

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

SEP 18 2023

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

DARRIN ESPINOSA,

No. 22-15130

Plaintiff - Appellant,

D.C. No. 4:19-cv-08055-JSW

v.

U.S. District Court for Northern
California, Oakland

CONTRA COSTA COUNTY,

MANDATE

Defendant - Appellee.

The judgment of this Court, entered May 23, 2023, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule
41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

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

Plaintiff-Appellant,

D.C. No. 4:19-cv-08055-JSW
Northern District of California,
Oakland

v.

CONTRA COSTA COUNTY,

ORDER

Defendant-Appellee.

Before: BENNETT, MILLER, and VANDYKE, Circuit Judges.

Espinosa's petition for panel rehearing (Docket Entry No. 17) is denied.

No further filings will be entertained in this closed case.

NOT FOR PUBLICATION

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FOR THE NINTH CIRCUIT

MAY 23 2023

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

DARRIN ESPINOSA,

No. 22-15130

Plaintiff-Appellant,

D.C. No. 4:19-cv-08055-JSW

v.

MEMORANDUM*

CONTRA COSTA COUNTY,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of California
Jeffrey S. White, District Judge, Presiding

Submitted May 16, 2023**

Before: BENNETT, MILLER, and VANDYKE, Circuit Judges.

Darrin Espinosa appeals pro se from the district court's summary judgment in his employment action alleging disability discrimination under the Americans with Disabilities Act ("ADA") and the California Fair Employment and Housing Act ("FEHA"). We have jurisdiction under 28 U.S.C. § 1291. We review de

* 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).

novo. *Shelley v. Geren*, 666 F.3d 599, 604 (9th Cir. 2012). We affirm.

The district court properly granted summary judgment on Espinosa's discrimination claims because Espinosa failed to raise a genuine dispute of material fact as to whether he was capable of performing the essential functions of the job with or without reasonable accommodation. *See Dep't of Fair Emp't & Hous. v. Lucent Techs., Inc.*, 642 F.3d 728, 745 (9th Cir. 2011) ("The FEHA prohibits discrimination against any person with a disability but, like the ADA, provides that the law allows the employer to discharge an employee with a physical disability when that employee is unable to perform the essential duties of the job even with reasonable accommodation."); *Dark v. Curry County*, 451 F.3d 1078, 1089 (9th Cir. 2006) ("The ADA does not require an employer to exempt an employee from performing essential functions or to reallocate essential functions to other employees."); *see also Brown v. Lucky Stores, Inc.*, 246 F.3d 1182, 1188 (9th Cir. 2001) (concluding that employer was under no affirmative obligation to provide an accommodation for employee who never requested an accommodation).

We do not consider matters not specifically and distinctly raised and argued in the opening brief, or arguments and allegations raised for the first time on appeal. *See Padgett v. Wright*, 587 F.3d 983, 985 n. 2 (9th Cir. 2009).

We treat Espinosa's motions (Docket Entry No. 14) as motions to

supplement the record on appeal and deny the motions.

AFFIRMED.

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4 DARRIN ESPINOSA,

5 Plaintiff,

6 v.

7 CONTRA COSTA COUNTY,

8 Defendant.

9 Case No. 19-cv-08055-JSW

10
11 **ORDER GRANTING MOTION FOR
SUMMARY JUDGMENT**

12 Re: Dkt. No. 36

13 Now before the Court is the motion for summary judgment filed by Defendant County of
14 Contra Costa ("County"). The Court finds the motion well-taken and it is GRANTED.

15 **BACKGROUND**

16 Plaintiff was a temporary building inspector for the County who was seriously injured by a
17 dog bite on his first day of work. After working with the injury for the time period of his
18 temporary employment, Plaintiff eventually applied for a permanent position. Although he
19 received a conditional offer of permanent employment, the offer was withdrawn after it was
20 determined that Plaintiff was unable to pass the functional capacity examination due to his
21 inability to climb a ladder. Plaintiff's employment by the County ended when his temporary
22 assignment terminated.

23 By this lawsuit, Plaintiff seeks to raise state and federal claims that he was unlawfully
24 terminated based on his disability. However, Plaintiff was not qualified to perform the essential
25 functions of the permanent position he applied for. Plaintiff was not deprived of a reasonable
26 accommodation as the employer is not required to waive an essential function of the job and
27 Plaintiff himself has not identified any reasonable accommodation he requested, was entitled to, or
28 was denied. Lastly, the County did not fail to engage in an interactive process when the

1 undisputed record indicates that Plaintiff cancelled the interactive meeting, failed to reschedule
2 one, and consistently maintained that he did not require any accommodation.

3 **ANALYSIS**

4 **A. Applicable Legal Standards.**

5 Summary judgment, or partial summary judgment, is proper “if the movant shows that
6 there is no genuine dispute as to any material fact and the movant is entitled to judgment as a
7 matter of law.” Fed. R. Civ. P. 56(a). A principal purpose of the summary judgment procedure is
8 to identify and dispose of factually unsupported claims. *Celotex Corp. v. Catrett*, 477 U.S. 317,
9 323-24 (1986). The Court may not weigh evidence or make determinations of credibility. Rather,
10 “[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn
11 in his favor.” *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986). The party moving for
12 summary judgment bears the initial burden of identifying those portions of the pleadings,
13 discovery, and affidavits that demonstrate the absence of a genuine issue of material fact. *Celotex*,
14 477 U.S. at 323; *see also* Fed. R. Civ. P. 56(c). While the Court may consider all materials in the
15 record, the court need only consider the materials the parties cite: it is not the Court’s task to scour
16 the record in search of a disputed issue of fact. *See Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir.
17 1996) (citing *Richards v. Combined Ins. Co.*, 55 F.3d 247, 251 (7th Cir. 1995)); *see also* Fed. R.
18 Civ. P. 56(c)(3).

19 An issue of fact is “genuine” only if there is sufficient evidence for a reasonable fact finder
20 to find for the non-moving party. *Anderson*, 477 U.S. at 248-49. A fact is “material” if it might
21 affect the outcome of the case. *Id.* at 248. If the party moving for summary judgment does not
22 have the ultimate burden of persuasion at trial, that party must produce evidence which either
23 negates an essential element of the non-moving party’s claims or show that the non-moving party
24 does not have enough evidence of an essential element to carry its ultimate burden of persuasion at
25 trial. *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000). Once the
26 moving party meets its initial burden, the non-moving party must “identify with reasonable
27 particularity the evidence that precludes summary judgment.” *Keenan*, 91 F.3d at 1279 (9th Cir.
28 1996). A “mere scintilla of evidence” is insufficient to defeat a properly supported motion for

1 summary judgment; rather, the nonmoving party must "introduce some significant probative
2 evidence" to support its case. *Summers v. Teichert & Son, Inc.*, 127 F.3d 1150, 1152 (9th Cir.
3 1997) (citation and internal quotation marks omitted). If the non-moving party fails to point to
4 evidence precluding summary judgment, the moving party is then entitled to judgment as a matter
5 of law. *Celotex*, 477 U.S. at 323.

6 **B. Claims under ADA and FEHA.**

7 Plaintiff contends that he was subject to discrimination in employment due to his
8 disability. He claims that the County's failure to hire him in a permanent position, or to terminate
9 him from a temporary one, was based upon his disability as a result of the dog bite on the first day
10 of his temporary position, causing him injuries to his left shoulder, arm, and wrist.

11 After some time as a temporary inspector, Plaintiff applied for a permanent position and
12 was granted a conditional offer of employment contingent on successfully passing the physical
13 examination and functional capacity test. Plaintiff self-reported loss of feeling in his upper
14 extremities and pain that limited his daily activities and/or ability to perform essential functions of
15 the job. He reported weakness in his arms and hands and difficulty moving his arms and legs, as
16 well as difficulty climbing a flight of stairs or a ladder carrying more than 25 pounds. (County
17 Evidence, Ex. EE at 9.) As part of the functional capacity test, Plaintiff was required to climb up
18 and down a ladder twice. (*Id.* at ¶ 8.) Plaintiff did not take or pass the functional capacity test and
19 he did not reschedule a time to meet for an interactive meeting.

20 Plaintiff's first claim for disability discrimination is premised upon an alleged violation of
21 the Americans with Disabilities Act ("ADA"). Plaintiff claims the County violated the ADA by
22 "refusing to accommodate [his] disability, by refusing to consider any request for reasonable
23 accommodation or offer any other reasonable accommodation which would not have caused an
24 undue hardship for [the County], and by instead terminating him." (Complaint at ¶ 36.)

25 In order to prevail on an ADA claim based on unlawful discharge, a plaintiff must show
26 that he suffered an adverse employment action because of his disability. Specifically, the plaintiff
27 "must establish a *prima facie* case by showing that: (1) he is a disabled person within the meaning
28 of the statute; (2) he is a qualified individual with a disability; and (3) he suffered an adverse

1 employment action because of his disability.” *Hutton v. Elf Atochem N. Am.*, 273 F.3d 884, 891
2 (9th Cir. 2001). In order to satisfy the requirement to be considered a qualified individual with a
3 disability, the employee must be able to “perform the essential functions of the employment
4 position.” 4 U.S.C. § 1211(8). The “essential functions” of a position are comprised of the
5 position’s “fundamental duties.” *Garcia v. Johnson*, 630 Fed. Appx. 684, 686 (9th Cir. Nov. 13,
6 2015). The ADA does not apply where the employee is incapable of performing an essential
7 function of the job, even with an accommodation. *Bates v. UPA*, 511 F.3d 974, 990 (9th Cir.
8 2007). “The ADA does not require an employer to exempt an employee from performing essential
9 functions or to reallocate essential functions to other employees.” *Dark v. Curry County*, 451 F.3d
10 1078, 1089 (9th Cir. 2006). Here, there is no dispute that being able to climb a ladder is an
11 essential function of the job Plaintiff applied for – and there is no dispute that Plaintiff passed the
12 test to demonstrate he was capable of this essential function.

13 With regard to the third prong – the requirement that the adverse action was taken because
14 of the employee’s disability, the burden is on the plaintiff to “show that the adverse employment
15 action would not have occurred *but for* the disability.” *Murray v. Mayo Clinic*, 934 F.3d 1101,
16 1105 (9th Cir. 2019) (emphasis added). In order to prevail on a claim under the ADA, the plaintiff
17 must show that he would not have been discharged if not for his disability. *Id.* at 1006.

18 In this case, Plaintiff at once contends that he functioned in his temporary position without
19 accommodation, and also that he requested no further accommodations when applying for a
20 permanent position. An employee who is adamant that he does not require accommodation cannot
21 be entitled to recovery under a theory that he was deprived an accommodation he neither sought
22 nor needed. In this case, Plaintiff has changed position from his original complaint in which he
23 alleged that he was terminated because of his disability to his current position in opposing the
24 motion for summary judgment that he was not terminated, but rather was not hired as a permanent
25 employee due to his disability. (See Opp. Br. at 19 n.1.) Further, as Plaintiff claims that he was
26 able to perform all the functions of the building inspector, regardless whether it was in his
27 temporary or the permanent position, he claims that the County violated his rights because of “his
28 perceived disability.” (*Id.*)

1 It is clear from the undisputed factual record that during his temporary tenure at the
2 County, Plaintiff's position as building inspector required that he be able to climb ladders. The
3 determination not to give Plaintiff the functional capacity test during the application process for a
4 permanent position was based on upon the conclusion that Plaintiff was not able, safely, to climb
5 due to the loss of strength in Plaintiff's left hand. (See Def. Ex. EE at ¶ 29.)

6 The California Fair Housing and Employment Act ("FEHA"), which bars discrimination
7 based on disability, similarly requires the plaintiff to show that (1) he suffers from a disability, (2)
8 he is otherwise qualified to do his job, (3) he suffered an adverse employment action, and (4) the
9 employer harbored discriminatory intent. *Avila v. Continental Airlines, Inc.*, 165 Cal. App. 4th
10 1237, 1247 (2008). Again, based on the undisputed record here, Plaintiff cannot make out a prima
11 facie case of discrimination as he was not qualified to the job as permanent building inspector.
12 See *Dep't of Fair Empl. & Housing v. Lucent Techs, Inc.*, 642 F.3d 728, 745 ("The FEHA prohibits
13 discrimination against any person with a disability, but, like the ADA, provides that the law allows
14 the employer to discharge an employee with a physical disability when that employee is unable to
15 perform the essential duties of the job even with reasonable accommodation."). The plaintiff bears
16 the burden to demonstrate that he is a qualified individual under the statute and must demonstrate
17 that he could perform the essential functions of the job with or without a reasonable
18 accommodation. See *Atkins v. City of Los Angeles*, 8 Cal. App. 5th 696, 71 (2017) (internal
19 quotations omitted).

20 Just as he was unable to carry his burden under the ADA, Plaintiff here is unable to
21 demonstrate that he qualifies for the protections under the FEHA. Employers simply do not have
22 the obligation to accommodate a disabled employee by waiving a requirement of the position at
23 issue. *Furtado v. State Pers. Bd.*, 212 Cal. App. 4th 729, 753 (2013). Here, it is also clear that the
24 adverse employment action was not terminating Plaintiff from his temporary position, but rather
25 failing to hire him for a permanent position without the appropriate qualifications. This does not
26 amount to a violation of either the ADA or the FEHA. Regardless, under both the ADA and the
27 FEHA, Plaintiff cannot be heard to complain about the lack of accommodation when he
28 specifically and repeatedly denied needing or requesting one.

C. Claim for Failure to Engage in the Interactive Process.

Plaintiff's claim for failure to engage in the interactive process under the FEHA is similarly precluded by the undisputed facts in the record. In order to state such a claim, a plaintiff must establish that (1) he had a known disability, (2) he requested a reasonable accommodation for the disability so that he could perform the essential job functions, (3) he was willing to participate in the interactive process to determine whether a reasonable accommodation could be made, (4) the employer failed to participate in a timely good-faith interactive process to determine whether a reasonable accommodation could be made, (5) the employee was harmed, and (6) the employer's failure to engage in a good-faith interactive process was a substantial factor in causing the harm.

Shirvanyan v. L.A. Community College District, 59 Cal. App. 5th 82, 94 (2020).

Plaintiff is unable to bear his burden to demonstrate that he was so harmed as he has consistently maintained that he neither requested nor needed an accommodation for his perceived or actual disability. Without seeking such an accommodation, Plaintiff is not able to demonstrate that he was harmed by the failure of his employer to provide one. The statutory provision applicable for this cause of action provides that it is unlawful for an employer to fail to engage in an interactive process “in response to a request for a reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition.” Cal. Gov’t Code § 12940(n). As Plaintiff has consistently and unequivocally stated that he made no request for such accommodation nor did he need such an accommodation, his claim for his employer’s failure to engage in the process of fixing such an accommodation necessarily fails.¹

¹ Indeed, the same analysis applies to Plaintiff's final claim for failure to accommodate under the FEHA. Because Plaintiff has consistently maintained that he neither asked for nor required an accommodation, his employer cannot be held liable for its failure to provide one. *See, e.g., Schmid v. Safeway Inc.*, 864 F. Supp. 991, 997 (D. Or. 1994) (holding that an employer "has no duty to accommodate an employee who denies she has an accommodation or denies a need for accommodation."). Not only would Plaintiff need to bear his burden to demonstrate that he was qualified to do the essential functions of the position – which he cannot – but he also needs to demonstrate that the employer unreasonably failed to accommodate him upon his request. Again, because Plaintiff was unable to carry out an essential function of the job (climbing a ladder) and because he explicitly maintains he failed to request an accommodation, he is similarly unable to carry his burden on this claim.

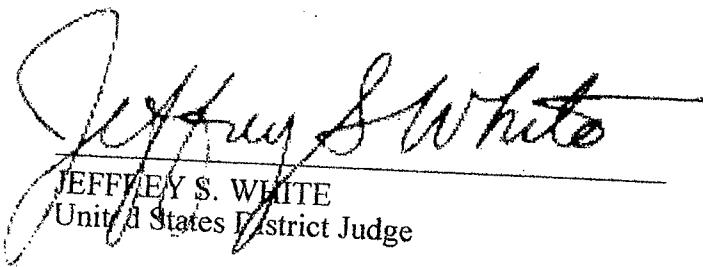
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CONCLUSION

2 Based on the foregoing, the Court GRANTS the County's motion for summary judgment
3 on all claims. The Court shall issue a separate judgment and the clerk shall close the file.
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5 **IT IS SO ORDERED.**

6 Dated: January 10, 2022


7
8 JEFFREY S. WHITE
9 United States District Judge
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