UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	SACV 09-01515-JVS (ANx)	Date	April 11, 2011
Title	Raymond L. Brooks v. Allstate Insurance Company, et al.		

Present: The Honorable	James V. Selna	
Karla J. Tunis		Sharon Seffens
Deputy Clerk		Court Reporter
Attorneys Present for Plaintiffs:		Attorneys Present for Defendants:
Douglas Ames		Max Sank / Sheryl Skibbe

Proceedings: Defendant's Motion for Summary Judgment (Fld 2-18-11)
Defendant's Motion to Bifurcate Issues of Liability and Punitive Damages (Fld 3-14-11)

Cause called and counsel make their appearance. The Court's tentative ruling is issued. Counsel make their appearances. The Court DENIES the defendant's motion for Summary Judgment and GRANTS the defendant's motion to bifurcate. These rulings are made in accordance with the tentative rulings as follows:

This case arises out of plaintiff's employment with defendant. After certain changes to plaintiff's conditions of employment, plaintiff Raymond L. Brooks, whose mobility is impaired by Multiple Sclerosis, tendered his resignation. He claims constructive discharge and asserts a number of state and federal disability discrimination claims against his former employer, Allstate Insurance Company ("Allstate").

Specifically, plaintiff asserts the following claims: (1) Violation of Cal. Gov't Code § 12940(m) (failure to reasonably accommodate a disability); (2) Violation of Cal. Gov't Code § 12940(n) (failure to engage in interactive process); (3) constructive discharge in violation of public policy; and (4) violation of the Americans with Disabilities Act ("ADA"), §§ 12101 et seq.

Allstate has moved for summary judgment or, in the alternative, partial summary judgment (Docket No. 36). Additionally, Allstate has moved to bifurcate trial into two phases: First, a phase that determines liability, compensatory damages, and entitlement to punitive damages; second, a phase that determines the amount of punitive damages. (Docket No. 51). As set forth herein, the Court denies the Motion for Summary

Judgment, and the Court grants the Motion to Bifurcate.

I. Uncontroverted Facts

The material facts are uncontroverted.

Plaintiff began working for Allstate as a sales agent in 1997. Brooks Depo. at 14.

In 2005, Allstate created the position of Inside Sales Leader ("ISL"), who provide regional sales support to Allstate's independent contractor agents on property and casualty and financial services products. Palmer Depo. at 24. In May 2005, plaintiff became an ISL. Brooks Depo. at 21. ISLs assist agents with growing their businesses and increasing profits and market share in their territories. Palmer Decl. ¶ 4. ISLs assist agents with aligning their sales processes with Allstate's objectives, ensuring that registered representative agents comply with the regulations and requirements of the Securities and Exchange Commission, the Financial Industry Regulatory Authority, and all other broker/dealer requirements and securities rules. Id. ISLs also recruit new agents. Id. ISLs oversee the sales agents in their territories, which requires ISLs to travel to meetings with their agents, supervisors, and other ISLs. Brooks Depo. at 28. During plaintiff's employment, ISLs and other sales leaders also had to review the customer files and offices of their registered representative agents to ensure that they were complying with all securities regulations and procedures. Palmer Decl. ¶¶ 3, 6. ISLs conduct training meetings for sales agents. Brooks Depo. at 252. They are required to attend "Town Hall" meetings with sales agents to develop a more personal relationship with their agents through face-to-face contact. Id. at 251-52.

In approximately late 2004, plaintiff informed Field Vice President Hank Barge that he had been diagnosed with MS. Id. at 62-64.

In March 2007, plaintiff told Heidi Palmer, Territorial Sales Leader ("TSL"), that his MS affected his mobility and asked Palmer if she would limit his travel to necessary locations. Id. at 270; Palmer Depo. at 15. Some efforts at minimizing time away from plaintiff's home office were made. For example, to reduce the number of training meetings plaintiff needed to travel to and attend, Palmer instructed other ISLs to permit sales agents in his territory to attend their training meetings. Brooks Depo. at 252. Sales agents within plaintiff's territory often attended meetings conducted by other sales

leaders. Id. Palmer limited the number of Town Hall meetings that plaintiff was required to attend and allowed him to attend those meetings that were closest to his home. Id. at 252, 255-56.

Additionally, at plaintiff's request, Allstate paid for and provided plaintiff with wheelchairs and scooters. Id. at 251. In March 2008, Allstate offered to fly plaintiff and his wife first class to Australia to allow him to attend an awards ceremony. Id. at 251.

Until November 2008, plaintiff found Allstate's attempts at accommodating his disability to be sufficient. Id. at 273.

Two agents whose files plaintiff was required to review on-site had offices on second floors in buildings with no elevators, rendering them inaccessible to plaintiff; although plaintiff requested that other agents with accessible offices be assigned to him, this request went unanswered. Brooks Decl. ¶¶ 8-11. On one occasion, in November 2008, plaintiff injured his knee while ascending the staircase in one of the inaccessible offices. Id. ¶ 11.

When plaintiff began working in the position, Allstate permitted all California ISLs to work from their homes; however, later, in January 2009, all ISLs were required to work from an Allstate office. Brozick Depo. at 42-43, 46. This occurred after Larry M. Sedillo, Regional Distribution Leader for California, attended a regional leadership meeting in Las Vegas, where he learned other regions had ISLs work from Allstate offices, and where he thought that might be something to try to alleviate the isolation some ISLs had complained to him about. Sedillo Depo. at 16, 70-71; cf. Barge Depo. at 52-53 (recalling a conference call including Sedillo and addressing conclusion that ISLs working from home were less productive than "those working in a regional environment"); Sedillo Depo. at 73 ("Again, I think to help them to not feel so isolated, to be able to take advantage of this energy they would have amongst themselves as a group."); id. at 91 ("[ISLs] would have the facilities available to them at the claims office . . . Web conferencing, they would have [a] highly technical phone system. They would have all of the company facilities available for them to be able to communicate across the state and amongst each other."). Additionally, the move was perceived to allow TSLs to visit with ISLs and observe their work. Sedillo Id. at 74. A corporate officer of Allstate, Robert Henry "Hank" Barge testified that having ISLs work in the office in "a controlled environment" measurably improved sales results by providing ISLs with greater

resources, by the increased ability to manage the number of contacts, and by providing a better measure of results. Barge Depo. at 54.

In addition to these perceived across-the-board advantages, Palmer believed that a moving plaintiff to an office, where he would be accessible to her, would improve his performance, which varied in its quality. Palmer Decl. ¶¶ 7-9, 11; id. Exs. B-C (performance reviews).

Allstate apparently recognized from the outset that plaintiff would have difficulty in moving into an Allstate office environment. In advance of the January 2009 date for moving all ISLs to an Allstate office environment, even absent a request from plaintiff, it was suggested that plaintiff work from home four days a week and one day at Allstate's Temecula office. Brooks Depo. at 124-25. At the time, two other ISLs were working at the Temecula office with an ISL supervisor, John Stolte. Id. at 137-39. Plaintiff did not object to the suggested accommodation that he work from home four days per week and one day from the Temecula office. Id. at 125. Plaintiff worked from the Temecula office approximately one month, in March 2009, or three work days total. Id. at 137. Plaintiff did not complain to his supervisors or to anyone in Human Resources that he was unable to work form the Temecula office. Id. 128-34.

In April 2009, the possibility that plaintiff work from the Allstate's Corona claims office ("Corona MCO") was explored. Id. at 139-40. Although this office was closer to his home than was the Temecula office (40 miles as opposed to 60 miles), the change was contemplated in conjunction with an increase in the number of days plaintiff would be required to work in an Allstate office from one day a week to five days per week. Id. at 153-54. In response, on May 14, 2009, plaintiff provided a medical form from his treating physician, Dr. Robert A. Klein, in which Dr. Klein noted that plaintiff "[d]oes best in [a] home office setting."[1] Klein Depo. at 17-18, 26-29, Ex. A. After reviewing

[1] Specifically, Dr. Klein's answers to the questions on Allstate's "Workplace Assistance Request" included the following: (1) that plaintiff's functional limitations were impaired in that he was required to use an electric scooter for mobility, that he gets fatigued easily, and that he has very weak legs and poor stamina; (2) that plaintiff's condition limited his mobility and functioning due to his very

that form, in early June 2009, plaintiff met with Palmer and was informed that he'd be working at the Corona MCO three days a week, and that that arrangement would be re-assessed in 60 days. Brooks Depo. at 153, 159-60; Palmer Depo. at 154. Plaintiff agreed to try out the arrangement.[2] Brooks Depo. at 154. During this meeting, a Human Resources contact, Debbie Brozick, began discussing plaintiff's retirement options. Brooks Decl. ¶ 17. A week or so later, Palmer again raised the issue of plaintiff retiring and informed plaintiff that he would have to work outside his home every day beginning in January 2010, possibly before then. Id. ¶ 18. Palmer refused plaintiff's request that he work mostly from his home office. Id. On June 30, 2008, Brozick contacted plaintiff again to ask whether he'd thought more about retirement and to inform him she would be happy to assist him with that process. Id. ¶ 20.

On July 1, 2009, plaintiff started working at the Corona MCO. Brooks Depo. at 143. Because plaintiff was unable to drive, his wife drove him 40 miles to work, drove home, and then returned to collect him at the end of the day. Brooks Decl. ¶ 21. During three months Brooks worked at the Corona MCO, plaintiff encountered difficulties

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weak legs such that he would perform "best in a home office setting"; (3) that a "long day at work including travel time causes worsened fatigue and weakness"; (4) that plaintiff's condition nevertheless did not preclude him from working full-time; but (5) that plaintiff's worksite "must be handicap accessible" with "[o]ccasional office visits or meetings" being "OK." Klein Depo. Ex. A (emphasis in the original).

[2] Allstate overstates the evidence regarding plaintiff's willingness to try out the arrangement. Although expressing his willingness to cooperate, he also expressed concerns from the outset regarding the feasibility of this arrangement:

> She said something along the lines, I think, of how do you feel about that? And I said, you know, I don't like it. It is going to be tough. I am going to give it a try, you know.

Brooks Depo. at 154.

accessing the building and the restroom facilities.[3] Id. ¶ 23. Moreover, plaintiff expressed concern that he was unable to access the building and that his location, on the fifth floor, presented a risk to his safety in the event of an emergency that required evacuation of the building. Indeed, recognizing the difficulties that would be encountered in evacuating plaintiff without a working elevator, in advance of a planned evacuation drill, Palmer emailed plaintiff to suggest that he work from home that day. Id., Ex. 20 ("Please plan on working from home on the 10th of July. There are some activities going on in the Corona MCO that would make it crazy for you that day."). Plaintiff reported the accessibility problems and his concerns regarding his safety to Brozick in late August, but these issues were not addressed further. Id. ¶ 26.

No other Allstate sales employee worked at the Corona MCO; rather, the Corona office was a claims office. Id. ¶ 24. Palmer did not visit plaintiff at the Corona MCO. Id. ¶ 24. His noisy cubicle at the Corona MCO did not permit him to conduct web conferences with his agents, as his quiet home office had done. Id. ¶ 25. The commute made plaintiff fatigued. Id.

On at least one occasion in August or September 2009, Palmer delivered certain letters on plaintiff's behalf to plaintiff's sales agents so that he would not have to travel; similarly, in September 2009, plaintiff was asked to attend only one of three quality control meetings (rather than all three) so that he would not have to travel as much. Brooks Depo. at 256-58.

On September 9, 2009, plaintiff sent a detailed letter to Palmer and Debbie Brozick, complaining about the changes to his work environment. Id. at 185-87, Ex. 2. Specifically, plaintiff complained of what he viewed at Allstate's failure to reasonably accommodate his inability to walk or drive, he referenced the apparent lack of plan to

[3] Allstate's objections to this evidence are overruled. Plaintiff's testimony regarding the difficulties he, on his motorized scooter, experienced is not irrelevant (it is relevant to reasonable accommodation), it is not lacking in foundation or speculative (it is something plaintiff himself experienced), and it is not an improper lay opinion (it is a permissible lay opinion based on plaintiff's perception).

evacuate him from the Corona MCO's fifth floor in the event of a real emergency, certain difficulties he has encountered with the physical facilities in Corona, Allstate's refusal to permit plaintiff's colleagues assist him by driving plaintiff's truck to transport him and his scooter to meetings that both plaintiff and his colleagues were attending, the necessity that his wife drive him wherever he needed to go, the fatigue he encounters when traveling, and Palmer's suggestion to him that he retire while he still had the ability "to control [his] own future." Id. Ex. 2.

Plaintiff had a regularly scheduled "checkpoint" meeting with Palmer on September 16, 2009, during which Palmer, unbeknownst to plaintiff, intended to address the concerns that plaintiff raised in his letter; however, plaintiff's illness kept him from attending that meeting. Id. at 188-92; Palmer Depo. at 192-94; Brozick Depo. at 115, 126-27.

The meeting was rescheduled to September 24, 2009, but plaintiff did not attend, presumably because one day prior, he sent an email to Palmer and others in which he informed Allstate that he believed he had been constructively discharged. Id. at 111-12, Ex. 2. Specifically, plaintiff reminded the recipients of a number of honors he had earned while working from his home office; he referenced Allstate's non-response to his September 9, 2009, letter; he pointed out that several recent directives he received required him to enter inaccessible agent offices; and he noted that requiring him to attend in-person a checkpoint meeting required a three- or four-hour round-trip drive by plaintiff and his wife, but only a half hour time commitment by Palmer. Plaintiff ended the email by noting that he believed that his employment "in effect[, had] been terminated by Allstate," requesting that he be paid using vacation time until that was exhausted, and then requesting short-term disability pay. Brooks Depo., Ex. 3.

Plaintiff's last day of work was on or about September 23, 2009.[4] Brooks Decl.¶ 33.

[4] Dondi Morrison replaced Brooks as an ISL, reporting to Heidi Palmer. Morrison Depo. at 10-12. As an ISL, Morrison was not required to conduct any reviews of the customer files and offices of her registered representative agents. Id. at 10.

Between September 24, 2010, and October 1, 2010, Allstate placed plaintiff on a leave of absence, and plaintiff was paid his salary by using his paid time off days; thereafter, plaintiff received short-term disability benefits. Brozick Decl. ¶ 3. He received short-term disability benefits from October 2, 2010, through February 16, 2010. Id.

The short-term disability carrier, Liberty Life Assurance Company of Boston, on a number of occasions, specifically asked for confirmation regarding whether plaintiff's disability could be accommodated by his working from his home office; however, Allstate did not respond to these requests for confirmation. See generally Hooks Depo.

In advance of the expiration date of plaintiff's short-term disability period, but after the present action was filed, Allstate sent plaintiff a letter offering three options (1) to discuss reasonable accommodations if he was ready to return to work, (2) to place him on an unpaid leave of absence if he was unable to return to work but believed he would be able to return to work in the future, or (3) if he was totally disabled, to apply for health retirement. Brooks Depo., Ex. 8. Plaintiff responded via email on February 12, 2010, noting the fact that he had filed suit against Allstate[5] and that further communications should be addressed to plaintiff's counsel. Id., Ex. 9. On February 15, 2009, Allstate placed plaintiff on unpaid medical leave. Id., Ex. 10.

II. Summary Judgment Standard

Summary judgment is appropriate only where the record, read in the light most favorable to the nonmoving party, indicates that "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c)(2); see also Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986). Summary adjudication, or partial summary judgment "upon all or any part of a claim," is appropriate where there is no genuine issue of material fact as to that portion of the claim. Fed. R. Civ. P. 56(a), (b); see also Lies v. Farrell Lines, Inc., 641 F.2d 765, 769 n.3 (9th Cir. 1981) ("Rule 56 authorizes a summary adjudication that will often fall short of a final determination, even of a single claim . . . .") (internal quotation marks omitted).

[5] The present action was filed on December 30, 2009.

Material facts are those necessary to the proof or defense of a claim, and are determined by reference to substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Celotex, 477 U.S. at 322. A fact issue is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248. To demonstrate a genuine issue, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts. . . . [T]he nonmoving party must come forward with specific facts showing that there is a genuine issue for trial." Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986) (internal quotation marks and citations omitted). In deciding a motion for summary judgment, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson, 477 U.S. at 255. Nevertheless, inferences are not drawn out of the air, and it is the opposing party's obligation to produce a factual predicate from which the inference may be drawn. See Richards v. Nielsen Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), aff'd, 810 F.2d 898, 902 (9th Cir. 1987).

The burden initially is on the moving party to demonstrate an absence of a genuine issue of material fact. Celotex, 477 U.S. at 323. If the moving party meets its burden, then the nonmoving party must produce enough evidence to rebut the moving party's claim and create a genuine issue of material fact. See id. at 322-23. If the nonmoving party meets this burden, then the motion will be denied. Nissan Fire & Marine Ins. Co. v. Fritz Co., Inc., 210 F.3d 1099, 1103 (9th Cir. 2000).

III. Disability Discrimination Claims

A. Legal Standard

The ADA requires employers to "mak[e] reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability" to their employees, unless the employer "can demonstrate that the accommodation would impose an undue hardship on the operation of the business." 42 U.S.C. § 12112(b)(1).

To establish a prima facie case under ADA based on an employer's failure to reasonably accommodate a disability, plaintiff must establish that: "(1) [H]e is disabled

within the meaning of the ADA; (2) he is a qualified individual able to perform the essential functions of the job with reasonable accommodation; and (3) he suffered an adverse employment action because of his disability." Allen v. Pacific Bell, 348 F.3d 1113, 1114 (9th Cir. 2003).

In order to arrive at a reasonable accommodation, employers must engage in an "interactive process" with their employees:

> Once an employee requests an accommodation, the employer must engage in an interactive process with the employee to determine the appropriate reasonable accommodation. . . . This interactive process requires: (1) direct communication between the employer and employee to explore in good faith the possible accommodations; (2) consideration of the employee's request; and (3) offering an accommodation that is reasonable and effective.

U.S. E.E.O.C. v. UPS Supply Chain Solutions, 620 F.3d 1103, 1110 (9th Cir. 2010) (internal quotation and alteration marks omitted) (citing Zivkovic v. S. Cal. Edison Co., 302 F.3d 1080, 1089 (9th Cir. 2002)). "An employer is not obligated to provide an employee the accommodation he requests or prefers, the employer need only provide some reasonable accommodation." Id. at 1110-11 (internal quotation marks omitted). Where the interactive process is initiated, but nevertheless fails, employer "[l]iability for failure to provide reasonable accommodations ensues only where the employer bears responsibility for the breakdown in the interactive process." Zivkovic, 302 F.3d at 1089 (internal quotation marks and citation omitted).

An "employer providing the accommodation has the ultimate discretion to choose between effective accommodations, and may choose the less expensive accommodation or the accommodation that is easier for it to provide."
UPS Supply Chain Solutions, 620 F.3d at 1111 (internal quotation marks omitted) (citing EEOC Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. Part 1630, App., 56 Fed.Reg. 35,726-01, 35,749 (July 26, 1991)).

California statutory law incorporates the duty to engage in an interactive process to reasonably accommodate the limitations of a disabled employee. See Cal. Gov't Code § 12940(n) (requiring employers "to engage in a timely, good faith, interactive process

with the employee . . . to determine effective reasonable accommodations"); id. § 12940(m) (requiring employers, in the absence of "an undue hardship to [their] operations," to "make reasonable accommodation for the known . . . disability of an . . . employee"). The relevant analysis under the FEHA is virtually indistinguishable from that required under the ADA, and "California relies on ADA precedents to interpret analogous provisions of the state's Fair Employment and Housing Act." Allen, 348 F.3d at 1114 n.1; see Sandell v. Taylor-Listug, Inc., 188 Cal. App. 4th 297, 310 (2010) (setting forth three elements of prima facie case of disability discrimination under the FEHA that are substantively indistinguishable from the elements of an ADA prima facie case); Scotch v. Art Institute of California-Orange County, Inc., 173 Cal. App. 4th 986, 1013-14 (2009) (describing the interactive process required by the FEHA); Jensen v. Wells Fargo Bank, 85 Cal. App. 4th 245, 263 (2000) (liability issue resolved in favor of the party not responsible for breakdown in interactive process); Hanson v. Lucky Stores, Inc., 74 Cal. App. 4th 215, 228 (1999) (employer not required to grant plaintiff's preferred accommodation).

Thus, the Court's discussion of the parties' attempts at arriving at a reasonable accommodation applies to both the federal and state claims.

B. Prima Facie Case

1. Disability

The first step of the prima facie case is clearly met here. Plaintiff has MS and informed Allstate of his condition in 2004. Plaintiff's use of a motorized scooter made his physical disability evident to those in contact with him, and Allstate's action in informing him he should work from home on the day of a planned evacuation drill of his office shows Allstate's knowledge of plaintiff's physical limitations. Moreover, Allstate does not argue that plaintiff is not a "qualified individual" with a "disability" under the ADA, 42 U.S.C. §§ 12102, 12111, or that plaintiff does not have a "physical disability" that was known to Allstate, Cal. Gov't Code § 12940(m). On the uncontroverted record, plaintiff has established the first element of the prima facie case.

2. Ability to Perform the Essential Functions of the Position with Reasonable Accommodation

The dispute related to the second element of the prima facie case centers on whether the parties engaged in an interactive process to identify a reasonable accommodation and whether the employer offered a reasonable accommodation. On the current uncontroverted facts, plaintiff has raised a triable issue of fact regarding whether Allstate failed to engage in an interactive process regarding reasonable accommodation with him and whether Allstate failed to accommodate him. The interactive process, which clearly was initiated by plaintiff, broke down, but the uncontroverted facts support the inference that Allstate bears responsibility for that break down. By the same token, the record supports the inference that permitting plaintiff to continue to work from his home office was a reasonable accommodation that did not impose an undue burden on Allstate.

Specifically, Allstate was aware as early as 2007 that plaintiff's mobility was effected by his MS and it took steps to limit plaintiff's travel outside of his home office. Additionally, Allstate provided plaintiff on certain occasions with devices to assist his mobility. When the decision was made in 2008 that all ISLs should begin reporting to Allstate offices rather than work out of their home offices, the requirement that plaintiff needed accommodation as to his work location was apparently evident to Allstate; Allstate initially suggested plaintiff report to an Allstate office only one day per week. Although apparently not happy with this arrangement, plaintiff nevertheless did not complain that it was unworkable.

Rather, plaintiff voiced his concern when he was informed he would be required to report to an Allstate office five days a week. At this point, there was no doubt that plaintiff communicated his need for a reasonable accommodation. By this time, Allstate, having suggested that plaintiff hire a driver (rather than have a colleague drive plaintiff in plaintiff's truck and presumably at plaintiff's own expense), understood plaintiff was no longer able to drive himself anywhere. In response to communications from plaintiff's treating neurologist, that plaintiff had to use a scooter for mobility, that he was easily fatigued, that travel time to and from work worsened this fatigue, and that he would work best from a home office, Allstate suggested plaintiff report to an Allstate office three days a week instead of five. The meetings in which plaintiff's office location were discussed were accompanied by Allstate's implicit acknowledgment that his relocation would be a

struggle for him, in that it was suggested by his supervisor and a human resources contact that he consider retiring from Allstate rather than continue to endure the current working environment or face the inevitable arrangement that he be required to report to the Corona MCO five days a week.

Plaintiff expressed his concerns regarding the reasonableness of the three-days-a-week accommodation, but also his willingness to try out the arrangement. During the time he did so, plaintiff expressed concerns regarding accessibility to the facilities and regarding his safety in the event of an emergency evacuation, neither of which were addressed by Allstate. These communications evidence plaintiff continued to voice his concerns regarding the reasonableness of the requested accommodation.

After working slightly more than two months under these conditions, plaintiff sent his detailed letter regarding his numerous concerns. Plaintiff's subjective level of frustration is evident from the contents of the letter. Plaintiff did not receive an acknowledgment of or response to this letter; although plaintiff's supervisor intended to address the letter at plaintiff's regularly scheduled "checkpoint" meeting with him, that fact was not communicated to plaintiff. Despite the passage of more than two weeks, and although plaintiff spoke with his supervisor on a number of occasions during this time, Allstate did not communicate with plaintiff regarding his complaint before plaintiff authored his second detailed letter, informing Allstate that he considered himself to be terminated from his position with Allstate.

On this record, a reasonable jury could conclude that Allstate failed to act in good faith by "taking off the table" the suggestion that plaintiff, whom the record establishes cannot drive and whom the record establishes has limited mobility, continue to work, as he had for a number of years, at least somewhat successfully, from his home office. From this, a reasonable jury could conclude that Allstate failed to give "consideration [to] the employee's request." UPS Supply Chain Solutions, 620 at 1110. Such an inference would also be supported by Allstate's failure to respond to the short-term disability carrier's repeated requests for confirmation regarding whether plaintiff could be accommodated by working from his home office. Moreover, a reasonable jury could conclude that the coupling of discussions about plaintiff's office location with his retirement options evidenced Allstate's desire that plaintiff retire rather than continue to request accommodation of his limitations. Although plaintiff clearly became frustrated with his interactions with Allstate, the current record does not foreclose the conclusion

that Allstate bears ultimate responsibility for the break down in the interactive process.

By the same token, a reasonable jury could conclude that the offered accommodation, that plaintiff work only three days a week at the Corona MCO, was not "reasonable and effective." Id. Allstate understood plaintiff could not drive, which itself conferred a hardship on plaintiff. Moreover, because plaintiff was placed in a claims office, in which no other sales personnel were stationed and at which plaintiff was placed in a noisy cubicle that inhibited his communications with his agents, a reasonable jury could conclude that none of the purposes of moving the ISLs into an Allstate office was served. Indeed, on this record, a reasonable jury could conclude that rather than improving his performance by lessening his isolation and increasing his resources, the move actually rendered plaintiff much less able to perform his duties proficiently by unnecessarily sapping his limited energy and by providing him with a working environment with fewer resources. In short, the record supports an inference that despite the stated goals of decreasing the ISLs' isolation, giving the TSLs more access to ISLs, providing ISLs with greater resources and better access to facilities, and improving plaintiff's overall employment, plaintiff's movement from his home office to an Allstate claims office actually had the opposite effect.

A conclusion that this arrangement was not a reasonable accommodation is also supported by Allstate's acknowledgment that it would incur no additional cost in permitting plaintiff to continue to work from his home.

In sum, the record supports an inference that Allstate failed to engage in an interactive process that might have identified a reasonable accommodation for plaintiff, and failed to offer a reasonable accommodation.

3. Adverse Employment Action

A plaintiff suffers an adverse employment action when the action "materially affects the compensation, terms, conditions, or privileges of employment" or results in the "assign[ment of] more, or more burdensome, work responsibilities." Davis v. Team Elec. Co., 520 F.3d 1080, 1089 (9th Cir. 2008) (internal alteration marks, quotation marks, and citations omitted). Additionally, a plaintiff suffers an adverse employment action when he is constructively discharged based on disability discrimination. See, e.g., Sekiya v. Gates, 508 F.3d 1198, 1200 (9th Cir. 2007).

Plaintiff contends he was constructively discharged, thus meeting the third element of the prima facie case. For the reasons set forth in infra, section IV., the Court agrees.

C. Disposition of Disability Claims

The Motion for Summary Judgment is denied as to plaintiff's federal and state disability claims, his first, second, and fourth causes of action. Plaintiff has met his burden in response to All's showing. Nissan Fire & Marine Ins. Co., 210 F.3d at 1103.

IV. Constructive Discharge

Federal cases have defined "constructive discharge" as:

> A constructive discharge occurs when, looking at the totality of circumstances, a reasonable person in the employee's position would have felt that he was forced to quit because of intolerable and discriminatory working conditions.

Watson v. Nationwide Ins. Co., 823 F.2d 360, 361 (9th Cir. 1987). California cases describe a similar standard; however, California law adds an intent element that is not found in the federal cases. Specifically, California cases have held that constructive discharge occurs when an employer "either deliberately create[s] intolerable working conditions that trigger [an employee's] resignation or, at a minimum, [the employer] know[s] about them and fail[s] to remedy the situation in order to force the employee to resign." Turner v. Anheuser-Busch, Inc., 7 Cal.4th 1238, 1249-50 (1994); cf. Poland v. Chertoff, 494 F.3d 1174, 1184 n.7 (9th Cir. 2007) ("[W]e do not require that, in addition to proving that working conditions were intolerable, a plaintiff must establish that his employer created the intolerable conditions with the intent to cause the employee to resign."); see also Steele v. Youthful Offender Parole Bd., 162 Cal. App. 4th 1241, 1253 (2008) (recent application of Turner intent requirement).

Plaintiff has raised a triable issue of fact under either standard. Here, the record supports the inference that Allstate subjected plaintiff to working conditions that taxed him physically, that failed to provide for his physical safety, that failed to take into account limitations specified by his treating physician, and that effectively decreased his productivity (while purporting to be designed to increase his productivity). The record

supports the inference that Allstate was aware of these working conditions yet failed to remedy them. Because his requests for accommodation and discussions regarding his office assignment were coupled with suggestions that he might fare better if he considered retiring from Allstate, the record also supports the inference that Allstate imposed plaintiff's relocation upon him with the intent to force plaintiff to retire or resign. Although capable of supporting other inferences, the Court, in considering a motion for summary judgment is obligated to, and has, considered the evidence, and the competing inferences that flow therefrom, in the light most favorable to plaintiff, as the non-moving party. Anderson, 477 U.S. at 255.

The Motion for Summary Judgment is denied as to the constructive discharge claim.

V. Punitive Damages

Finally, Allstate contends that summary adjudication of plaintiff's entitlement to punitive damages is appropriate. The Court disagrees.

To be entitled to punitive damages pursuant to the state-law claims, plaintiff must establish by clear and convincing evidence that Allstate acted with "oppression, fraud, or malice." Cal. Civ. Code § 3294(a).

Under the ADA, to be entitled to punitive damages, plaintiff must establish that Allstate "engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to [his] federally protected rights." 42 U.S.C. § 1981a(b)(1); see Alvarado v. Cajun Operating Co., 588 F.3d 1261, 1265 (9th Cir. 2009) (noting that claims pursuant to 42 U.S.C. § 12112 are subject to the remedy provisions of 42 U.S.C. § 1981a); 42 U.S.C. § 12112(a) and (b)(5)(A) (requiring employers to reasonably accommodate a disabled employee's limitations).

The Court cannot conclude that, on the current uncontroverted record, that plaintiff could not, as a matter of law, establish entitlement to punitive damages. Therefore, the Court denies the remainder of Allstate's Motion for Summary Judgment.

VI. Motion to Bifurcate

Allstate seeks bifurcation at trial as to the amount of punitive damages. Pursuant to Allstate's proposal, the first phase of the trial would address the issues of liability, the entitlement to and amount of compensatory damages, and the issue of entitlement to (but not the amount of) punitive damages. Should the jury in the first phase determine the issues of liability and entitlement to punitive damages in favor of plaintiff, then plaintiff could present evidence relevant to the determination of the amount of punitive damages (e.g., evidence relevant to Allstate's financial status).

Rule 42(b) provides that the Court may, "[f]or convenience, to avoid prejudice, or to expedite and economize, . . . order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims," so long as it "preserve[s] any federal right to a jury trial." Courts have broad discretion in deciding when separate trials will meet this standard. Jinro Am., Inc. v. Secure Invs., Inc., 266 F.3d 993, 998 (9th Cir. 2001). In determining whether to bifurcate a trial, courts consider such factors as the uniqueness of the issues sought to be tried separately, the risk of jury confusion, and any potential prejudice to the parties. See Calmar, Inc. v. Emson Research, Inc., 850 F. Supp. 861, 866 (C.D. Cal. 1994) ("Factors to be considered when ruling on a Rule 42(b) motion include complexity of the issues, factual proof, risk of jury confusion, difference between the separated issues, the chance that separation will lead to economy in discovery and, the possibility that the first trial may be dispositive of the case.").

Plaintiff's opposition focuses on the differing standards for imposition of punitive damages under the ADA and the FEHA, as well as certain compensatory damages caps. These are not relevant to the issue of bifurcation of punitive damages.

Bifurcation of the issue of the proper amount of punitive damages from the remainder of the issues presented here is warranted. Presentation of evidence regarding the net worth of Allstate would detract from the wholly separate inquiry of whether Allstate failed to reasonably accommodate plaintiff. Assuming a verdict in favor of plaintiff on the issue of liability, presentation of evidence regarding the value of a large insurance company such as Allstate in the same phase as evidence regarding plaintiff's entitlement to compensatory damages could unduly influence the jury's determination of the appropriate amount of those compensatory damages. Alternatively, assuming a verdict in favor of Allstate on the issue of liability, that issue would be dispositive of the

entire case, and no second phase would be required.

Allstate's Motion to Bifurcate is granted, and the trial shall be bifurcated in the manner set forth above.

VII. Conclusion

As set forth above, the Court denies the Motion for Summary Judgment and grants the Motion to Bifurcate.

IT IS SO ORDERED.

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