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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

TYRONE DOUTHERD,

Plaintiff,

v.

DORIS MARIE MONTESDEOCA, The
Estate of LUCILLE J. SMITH, UNITED
PARCEL SERVICE, INC., LIBERTY
MUTUAL INSURANCE COMPANY, and
HARMONY HOME CARE, INC.,

Defendants.

No. 2:17-cv-02225-KJM-JDP

ORDER

This case arises from a motor vehicle accident plaintiff suffered while at work for his employer, UPS Ground Freight, Inc., and subsequent events related to his employment. Two motions for summary judgment are before the court. Defendant UPS Ground Freight, Inc. (sued as United Parcel Service, Inc., hereafter “UPS”) moves for summary judgment as to all of plaintiff Tyrone Doutherd’s claims against it. UPS Mot., ECF Nos. 123, 123-1. Plaintiff opposes the motion. UPS Opp’n, ECF No. 135. UPS replied. UPS Reply, ECF No. 144. Defendant Harmony Home Care, Inc. (“Harmony”) moves for summary judgment as to plaintiff’s claims against it. Harmony Mot., ECF No. 125; Harmony Mem. P&A, ECF No. 125-1. Plaintiff opposes. Doutherd Opp’n, ECF No. 133. Harmony replied. Harmony Reply, ECF No. 140.

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1 The court heard oral argument on the motions by video teleconferencing in
2 consideration of the ongoing coronavirus pandemic on July 10, 2020. Ellen Dove appeared on
3 behalf of plaintiff. Amanda Griffith appeared on behalf of Harmony Home Care. Emily
4 Burkhardt Vicente appeared on behalf of UPSF. Having carefully considered the parties'
5 arguments, the evidence in the record, and the applicable law, the court now GRANTS UPSF's
6 motion and GRANTS IN PART and DENIES IN PART Harmony's motion.

7 Before reciting the facts in detail, the court resolves evidentiary objections and
8 notes the effect of the law of the case.

9 I. EVIDENTIARY OBJECTIONS

10 The court focuses on UPSF's objections and consider Harmony's objections only
11 when they are material, as many of them are duplicative of USPF's. To the extent both moving
12 defendants' objections are merely "boilerplate recitations of evidentiary principles or blanket
13 objections without analysis applied to specific items of evidence," the court declines to scrutinize
14 them one-by-one. *See Ramsey v. Siskiyou Hosp. Inc.*, No. 2:14-cv-01908-KJM-CMK, 2016 WL
15 3197557, at *1 (E.D. Cal. June 9, 2016) (citations omitted); *see also Capitol Records, LLC v.*
16 *BlueBeat, Inc.*, 765 F. Supp. 2d 1198, 1200 n.1 (C.D. Cal. 2010) ("In motions for summary
17 judgment with numerous objections, it is often unnecessary and impractical for a court to
18 methodically scrutinize each objection and give a full analysis of each argument raised." (citation
19 omitted)).

20 A. Self-Serving Declarations

21 Plaintiff relies chiefly on his own declarations to oppose the motions. Pl.'s Resp.
22 UPSF SUF, ECF No. 136; Doutherd UPSF Decl., ECF No. 134; Pl.'s Resp. Harmony SUF, ECF
23 No. 133-1; Doutherd Harmony Decl., ECF No. 133-2. Both Harmony and UPSF object that the
24 declarations are self-serving. UPSF Obj. Pl.'s Decl., ECF No. 143; Harmony Obj. Pl.'s Decl.,
25 ECF No. 142. This is not per se a bar to their consideration:

26 [D]eclarations are often self-serving, and this is properly so because
27 the party submitting it would use the declaration to support his or
28 her position. Although the source of the evidence may have some
bearing on its credibility and on the weight it may be given by a
trier of fact, the district court may not disregard a piece of evidence

1 at the summary judgment stage solely based on its self-serving
2 nature.

3 *Nigro v. Sears, Roebuck & Co.*, 784 F.3d 495, 497 (9th Cir. 2015). However, the court is
4 empowered to “disregard a self-serving declaration that states only conclusions and not facts that
5 would be admissible evidence.” *Id.* (citing *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054,
6 1059 n.5, 1061 (9th Cir. 2002). “A conclusory, self-serving affidavit, lacking detailed facts and
7 any supporting evidence, is insufficient to create a genuine issue of material fact.” *F.T.C. v.*
8 *Publishing Clearing House, Inc.*, 104 F.3d 1168, 1171 (9th Cir. 1997).

9 The court’s power to disregard conclusory and threadbare self-serving declarations
10 must be weighed against the requirement to draw all reasonable inferences in favor of the
11 nonmoving party at the summary judgment stage. *Matsushita Elec. Indus. Co. v. Zenith Radio*
12 *Corp.*, 475 U.S. 574, 587-88 (1986).

13 In considering plaintiff’s declarations, the court disregards plaintiff’s conclusions
14 of law unsupported by factual details. Insofar as he asserts facts, however, the court will not
15 disregard them solely for their self-serving nature, as counseled by *Nigro*, 784 F.3d at 497. It
16 remains plaintiff’s burden in opposing summary judgment to present evidence from which a jury
17 could reasonably render a verdict in the non-moving party’s favor. *Anderson v. Liberty Lobby,*
18 *Inc.*, 477 U.S. 242, 252 (1986).

19 Plaintiff’s UPSF declaration recounts his story at a high level of generality,
20 omitting key facts. This level of generality is not enough to withstand summary judgment. A
21 reasonable juror would not have a sufficient understanding of the details from such testimony to
22 find for the plaintiff. While, deficiencies in affidavits offered in opposition to summary judgment
23 may be cured to make them “admissible at trial” and thus competent to oppose, *Block v. City of*
24 *L.A.*, 253 F.3d 410, 418-19 (9th Cir. 2001) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324
25 (1986)), these basic details would have been in plaintiff’s personal knowledge and possession at
26 the time and could have been included in his declaration. “When a party has relevant evidence in
27 his control which he fails to produce, that failure gives rise to an inference that the evidence is
28 unfavorable to him.” *Singh v. Gonzales*, 491 F.3d 1019, 1024 (9th Cir. 2007) (quoting *Int’l*

1 *Union, United Auto., Aerospace, and Agric. Implement Workers of Am. (U.A.W.) v. N.L.R.B.*, 459
2 F.2d 1329, 1336 (D.C. Cir. 1972)). The missing details are not trifles; they are the factual basis
3 for his case. The court has no obligation to comb the record for a basis of admissibility of his
4 threadbare factual assertions “as if [it were] [a] pig[] sniffing for truffles.” *In re Oracle Sec.*
5 *Litigation*, 627 F.3d 376, 386 (9th Cir. 2010) (citation omitted).

6 Therefore the court cannot consider sworn statements where plaintiff omits key
7 details of events to which he would have been a percipient witness as competent to oppose. The
8 court does not sustain the objection as to the totality of plaintiff’s declaration. However, the court
9 sustains the objection as to those parts of the declaration that state in a conclusory fashion that
10 events occurred without any detail.

11 B. Sham Declaration

12 UPSF objects that several portions of plaintiff’s declaration are “sham
13 declaration[s]” that contradict his testimony at deposition and should thus be disregarded. UPSF
14 Obj. Pl.’s Decl. at 2–3, 4, 6, 14, 17, 18–20 (objecting to Doutherd UPSF Decl. ¶¶ 5, 7, 10, 11, 12,
15 15, 18, 34¹, 37, 38; citing *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 266 (9th Cir. 1991)).

16 Under *Kennedy*, a nonmoving party’s declaration does not create a genuine issue of material fact
17 if it is inconsistent with that party’s deposition testimony, when the inconsistency is not based on
18 confusion at the deposition or a lack of material facts at that time. *Kennedy*, 952 F.2d at 267.

19 The “rule does not automatically dispose of every case in which a contradictory affidavit is
20 introduced to explain portions of earlier deposition testimony.” *Id.* at 266–67. Instead, the non-
21 moving party “is not precluded from elaborating upon, explaining or clarifying prior testimony
22 elicited by opposing counsel on deposition and minor inconsistencies that result from an honest
23 discrepancy, a mistake, or newly discovered evidence afford no basis for excluding an opposition
24 affidavit.” *Van Asdale v. Int’l Game Tech.*, 577 F.3d 989, 999 (9th Cir. 2009) (citation omitted).

25 Under this rule, the court is required to make a specific factual finding whether the declaration

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28 ¹ Plaintiff’s declaration contains two consecutive paragraphs numbered 34, an apparent typo.
Doutherd UPSF Decl. at 11. UPSF objects to them both.

1 offered at summary judgment is truly a contradictory “sham,” or whether it is an honest
2 discrepancy based on confusion, mistake or lack of evidence. *Id.*

3 Plaintiff responds to UPSF’s objections by asserting his testimony at deposition
4 was incomplete because defendant’s attorneys failed to ask the follow-up questions necessary for
5 a full explanation. Pl.’s Resp. Obj. Doutherd UPSF Decl. at 2, ECF No. 147. Furthermore,
6 plaintiff asserts the deposition excerpts are taken out of context. *Id.* Plaintiff does not point to or
7 attach specific excerpts to clarify his position in this regard. If plaintiff will not put the relevant
8 deposition excerpts in context himself, the court has no obligation to comb the record for him. *In*
9 *re Oracle*, 627 F.3d at 386.

10 Having reviewed the deposition transcripts UPSF points to, the court finds the
11 assertions UPSF objects to in paragraphs 5, 7, 10, 11, 12, 15 and 37 of plaintiff’s declaration are
12 directly contradictory to his deposition with no indication of confusion, incomplete context or a
13 lack of knowledge. In particular, the affidavit’s narrative of plaintiff’s communications with his
14 dispatcher after the accident and his course of treatment differs materially from his deposition
15 testimony. At deposition, plaintiff chronologically recounted the events of the day in response to
16 open ended, unambiguous questions, giving him an opportunity to explain the entire situation.
17 *See* UPSF Supp. Vicente Decl. Ex. B at B07-B11, ECF No. 146-2. Therefore, the court
18 SUSTAINS the “sham declaration” objection to the contradictory portions of these paragraphs of
19 plaintiff’s declaration.

20 On the other hand, the court overrules the objection to both paragraphs numbered
21 34 and paragraph 38. As to the first 34, the question at deposition called for whether plaintiff had
22 trouble attending medical and physical therapy appointments in 2015, not in 2017, as the
23 declaration states. UPSF Supp. Vicente Decl. Ex. B at B19–B20. The second 34 relates to
24 plaintiff’s allegedly unrepaired and dangerous truck. Plaintiff testified at deposition to his
25 perception the bumper to his truck was damaged creating a dangerous condition. UPSF Supp.
26 Vicente Decl. Ex. C at C08–C09, ECF No. 146-3. His concession that he was not a mechanic is
27 not sufficient to render his percipient observation of the bumper inconsistent with his declaration.
28 Finally, UPSF cites its own undisputed facts for the proposition that paragraph 38 of plaintiff’s

1 declaration, in which he claims to have received write-ups, is a sham. UPSF Obj. Pl.’s Decl. at
2 18-19. The referenced fact, UPSF SUF 32, is irrelevant to write-ups; here as well, the court has
3 no obligation to comb the record to find what counsel truly meant, regardless which party that
4 counsel represents. *In re Oracle*, 627 F.3d at 386.

5 C. Foundation

6 Plaintiff asserts, only on information and belief, that UPSF did not report the
7 accident to the Department of Transportation or the California Occupational Health and Safety
8 Administration (“CalOSHA”). Doutherd UPSF Decl. ¶ 14. UPSF objects this assertion lacks
9 foundation, as plaintiff had no responsibility for preparing reports to DOT or OSHA. In the
10 absence of any information establishing a basis for this assertion, the objection is SUSTAINED.

11 D. Relevance

12 UPSF objects repeatedly to plaintiff’s declaration on relevance grounds.
13 Relevance objections are generally poorly suited for the summary judgment context because
14 relevance objections are necessarily “duplicative of the summary judgment standard itself ... [the
15 court] cannot rely on irrelevant facts, and thus relevance objections are redundant.” *Burch v.*
16 *Regents of Univ. of Cal.*, 433 F. Supp. 2d 1110, 1119 (E.D. Cal. 2006). The court OVERRULES
17 relevance objections at this stage, without prejudice.

18 E. Hearsay

19 Similarly, hearsay objections are inappropriate at summary judgment; “objections
20 to the *form* in which the evidence is presented are particularly misguided where, as here, they
21 target the non-moving party’s evidence.” *Burch*, 433 F. Supp. 2d at 1119 (emphasis in original).
22 Furthermore, many of the hearsay objections to statements made by UPSF employees in the scope
23 of their duties would likely be considered statements by a party opponent. Fed. R. Evid.
24 801(d)(2)(A). The court also will not sustain hearsay objections at this stage; they are
25 OVERRULED without prejudice.

26 F. Improper Medical Testimony

27 The court overrules in part and sustains in part UPSF’s objections that plaintiff
28 attempts to offer improper medical expert testimony through his own declaration and his response

1 to UPSF’s statement of facts. *See* Doutherd UPSF Decl. ¶¶ 10, 30. Plaintiff testifies throughout
2 that his work restrictions were inaccurate or improper and that he should have been afforded other
3 restrictions. For example, plaintiff argues “[n]o one is a better witness to his pain, no expert is
4 needed or even useful in this area.” Pl.’s Resp. UPSF’S Obj. Doutherd Decl. at 1, ECF No. 147.
5 Plaintiff’s point is well-taken in the most immediate sense of his descriptions of his own bodily
6 perceptions. Similarly, he may also competently describe the sensations he felt when working
7 without restrictions, which may be probative of a need for greater work restrictions,
8 accommodations or damages. Logically, lay individuals experiencing pain when performing
9 certain activities can have a reasonable comprehension of what kind of alteration in behavior can
10 avoid further pain.

11 Expert testimony is not required to demonstrate a medical condition’s effect on a
12 major life activity at summary judgment in ADA and FEHA cases. *Head v. Glacier Northwest,*
13 *Inc.*, 413 F.3d 1053, 1058–59 (9th Cir. 2005). The court can find no authority that what
14 accommodations are necessitated by a disability can only be shown by an expert. *See, e.g.,*
15 *Donelson v. Providence Health & Servs.-Washington*, 823 F. Supp. 2d 1179, 1190 (E.D. Wash.
16 2011) (“In the summary judgment context, a court should weigh the risks and alternatives,
17 including possible hardships on the employer, to determine whether a genuine issue of material
18 fact exists as to the reasonableness of the accommodation.” (citation omitted)). Therefore,
19 defendant’s testimony as to his perceptions of pain and reasonable accommodations need not be
20 excluded on the basis that he is not an expert. Defendant’s objections on this basis are

21 OVERRULED.

22 II. BACKGROUND

23 A. Procedural Background

24 Before this case was reassigned to the undersigned, the prior District Judge
25 decided several issues raised by plaintiff. The court is not necessarily bound by a prior order of
26 another judge of this court in the same case, if the prior order resolved fewer than all claims
27 among all parties. Fed. R. Civ. P. 54(b). However, the law of the case doctrine counsels against
28 reopening or revisiting questions once resolved in ongoing litigation. *Pyramid Lake Paiute Tribe*

1 of *Indians v. Hodel*, 882 F.2d 364, 369 n.5 (9th Cir. 1989) (citing 18 Charles Alan Wright &
2 Arthur R. Miller, *Federal Practice and Procedure* § 4478). Plaintiff states he objects to and
3 contests the prior judge's orders, but he has not filed a motion for reconsideration and does not
4 state a legal basis for overturning them. This court finds that the prior judge's rulings
5 circumscribe what the court may now consider in ruling on the pending motions. Specifically,
6 because the previous rulings relate to the claims properly before the court, their effect determines
7 the relevance of certain facts plaintiff claims are at issue, as explained below.

8 1. Liberty Mutual's Motion to Dismiss

9 The prior judge granted a first motion to dismiss brought by Liberty Mutual
10 Insurance Co. ("Liberty Mutual"), ECF No. 8, for failure to state a claim. Order on Liberty
11 Mutual MTD 1, ECF No. 31. Liberty Mutual was UPSF'S workers' compensation insurer, and
12 the judge found plaintiff's claims against it were preempted by the exclusive remedy of the state
13 Workers' Compensation Act (WCA). Order on Liberty Mutual MTD 1 at 10. The judge granted
14 leave to amend, plaintiff filed his First Amended Complaint ("FAC"), which is not verified,
15 ECF No. 33, and Liberty Mutual again moved to dismiss on the same grounds, Liberty Mutual
16 MTD 2, ECF No. 39. In an order resolving the second motion to dismiss and UPSF'S motion to
17 strike, ECF No. 36, the judge dismissed Liberty Mutual from the case with prejudice, confirming
18 his determination that plaintiff's claims against Liberty Mutual were preempted by the exclusive
19 jurisdiction of the state Workers' Compensation Appeals Board. March 22, 2019 Order,
20 ECF No. 96.

21 2. UPSF's Motion to Strike

22 After plaintiff filed his FAC, UPSF filed a motion to strike portions of the FAC
23 that went beyond the grant of leave to amend in the prior judge's order on Liberty Mutual's first
24 motion to dismiss. Mot. to Strike, ECF No. 36. Despite the judge's limited grant of leave to
25 amend "to assert a cause of action against Liberty Mutual that is not barred by the exclusivity
26 rule," Order on Liberty Mutual MTD 1 at 10, plaintiff added a total of thirty-three paragraphs
27 comprising three to five additional claims against UPSF. UPSF moved to strike the additional
28 material. Mot. to Strike. At the time, the close of fact discovery was less than thirty days away

1 and UPSF had already taken most of its allotted time for plaintiff's deposition. *Id.* at 7. The
2 judge struck the additional thirty-three paragraphs of the FAC. March 22, 2019 Order at 7–9. He
3 ordered plaintiff to either move for leave to amend or obtain a stipulation to incorporate the
4 stricken material. *Id.* at 9.

5 3. Plaintiff's Motion for Leave to Amend

6 Plaintiff moved for leave to file a second amended complaint containing
7 substantially the same material that had been stricken. Mot. to Am., ECF No. 101. The prior
8 judge denied the motion, finding plaintiff was not diligent in seeking to amend the complaint.
9 Order on Mot. to Am. at 6, ECF No. 122 (citing *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d
10 604, 609 (9th Cir. 1992) (core inquiry is whether moving party acted diligently prior to filing
11 amendment)). The judge found the proposed amendment, adding new facts relating to UPSF'S
12 alleged retaliation between the time of plaintiff's last day of work in June 2018 and the close of
13 discovery in December 2018, would prejudice UPSF. *Id.* at 7. The judge held plaintiff's
14 proposed amendment "essentially asks the Court to allow him to file a new lawsuit long after
15 discovery has closed." *Id.*

16 In light of this procedural background, and seeing no basis in law or equity to
17 depart from the previous decisions of the prior judge, this court will not entertain attempts to
18 litigate issues occurring after June 2018. The above-referenced paragraphs of the FAC remain
19 stricken. Facts relating to allegations of ongoing retaliation are not properly before the court and
20 will be disregarded.

21 B. Factual Background

22 The following narrative is drawn from the undisputed facts. To the extent the
23 court cites to plaintiff's response to statements of undisputed facts without citing underlying
24 evidence, it is to clarify his arguments rather than for the existence of admissible evidence. In
25 other words, where the court cites only his responses to statements of undisputed facts, it is to
26 clarify his arguments only. As noted, this case arises from a motor vehicle accident that occurred
27 in 2015. Plaintiff was driving a truck in the course of his employment for defendant UPSF when
28 he was hit by a car driven by defendant Doris Montesdeoca. Because UPSF's motion concerns

1 plaintiff's employment-related claims against UPSF, the court first reviews the history of his
2 employment.

3 1. Plaintiff Employed by UPSF

4 UPSF hired plaintiff as a Pickup and Delivery ("P&D") driver in 2005. UPSF
5 SUF 1. As a P&D driver, plaintiff's responsibilities were to pick up, deliver and load freight on a
6 tractor-trailer. UPSF SUF 3. His employment was governed by a Collective Bargaining
7 Agreement ("CBA") between UPSF and the International Brotherhood of Teamsters ("IBT").
8 UPSF SUF 5. The CBA sets out the driver route-bidding process, grievance process and
9 disciplinary processes, prohibits favoritism and harassment and sets wages, among other terms of
10 employment. UPSF SUF 6. Plaintiff has read the CBA and is generally familiar with its
11 provisions. UPSF SUF 8.

12 The delivery route assigned a P&D driver depends on the results of a seniority-
13 based bid system, the procedures for which are set out in the CBA. UPSF SUF 9; Vicente Decl.
14 Ex. E, (Douthard Depo. Exhibits) No. 3 (CBA), ECF No. 126-9. Delivery routes are put up for
15 bid every six months. UPSF SUF 9. Drivers are given priority in selecting the routes they want
16 based on their position on the seniority list. UPSF SUF 9-10. Seniority is generally determined
17 by hire date. UPSF SUF 11. At plaintiff's first terminal, SCM,² his seniority date was the date of
18 his original hire in 2005. UPSF SUF 19.

19 In 2009, UPSF reduced the number of delivery routes available at plaintiff's
20 assigned terminal, SCM. UPSF SUF 12, 19. Plaintiff moved to a different terminal, SAC, in
21 order to "follow the freight." UPSF SUF 12, 19. Had he not done so, he would have risked being
22 laid off. UPSF SUF 13. When he changed terminals, his seniority date was changed from the
23 date of his hire to the date of the transfer as provided by the CBA and it has remained the later
24 date since. UPSF SUF 14.

25 Three other drivers also "followed the freight" to plaintiff's new terminal and had
26 their seniority dates changed. UPSF SUF 15. These drivers were 32, 48 and 47 years old when

27 ² The names of the SCM and SAC terminals appear to the court to be abbreviations, but the
28 parties do not explain them.

1 their seniority dates were changed. UPSF SUF 16. Plaintiff was born in 1966 and was thus 43
2 years old in 2009 when he transferred to the new facility. UPSF SUF 17. Plaintiff was one of the
3 least senior P&D drivers at the SAC facility.³ UPSF SUF 18. Plaintiff testified that when he was
4 transferred to SAC, “it didn’t matter if they used my new or old seniority date ‘cause I was on the
5 bottom. So it was irrelevant.” UPSF SUF 19. Plaintiff’s age discrimination claim is based on
6 the change in his seniority in 2009. UPSF SUF 46.

7 2. August 27, 2015 Motor Vehicle Accident

8 On August 27, 2015, plaintiff was driving a UPSF Freight-owned truck on his
9 route when defendant Doris Montesdeoca, driving defendant Lucille Smith’s car with Smith in
10 the front passenger seat, collided with his truck. Harmony SUF 1; UPSF SUF 20. Montesdeoca
11 was employed at that time by Harmony as a part-time caregiver to Smith, for at least twenty hours
12 per week. Harmony SUF 5, 6, 9. Plaintiff was driving southbound on Business 80 when he saw
13 Montesdeoca fighting with an unidentified male passenger in the back seat of Smith’s car, with
14 Smith in the front seat as plaintiff passed in a different lane. Doutherd UPSF Decl. ¶ 2. Plaintiff
15 averred

16 [t]hat car caught up with my truck; the passenger in the back seat
17 of the car pulled the driver’s hair and turned her head around. At
18 this point, the driver suddenly accelerated, spun around and came
19 toward me head on, driving the wrong way on the freeway. I saw
an old woman in the front passenger seat with a look of complete
horror on her face.

20 *Id.* The male passenger in the back seat pulled Montesdeoca’s hair immediately prior to the
21 collision. Harmony SUF 3. Plaintiff was unable to avoid hitting Smith’s car. Doutherd UPSF
22 Decl. ¶ 3. Smith’s car came to a stop after hitting plaintiff’s truck. *Id.* The male assailant in the
23 back seat opened the door and staggered away. *Id.* His identity remains unknown. Harmony
24 SUF 2. Montesdeoca pled no contest to a DUI charge following the incident. Harmony SUF 4.

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28 ³ The UPSF SUF does not clarify whether plaintiff was one of the least senior drivers at the time
of transfer, the time of the accident, or at all relevant times.

1 employment file showed no negative reports, feedback or disciplinary actions. Harmony SUF 14.
2 Harmony never received any complaints regarding Montesdeoca about prior misconduct, alcohol
3 use or similar incidents. Harmony SUF 16. Montesdeoca did not have a criminal record or other
4 misconduct that would have appeared on a background check at any time until the subject
5 accident occurred. Harmony SUF 17. Smith's family was unaware of Montesdeoca's drinking in
6 the presence of Smith, Harmony SUF 15, and there was no alcohol in Smith's house at the time
7 she was being assisted by Montesdeoca, *Id.*

8 Harmony had a zero-tolerance policy for employees using alcohol while
9 performing their duties. Harmony SUF 18. Harmony provided this policy verbally and in writing
10 to Montesdeoca during the hiring process. Harmony SUF 20. Upon learning of Montesdeoca's
11 role in the collision, Harmony terminated her employment. Harmony SUF 23.

12 4. Medical Consequences of the Accident

13 Plaintiff notified his dispatcher immediately after the accident. In response to his
14 dispatcher's offer to have someone come get him, plaintiff said, "I'm taking Aleve, so right now
15 it's not critical." Suppl. Vicente Decl. Ex. B (Suppl. Doutherd Depo. Excerpts) at B11:7-10, ECF
16 No. 146-2.⁵ Plaintiff took pictures of the damage to the truck's bumper. UPSF SUF 20. After
17 finishing his shift, plaintiff went to UPSF'S approved workers' compensation medical provider,
18 U.S. Healthworks, but its offices were closed. Suppl. Doutherd Depo. Excerpts at B11.

19 The following day, plaintiff visited Kaiser's emergency room. *Id.* at B13-15.
20 Because he reported his injury as work-related, the emergency room doctor recommended he go
21 to the workers' compensation doctor, and he was not admitted. *Id.* Plaintiff "went to Kaiser on
22 [his] own time three different days and filled out paperwork and met with the admissions person
23 that's in charge of that, and they didn't have any record of me being there because I didn't make a
24 co-payment." *Id.* at B14:22-B15:2.

25 Plaintiff was suffering from pain in his back, neck, knee and shoulders
26 immediately following the accident. Doutherd UPSF Decl. ¶ 8. He avers he suffered pain "on

27 ⁵ Given the court's evidentiary ruling, this review of the facts disregards plaintiff's contradictory
28 declaration and relies on his deposition testimony.

1 numerous occasions in the months since the accident. *Id.* ¶ 11. On September 17, 2015, he went
2 to his first appointment with a medical provider at Sutter Medical Group to begin treatment as
3 part of his workers' compensation claim. UPSF SUF 21; Suppl. Doutherd Depo. Excerpts at
4 B16. The treating provider, physician's assistant Rhonda Blankenheim, provided plaintiff with a
5 medical note dated September 17, 2015, specifying a work restriction of "no driving commercial
6 vehicles." UPSF SUF 21. She also prescribed plaintiff a course of physical therapy. Plaintiff
7 asserts he was given "light duty," which was in fact quite strenuous, causing him further injury.
8 Doutherd UPSF Decl. ¶ 8. He "was required to perform tough manual labor in the terminal and
9 in the yard." Pl.'s Resp. UPSF SUF 26. He states "I was in significant pain doing these
10 strenuous [sic] clean up chores and told Jim, Sara, Kurt, Reed, all the dispatchers, I was in
11 significant pain. Jim repeatedly told me just to 'man up.'" Doutherd UPSF Decl. ¶ 8. Plaintiff
12 provided UPSF with similar medical notes prescribing a sole restriction of "no driving
13 commercial vehicles" on September 23, 2015 and October 22, 2015. UPSF SUF 22. He never
14 provided any note to his employer stating any restriction other than avoiding driving commercial
15 vehicles. UPSF SUF 23. He in fact did not drive commercial vehicles for UPSF between
16 September 17, 2015 and November 5, 2015. UPSF SUF 26.

17 On November 5, 2015, plaintiff provided a medical note to UPSF stating he could
18 return to work without restrictions. UPSF SUF 24. He then returned to work in his prior capacity
19 as a driver. UPSF SUF 25. Thereafter plaintiff avers he

20 asked [his] managers and supervisors, mainly Jim Anderson, to
21 send me back to the doctor for treatment for the pain in my knee,
22 back, neck and shoulders. [...] Rather than allow me to receive
23 further medical treatment, terminal manager Jim Anderson began a
24 course of harassment and write ups. At no time during this period
was I informed by management of my rights as an injured worker.
I was not told the [workers' compensation] claim was submitted
after the accident or that it was closed in November 2015.

25 Doutherd UPSF Decl. ¶ 11. However, plaintiff conceded at his deposition he knew from a
26 workers' compensation poster in the break room at the terminal he could opt out of treatment by
27 UPSF'S assigned medical providers and see his own doctor. Suppl. Doutherd Depo. Excerpts at
28 B5.

1 Following his provision to UPSF of the medical note stating he could be returned
2 to full duty, plaintiff did not provide UPSF with another medical note indicating a need for work
3 restrictions or accommodations. UPSF SUF 27.⁶ Plaintiff did not seek treatment for the accident
4 from his own primary care provider. UPSF SUF 28.

5 Plaintiff did not contact UPSF's workers' compensation insurer, Liberty Mutual,
6 to request a second opinion on his fitness for return to work. UPSF SUF 31.⁷ Plaintiff did not
7 request a return to light duty or a restricted work status. UPSF SUF 32. Plaintiff asserts the
8 reason he did not request a return to light duty is that light duty was in fact more strenuous than
9 driving a truck. Pl.'s Resp. UPSF SUF 32.

10 Plaintiff avers in a conclusory fashion UPSF and Liberty Mutual are conspiring to
11 conceal his medical records and obstruct his ability to receive a recovery from other defendants
12 with regard to his motor vehicle claims. Doutherd UPSF Decl. ¶ 39. His declaration does not
13 state a basis of knowledge for this contention and the court gives it no weight.

14 In his complaint, plaintiff alleges the pain of his injuries constituted a protected
15 disability. FAC ¶¶ 29–31. He supports this contention solely with his own testimony and does
16 not provide any other evidence of record. He asserts he was not accommodated for failure to
17 provide true light duty, a reasonable route, and a pallet jack.⁸ *Id.* ¶ 30. He disputes UPSF's fact,
18 that “[i]f a driver does not have access to their own assigned pallet jack, a driver had access to
19 and can use an available pallet jack or borrow one from a customer.” Pl.'s Resp. UPSF SUF 37.
20 He cites the depositions of James Anderson and the deposition of Sarah Cutshaw for his
21 contention this is not true, but the cited deposition transcripts do not support his position. *Id.*
22 (citing Dove Decl. Ex. A (Anderson Depo. Excerpts) at 58:1-65:25; Dove Decl. Ex. B (Cutshaw
23 Depo. Excerpts) at 60:2-63:20, ECF No. 137). Plaintiff claims to have been denied an assigned
24 pallet jack before January 21, 2015. UPSF SUF 36. He ultimately purchased his own pallet jack

25 ⁶ The UPSF SUF notes plaintiff did not provide a note during the period at issue in the case,
26 which is prior to June 2018, as reflected in the prior district judge's March 22, 2019 Order and
Order on Mot. to Amend.

27 ⁷ Plaintiff does not dispute this fact but disputes he knew he could seek a second opinion, without
citing to underlying evidence including a relevant portion of his declaration.

28 ⁸ A pallet jack is an assistive device for lifting pallets.

1 for which he was not reimbursed. Doutherd UPSF Decl. ¶ 32. When he was without it, he
2 experienced increased neck, knee and shoulder pain. *Id.* UPSF ultimately acquired more pallet
3 jacks and provided him one in March 2017. UPSF SUF 41.

4 Plaintiff asserts his truck was deliberately misloaded in retaliation for reporting
5 ADA and workers' compensation violations. FAC ¶ 42. His dispatcher, Sarah Cutshaw, avers
6 she was the one responsible for allocating freight to drivers based on the variable demands of
7 routing. Cutshaw Decl. ¶ 4, ECF No. 126-2. Plaintiff does not specify who was responsible for
8 misloading his truck in his declaration.

9 Plaintiff asserts he was subject to racial discrimination, because he was called a
10 "monkey, f***, and ni*****" by another driver. Pl.'s Resp. UPSF SUF 46. Plaintiff cites to the
11 deposition of dispatcher Sarah Cutshaw, Cutshaw Depo. Excerpts at 54:23–56:12, for this fact.
12 As discussed below, Cutshaw did not recount this incident, but an incident in which Montoya
13 called a third driver a ni***** within earshot of plaintiff. Plaintiff claims racial discrimination by
14 other drivers was ratified by his supervisor, terminal manager Jim Anderson. *Id.* Plaintiff asserts
15 he submitted a manifesto to Anderson accusing him of racial discrimination, which is now
16 missing from his personnel file. *Id.* At his deposition, Anderson conceded he received a
17 complaint of racial discrimination through an anonymous hotline at the beginning of his tenure at
18 the terminal but he "would never know who – who any complaints would have been from."
19 Anderson Depo. Excerpts at 76:2–13. But Anderson later referenced receiving such a manifesto:
20 "Again, I'll have to go back to the manifesto that he presented that said, yeah, that I was a racist
21 and a bigot and he thought he was being treated differently." *Id.* at 84:4–7.

22 Plaintiff alleges UPSF did not accommodate him because it did not provide him
23 with a route that would allow him to make it to medical and physical therapy appointments. FAC
24 ¶ 34; *see also* Doutherd UPSF Decl. ¶ 33. But he testified at deposition he did not have trouble
25 making it to medical appointments or physical therapy appointments. Suppl. Doutherd Depo.
26 Excerpts at B19–B20.

27 Plaintiff claims that, as an act of retaliation, his truck was not properly repaired,
28 forcing him to drive it with its front bumper dangling dangerously, putting him and the public at

1 risk. FAC ¶ 38; Doutherd UPSF Decl. ¶ 18. UPSF asserts the truck had “mere scratches,”
2 Doutherd Depo. Ex. 15 (photos of truck after accident showing scratches but no detachment of
3 bumper), although it may be the bumper detached only later, after the accident.

4 Plaintiff asserts he complained of the failure to repair the bumper, as well as
5 nonpayment of morning prep time wages, failures to adhere to company policy, and failures to
6 provide a half-hour safety check before shifts to “regulatory bodies” and thus believes he has
7 attained whistleblower status. Doutherd UPSF Decl. ¶ 15. His declaration does not identify
8 when or to whom he complained, and at his deposition he testified he reported these issues to his
9 supervisor and his Union, but not to any governmental agency. As discussed above, UPSF’s
10 objection that the declaration is self-serving is sustained as to this conclusory statement. Plaintiff
11 did file a charge with the California Department of Fair Employment and Housing (“DFEH”) on
12 April 3, 2017, alleging discrimination and retaliation. *Id.* ¶ 16. He filed a second charge with
13 DFEH dated March 28, 2018. UPSF SUF 45.

14 Plaintiff had a second accident on the job on June 7, 2018. Doutherd Decl. ¶ 35.
15 As discussed above, this fact is irrelevant to the claims at issue in this suit.

16 III. LEGAL STANDARD

17 A court will grant summary judgment “if . . . there is no genuine dispute as to any
18 material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a).
19 The “threshold inquiry” is whether “there are any genuine factual issues that properly can be
20 resolved only by a finder of fact because they may reasonably be resolved in favor of either
21 party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

22 The moving party bears the initial burden of showing the district court “that there
23 is an absence of evidence to support the nonmoving party’s case.” *Celotex Corp. v. Catrett*,
24 477 U.S. 317, 325 (1986). The burden then shifts to the nonmoving party, which “must establish
25 that there is a genuine issue of material fact” *Matsushita Elec. Indus. Co. v. Zenith Radio*
26 *Corp.*, 475 U.S. 574, 585 (1986). In carrying their burdens, both parties must “cit[e] to particular
27 parts of materials in the record . . . ; or show [] that the materials cited do not establish the absence
28 or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to

1 support the fact.” Fed. R. Civ. P. 56(c)(1); *see also Matsushita*, 475 U.S. at 586 (“[the
2 nonmoving party] must do more than simply show that there is some metaphysical doubt as to the
3 material facts”). Moreover, “the requirement is that there be no genuine issue of material fact
4 Only disputes over facts that might affect the outcome of the suit under the governing law
5 will properly preclude the entry of summary judgment.” *Anderson*, 477 U.S. at 247-48 (emphasis
6 in original).

7 In deciding a motion for summary judgment, the court draws all inferences and
8 views all evidence in the light most favorable to the nonmoving party. *Matsushita*, 475 U.S. at
9 587-88; *Whitman v. Mineta*, 541 F.3d 929, 931 (9th Cir. 2008). “Where the record taken as a
10 whole could not lead a rational trier of fact to find for the non-moving party, there is no ‘genuine
11 issue for trial.’” *Matsushita*, 475 U.S. at 587 (quoting *First Nat’l Bank of Arizona v. Cities Serv.
12 Co.*, 391 U.S. 253, 289 (1968)).

13 A court may consider evidence as long as it is “admissible at trial.” *Fraser v.
14 Goodale*, 342 F.3d 1032, 1036 (9th Cir. 2003). “Admissibility at trial” depends not on the
15 evidence’s form, but on its content. *Block v. City of L.A.*, 253 F.3d 410, 418-19 (9th Cir. 2001)
16 (citing *Celotex Corp.*, 477 U.S. at 324). The party seeking admission of evidence “bears the
17 burden of proof of admissibility.” *Pfingston v. Ronan Eng’g Co.*, 284 F.3d 999, 1004 (9th Cir.
18 2002). If the opposing party objects to the proposed evidence, the party seeking admission must
19 direct the district court to “authenticating documents, deposition testimony bearing on attribution,
20 hearsay exceptions and exemptions, or other evidentiary principles under which the evidence in
21 question could be deemed admissible” *In re Oracle*, 627 F.3d at 385-86. However, courts
22 are sometimes “much more lenient” with the affidavits and documents of the party opposing
23 summary judgment. *Scharf v. U.S. Atty. Gen.*, 597 F.2d 1240, 1243 (9th Cir. 1979).

24 The Supreme Court has taken care to note that district courts should act “with
25 caution in granting summary judgment,” and have authority to “deny summary judgment in a case
26 where there is reason to believe the better course would be to proceed to a full trial.” *Anderson*,
27 477 U.S. at 255. A trial may be necessary “if the judge has doubt as to the wisdom of terminating
28 the case before trial.” *Gen. Signal Corp. v. MCI Telecommunications Corp.*, 66 F.3d 1500, 1507

1 (9th Cir. 1995) (quoting *Black v. J.I. Case Co.*, 22 F.3d 568, 572 (5th Cir. 1994)). This may be
2 the case “even in the absence of a factual dispute.” *Rheumatology Diagnostics Lab., Inc v. Aetna,*
3 *Inc.*, No. 12-05847, 2015 WL 3826713, at *4 (N.D. Cal. June 19, 2015) (quoting *Black*, 22 F.3d
4 at 572); accord *Lind v. United Parcel Serv., Inc.*, 254 F.3d 1281, 1285 (11th Cir. 2001).

5 IV. HARMONY’S MOTION

6 Plaintiff’s claim against Harmony is consolidated in a single cause of action styled
7 “Motor Vehicle.” FAC ¶¶ 24-25. However, the language of the allegations against Harmony
8 evince reliance on two entirely separate legal theories: negligent hiring and supervision, and
9 vicarious liability. *See id.* ¶ 25 (“While driving Ms. Smith, Montesdeoca was acting within the
10 course and scope of her employment with Harmony Home Care, Inc., who is liable for negligent
11 hiring, negligent monitoring and failure to vet or supervise its employee/contractee properly.”).
12 While these separate theories are conflated in the operative complaint, the parties agree both
13 theories are at issue, as clarified at hearing.

14 A. Negligent Hiring and Supervision

15 Under California law, an employer who is negligent in the hiring, training,
16 supervising or retaining of an unfit employee who causes harm to another may be held directly
17 liable for the harm caused by the employee. *Delfino v. Agilent Technologies, Inc.*, 145 Cal. App.
18 4th 790, 815 (2006). Liability can only be imposed on an employer for the acts of an employee
19 under a negligent hiring or supervision theory if the employer “knew or should have known that
20 hiring the employee created a particular risk or hazard and that particular harm materializes.”
21 *Doe v. Capital Cities*, 50 Cal. App. 4th 1038, 1054 (1996). “Liability results ... not because of
22 the relation of the parties, but because the employer antecedently had reason to believe that an
23 undue risk of harm would exist because of the employment...” *Phillips v. TLC Plumbing, Inc.*,
24 172 Cal. App. 4th 1133, 1140 (2009) (quoting Restatement (Third) of Agency § 213, cmt. d, p.
25 459–460).

26 Here, Harmony introduced evidence showing Montesdeoca’s background and
27 personnel file transferred to it by Love at Home disclosed nothing suggesting a propensity to
28 drink on the job or engage in other dangerous activity. In fact, the file did not contain even a

1 single complaint about Montesdeoca or any prior criminal history. Harmony’s own investigator
2 conducted an independent background check on Montesdeoca in connection with this case. *See*
3 Kevin Dente Decl. Ex. A, ECF No. 125-3. His investigation yielded nothing, save the incident
4 itself, tending to show a similar investigation, had it been conducted by Harmony at the time
5 Montesdeoca was rehired after the Love at Home acquisition, would not have put Harmony on
6 notice of a risk.

7 In response, plaintiff relies on his own declaration to raise questions about the
8 possibility Montesdeoca’s personnel file was somehow incomplete, or that the background checks
9 at the time of her hiring or rehiring could have been more exhaustive. Pl.’s Harmony SUF, ECF
10 No. 133-1; Doutherd Harmony Decl. ¶ 15, ECF No. 133-2. This declaration is essentially
11 speculative: “For instance, no liquor in Mrs. Smith’s house does not mean she and Doris did not
12 go somewhere that liquor is served or sold. If it is true no prior complaint about misconduct or
13 alcohol was produced, that does not a [sic] guarantee they did not exist.” Doutherd Harmony
14 Decl. ¶ 15. The other portions of the declaration are of a piece with this rank speculation.
15 Plaintiff advances no competent evidence tending to show Harmony was aware of the risk
16 Montesdeoca would drink or drive recklessly on the job.

17 Plaintiff’s declaration does not raise a genuine issue of material fact as to
18 Harmony’s knowledge. It is precisely the kind of raising “metaphysical doubt” the Supreme
19 Court disallowed in *Matsushita*, 475 U.S. at 586. More is needed here to survive summary
20 judgment.

21 Plaintiff also raises the issue of whether Harmony failed to comply with its own
22 policy of requiring Montesdeoca to carry an insurance policy that would have covered her when
23 driving Smith’s car. Pl.’s Opp’n to Harmony MSJ at 1. This argument is irrelevant to the
24 question of negligent hiring or supervision. Montesdeoca’s possible failure to carry insurance
25 was not the cause, actual or proximate, of the collision on August 27, 2015, and in any event no
26 party has advanced any competent evidence either way. Even if Harmony were negligent in
27 failing to confirm her insurance coverage, the risk engendered by that negligence was not the

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1 “particular risk or hazard ... that materializ[ed],” as required for direct supervisory liability.
2 *Capital Cities*, 50 Cal. App. 4th at 1054.

3 Because plaintiff has not met his burden of opposing summary judgment on this
4 claim with any competent evidence, no reasonable factfinder could find Harmony knew or should
5 have known Montesdeoca would consume alcohol while driving her client’s car, causing the
6 accident at issue. Harmony’s motion is GRANTED as to plaintiff’s theory of direct liability for
7 Harmony’s negligence.

8 B. Vicarious Liability

9 The more difficult question is whether, under California law, Montesdeoca was
10 acting in the scope of her employment at the time of the crash, making Harmony vicariously
11 liable. If she was, Harmony is responsible for her negligence under the theory of *respondeat*
12 *superior*, regardless of whether Harmony itself negligent. *Baptist v. Robinson*, 143 Cal. App. 4th
13 151, 160 (2006); *see also* Cal. Civ. Code § 2338. This doctrine imposes liability on an employer
14 for the realization of risks “that may be regarded as typical of or broadly incidental to the
15 enterprise undertaken by the employer.” *Farmers Ins. Group v. Cty. of Santa Clara*, 11 Cal.4th
16 992, 1009 (1995) (internal quotation marks and citation omitted).

17 Where an employee has substantially deviated from the duties of employment, the
18 employer will not be held liable, as the doctrine is not intended to impose strict liability on
19 employers for all torts of an employee during the working day. *Baptist*, 143 Cal. App. 4th at 161
20 (citing *Farmers*, 11 Cal. 4th at 1004). However, where “the employee is combining his own
21 business with that of his employer, or attending to both at substantially the same time, no nice
22 inquiry will be made as to which business he was actually engaged in at the time of the injury,
23 unless it clearly appears that neither directly nor indirectly could he have been serving his
24 employer.” *Farmers*, 11 Cal. 4th at 1004 (citations omitted). “The question of scope of
25 employment is ordinarily one of fact for the jury to determine.” *Mary M. v. City of Los Angeles*,
26 54 Cal.3d 202, 221 (1991).

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1 Here, Harmony offers the declaration of Smith’s daughter, Debbie Blucher, who
2 testifies:

3 Ms. Montesdeoca would take my mother out for drives, including
4 going to the store, or out to lunch. However, this driving was
5 restricted to the “Pocket” area of Sacramento – this was close to my
6 mother’s home, and they never traveled very far. They traveled to
7 nearby places that my mother knew because it made her happy. I
8 do not know what the purpose of the drive was at the time of the
9 August 27, 2015 accident, but it was further away than their normal
10 outings.

11 Debbie Blucher Decl. ¶ 5. Montesdeoca’s supervisor’s testimony accords with this: “[H]er job
12 duties were caring for Ms. Smith within the guidelines recommended by family members.
13 Among these included driving Ms. Smith around her immediate neighborhood only for errands
14 and social purposes, but nothing outside of that.” Philbrick Decl. ¶ 9.

15 Plaintiff contends the fact Montesdeoca was driving Smith’s car, with Smith in the
16 passenger seat, is sufficient to create a genuine dispute of fact for the jury. Here the court agrees.
17 An employer is not liable for travel to and from the work environment, because “the employee is
18 not ordinarily rendering services to the employer while traveling.” *Baptist*, 143 Cal. App. 4th at
19 162. But this “coming and going rule” does not apply when the employee is engaged in a “special
20 errand” for the benefit of the employer. *Jeewarat v. Warner Bros. Enter., Inc.*, 177 Cal. App. 4th
21 427, 436 (2009) (citations omitted). In *Jeewarat*, for instance, employee was engaged in a special
22 errand when he was driving home from the airport in his own car after attending a work-related
23 conference. *Id.* at 432. The employer is “liable for torts committed by its employee while
24 traveling to accomplish a special errand because the errand benefits the employer.” *Tognazzini v.*
25 *San Luis Coastal Unif. School Dist.*, 86 Cal. App. 4th 1053, 1057 (2001) (citation omitted).

26 Harmony’s declarations establish the ordinary geographical scope of
27 Montesdeoca’s driving duties. But they do not foreclose the possibility that Smith herself had
28 authority to direct Montesdeoca to undertake a “special errand” outside her normal range. Smith
was in the car. And nothing in the record indicates Montesdeoca would have had access to the car
for her own purposes outside the scope of Harmony’s business. Because Montesdeoca was
driving her client as a passenger in the passenger’s own car, a situation no party asserts would

1 have arisen outside of Montesdeoca's duties, a reasonable jury could find Montesdeoca was
2 within the scope of her employment at the time of the incident.

3 For these reasons, the court finds there is a genuine issue of material fact as to
4 Harmony's vicarious liability for its employee Montesdeoca. Harmony's motion is thus DENIED
5 with respect to this theory incorporated into plaintiff's claim against Harmony.

6 V. UPS F'S MOTION

7 A. Claim Two: Fraud

8 The gravamen of plaintiff's second cause of action, brought against UPS F for
9 fraud, is that UPS F fraudulently withheld information from plaintiff about his right to treatment
10 as an injured worker, failed to disclose how it processed workers compensation claims and
11 misrepresented the status of his workers' compensation claim. FAC ¶¶ 26–28.

12 To succeed on a claim for fraud under California law, plaintiff must prove 1) a
13 misrepresentation (a false representation, concealment, or nondisclosure); 2) defendant's
14 knowledge of the falsity of the representation; 3) intent to induce reliance; 4) justifiable reliance;
15 and 5) damages. *Lazar v. Sup. Ct.*, 12 Cal. 4th 631, 638 (1996) (citing 5 Witkin, Summary of
16 Cal. Law Torts § 676 (9th ed. 1988)).

17 UPS F asserts all such claims are preempted by the exclusive remedy of the
18 California workers' compensation system. UPS F Mot. at 6–7. As discussed above, the
19 previously-assigned district judge held that Liberty Mutual's role in the alleged plot to defraud
20 plaintiff by undermining his right to workers' compensation was preempted by the WCA. March
21 22, 2019 Order. Plaintiff's only response to this argument is the assertion that "the pre-emption
22 assertion is a cop out as everyone knows the WCAB [Worker's Compensation Appeals Board]
23 does not handle or review any type of fraud allegation." Pl.'s UPS F Opp'n at 2, ECF No. 135.
24 This unsupported assertion is not the law.

25 California's workers' compensation benefits system provides an exclusive remedy
26 for workers injured in the course of their employment. Cal. Lab. Code § 3602(a). A suit for the
27 "recovery of compensation, or concerning any right or liability arising out of or incidental thereto
28 . . . shall be instituted before the [Worker's Compensation Appeals Board ("WCAB")] and not

1 elsewhere . . .” Cal. Lab. Code § 5300(a). In determining whether a given claim is barred by
2 exclusivity, courts “initially determine whether the alleged injury falls within the scope of the
3 exclusive remedy provisions. Where the alleged injury is ‘collateral to or derivative of’ an injury
4 compensable by the exclusive remedies of the WCA, a cause of action predicated on that injury
5 may be subject to the exclusivity bar.” *Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund.*,
6 24 Cal. 4th 800, 811 (2001).

7 Here, plaintiff’s fraud claim is derivative of plaintiff’s collision with Montesdeoca
8 while on the job; the allegations going to the elements of fraud are essentially concerned with the
9 handling of his workers’ compensation claim. No party disputes the workers’ compensation
10 claim arose from an injury at work, therefore any dispute about its handling is derivative. Where
11 a claim is collateral to or derivative of a compensable injury, “then courts consider whether the
12 alleged acts or motives that establish the elements of the cause of action fall outside the risks
13 encompassed within the compensation bargain.” *Id.* at 811-12.

14 The exception to the WCAB’s jurisdiction is when the actor, by his or her alleged
15 acts or motives, was “*no longer acting as an ‘employer’*” *Id.* at 820 (emphasis in original).
16 “[O]nly conduct so extreme and outrageous that the defendant in effect stepped out of its role as
17 an insurer precludes the application of workers’ compensation exclusivity.” *Id.* (quoting *Marsh*
18 *& McLennan, Inc. v. Sup. Ct.*, 49 Cal. 3d 1, 11 (1989)) (internal quotation marks omitted). “The
19 compensation bargain cannot encompass conduct, such as sexual and racial discrimination
20 obnoxious to the interests of the state and contrary to public policy and sound morality.”
21 *Piscitelli v. Friedenber*, 87 Cal. App. 4th 953, 987 (2001) (internal quotation marks and citation
22 omitted). At the same time, “California courts have invariably barred statutory and tort claims
23 alleging that an insurer unreasonably avoided or delayed payment of benefits even though the
24 insurer committed fraud and other misdeeds in the course of doing so.” *Vacanti*, 24 Cal. 4th at
25 821. “In adjudicating whether a claim falls within the workers’ compensation system, all doubt
26 should be resolved in favor of finding jurisdiction within the workers’ compensation system.”
27 *Mitchell v. Scott Wetzel Servs., Inc.*, 227 Cal. App. 3d 1474, 1480 (1991).

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1 Here, plaintiff's allegations under the heading of fraud cut directly to the ordinary
2 process of claims handling with no reference to discrimination. See FAC ¶¶ 26–28. To the extent
3 plaintiff's facts opposing summary judgment could be construed to show racial or other
4 discrimination as a moving force behind the allegedly deficient handling of his claim, those facts
5 are scant. There is no competent evidence plaintiff was in fact called racial epithets. Pl.'s Resp.
6 UPS SUF 46 (asserting he was called a "ni*****" by a fellow driver, but citing only to a
7 deposition transcript recounting an incident in which he overheard the epithet used by one driver
8 against a third.). While plaintiff asserts he took pictures of "monkey, f**, and ni*****" written on
9 the windshield of his truck and sent them to Kurt Lauer, a supervisor, his citation to the record
10 reads only as follows: "See Doutherd deposition in this regard"; he does not attach any relevant
11 deposition excerpts or exhibits. *Id.* He cites to his supervisor James Anderson's admission at
12 Anderson's deposition that he received plaintiff's manifesto claiming discrimination and racism,
13 but this also is not proof of the truth of plaintiff's allegations. *Id.* In short, while defendants have
14 put forward no information to negate plaintiff's assertions, the standard at summary judgment is
15 the existence of evidence sufficient to obtain a judgment from the factfinder.

16 Although a reasonable factfinder could have doubts that plaintiff received
17 adequate treatment for his injury itself in the workers' compensation system, nothing in the facts
18 before the court would support a finding that UPSF "stepped out of its role" as plaintiff's
19 employer in handling his workers' compensation claim. One of the risks of the compensation
20 bargain is the risk of pretextual or skewed evaluation by compensation evaluators and providers;
21 but it is not for the court to second guess the compensation bargain itself if the conduct alleged
22 falls within it. Because there is insufficient evidence to support the alleged fraud violated
23 California's fundamental policies against discrimination, the fraud claim does not fall outside the
24 exclusive jurisdiction of the WCAB.

25 For all these reasons, the exclusivity of California's workers' compensation
26 remedy bars plaintiff's fraud claim. UPSF's motion for summary judgment is GRANTED on this
27 claim.

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1 B. Claim Three: Failure to Accommodate

2 Plaintiff’s third cause of action is for UPSF’s alleged failure to accommodate his
3 disability. *See* FAC ¶¶ 29-36. He asserts UPSF failed to provide the reasonable accommodations
4 of light duty, a reasonable route and a pallet jack after the accident. *Id.* ¶ 30. Plaintiff cites both
5 the Americans with Disabilities Act of 1990 (“ADA”) and California’s Fair Employment and
6 Housing Act (“FEHA”), but his complaint identifies only the ADA as the operative theory. *See*
7 *id.* ¶ 32 (“Defendant employer’s failure to make reasonable accommodation to Plaintiff
8 constitutes a violation of Section 102(b)(5)(A) of the ADA, 42 U.S.C. § 12112(b)(5)(A).”). That
9 said, California courts have relied on federal interpretations of Title VII to interpret analogous
10 provisions of FEHA, which prohibits unlawful discrimination. *Bradley v. Harcourt, Brace &*
11 *Co.*, 104 F.3d 267, 270 (9th Cir. 1996) (citing *Clark v. Claremont Univ. Ctr. & Graduate Sch.*, 6
12 Cal. App. 4th 639, 662 (1992)). Insofar as plaintiff’s complaint could be construed to make
13 claims under FEHA, the analysis under FEHA is relevant to his ADA claim as well.
14 Furthermore, California precedent analyzing the FEHA claim is persuasive here.

15 To prove his case for failure to accommodate under the ADA, plaintiff must show
16 “(1) he is disabled within the meaning of the ADA; (2) he is a qualified individual able to perform
17 the essential functions of the job with reasonable accommodation; and (3) he suffered an adverse
18 employment action because of his disability.” *Allen v. Pac. Bell*, 348 F.3d 1113, 1114 (9th Cir.
19 2003).

20 FEHA defines disability more broadly than the ADA. *See Jensen v. Wells Fargo*
21 *Bank*, 85 Cal. App. 4th 245, 257–58 (2000). Because of this, a condition which does not rise to
22 the level of a disability under FEHA will not suffice for the ADA. *Cf. Cripe v. City of San Jose*,
23 261 F. 3d 877, 895 (9th Cir. 2001) (noting definition of disability is broader under FEHA such
24 that failure to meet FEHA standard is *a fortiori* a failure to meet ADA standard). A physical
25 disability under FEHA must limit a major life activity. *Arteaga v. Brink’s, Inc.*, 163 Cal. App.
26 4th 327, 345 (2008).

27 An employer cannot be liable for failure to accommodate a disability of which it
28 had no knowledge. *Ludovico v. Kaiser Permanente*, 57 F. Supp. 3d 1176, 1198–99 (N.D. Cal.

1 2014) (citing *Prilliman v. United Air Lines, Inc.*, 53 Cal. App. 4th 935, 954 (1997)). “While
2 knowledge of the disability can be inferred from the circumstances, knowledge will only be
3 imputed to the employer when the fact of disability is the only reasonable interpretation of the
4 known facts. Vague or conclusory statements revealing an unspecified incapacity are not
5 sufficient to put an employer on notice of its obligations” under FEHA and the ADA. *Avila v.*
6 *Continental Airlines, Inc.*, 165 Cal. App. 4th 1237, 1248 (2008) (citation omitted).

7 Plaintiff asserts he was not accommodated because “light duty” in fact did not
8 exist. Doutherd UPSF Decl. ¶¶ 8-9. He does not dispute he provided a medical note to UPSF on
9 September 17, 2015, which restricted him only from driving commercial vehicles. Pl.’s Resp.
10 UPSF SUF 23. UPSF accommodated that restriction by keeping him from driving commercial
11 vehicles during that time. *Id.* ¶ 26. Plaintiff asserts what he understood would be “light duty”
12 was in fact strenuous cleaning labor in the terminal and he told “Jim [Anderson], Sara [Cutshaw],
13 Reed [sic, Reid Roy], all the dispatcher [sic]” he was in significant pain. Doutherd UPSF Decl. ¶
14 8. He asserts Jim Anderson, his supervisor, told him to “man up.” *Id.* Plaintiff asserts he “asked
15 his managers and supervisors, mainly Jim Anderson, to send me back to the doctor for treatment
16 for the pain in my knee, back, neck and shoulders.” *Id.* ¶ 11. Plaintiff has not identified any
17 specific instance in which anyone at USPF told him his accommodation was “light duty.”

18 “An employee cannot demand clairvoyance of his employer.” *King v. United*
19 *Parcel Service, Inc.*, 152 Cal. App. 4th 426, 443 (2007). Employers provided medical
20 information stating the employee is fit to work without restrictions are entitled to rely on that
21 information. *Arteaga*, 163 Cal. App. 4th at 347. From September to November of 2015, UPSF
22 accommodated the work restriction listed in the medical documentation plaintiff provided.
23 Plaintiff requested to be sent back to workers’ compensation medical providers, but he offers no
24 evidence he asked for greater restriction in his duties. It appears from the record UPSF fully
25 accommodated plaintiff between September to November of 2015.

26 On November 5, 2015, plaintiff provided another medical note to UPSF indicating
27 he could return to work without restrictions. UPSF SUF 24. He then began performing his
28 ordinary job as a truck driver. UPSF SUF 25. At hearing, plaintiff asserted his request for a

1 pallet jack was a request for accommodation. Nothing in the record shows that he ever
2 communicated the pallet jack's purpose of accommodating his claimed disability to his employer.
3 Furthermore, he agrees his contention is that he was denied an assigned pallet jack before January
4 21, 2015. *See* Pl.'s Resp. UPSF SUF 36 ("Undisputed, as they had been discriminating against
5 him for a long time.").

6 Defendant says plaintiff did not provide a medical note to his supervisors
7 indicating a need for an accommodation or work restriction after November 2015. UPSF SUF 27.
8 Plaintiff purports to dispute this fact, citing his own declaration, and saying only: "Disputed, as he
9 could not obtain a medical note, but he needed one." Pl.'s Resp. UPSF SUF 27. Despite
10 claiming "[h]e had been told and believed he could only obtain treatment for those injuries from
11 [UPSF's workers' comp provider]," *id.* 28, plaintiff conceded at his deposition he knew he could
12 seek treatment outside the workers' compensation system from a poster in the break room at the
13 terminal. Suppl. Doutherd Depo. Excerpts at B05. No evidence shows he raised shoulder, knee
14 or neck pain with his own doctor, that he sought further treatment from Sutter Medical Group or
15 contacted Liberty Mutual for a second opinion on his fitness to return to work. Pl.'s Resp. UPSF
16 SUF 29-31.

17 Under FEHA, pain alone may constitute a disability, but only if it "interfere[s]
18 with the performance of the job." *Arteaga*, 163 Cal. App. at 347; *see also Leatherby v. C & H*
19 *Sugar Co., Inc.*, 911 F. Supp. 2d 872, 880 (N.D. Cal. 2012) ("Although pain can be a disability
20 under FEHA, it must actually limit the employee's ability to work"). In a few cases, plaintiffs
21 who experienced pain but were still able to discharge the functions of their job have been held to
22 be disabled. *See Huck v. Kone, Inc.*, No. 10-1845, 2011 WL 6294466, at *5 (N.D. Cal. Dec. 15,
23 2011) (physician provided note asserting unspecified pain and reduced arm mobility were work-
24 related); *see also Glow v. Union Pac. R.R. Co.*, 652 F. Supp. 2d 1135, 1146 (E.D. Cal. 2009)
25 (plaintiff tendered declaration and evaluation of his treating physician). In those cases, in contrast
26 to this one, plaintiffs submitted declarations and evaluations from their doctors specifically
27 advising them to stop working into evidence.

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1 In other cases, plaintiffs who suffered pain but were able to perform their duties
2 were not disabled. *See, e.g., Keshe v. CVS Pharmacy Inc.*, No. 14-08418, 2016 WL 1367702, at
3 *9 (C.D. Cal. April 5, 2016) (citing *Arteaga*, 163 Cal. App.4th at 345; *Leatherby*, 911 F. Supp. 2d
4 at 880; and *Boudreaux v. J.B. Hunt Transp., Inc.*, No. 14-00720, 2015 WL 4730340, at *2 (E.D.
5 Cal. Aug. 10, 2015)). In these cases, plaintiffs were able to perform their job duties and put
6 forward no evidence of a medical recommendation to alter those duties.

7 This case is analogous to the latter strain of cases noted in *Keshe*. Plaintiff asserts
8 he was disabled on an ongoing basis, yet he does not contest he was able to complete the work
9 required during both the September to November 2015 period and the subsequent period. Nor
10 does he advance any medical evidence whatsoever to support his allegation that his treating
11 medical providers got his diagnosis wrong. As discussed above, he relies on his own declaration
12 in this regard. While the declaration is admissible as discussed above, his own testimony is
13 insufficient to create a triable issue of whether pain that did not appear to the employer to
14 interfere with his job duties could constitute a disability. The absence of any medical expert
15 testimony, medical records or any other such evidence is notable. “Reliance on medical opinion
16 and an individualized assessment is especially important when the symptoms are subjective and
17 the disease is of a type that varies widely between people.” *Leatherby*, 911 F. Supp. 2d at 880
18 (citation omitted). This makes this case more similar to *Keshe* than *Huck*. Because there is no
19 evidence beyond plaintiff’s conclusory say-so that he should have been afforded greater
20 restrictions, there is no evidence plaintiff was disabled after November 2015.

21 For the foregoing reasons, the court GRANTS defendant’s motion as to plaintiff’s
22 claim for failure to accommodate.

23 C. Claim Four: Discrimination, Harassment and Retaliation

24 Plaintiff’s fourth cause of action against UPSF is styled “Employment
25 Discrimination by UPSF Freight/Harassment and Retaliation.” FAC ¶¶ 37–42. Plaintiff alleges
26 UPSF retaliated against him “based on race, whistleblower activities, and making a civil rights
27 claim. He suffered retaliation for exercising his rights, reporting a workplace injury, making a
28 Worker’s [sic] Compensation claim and for having had an accident in a company vehicle.” *Id.*

1 ¶ 38. Plaintiff cites the ADA, FEHA and 42 U.S.C. § 2000e. *Id.* UPSF moves for summary
2 judgment on the retaliation claims, harassment claims, and disability discrimination claim, but has
3 not moved for summary judgment on any race discrimination claim. *See* UPSF Mot. 15–23.

4 Discrimination, harassment and retaliation are discrete causes of action. Race
5 discrimination, retaliation and harassment claims may arise under Title VII (42 U.S.C. § 2000e)
6 or FEHA. Disability discrimination, retaliation and harassment claims may arise under either
7 FEHA or the ADA.

8 1. Disability Discrimination

9 Under FEHA, plaintiff must first establish a prima facie case by showing (1) he
10 was disabled; (2) he was qualified to do the essential functions of his job with or without
11 reasonable accommodations; and (3) he suffered an adverse employment action because of the
12 disability or perceived disability. *Wills v. Sup. Ct.*, 195 Cal. App. 4th 143, 159–60 (2011). The
13 elements are substantially similar under the ADA. *Hutton v. Elf Atochem N. Am., Inc.*, 273 F.3d
14 884, 891 (9th Cir. 2001). Circumstantial evidence is sufficient to show a discriminatory motive.
15 *Harris v. City of Santa Monica*, 56 Cal. 4th 203, 232 (2013).

16 As discussed above, plaintiff has only advanced evidence of a disability between
17 September and November 2015. Following that time, he vociferously requested to be sent back
18 to a doctor to no avail. All the while, he continued to discharge his duties without seeking any
19 independent medical evaluation. While the court assigns some weight to his testimony of pain, it
20 does not, alone, suffice to prove he had a disability at the critical times. Plaintiff has failed to
21 meet his burden and the court GRANTS the motion as to this claim.

22 2. Retaliation

23 a. Disability Retaliation

24 Also as discussed above, plaintiff was accommodated as prescribed by the medical
25 note he provided between September and November 2015, and following that time, there is no
26 evidence he was disabled. However, under the ADA, an employee’s request for accommodation
27 may constitute a protected activity if the employee had a good faith belief he or she was
28 “disabled” and therefore entitled to accommodation. *Coons v. Sec. of the U.S. Dept. of Treas.*,

1 383 F.3d 879, 887 (9th Cir. 2004). Requests for disability accommodation are also protected
2 from retaliation under FEHA. *Moore v. Regents of University of California*, 248 Cal. App. 4th
3 216, 245–46 (2016) (citing Cal. Gov’t Code § 12940(m)(2)). Disability retaliation claims under
4 the ADA are analyzed using the same burden-shifting framework as employed in racial retaliation
5 claims. *Brown v. City of Tuscon*, 336 F.3d 1181, 1186 (9th Cir. 2003) (approving use of Title VII
6 burden-shifting framework articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792
7 (1973) for ADA claims). Under both, the employee must first establish a *prima facie* case of
8 retaliation by showing (1) he engaged in an activity protected by statute; (2) he suffered an
9 adverse employment action; and (3) there was a causal link between the two. *Pardi v. Kaiser*
10 *Found. Hosps.*, 389 F.3d 840, 849 (9th Cir. 2004). If the employee can make a *prima facie* case
11 that his protected activity was the basis of an adverse employment decision, the burden shifts to
12 the employer to present legitimate reasons for the adverse employment action. *Coons*, 383 F.3d
13 at 887 (citations omitted). If the employer carries this burden, the plaintiff must demonstrate a
14 genuine issue of material fact as to whether the reason advanced by the employer is a pretext to
15 advance beyond the summary judgment stage. *Id.* (citation omitted).

16 When plaintiff furnished his supervisors with medical notes restricting his ability
17 to drive commercial vehicles, he engaged in a protected act under at least the ADA. While
18 disputed, plaintiff’s assertion he is not currently employed by UPSF is supported by his testimony
19 that he is “not paid a salary and ha[s] not received any pay or back pay at all,” but cannot receive
20 unemployment because, to the Employment Development Department, he appears to be
21 employed by UPSF. Doutherd UPSF Decl. ¶ 20.

22 Plaintiff has failed to show any evidence, circumstantial or direct, however, to
23 meet his burden that his requests for accommodation were the cause of any adverse action. Even
24 assuming he requested accommodation for his pain, which as discussed above is not a legally
25 protected disability in his case, there is no evidence of a causal connection. The court GRANTS
26 the motion as to disability retaliation claims.

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b. Racial Retaliation

Employers may not retaliate against employees who have “opposed any practice made an unlawful employment practice” by Title VII. 42 U.S.C. § 2000e-3(a). “The elements of a prima facie case of retaliation [under Title VII] are, (1) the employee engaged in a protected activity, (2) she suffered an adverse employment action, and (3) there was a causal link between the protected activity and the adverse employment action.” *Davis v. Team Elec. Co.*, 520 F.3d 1080, 1093-94 (9th Cir. 2008) (citation omitted). The employer’s retaliatory motive must be a “but-for” cause of the adverse employment action, not just a motivating factor. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 360 (2013).

Here, there is insufficient evidence of causation to find a retaliatory motive was a “but-for” cause. An employee need only reasonably believe that the employer has engaged in an unlawful employment practice when reporting it in order to claim protection from retaliation under Title VII. *EEOC v. Crown Zellerbach Corp.*, 720 F.2d 1008, 1013 (9th Cir. 1983) (letter protesting unspecified racism and discrimination in employer’s practices is protected opposition activity). Although a close reading of the deposition of Jim Anderson reveals he did in fact receive a “manifesto” in which he was accused of race discrimination, it is entirely vague as to time and unclear to what events the manifesto referred. Anderson Depo. Excerpts at 83-84. In plaintiff’s FEHA charges, he neither mentions his race nor any incident of racial discrimination against another. Doutherd Depo. Exs. 17-20, ECF No. 126-9.

Even assuming plaintiff engaged in protected reporting of an unlawful practice under Title VII, there is little evidence of adverse action that remains at issue in the suit, as discussed above, and plaintiff himself contends the retaliation was the result of his reporting ADA and workers’ compensation violations. *See* FAC ¶ 42. Therefore, there is no evidence that reporting or complaining of any racial discrimination from which a reasonable jury could find a “but-for” cause of any adverse action. On this record, the motion must be GRANTED as to this theory.

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c. Harassment

i. Racial Harassment

It is unlawful under Title VII to create or maintain a racially hostile work environment. *Reynaga v. Roseburg Forest Prods.*, 847 F.3d 678, 686 (9th Cir. 2017). To establish a prima facie case of a racially hostile work environment, plaintiff must show (1) he was subjected to verbal or physical conduct because of his race, (2) the conduct was unwelcome, and (3) the conduct was sufficiently severe or pervasive to alter the conditions of his employment and create a an abusive working environment. *Manatt v. Bank of Am., N.A.*, 339 F.3d 792, 798 (9th Cir. 2003). “When the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment, Title VII is violated.” *Harris v. Forklift Sys., Inc.* 510 U.S. 17, 21 (1993). Causing the employee to take offense based on an isolated comment is not sufficient to create actionable harassment under Title VII. *Id.* at 22. However, if the hostile conduct “pollutes the victim’s workplace, making it more difficult for [him] to do [his] job, to take pride in [his] work, and to desire to stay on in [his] position,” it is sufficiently severe to be actionable. *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1463 (9th Cir. 1994).

Courts make this determination taking account of the totality of the circumstances. *Nichols v. Azteca Rest. Enterprises*, 256 F.3d 864, 872 (9th Cir. 2001). Discriminatory conduct must be both subjectively and objectively hostile. *Id.* In evaluating whether conduct is objectively hostile, the factors to be considered include the “frequency of discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.” *Id.* (citation omitted). An employer may be held liable either for creating a hostile work environment vicariously through the acts of a supervisory employee, or through negligently failing to correct or prevent discriminatory conduct by an employee. *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1119 (9th Cir. 2004).

As with plaintiff’s fraud claim as discussed above, plaintiff’s assertions of racist behavior in the workplace do not match the evidentiary record. In his response to UPSF’s

1 statement of undisputed facts, plaintiff describes a situation in which a fellow employee, Sam
2 Montoya “use[d] the N word to and about [plaintiff] and others in [plaintiff]’s presence” and
3 performed acts “such as writing ‘monkey, f** and N...r’ on [plaintiff]’s assigned tractor
4 windshield, and banana peels on his access step.” Pl.’s Resp. UPSF SUF 46. But his citation to
5 evidence for these occurrences consists of dispatcher Sarah Cutshaw’s recounting an incident in
6 which managerial employees, including Jim Anderson, had to discipline Montoya for calling a
7 third employee, James Franklin, a “ni*****” in plaintiff’s presence. *See* Cutshaw Depo. Excerpts
8 at 54:23–57:17. This testimony does not serve as evidence plaintiff himself was called the
9 epithet. While a racially hostile work environment may arise from the use of slurs in the
10 workplace even if plaintiff was not targeted, *McGinest*, 360 F.3d at 1117, there is no competent
11 evidence in the record here beyond this deposition transcript. Despite plaintiff’s claim he took
12 pictures of racially insulting graffiti on his truck and sent them to Kurt Lauer, a supervisory
13 employee, UPSF SUF 70; Pl.’s Resp. UPSF SUF 46, there is no evidence of the photos in the
14 record. As noted above, Jim Anderson did concede in his deposition that he had received a
15 “manifesto” from plaintiff accusing him of discrimination, but the contents of the manifesto and
16 evidence going to their truth also are missing from the record.

17 Critically, despite plaintiff’s arguments in his papers, his sworn declaration is
18 nearly devoid of these allegations. Legal memoranda and argument are not evidence that can be
19 assigned any weight in support of plaintiff’s position. Fed R. Civ. P. 56(c)(1); *see also British*
20 *Airways Bd. v. Boeing Co.*, 585 F.2d 946, 952 (9th Cir. 1978). Because plaintiff is necessarily a
21 percipient witness to these alleged acts of discrimination, his own testimony would be competent
22 to raise an issue of fact here, but it is notably absent. *See Singh*, 491 F.3d at 1024 (discussing
23 presumption of unfavorability arising from party’s withholding probative evidence in his
24 possession and control).

25 Plaintiff appears to assert his employment file, which would have contained his
26 report of harassment including photos of his vandalized truck, has been tampered with or altered,
27 in representing, “No manager at UPSF admitted to knowing what happened to plaintiff’s reports
28 of racial harassment.” Pl.’s Resp. UPSF SUF 46. But to the extent the court could possibly

1 interpret this as a claim UPSF engaged in evidence spoliation, it must fail, as plaintiff has the
2 burden of proving the elements of spoliation, and he advances no further argument, let alone
3 evidence, on that point. *Reinsdorf v. Skechers U.S.A., Inc.*, 296 F.R.D. 604, 626 (C.D. Cal. 2013).

4 ii. Disability Harassment

5 The Ninth Circuit has not expressly held hostile work environment claims are
6 actionable under the ADA, but also has not foreclosed the possibility. *See Wynes v. Kaiser*
7 *Permanente Hosps.*, 936 F. Supp. 2d 1171, 1185 (E.D. Cal. 2013) (discussing *Brown v. City of*
8 *Tuscon*, 336 F.3d 1181, 1190 (9th Cir. 2003)). In *Wynes*, another judge of this court assumed for
9 purposes of a motion for summary judgment that such a claim is cognizable and analyzed the
10 claim under the elements of the Title VII hostile work environment standard articulated by the
11 Third Circuit. *Id.* (citing *Walton v. v. Mental Health Ass'n*, 168 F.3d 661, 667 (3d Cir. 1999)).
12 This court does the same. The elements of an ADA harassment claim require plaintiff to
13 demonstrate (1) he is a qualified individual with a disability; (2) he suffered from unwelcome
14 harassment; (3) the harassment was based on his disability or a request for accommodations;
15 (4) the harassment was sufficiently severe or pervasive to alter the conditions of his employment
16 and to create an abusive working environment; and (5) defendants knew or should have known of
17 the harassment and failed to take prompt remedial action. *Id.*

18 As discussed above, plaintiff has not advanced any evidence beyond his own
19 assertion he suffered pain that he was disabled after November of 2015. Something more is
20 needed to demonstrate he was a qualified individual with a disability. Because one would need to
21 be disabled to be discriminated against as such, the court GRANTS UPSF's motion as to this
22 claim.

23 3. Claim Five: Violation of ADEA

24 Plaintiff bases his claim for a violation of the Age Discrimination in Employment
25 Act ("ADEA") on "being denied the benefits of seniority in his position." *See* FAC ¶ 44. The
26 ADEA requires a person alleging discrimination on the basis of age to file a charge with the
27 Equal Employment Opportunity Commission ("EEOC") within 180 days of the allegedly
28 discriminatory act, 29 U.S.C. § 626(d), or if the state in which the discrimination has occurred has

1 its own age discrimination law and enforcement agency, as does California, the claimant must file
2 the charge within 300 days of the allegedly discriminatory act. *Sanchez v. Pac. Powder Co.*, 147
3 F.3d 1097, 1099 (9th Cir. 1998); *Josephs v. Pac. Bell*, 443 F.3d 1050, 1054 (9th Cir. 2006). The
4 timely filing of a charge of discrimination with the EEOC is not jurisdictional, but is a
5 requirement like a statute of limitations that is subject to doctrines including waiver, estoppel and
6 equitable tolling. *Zipes v. TransWorld Airlines, Inc.*, 455 U.S. 385, 393 (1982). Plaintiff makes
7 no argument and advances no facts supporting the application of these equitable doctrines.

8 Plaintiff's seniority status changed in 2009. UPSF SUF 46. He filed his EEOC
9 charge alleging age discrimination on March 30, 2017. UPSF SUF 44. Plaintiff claims the
10 change in seniority was part of a continuing violation because he is "presently and currently being
11 discriminated against because of his race, age, whistleblower status, having made a complaint
12 and/or his disability." UPSF Opp'n at 3. In responding to UPSF's fact that his age
13 discrimination claim is based on the change in his seniority in 2009, plaintiff responds
14 "Undisputed that was *a part of his age discrimination claim*, but **disputed** the employer has
15 responded to the racial discrimination claim, leaving that complaint at issue." Pl.'s Resp. UPSF
16 SUF 46 (emphases in original). Plaintiff may not invoke the continuing violations doctrine by
17 simply conflating all events that followed his change in seniority. Unlike Title VII, ADEA
18 discrimination claims require that the plaintiff's age is the "but for" cause of the adverse
19 employment action complained of; the ADEA does not authorize "mixed motive" claims, which
20 are possible as discrimination claims under Title VII. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S.
21 167, 175 (2009). Again, plaintiff alleges only his change in seniority was motivated by age alone.
22 FAC ¶ 44. To the extent plaintiff alleges events that followed were motivated by factors other
23 than age such as race, they would not be actionable as an ADEA violation in the first place. The
24 change in seniority is the only discrete discriminatory act of age discrimination at issue.

25 "[D]iscrete discriminatory acts are not actionable if time barred, even when they
26 are related to acts alleged in timely filed charges. Each discrete discriminatory act starts a new
27 clock for filing charges alleging that act." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101,
28 113 (2002). Because plaintiff's change in seniority was the sole discrete act he alleges was age-

1 motivated, it is untimely, as the clock began to run in 2009. This puts the EEOC filing in 2017
2 far beyond the 300 days during which a filing with the EEOC was required. *See Sanchez*, 147
3 F.3d at 1099.

4 UPSF's motion is GRANTED as to plaintiff's ADEA cause of action.

5 4. Claim Seven: "Violation of State Statutes by UPS Freight"

6 Plaintiff's seventh claim is styled "Violation of State Statutes by UPS Freight."
7 The majority of this claim previously has been struck. March 22, 2019 Order at 7–9. The
8 remaining portion consists of a portion of a paragraph alleging wage and hour violations, and a
9 claim based on OSHA.

10 a. Wage and Hour

11 In what remains of plaintiff's pleading, he alleges UPSF harmed plaintiff "by its
12 violation of the California Labor Code and Wage and Hour laws by overtime assignments
13 unfairly scheduled; overtime forced upon him when he is injured; requiring him to work while
14 injured, and forcing his return to full duty before he was healed[.]" FAC ¶ 77. The California
15 wage and hour statements, and their implementing Industrial Welfare Commission regulations,
16 known as "wage orders," specify a range of possible violations, each with discrete elements.
17 Here, the pleading is so uncertain the court is unable to determine what legal theory plaintiff is
18 relying on. "Simply put, summary judgment is not a procedural second chance to flesh out
19 inadequate pleadings." *Wasco Prods., Inc. v. Southwall Technologies, Inc.*, 435 F.3d 989, 992
20 (9th Cir. 2006) (citation omitted). The court has no obligation to do plaintiff's work for him. To
21 the extent plaintiff alleges a violation stemming from overtime, plaintiff's concession that he was
22 always paid 1.5 times his regular rate for any overtime is fatal. UPSF SUF 42–43. Defendant's
23 motion is GRANTED as to any wage and hour claim.

24 b. OSHA

25 "Plaintiff alleges his employer has harmed him by its violation of OSHA
26 regulations and put him at risk for injury." FAC ¶ 78. There is no private right of action for
27 OSHA violations. 29 U.S.C. § 653(b)(4) ("[n]othing in this chapter shall be construed to ...
28 enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or

1 liabilities of employers and employees.”); *see also Crane v. Conoco, Inc.*, 41 F.3d 547, 553 (9th
2 Cir. 1994) (noting no private right of action under OSHA). Plaintiff’s purported private claim for
3 OSHA violations is barred as a matter of law.

4 VI. CONCLUSION

5 For the foregoing reasons, the court GRANTS Harmony Home Health Care’s
6 motion as to supervisory liability and DENIES it as to vicarious liability. The court GRANTS
7 UPSF’s motion in full. Because UPSF did not move for summary judgment on a Title VII race
8 discrimination claim, that claim survives.

9 The court sets a final pretrial conference for December 11, 2020 at 10:00 a.m.,
10 with a joint pretrial statement in compliance with E.D. Local Rule 281 due three weeks prior. If
11 the parties jointly agree to referral to a court-convened settlement conference with another judge
12 of the court before the pretrial conference, they may request it now, or as soon as possible after
13 receiving this order.

14 IT IS SO ORDERED

15 DATED: October 13, 2020.

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19 CHIEF UNITED STATES DISTRICT JUDGE
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