

1 Plaintiff's declaration consists of 103 numbered paragraphs which are not supported by
2 citation to the record. (ECF No. 71-3.) The Court will only rely on information within Plaintiff's
3 personal knowledge or which he offers to show statements were made to him, not to prove the
4 truth of matters asserted in the statements. *Shakur v. Schriro*, 514 F.3d 878, 889 (9th Cir. 2008);
5 *Calmat Co. v. U.S. Dep't of Labor*, 364 F.3d 1117, 1124 (9th Cir. 2004); Fed. R. Civ. P. 56(c)(4).

6 Plaintiff provides undisputed material facts without citation to the record, except for Fact
7 35, which contains cites to several numbered paragraphs in Plaintiff's declaration, which
8 themselves do not include citations to the record. (ECF No. 71-1 ¶ 35; ECF No. 71-3 ¶¶ 51–60.)
9 The Court will not search several hundred pages of briefs and supporting materials to determine
10 whether they contain support for the facts Plaintiff asserts and whether those facts would be
11 admissible at trial. *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 774–75 (9th Cir. 2002).

12 Defendant's separate statement of undisputed material facts consists of 70 facts with
13 citation to the record. (ECF No. 69-1 at 1–13.) Plaintiff agrees that 56 of those facts are
14 undisputed, but objects to 14 others. (ECF No. 71-2 at 2–16.) Plaintiff labels some facts disputed
15 then cites to the same portion of the record as Defendant without explanation, or asserts a new
16 fact, or attempts to provide context. In those cases, the Court deems the facts undisputed for the
17 purposes of this motion. *Brinson v. Linda Rose Joint Venture*, 53 F.3d 1044, 1049 (9th Cir.
18 1995); Fed. R. Civ. P. 56(c)(1)(A)–(B), 56(e)(2). Plaintiff raises genuine disputes regarding three
19 of Defendants facts, 35, 44, and 53. (ECF No. 72-1 ¶¶ 35, 44, 53.) The Court deems Facts 35,
20 44 and 53 disputed for purposes of this motion, though notes neither party relied on these facts.

21 II. FACTUAL AND PROCEDURAL BACKGROUND

22 Plaintiff asserts claims beginning in 2003, however, the parties signed a Stipulation and
23 Settlement Agreement (“Settlement”) in which Plaintiff “waived and released” Defendant from
24 liability for any claim related to Plaintiff's employment before April 30, 2008. (ECF No. 69 at
25 22; ECF No. 71-4 at 2–4.) *Stroman v. W. Coast Grocery Co.*, 884 F.2d 458, 460–61 (9th Cir.
26 1989); *Fair Hous. Council of Cent. California, Inc. v. Tylar Prop. Mgmt. Co.*, 975 F. Supp. 2d
27 1115, 1122 (E.D. Cal. 2012). Accordingly, the Court will only evaluate claims based on conduct
28 after the settlement date, and this section primarily contains facts following that date.

1 A. Plaintiff Begins Working for Defendant

2 Plaintiff, an African American male, began working for Defendant in 2001. (ECF No. 69-
3 1 ¶¶ 1, 6.) Defendant hired Plaintiff for a position as a Project Management Office (“PMO”)
4 Staff Information Systems Analyst (“SISA”). (ECF No. 69-1 ¶ 2.) As a PMO SISA, Plaintiff’s
5 duties included assisting in the management of Department IT projects with an emphasis on
6 working with outside vendors. (ECF No. 69-1 ¶ 3.)

7 B. Plaintiff’s Application for Promotion

8 In October 2009, Plaintiff completed the Systems Software Specialist Series exams for
9 promotional purposes. (ECF No. 71-3 ¶ 48.) In 2009 or 2010, Plaintiff applied for a promotion
10 to System Software Specialist II (“SSS II”) with the DMV and was granted a first-round
11 interview, but he was not selected for the position. (ECF No. 69-1 ¶ 43.) Plaintiff also sought
12 positions with other state agencies, but he did not secure other employment. (ECF No. 71-3 ¶¶
13 51, 53, & 54.) During this time, Plaintiff’s position numbers changed because the department in
14 which he worked, the Systems Test Unit in the Information Systems Division (“ISD”), was
15 undergoing a reorganization. (ECF No. 69-1 ¶¶ 39, 40.) His classification as a SISA remained
16 constant. (ECF No. 69-1 ¶ 39.) No representative from any state agency reported any work
17 history irregularities to Plaintiff when considering him for a job. (ECF No. 69-1 ¶ 45.)

18 C. Security Breach and Investigation

19 Around August 2010, Plaintiff discovered and accessed a security flaw which allowed him
20 to view employees’ personal information such as social security numbers and leave requests.
21 (ECF No. 69-1 ¶ 46.) Plaintiff reported this breach to his supervisor. (ECF No. 69-1 ¶ 47.) Two
22 weeks later, Plaintiff’s supervisor informed him that Internal Affairs was investigating, and ISD
23 Desktop Support and Information Protection Office confiscated his computers. (ECF No. 69-1 ¶
24 47.) Plaintiff met with Internal Affairs shortly after, although the Investigations Division does
25 not normally communicate with individuals who are under investigation. (ECF No. 69-1 ¶ 48.)

26 Plaintiff does not think Internal Affairs launched the investigation because of his race, but
27 he does think that he was moved to a new cubicle for that reason. (ECF No. 69-1 ¶ 55.)
28 Defendant’s standard procedure after a security breach is to remove the computer used to access

1 the confidential information and to move the employee to a new workspace. (ECF No. 69-1 ¶
2 49.) A Desktop Support Team moved Plaintiff to a new cubicle along with an old computer from
3 Plaintiff's prior cubicle. (ECF No. 69-1 ¶ 50.) While Plaintiff had replacement equipment in his
4 new cubicle, Defendant restricted his access to software and the compromised database. (ECF
5 No. 69-1 ¶ 52.) The new cubicle had an existing PC in the center and his replacement PC was
6 placed to the side, which Plaintiff thinks was non-ergonomic. (ECF No. 69-1 ¶ 51.)

7 Plaintiff thinks he worked under a cloud due to the investigation, although he does not
8 recall hearing anyone speak about it, and to his knowledge his supervisor Casey Evans ("Evans")
9 was the only person aware of it. (ECF No. 69-1 ¶ 58.) Evans gave Plaintiff an assignment to
10 work with the Quality Center Administrator to write a user manual, but Plaintiff did not work on
11 the project because he was "leery" of doing so during the investigation. (ECF No. 69-1 ¶ 54.)

12 Internal Affairs exonerated Plaintiff in September 2010, but Plaintiff did not learn of his
13 exoneration until June 2011. (ECF No. 69-1 ¶¶ 59–61; 71-3 ¶¶ 65 & 66.) Plaintiff believes he
14 was not informed of the exoneration earlier and an exoneration letter was kept from him because
15 of his race. (ECF No. 69-1 ¶ 60.) The letter exonerating Plaintiff was addressed to a Deputy
16 Director. (ECF No. 69-1 ¶ 61.) Plaintiff never asked the Deputy Director when he had received
17 the letter. (ECF No. 69-1 ¶ 61.) Plaintiff first saw the letter on June 24, 2011. Evans informed
18 Plaintiff of his exoneration and showed Plaintiff the cover page of the letter on June 24, 2011, just
19 after Evans received it. (ECF No. 69-1 ¶ 59; ECF No. 71-3 ¶ 66.)

20 D. Medical Leave and Request for Accommodation

21 In June 2011, Plaintiff went on medical leave due to stress. (ECF No. 69-1 ¶ 62.) He
22 returned on July 18, 2011 and went on leave again on July 27, 2011. (ECF No. 71-3 ¶¶ 69, 70.)
23 Plaintiff's psychologist provided a note stating Plaintiff was "restricted from working under [the]
24 current chain of command in [the] Information Systems Division." (ECF No. 69-1 ¶ 63.)
25 Plaintiff includes the Deputy Director and each supervisor in that chain of command. (ECF No.
26 69-1 ¶ 65.) Plaintiff states Defendant informed him it rejected his request for accommodation,
27 but later re-processed his request with a corrected duty statement. (ECF No. 71-3 ¶¶ 72–76.)

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1 On December 6, 2011, Plaintiff filed a complaint with the Equal Employment Opportunity
2 Commission (“EEOC”) and California Department of Fair Employment and Housing (“DFEH”).
3 (ECF No. 71-3 ¶ 77.) Plaintiff states he returned to work on January 11, 2012, but went on leave
4 again the next day when given a choice of being “written-up” for not having his resume available
5 or working under an IDS supervisor. (ECF No. 69-1 ¶ 64; ECF No. 71-3 ¶¶ 78–79.) Defendant
6 received a worker’s compensation Panel Qualified Medical Evaluator report and accepted
7 Plaintiff’s reasonable accommodation request in March 2012. (ECF No. 69-1 ¶ 66.)

8 Between 2012 and 2014, Defendant made at least 14 job offers to Plaintiff, and Plaintiff
9 accepted the final offer. (ECF No. 69-1 ¶ 68; ECF No. 71-3 ¶¶ 84–101.) Plaintiff states he was
10 released back to work by his doctor in May 2013. (See ECF No. 71-3 ¶¶ 85, 86.) On four
11 occasions in 2014, the Reasonable Accommodations Program in the DMV’s Health Management
12 Unit (“HMU”) requested Plaintiff provide an updated resume to help the search for a position he
13 would find suitable. (ECF No. 69-1 ¶ 67.) In November 2014, Plaintiff accepted a SISA position
14 in the Enterprise Risk Management Division, started in the role in January 2015, and remains in
15 that job as of the time the parties filed their briefs in this motion. (ECF No. 69-1 ¶ 69; ECF No.
16 71-3 ¶ 101.) Plaintiff believes Defendant had several suitable jobs available which Defendant did
17 not offer Plaintiff. (ECF No. 71-3 ¶ 102.)

18 Plaintiff asserts state law claims for disability discrimination and retaliation, race based
19 discrimination, and retaliation, and federal claims for race based discrimination and retaliation.
20 (ECF No. 28.) Defendant moves for summary judgment as to all claims. (ECF No. 69.)

21 III. STANDARD OF LAW

22 Summary judgment is appropriate when the moving party demonstrates no genuine issue
23 as to any material fact exists and the moving party is entitled to judgment as a matter of law. Fed.
24 R. Civ. P. 56(a); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). Under summary
25 judgment practice, the moving party always bears the initial responsibility of informing the
26 district court of the basis of its motion, and identifying those portions of “the pleadings,
27 depositions, answers to interrogatories, and admissions on file together with affidavits, if any,”
28 which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v.*

1 *Catrett*, 477 U.S. 317, 323 (1986). “[W]here the nonmoving party will bear the burden of proof
2 at trial on a dispositive issue, a summary judgment motion may properly be made in reliance
3 solely on the pleadings, depositions, answers to interrogatories, and admissions on file.” *Id.* at
4 324 (internal quotations omitted). Indeed, summary judgment should be entered against a party
5 who does not make a showing sufficient to establish the existence of an element essential to that
6 party’s case, and on which that party will bear the burden of proof at trial.

7 If the moving party meets its initial responsibility, the burden then shifts to the opposing
8 party to establish that a genuine issue as to any material fact actually does exist. *Matsushita Elec.*
9 *Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585–87 (1986); *First Nat’l Bank of Ariz. v. Cities*
10 *Serv. Co.*, 391 U.S. 253, 288–89 (1968). In attempting to establish the existence of this factual
11 dispute, the opposing party may not rely upon the denials of its pleadings, but is required to
12 tender evidence of specific facts in the form of affidavits, and/or admissible discovery material, in
13 support of its contention that the dispute exists. Fed. R. Civ. P. 56(c). The opposing party must
14 demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome of the
15 suit under the governing law, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986), and that
16 the dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for
17 the nonmoving party. *Id.* at 251–52.

18 In the endeavor to establish the existence of a factual dispute, the opposing party need not
19 establish a material issue of fact conclusively in its favor. It is sufficient that “the claimed factual
20 dispute be shown to require a jury or judge to resolve the parties’ differing versions of the truth at
21 trial.” *First Nat’l Bank*, 391 U.S. at 288–89. Thus, the “purpose of summary judgment is to
22 ‘pierce the pleadings and to assess the proof in order to see whether there is a genuine need for
23 trial.’” *Matsushita*, 475 U.S. at 587 (quoting Rule 56(e) advisory committee’s note on 1963
24 amendments).

25 In resolving the summary judgment motion, the court examines the pleadings, depositions,
26 answers to interrogatories, and admissions on file, together with any applicable affidavits. Fed.
27 R. Civ. P. 56(c); *SEC v. Seaboard Corp.*, 677 F.2d 1301, 1305–06 (9th Cir. 1982). The evidence
28 of the opposing party is to be believed, and all reasonable inferences that may be drawn from the

1 facts pleaded before the court must be drawn in favor of the opposing party. *Anderson*, 477 U.S.
2 at 255. Nevertheless, inferences are not drawn out of the air, and it is the opposing party’s
3 obligation to produce a factual predicate from which the inference may be drawn. *Richards v.*
4 *Nielsen Freight Lines*, 602 F. Supp. 1224, 1244–45 (E.D. Cal. 1985), *aff’d*, 810 F.2d 898 (9th Cir.
5 1987). Finally, to demonstrate a genuine issue that necessitates a jury trial, the opposing party
6 “must do more than simply show that there is some metaphysical doubt as to the material facts.”
7 *Matsushita*, 475 U.S. at 586. “Where the record taken as a whole could not lead a rational trier of
8 fact to find for the nonmoving party, there is no ‘genuine issue for trial.’” *Id.* at 587.

9 IV. ANALYSIS

10 Plaintiff asserts state law claims for (i) disability discrimination and retaliation in violation
11 of California’s Fair Employment and Housing Act (“FEHA”), (ii) race based discrimination in
12 violation of FEHA, and (iii) retaliation in violation of FEHA, and federal claims for (iv) race
13 based discrimination in violation of Title VII of the Civil Rights Act (“Title VII”) and (v)
14 retaliation in violation of Title VII. (ECF No. 28 at 8–12.) Defendant moves for summary
15 judgment on all claims, arguing that there are no genuine issues of material fact. (ECF No. 69 at
16 1–2.) The Court will address each claim in turn.

17 The Court notes Defendant’s argument that Plaintiff “implicitly acquiesces to Defendant’s
18 substantive legal arguments” by not addressing some arguments thoroughly or at all. (ECF No.
19 72 at 2.) A district court may not grant summary judgment by default, even when the opposing
20 party fails to oppose the motion. *Fetter v. Placer Cty. Sheriff*, 2017 WL 896275, at *3 (E.D. Cal.
21 Mar. 6, 2017) (citing *Cristobal v. Siegel*, 26 F.3d 1488, 1494–95 n.4 (9th Cir. 1994)). A court
22 must assess whether the movant’s papers are sufficient. *Id.* (citing *United States v. Real Prop. at*
23 *Incline Vill.*, 47 F.3d 1511, 1520 (9th Cir. 1995), *rev’d on other grounds*, 517 U.S. 820 (1996).

24 A. Disability Discrimination and Retaliation Claim Pursuant to FEHA.

25 Plaintiff alleges he is disabled and Defendant discriminated against him by failing to
26 reasonably accommodate him and by not engaging in an interactive process in violation of FEHA.
27 (ECF No. 28 ¶¶ 75–77; ECF No. 71 at 18–20.) The undisputed facts show Plaintiff does not have
28 a FEHA-recognized disability and Defendant is entitled to summary judgment on this claim.

1 action, and (3) a causal link existed between the protected activity and the employer’s action.”
2 *Moore v. Regents of the Univ. of Cal.*, 248 Cal. App. 4th 216, 244 (2016).

3 In August 2011, Plaintiff requested reasonable accommodation for the mental disability
4 from which he said he suffered. (ECF No. 71-3 ¶ 71.) At the time, however, a request for
5 accommodation did not constitute protected activity. *Moore*, 248 Cal. App. 4th at 245 (citing
6 *Rope v. Auto-Chlor Sys. of Wash., Inc.*, 220 Cal. App. 4th 635, 652 (2013) (determining there was
7 “no support in the regulations or case law for the proposition that a mere request—or even
8 repeated requests—for an accommodation, without more, constitutes a protected activity
9 sufficient to support a claim for retaliation in violation of FEHA.”)).

10 The California Legislature later amended §§ 12940(1)(4) and 12940(m)(2) “to provide
11 protection against retaliation when an individual makes a request for reasonable accommodation
12 under these sections, regardless of whether the request was granted.” *Moore*, 248 Cal. App. 4th at
13 245 (citing Assem. Bill 987, § 1, subd. (d)). The *Moore* court found the amendments changed the
14 law, adding protections for those requesting reasonable accommodation after the amendments’
15 January 1, 2016, effective date. *Id.* at 247. Plaintiff cannot show he engaged in a protected
16 activity, an element of retaliation, when he requested reasonable accommodation in 2011.

17 Accordingly, Defendant’s motion for summary judgment on Plaintiff’s disability
18 discrimination and retaliation claim under FEHA is GRANTED.

19 B. Title VII and FEHA Race Based Employment Discrimination Claims

20 Plaintiff asserts claims for race based discrimination in violation of Title VII and FEHA.
21 (ECF No. 28 ¶¶ 62–68, 82–87.) As discussed above, Plaintiff released Defendant from liability
22 for events related to Plaintiff’s employment through April 30, 2008. Plaintiff’s factual allegations
23 after that date relate to (i) his applications for promotion within DMV, (ii) his applications for
24 positions with other agencies, (iii) the security breach he reported and subsequent investigation,
25 (iv) the timeliness with which Defendant informed him of his exoneration, and (v) constructive
26 discharge. (ECF No. 28 ¶¶ 31–61.)

27 Plaintiff’s claims fail because he has not shown Defendant treated him differently than it
28 treated similarly situated employees of different races, a required element for a disparate

1 treatment claim. *Pinder v. Emp't Dev. Dep't.*, 227 F. Supp. 3d 1123, 1136 (E.D. Cal. 2017)
2 (stating that “[a] plaintiff bringing a Title VII or FEHA racial discrimination action under a theory
3 of disparate treatment must demonstrate at trial that his or her employer took one or more adverse
4 employment actions against the plaintiff because of the plaintiff’s race”) (citing *Desert Palace,
5 Inc. v. Costa*, 539 U.S. 90, 92–93, 99–100 (2003); *Heard v. Lockheed Missiles & Space Co.*, 44
6 Cal. App. 4th 1735, 1748 (1996)).

7 *i. Title VII and FEHA Employment Discrimination Standard of Law*

8 Title VII makes it unlawful for an employer to “fail or refuse to hire or to discharge any
9 individual, or otherwise to discriminate against any individual with respect to his compensation,
10 terms, conditions, or privileges of employment, because of such individual’s race, color, religion,
11 sex, or national origin.” 42 U.S.C. § 2000e–2(a)(1). Because the objectives of and public policy
12 purposes of Title VII and FEHA are identical, “courts frequently seek guidance from Title VII
13 decisions when interpreting the FEHA.” *Lyle v. Warner Bros. Television Prod.*, 38 Cal. 4th 264,
14 278 (2006). “California courts apply the Title VII framework to claims brought under FEHA.”
15 *Metoyer v. Chassman*, 504 F.3d 919, 941 (9th Cir. 2007) (citing *Guz v. Bechtel Nat. Inc.*, 24 Cal.
16 4th 317, 354 (2000)).

17 A plaintiff can show disparate treatment under Title VII by offering proof: (1) that the
18 plaintiff belongs to a class of persons protected by Title VII; (2) that the plaintiff performed his or
19 her job satisfactorily; (3) that the plaintiff suffered an adverse employment action; and (4) that the
20 plaintiff’s employer treated the plaintiff differently than a similarly situated employee who does
21 not belong to the same protected class as the plaintiff. *Cornwell v. Electra Cent. Credit Union*,
22 439 F.3d 1018, 1028 (9th Cir. 2006).

23 *ii. The Court need not address the first three required elements.*

24 The parties have not disputed that Plaintiff, an African American, is a member of a
25 protected class. They have also not disputed that during the relevant time period, from April 30,
26 2008 on, he performed most job functions satisfactorily. Defendant does argue that Plaintiff did
27 not suffer any adverse employment actions and that Defendant did accommodate him. Plaintiff,
28 however, fails to meet the fourth element, showing Defendant treated him differently than

1 similarly situated employees not in Plaintiff's protected class, as required for a race based
2 disparate treatment claim under Title VII or FEHA. The Court is able to decide this matter based
3 on Plaintiff's failure to meet that fourth element, so it need not discuss the first three elements.

4 *iii. Plaintiff has not shown Defendant treated Plaintiff disparately.*

5 Plaintiff asserts he suffered several adverse employment actions, (i) refusal to promote
6 within DMV, (ii) Plaintiff's applications for positions with other agencies, (iii) the security breach
7 he reported and subsequent investigation, (iv) the timeliness with which Defendant informed him
8 of his exoneration, and (v) constructive discharge. (ECF No. 28 ¶¶ 32–58.) He does not allege
9 Defendant treated him differently than other employees in relation to these actions.

10 Plaintiff does not allege that Defendant filled the promotion position or senior DMV
11 positions with someone who was not a member of the same protected class, or continued to
12 consider other applicants with comparable qualifications after rejecting Plaintiff. (ECF Nos. 28 &
13 71.) *Dominguez-Curry v. Nevada Transp. Dep't*, 424 F.3d 1027, 1037 (9th Cir. 2005). Plaintiff
14 attributes his inability to find another position to changes in his position numbers in his electronic
15 work history. (ECF No. 28 ¶¶ 30, 36, 37, 42.) Plaintiff states, however, that his position numbers
16 changed because the Systems Test Unit was undergoing a reorganization, and he does not allege
17 that Defendant treated any other employees differently. (ECF No. 69-1 ¶¶ 39, 40.) Similarly,
18 Plaintiff raises a number of concerns regarding Defendant's conduct during the investigation of
19 the security breach and Plaintiff's exoneration. (ECF No. 28 ¶¶ 45, 46; ECF No. 69-1 ¶¶ 51, 54,
20 55, 58, 64; ECF No. 71 at 14.) Plaintiff again does not allege a single instance in which
21 Defendant treated him differently than any other similarly situated employee.

22 Plaintiff also asserts Defendant discriminated against him by constructively discharging
23 him by refusing to provide reasonable accommodation for his disability. (ECF No. 28 ¶ 58.)
24 Plaintiff has not alleged that he resigned, a required element for constructive discharge, and has
25 not alleged that Defendant treated him differently than other employees in relation to his request
26 for accommodation. *King v. AC & R Advert.*, 65 F.3d 764, 767 (9th Cir. 1995) (citing *Turner v.*
27 *Anheuser-Busch, Inc.*, 7 Cal. 4th 1238, 1251 (1994)); *Levy v. Cty. of Alpine*, No. 2:13-CV-02643-
28 KJM-CKD, 2016 WL 916251, at *8 (E.D. Cal. Mar. 10, 2016).

1 Plaintiff has not shown Defendant treated him differently from similarly situated
2 employees in relation to any challenged actions and cannot meet the fourth element required for a
3 race based disparate treatment claim. There are, therefore, no genuine issues of material fact as to
4 Plaintiff's employment discrimination claims. Accordingly, Defendant's motion for summary
5 judgment on Plaintiff's employment discrimination claims under Title VII and FEHA is
6 GRANTED.

7 C. Title VII and FEHA Retaliation Claims

8 Plaintiff asserts Defendant retaliated against him in violation of Title VII and FEHA for
9 filing a discrimination complaint against Defendant. (ECF No. 28 ¶¶ 69–74, 88–94.) Plaintiff
10 filed a discrimination complaint with DFEH in 2003 and later filed discrimination complaints
11 with EEOC and DFEH on December 6, 2011, amended on April 25, 2013. (ECF No. 28 ¶¶ 12,
12 59.) Plaintiff does not specify whether he believes Defendant retaliated against him for filing the
13 2003 or 2011 filings, but he refers to both at different points in his opposition. (ECF No. 71 at
14 14, 18.) Plaintiff's claims fail because he has not shown that he suffered an adverse employment
15 action related to his 2003 or 2011 complaints under either the Title VII or FEHA standard.

16 A plaintiff asserting a claim for retaliation must show (1) that he engaged in a protected
17 activity; (2) he suffered an adverse employment action; and (3) a causal link exists between the
18 protected activity and the adverse employment action. *Cornwell*, 439 F.3d at 1034–35 (citing
19 *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1464 (9th Cir. 1994)).

20 Filing a discrimination complaint is a protected activity under FEHA and Title VII.
21 *Yanowitz v. L'Oreal USA, Inc.*, 36 Cal. 4th 1028, 1035 (2005); *Cohen v. Fred Meyer, Inc.*, 686
22 F.2d 793, 796 (9th Cir. 1982). Under Title VII, an adverse employment action might “dissuade[]
23 a reasonable worker from making or supporting a charge of discrimination.” *Burlington N. &*
24 *Santa Fe Rwy. Co. v. White*, 548 U.S. 53, 68 (2006). Under FEHA, the action “must materially
25 affect the terms, conditions, or privileges of employment.” *Yanowitz*, 36 Cal. 4th at 1052.

26 i. *Plaintiff's 2003 complaint.*

27 Plaintiff states that Defendant engaged in a “series of retaliatory actions” beginning
28 “immediately after” Plaintiff filed his 2003 DFEH complaint. (ECF No. 71 at 18.) It is difficult

1 to know to which actions Plaintiff refers. As discussed above, Plaintiff waived all claims for
2 events related to his employment with Defendant through April 30, 2008 in the Settlement.
3 Plaintiff describes the incident or incidents to which he refers as beginning “immediately” after
4 he filed his 2003 DFEH complaint. (ECF No. 71 at 18.) Any actions taking place after April 30,
5 2008, could not reasonably be described as having taken place “immediately” after Plaintiff filed
6 his complaint about five years earlier. *See Black’s Law Dictionary* 764 (8th ed. 2004) (defining
7 “immediate” as “[o]ccurring without delay; instant”). Plaintiff has not shown he suffered an
8 adverse employment action in retaliation for his 2003 complaint.

9 *ii. Plaintiff’s 2011 complaints.*

10 Plaintiff argues “a reasonable inference can be drawn from Defendant’s refusal to
11 accommodate Plaintiff’s disability was in retaliation for filing discrimination complaint.” [sic]
12 (ECF No. 71 at 14.) Plaintiff claims that the adverse employment action he suffered was
13 Defendant’s failure to reasonably accommodate his mental disability, and that Defendant engaged
14 in this action in retaliation for Plaintiff filing his 2011 complaints. (ECF No. 71 at 14.)
15 Plaintiff’s claim fails because Defendant was not required to accommodate him as he does not
16 have a recognized disability.

17 “FEHA requires employers to make reasonable accommodation for the known disability
18 of an employee unless doing so would produce undue hardship to the employer’s operation.”
19 *Nealy v. City of Santa Monica*, 234 Cal. App. 4th 359, 373 (2015) (citing CAL. GOV. CODE, §
20 12940, subd. (m)). “The elements of a reasonable accommodation cause of action are (1) the
21 employee suffered a disability, (2) the employee could perform the essential functions of the job
22 with reasonable accommodation, and (3) the employer failed to reasonably accommodate the
23 employee’s disability.” *Nealy*, 234 Cal. App. 4th at 373 (citing *Wilson v. County of Orange* 169
24 Cal. App. 4th 1185, 1192 (2009)). As discussed above, Plaintiff does not have a FEHA-
25 recognized disability and so cannot meet the first element of showing that he suffered a disability.

26 Plaintiff cannot show Defendant failed to reasonably accommodate his mental disability
27 because he does not have a FEHA-recognized mental disability and he was accommodated with
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1 multiple job offers, including the one he ultimately accepted. There is no genuine issue of
2 material fact as to Plaintiff's retaliation claims under Title VII and FEHA.

3 Accordingly, Defendant's motion for summary judgment on Plaintiff's retaliation claims
4 under Title VII and FEHA is GRANTED.

5 **V. CONCLUSION**

6 For the reasons set forth above, Defendant's Motion for Summary Judgment (ECF No. 69)
7 is GRANTED. The Clerk of Court shall enter judgment in favor of Defendant and close this case.

8 IT IS SO ORDERED.

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10 Dated: August 17, 2017

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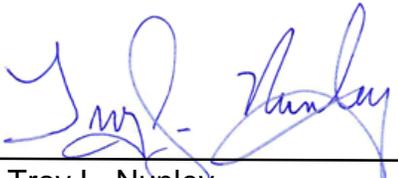
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Troy L. Nunley
United States District Judge