Court Executive is directed to enter this  
23 order and to provide copies to counsel.

24 **DATED** this 9<sup>th</sup> day of May, 2011.

25  
26 *s/Robert H. Whaley*  
27 **ROBERT H. WHALEY**  
United States District Judge

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