SUPREME COURT OF THE UNITED STATES

TYRONE DOUTHERD,

Petitioner,

v.

UNITED PARCEL SERVICE, UNITED PARCEL SERVICE FREIGHT, and LIBERTY MUTUAL INSURANCE COMPANY

Respondents.

On PETITION FOR WRIT OF CERTIORARI
from an Order of the
Ninth Circuit Court of Appeals Case #21-15966
Affirming the Opinions of the
United States District Court for the Eastern District of California
Case No. 2:17-cv-02225 MCE then KJM
Honorable Morrison C. England, Jr., United States District Court Judge
Honorable Kimberly J. Mueller, United States District Court Judge

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APPENDIX A to PETITION FOR WRIT OF CERTIORARI

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Tyrone Doutherd,
Petitioner Pro Se

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TYRONE DOUTHERD, Plaintiff-Appellant, v. UNITED PARCEL SERVICE, INC.; LIBERTY MUTUAL INSURANCE COMPANY, Defendants-Appellees, and DORIS MARIE MONTESDEOCA; et al., Defendants.	No. 21-15966 D.C. No. 2:17-cv-02225-KJM-JDP MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Kimberly J. Mueller, Chief District Judge, Presiding

Submitted December 8, 2022**
San Francisco, California

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Before: BRESS and VANDYKE, Circuit Judges, and RESTANI,*** Judge.

Tyrone Doutherd appeals the district court's grant of summary judgment to UPS Freight (UPSF) in Doutherd's employment action alleging various federal and state law claims. We review the grant of summary judgment de novo and may affirm on any ground supported in the record. *Nat'l R.R. Passenger Corp. v. Su*, 41 F.4th 1147, 1152 (9th Cir. 2022). We have jurisdiction under 28 U.S.C. § 1291 and affirm.

1. The district court properly granted summary judgment on Doutherd's fraud claim. Doutherd presents no evidence that his managers had the intent to defraud him as to his workers' compensation benefits or that he justifiably relied on any alleged misrepresentations. *See Lovejoy v. AT&T Corp.*, 111 Cal. Rptr. 2d 711, 717 (Cal. Ct. App. 2001) (reciting elements of fraud claim under California law). Doutherd's allegations that his managers harbored ill-will toward him, demonstrated by the fact that they forced him to "work injured" and did not "give [him] the time of day," are too "general and conclusory" to make out a fraud claim. *Lazar v. Superior Ct.*, 909 P.2d 981, 984–85 (Cal. 1996). Doutherd also admitted in his deposition that he knew the alleged misrepresentations about company policy were wrong, belying any reliance on them. Finally, to the extent that Doutherd's fraud claim pertains to his workers' compensation benefits, it is preempted by California's

*** The Honorable Jane A. Restani, Judge for the United States Court of International Trade, sitting by designation.

workers' compensation statute. Cal. Lab. Code § 3602(a); *see King v. CompPartners, Inc.*, 423 P.3d 975, 981 (Cal. 2018) (holding that "injuries stemming from conduct occurring in the workers' compensation claims process" fall within the statute's exclusivity bar); *Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund*, 14 P.3d 234, 243 (Cal. 2001) (explaining that claims predicated on injuries "'collateral to or derivative of' an injury compensable by the exclusive remedies of the WCA . . . may be subject to the exclusivity bar" (quoting *Snyder v. Michael's Stores, Inc.*, 945 P.2d 781, 785 (Cal. 1997))).

2. The district court properly granted summary judgment on Doutherd's disability discrimination and retaliation claims under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12112(b)(5)(A), and California's Fair Employment and Housing Act (FEHA), Cal. Gov. Code. § 12940(m)(1). Doutherd does not raise a genuine dispute of material fact as to whether UPSF failed to accommodate his alleged disability or retaliated on account of it. UPSF granted the only accommodation request Doutherd made that was supported by medical documentation. And Doutherd does not point to any other evidence—either from medical records or his own testimony—raising a genuine dispute of material fact as to whether he informed his employer that his disability rendered him incapable of performing his assigned duties. *See Avila v. Cont'l Airlines, Inc.*, 82 Cal. Rptr. 3d

440, 453 (Cal. Ct. App. 2008) ("The employee bears the burden of giving the employer notice of his or her disability.").

3. The district court properly granted summary judgment on Doutherd's ADA and FEHA retaliation claims because Doutherd failed to show that there was "a causal link" between his "protected activity" and an "adverse employment action." *Pardi v. Kaiser Found. Hosps.*, 389 F.3d 840, 849 (9th Cir. 2004). Doutherd has not demonstrated that any of the alleged adverse employment actions were causally related to his requests for accommodations.[1]

4. The district court did not abuse its discretion in denying Doutherd leave to amend his complaint. *See Gardner v. Martino*, 563 F.3d 981, 990 (9th Cir. 2009) (standard of review). Because Doutherd sought to amend his complaint after the district court had entered a pretrial scheduling order, he was required to satisfy the more stringent "'good cause' standard of Federal Rule of Civil Procedure 16(b)(4) . . . rather than the liberal standard of Federal Rule of Civil Procedure

[1] Doutherd's complaint also alleges that he was discriminated against and harassed on account of his race and disability. The district court granted summary judgment on the disability claim and granted UPSF's unopposed judgment on the pleadings on the race claim. Doutherd does not appear to challenge these rulings. These claims are therefore forfeited. *Novato Fire Prot. Dist. v. United States*, 181 F.3d 1135, 1141 n.6 (9th Cir. 1999). Regardless, judgment for UPSF on these claims was proper for the reasons the district court provided. Similarly, Doutherd does not appear to challenge the district court's resolution of Doutherd's claims under Title VII and the Age Discrimination and Employment Act (ADEA) and related state laws. These claims are also forfeited, *see id.*, but would lack merit regardless for the reasons the district court provided.

15(a)." *In re W. States Wholesale Nat. Gas Antitrust Litig.*, 715 F.3d 716, 737 (9th Cir. 2013). The district court reasonably concluded that Doutherd lacked good cause for amendment because he was aware of most of the facts that formed the basis of his proposed amendments prior to the deadline. *See Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1295 (9th Cir. 2000). The district court also properly concluded that the late amendment would prejudice UPSF because discovery had already closed.

5. The district court properly granted UPSF's application for a recovery lien. Under California law, an employer who has paid workers' compensation benefits based on injuries to an employee caused by a negligent third party may obtain a lien against the employee's recovery in a suit against that third party. Cal. Lab. Code § 3856. Doutherd's argument that UPSF failed to provide proof that it had actually paid workers' compensation benefits in the amount of the lien is contradicted by the record.

6. The district court properly dismissed Doutherd's claims against Liberty Mutual. These claims are all "collateral to or derivative of" of an injury compensable under California's workers' compensation statute and are thus barred by its exclusive remedy provision. *See King*, 423 P.3d at 981.[2]

AFFIRMED.

[2] We deny Doutherd's motion for judicial notice, Dkt. No. 12, because Doutherd has not explained how the materials at issue are relevant to this appeal.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JUDGMENT IN A CIVIL CASE

TYRONE DOUTHERD,

CASE NO: **2:17-CV-02225-KJM-JDP**

v.

DORIS MARIE MONTESDEOCA, ET AL.,

Decision by the Court. This action came before the Court. The issues have been tried, heard or decided by the judge as follows:

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER FILED ON 5/5/21

Keith Holland
Clerk of Court

ENTERED: **May 5, 2021**

by: /s/ H. Kaminski
Deputy Clerk

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

Tyrone Doutherd, Plaintiff, v. Doris Marie Montesdeoca, et al., Defendants.	No. 2:17-cv-02225 KJM JDP ORDER

Defendant UPS Ground Freight (UPSF) requests the court amend, correct, or reconsider its October 2020 order. Alternatively, UPSF requests the court dismiss plaintiff Tyrone Doutherd's race discrimination claim on the pleadings. Mot. at 1, ECF No. 162-1. Defendant argues that Mr. Doutherd did not plead a claim for race discrimination, and therefore UPSF could not have moved for summary judgment on that claim. In the alternative, defendant moves for judgment on the pleadings. For the reasons provided below, the court **denies** defendant's motion for reconsideration but **grants** the motion for judgment on the pleadings. Plaintiff's race discrimination claim is dismissed **without leave to amend.**

I. BACKGROUND

The court's October 2020 summary judgment order sets forth the factual background of this case; the court provides only a brief summary of the facts here. *See* Summ. J. Order at 10–17, ECF No. 160. In 2015, plaintiff suffered numerous injuries in a car accident while driving a

Cutshaw Depo. Excerpts at 54:23–56:12, for this fact whereas deposition actually reflects a third-party was called the N word within earshot of plaintiff).

- Plaintiff claimed racial discrimination by other drivers was ratified by UPSF management. *See id.*

In reply to plaintiff's statement of undisputed facts, UPSF asserted that "plaintiff's contentions regarding racial discrimination are not pled in the operative complaint, are time-barred, and are irrelevant to the fact at issue." Def. Resp. Pl. SUF at 33, ECF No. 145.

The court held a hearing on defendant's motion for summary judgment in July 2020. In October 2020, the court granted summary judgment for UPSF on all claims except for race discrimination, explaining that "UPSF did not move for summary judgment on a Title VII race discrimination claim." Summ. J. Order at 38.

II. MOTION TO RECONSIDER

Defendant requests the court amend or reconsider its prior order and cites to Rules 54(b), 60(a) and 60(b) of the Federal Rules of Civil Procedure as grounds for this part of their motion. The court's order granting summary judgment to defendant is interlocutory in nature as it is not a final judgment. Rule 54(b) thus provides the proper vehicle for requesting reconsideration of the prior order. *See Persistence Software, Inc. v. Object People, Inc.*, 200 F.R.D. 626, 627 (N.D. Cal. 2001); *Ernie Ball, Inc. v. Earvana, LLC*, No. 06-00384 2009 U.S. Dist. LEXIS 132457, at *2 n.2 (C.D. Cal. Sep. 16, 2009) (denying reconsideration under 60(a) or 60(b) of partial summary judgment order as it was not final judgment order).

A. Legal Standard

A district court has inherent authority to reconsider its interlocutory orders. *See* Fed. R. Civ. P. 54(b); *City of Los Angeles, Harbor Div. v. Santa Monica Baykeeper*, 254 F.3d 882, 885 (9th Cir. 2001). "Rule 54(b) does not describe the standard for reconsideration of an interlocutory order or otherwise detail in what circumstances revised orders should issue." *AmeriColor Corp. v. Kosto Food Prod. Co.*, No. SA-1600029, 2016 WL 10576634, at *2 (C.D. Cal. June 30, 2016). While the Ninth Circuit appears not to have addressed the matter, some district courts in the Ninth Circuit have applied standards of review similar to those used with respect to Rule 60(b), which

provide that "[r]econsideration is appropriate when 'the district court (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law[, or] other, highly unusual circumstances warranting reconsideration.'" *Id.* (citing *Sch. Dist. No. 1J, Multnomah Cty., Oregon v. ACandS, Inc.*, 5 F.3d 1255, 1262-63 (9th Cir. 1993)). "Reconsideration is ordinarily appropriate only when controlling law has changed, if new evidence has become available, or when necessary to correct a clear error or prevent manifest injustice." *Sants v. Seipert*, No. 215-00355, 2021 WL 465292, at *6 (E.D. Cal. Feb. 9, 2021) (applying local rule and Rule 60(b) standard). Absent a showing of manifest injustice, the court will not disturb its prior ruling, in the interest of overall fairness. *Advanced Steel Recovery, LLC v. X-Body Equip., Inc.*, No. 216-00148, 2020 WL 6043935, at *5 (E.D. Cal. Oct. 13, 2020).

This court's local rules also govern applications for reconsideration and require the moving party to provide "what new or different facts or circumstances are claimed to exist which did not exist or were not shown" or "what other grounds exist for the motion" and "why the facts or circumstances were not shown at the time of the prior motion." E.D. Cal. L.R. 230(j). "In the absence of new evidence or a change in the law, a party may not use a motion for reconsideration to raise arguments or present new evidence for the first time when it could reasonably have been raised earlier in the litigation." *Id.*

B. Discussion

Keeping in mind the above standards, after careful consideration, the court concludes it did not commit clear error in its October 2020 order; therefore reconsideration is unwarranted. Defendant is correct that the operative complaint is unwieldy, weaving together numerous allegations under one broad claim, but it was not clear error to construe the complaint as alleging a race discrimination claim under Title VII.

Fundamentally, plaintiff's amended complaint provides sufficient notice to defendant that plaintiff is asserting race discrimination. Even as a complaint must provide fair notice of its claims and surpass a plausibility bar, it is still the case that it need contain only a "short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2),

without necessarily including "detailed factual allegations," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In *McHenry v. Renne,* which defendant cites in support of its position, plaintiffs had filed a fifty-three page long complaint that mixed "allegations of relevant facts, irrelevant facts, political argument, and legal argument in a confusing way." 84 F.3d 1172, 1174 (9th Cir. 1996). Here, plaintiff's complaint is eighteen pages long, not including the paragraphs stricken by the prior presiding judge; it avoids political argument, and points to relevant statutes that invoke the law supporting a racial discrimination claim. *See* FAC ¶ 38. Plaintiff's DFEH complaint, which defendant attached as an exhibit to its summary judgment motion, also put defendant on notice given the "race/color" box plaintiff checked. *See* March 2017 DFEH Compl.

Defendant had an opportunity to challenge the race discrimination claim prior to the order granting summary judgment. Defendant included one sentence in its reply to plaintiff's statement of undisputed facts asserting plaintiff did not plead a race discrimination claim in his operative complaint, but defendant did not seek to clarify that its motion for summary judgment covered any race discrimination claim that might be pled. Against this backdrop, where defendant had not moved to dismiss any claim at an earlier stage of the case, and plaintiff's allegations of race discrimination included in his fourth claim survived defendant's motion to strike, it was not clear error for the court to construe plaintiff's complaint as containing a race discrimination claim.

III. MOTION FOR JUDGMENT ON THE PLEADINGS

The court next considers defendant's motion for judgment on the pleadings as to the claim the court has let stand, plaintiff's race discrimination claim. This motion relies on Federal Rule of Civil Procedure 12(c), and plaintiff has not opposed it.

A. Legal Standard

Rule 12(c) allows a party to move for judgment on the pleadings "[a]fter the pleadings are closed—but early enough not to delay trial." Fed. R. Civ. P. 12(c). The "same standard of review applicable to a Rule 12(b)(6) motion applies to a Rule 12(c) motion," at a different stage of the litigation. *Howell v. Leprino Foods Co.*, No. 18-01404, 2020 U.S. Dist. LEXIS 25515, at *1 (E.D. Cal. Feb. 12, 2020) (citing to *Dworkin v. Hustler Magazine*, Inc., 867 F.2d 1188, 1192 (9th Cir. 1989)). The court draws reasonable inferences in the non-moving party's favor and

accepts the complaint's allegations as true. *Hines v. Youseff*, 914 F.3d 1218, 1227 (9th Cir. 2019). Courts may grant a Rule 12(c) motion with or without leave to amend. *See Gregg v. Dep't of Pub. Safety*, 870 F.3d 883, 889 (9th Cir. 2017) (while Rule 15 provides for granting leave to amend freely when justice requires, leave may be denied where futile).

As required by Rule 12(c), the court looks only to the pleadings and does not assess any factual record developed through summary judgment practice. While it is unusual to consider motions under Rule 12(c) after resolving motions for summary judgment, it is not improper as long as the motion is submitted early enough not to delay trial. *See, e.g., MicroTechnologies, LLC v. Autonomy, Inc.*, No. 15-02220, 2018 U.S. Dist. LEXIS 162104, at *13 (N.D. Cal. Sep. 21, 2018) (reviewing Rule 12(c) motion after summary judgment). Here, defendant submitted its motion one week after the court's order granting summary judgment. This was prompt enough not to delay trial under any circumstances, even without a pandemic's effect on trial schedules. *See Craten v. Foster Poultry Farms Inc.*, No. 15-02587, 2018 U.S. Dist. LEXIS 23384, at *6 (D. Ariz. Feb. 13, 2018) (finding Rule 12(c) motion timely when submitted two weeks after order granting summary judgment).

B. Discussion

The different legal standards applicable to motions for reconsideration and motions for judgments on the pleading may well make for differing results on the pending motions. While it was not clear error for the court to construe the operative complaint as alleging a race discrimination claim, plaintiff's claim may not prevail when analyzed under the Rule 12(c) standard.

To properly plead a prima facie race discrimination case under Title VII, a plaintiff must allege: "(1) that the plaintiff belongs to a class of persons protected by Title VII; (2) that the plaintiff performed his or her job satisfactorily; (3) that the plaintiff suffered an adverse employment action; and (4) that the plaintiff's employer treated the plaintiff differently than a similarly situated employee who does not belong to the same protected class as the plaintiff." *Phelps v. U.S. Gen. Servs. Agency*, 469 F. App'x 548, 549 (9th Cir. 2012). Plaintiff alleges he is a member of a protected class of persons under Title VII, *see* FAC ¶¶ 31, 38, and that he suffered

numerous adverse actions because of his race, *id.* ¶ 38, but does not plead sufficient facts to meet either the second or fourth element. Specifically, even reading the complaint in the light most favorable to the plaintiff, he does not explain either how he performed his job satisfactorily or how his employer treated him differently than similarly situated employees who are not a part of the same protected class. As plaintiff did not oppose the defendant's motion, he does not point the court to any portion of the complaint to argue otherwise. Even drawing reasonable inferences in plaintiff's favor, as required, the court's review of the pleadings persuades it that defendant's motion for judgment on those pleadings must be granted.

Leave to amend should be "freely give[n] . . . when justice so requires," unless a defendant demonstrates undue delay, futility, undue prejudice, or bad faith. Fed. R. Civ. P. 15(a)(2); *Chudacoff v. Univ. Med. Ctr. of S. Nev.*, 649 F.3d 1143, 1153 (9th Cir. 2011). In its most recent motion, defendant notes correctly that this "case has been pending for more than three years and discovery lasted for over a year." Mot. at 9. Additionally, "no discovery [was] taken on a race discrimination claim" and, defendant argues, allowing plaintiff to plead a new claim well past the midnight hour would deeply prejudice defendant. *Id.* at 8. Without discovery to identify additional factual allegations not already before the court, any attempt to amend would be futile. The court thus will not grant leave to amend.

IV. CONCLUSION

The court **denies** defendant's motion for reconsideration, but **grants** defendant's motion for judgment on the pleadings. As the court **denies** plaintiff leave to amend his complaint, this case is now closed.

This order resolves ECF No. 162.

IT IS SO ORDERED.

DATED: May 4, 2021.

CHIEF UNITED STATES DISTRICT JUDGE

FILED

JAN 19 2023

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TYRONE DOUTHERD,

Plaintiff-Appellant,

v.

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DORIS MARIE MONTESDEOCA; et al.,

Defendants.

No. 21-15966

D.C. No.
2:17-cv-02225-KJM-JDP
Eastern District of California,
Sacramento

ORDER

Before: BRESS and VANDYKE, Circuit Judges, and RESTANI,* Judge.

The panel unanimously voted to deny the petition for panel rehearing, Dkt. 72. Judges Bress and VanDyke voted to deny the petition for rehearing en banc, Dkt. 73, and Judge Restani so recommended. The petition for rehearing en banc was circulated to the judges of the Court, and no judge requested a vote for en banc consideration. Fed. R. App. P. 35. The petition for rehearing en banc is **DENIED**.

* The Honorable Jane A. Restani, Judge for the United States Court of International Trade, sitting by designation.