NO. 45097-6-II

IN THE COURT OF APPEALS

OF THE STATE OF WASHINGTON, DIVISION II

ANTHONY BROWN,

Petitioner,

v.

GOLDEN STATE FOODS CORP. and QUALITY CUSTOM DISTRIBUTION SERVICES, INC.,

Respondents.

RESPONDENTS' BRIEF

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INTRODUCTION

This appeal involves an employment dispute. It arises from the trial court's rulings on cross-motions for summary judgment in favor of the employer, Quality Custom Delivery Services, Inc., and its affiliate Golden State Foods Corporation (collectively "QCDS").

QCDS employed the petitioner, Anthony Brown ("Brown"), as a delivery driver for only 83 days. QCDS decided to terminate Brown within his 90-day probationary period because he consistently failed to complete his routes on time and without assistance.

Brown contends that QCDS's reason for his termination is pretext. He asserts, among other things, that QCDS unlawfully terminated him because of a disability that the company failed to accommodate. As explained below, however, Brown had passed a DOT physical with no medical restrictions, he denied any limitations on his ability to do his job, and he has never produced evidence of a disability. QCDS's decision to terminate Brown was lawfully based on his poor performance, and the trial court's decision should be affirmed.

COUNTER-STATEMENT OF CASE

QCDS disputes Brown's Statement of the Case. To the extent that Brown's assertions of fact cite to the record, Brown relies heavily on declarations that are unsupported and, in some instances, contradict his

earlier deposition testimony. On appeal, as at the trial court, Brown is not entitled to the benefit of allegations that are not supported by admissible evidence. *See Hanson Industries Inc. v. Kutschkau*, 158 Wn. App. 278, 291, 239 P.3d 367 (2010) ("A party to litigation cannot create a material issue of fact by submitting a declaration contradicting his own deposition.").

QCDS also moves to strike assertions of fact on page 7, paragraph 11, of Appellant's Brief, to the extent those assertions are based on Brown's July 1, 2013 declaration, located in the record at CP 453-454. Brown submitted that declaration in support of a motion for reconsideration of the trial court's rulings under CR 59. The declaration was not part of the record before the trial court on summary judgment, and Brown did not assign error to the trial court's denial of his motion for reconsideration. Accordingly, the declaration is not evidence reviewable on appeal. *See Escude ex rel. Escude v. King County Pub. Hosp. Dist. No. 2*, 117 Wn. App. 183, 190, 69 P.3d 895 (2003) (party's failure to assign error to or provide argument and citation to authority in support of assignment of error "precludes appellate consideration of an alleged error").

A. The Parties

Respondent Golden State Foods Corporation is a leading supplier to the food service industry, providing manufacturing and distribution services to more than 20,000 restaurants around the world. Respondent Quality Custom Distribution Services is an affiliated company providing food product distribution services to the greater Puget Sound area, with a distribution facility located in Kent, Washington.

On May 20, 2009, QCDS hired Brown to work as a delivery driver in Washington. (CP 114.) Brown's employment lasted less than three months, until August 11, 2009. (CP 151-52.)

B. Brown's Job Duties

Brown's job duties consisted of "delivering products from one location to another." (CP 114-15.) As part of his daily responsibilities, Brown began his shift at around 4:45 p.m. by receiving a clipboard detailing the route he would drive that night. (CP 120-22.) Typically, Brown would deliver goods to between 12 and 16 different Starbucks' stores and was supposed to complete his route "as soon as possible." (CP 124-27.)

C. Brown Was Not Disabled During His Employment

As part of the hiring process, Brown underwent a standard Department of Transportation ("DOT") physical in which a doctor

performed a "complete physical" and required him to "do some maneuvers as far as lifting weights and moving around . . . and maybe repetitive reps." (CP 116-17.) Brown passed his DOT physical, did not "have any issues in passing that physical," and believed he could perform all of his duties for QCDS. (*Id.*)

Brown admitted that he was not disabled when he began his job and that he never had medical restrictions at any time during his employment. (CP 118; 141.) Brown also presented no evidence that any person ever perceived him as disabled or that he had a record of a disability. (CP 165.)

Brown testified that he "had back surgery in 1980" from "a previous injury before," after which he "had rods inserted in [his] back," but he told his supervisor that he "hadn't had any problems out of my back" and "told him [he] never had any problems" even though he had "done physical work before in warehouses and different things." (CP 137-39.) When asked if "there [was] anything that could hold [him] up" from physical work, Brown testified that he told his supervisor "no." (CP 138.) Brown explained: "I had an injury when I was a kid, and everything is fine. I've been doing physical work ever since then." (*Id.*)

D. Brown Was Warned About His Poor Performance

Brown understood that the ability to make timely deliveries was a performance issue and a "legitimate request" from his superiors. (CP 128-30.) Brown conceded in his deposition that, during his probationary period, his supervisors had repeatedly instructed him to speed up: "it was always, 'Hurry up. Speed up. We have a certain amount of time that we want to get these routes done.'" (CP 132.) Brown admitted that he was ultimately warned that he "needed to speed up because they w[ere] going to be hiring some more people, and if I didn't speed up . . . I probably wasn't going to be there." (CP 133.)

E. QCDS Decided to Terminate Brown's Employment on August 1, 2009

On August 1, 2009, or possibly a day or two earlier, Eric Lard, the Operations Manager of QCDS's facility in Kent, Washington, had a conversation with Corey Alfano, one of the supervisors at the facility, in which Lard directed Alfano to work with the other supervisors to terminate Brown's employment due to his poor performance before the 90-day probationary period under the collective bargaining agreement had passed. (CP 188.)

In response to this direction, Mr. Alfano corresponded with the other supervisors. (CP 508-09.) In an August 1, 2009 exchange of emails, Brown's supervisors noted that QCDS had been required to "send help to

[Brown] every night" that week on the University Village route, and that Brown required drivers from two other routes (South Seattle and Capitol Hill) to make some deliveries to Starbucks stores on Brown's route "so he wouldn't have any late deliveries." (*Id.*) At the same time, Brown's supervisors twice observed that the Kent facility was "hurting [for] drivers" and "we are short drivers. . . ." *Id.*

Due to the shortage of drivers, the supervisors decided that Brown's employment would continue through August 8, 2009, but he would be terminated starting the week of August 9:

> We can use Monroe to help him Sunday and Wednesday, he's off Monday and Tuesday, then have Nelson help him Thursday, Friday and Saturday. For the following week starting 8/9 on, I will just put up U. Village for overtime the whole week and we can get rid of him [Brown] after 8/8, unless Eric wants to get rid of him earlier than that.

(CP 509.)

Based on the decision to terminate his employment on August 1, Brown was taken off of the work schedules for the August 9, 2009 workweek and replaced by other drivers. (CP 188-221, at 198-204) (QCDS's schedules for the week of August 9-15, 2009.)

F. <u>Brown Works On August 9</u>

Damon Spear, one of QCDS's supervisors, planned to notify Brown of his termination when he first reported to work on August 9, 2009. (CP 172-73.) However, earlier on the afternoon of August 9, a

driver named Mark McAlister called in sick. (CP 171; 176.) Spear decided to place Brown on the schedule to work McAlister's Des Moines route because QCDS was "short-handed" on that day. (CP 171-73; 176.)

G. Brown Injures Himself On August 9 or 10

Brown worked McCalister's Des Moines route on August 9, 2010, which began at 6:15 p.m. and went into the early morning hours of August 10, 2009. (CP 173.) Brown claims that while he was making his deliveries, he experienced a sudden pain in his back when he "twisted to put the [milk] crates on the cart." (CP 150-51; 153-55.) He continued working through his shift and the pain worsened, at which time he claims to have contacted a supervisor, Chuck Brewer, who went to Brown's location to help him finish the route. (CP 155-56.)

H. Brown Was Informed Of His Termination On August 11

On August 11, 2009, Brown arrived at the Kent facility between 5 p.m. and 6 p.m., and, according to Brown, he was prepared to file an L&I claim relating to the injury he had suffered while making deliveries the previous night. (CP 159.) However, Brown testified that before he could say anything about his alleged injury or his desire to file an L&I claim, Spear told him that the company had decided to terminate his employment. (CP 160-61.) Brown testified that he then asked Spear if he

could work in the warehouse handling the goods before delivery, but Spear said no. (CP 161-62.)

I. Brown's First Treatment For His Alleged Injury Occurred After His Termination

Brown admitted that he did not seek any treatment for his alleged injury on August 10. Instead, Brown admitted that the first time he sought treatment for his alleged injury was on August 11, 2009, after being notified of his termination, when he went to an urgent care facility around 7:00 p.m. (CP 147; 151-52.) Brown had not filed a workers' compensation claim prior to his termination. (CP 149.) Brown admitted that no one at QCDS made any negative or disparaging statements about his alleged injury at any time. (CP 165.) Brown has been unable to work and has been receiving full workers' compensation benefits from the date of his alleged injury to the present. (CP 143-44.)

ARGUMENT

QCDS will address Brown's assignments of error out of order, beginning with the trial court's rulings on Brown's motion to compel and motion to strike, because the Court's review of those rulings will define the scope of the record on summary judgment. *See Sunbreaker v. Condominium Ass'n v. Travelers Ins. Co.*, 79 Wn. App. 368, 373, 901 P.2d 1078 (1995) (review of evidentiary rulings established scope of record for subsequent review of summary judgment order).

A. **The Trial Court Did Not Err in Denying Brown's Motion to Compel**

Brown assigns error to the trial court's May 17, 2013 order denying his motion to compel QCDS to respond to certain interrogatories and requests for production of documents. (CP 459-60.) A trial court's ruling on a discovery motion is reviewed for abuse of discretion, which occurs when the court "bases its decision on unreasonable or untenable grounds." *Clarke v. Office of Attorney Gen.*, 133 Wn. App. 767, 777, 138 P.3d 144 (2006).

Brown contends that the trial court erred in denying him discovery that "would have permitted access to [QCDS's] computer system." (App. Br. p. 17.) Brown speculates that such access would have uncovered evidence that the emails showing QCDS's non-discriminatory decision to terminate him a week before his alleged on-the-job injury had been "falsified." (*Id.*) Brown further appears to suggest that access to QCDS's computer system would have uncovered additional Trip Records relating to Brown that QCDS could not locate. (*Id.*, p. 17.) Lastly, Brown suggests that the trial court erred in denying him discovery of records relating to other employees "to demonstrate that [he] was doing as good a job as any other employee." (*Id.*)

Brown's arguments are not persuasive. As to his requests for access to QCDS's computer system, the trial court correctly determined that such invasive discovery was unjustified. QCDS represented that it had produced all responsive emails that it believed existed and/or that it could locate. (CP 22; 502-11.) Brown's professed disbelief and unsupported accusations of "falsification" of evidence was not sufficient to warrant the highly unusual remedy of granting Brown access to QCDS's computers. *See, e.g., Advante Intern. Corp. v. Mintel Learning Technology*, 2006 WL 1806151, *1 (N.D. Cal. Jun. 29, 2006) ("[J]ust as a party would not be entitled to inspect personally an opposing party's offices and filing cabinets simply because it believed that discovery misconduct had occurred, the accusations Mintel makes here do not justify [access to a party's computers].").

Similarly, the fact that QCDS could not produce all of Brown's Trip Records did not warrant additional, intrusive discovery. *See, e.g., Silva v. McKenna*, 2012 WL 1596971, *4 (W.D. Wash. May 7, 2012) ("While it is clear that Plaintiff is unhappy with this answer, Mr. McKenna responded to the interrogatories under oath and cannot be compelled to provide information that he does not have."); *Shalabi v. Atlantic Richfield Co.*, 2012 WL 3727334, *1 (W.D. Wash. Aug. 28, 2012) ("The Court is unable to compel a party to produce something that it does not possess.").

With respect to Brown's wide-ranging requests for records relating to other employees, QCDS pointed out that Brown sought records for individuals who were not similarly situated and, moreover, that Brown could not explain why the records of the other employees would support his claims. (CP 21; 23.) *See State v. Blackwell*, 120 Wn.2d 822, 845 P.2d 1017 (1993) (party must advance some factual predicate which makes it reasonably likely the requested file will bear information material to his claim).

Lastly, at the summary judgment hearing, the Court offered to give Brown more time for discovery, but Brown declined:

> THE COURT: . . . What you're suggesting, Mr. DeJean, is that there might be something else. If there's something else that you want to discover, you know, I'm always opposed to trying to make a decision if there's not enough information; but if you think that there is enough in the record[,] . . . I certainly would give you more time if you think you need more time to find more e-mails.
>
> MR. DEJEAN: I won't be able to find them, Judge.
>
> THE COURT: Okay.

(RP 6.)

In short, Brown waived any assertion that the trial court erred in deciding the parties' motions for summary judgment without allowing

Brown additional discovery. *See Avellaneda v. State*, 167 Wn. App. 474, 485 n. 5, 273 P.3d 477 (2012) ("Failure to request a continuance under CR 56(f) waives the issue."); *Guile v. Ballard Community Hosp.*, 70 Wn. App. 18, 24-25, 851 P.2d 689 (1993) (plaintiff who failed to indicate to trial court that she needed more time for discovery could not claim on appeal that "trial court granted the summary judgment motions prematurely").

B. The Trial Court Did Not Err in Denying Brown's Motion to Strike

Brown next assigns error to the Court's June 21, 2013 denial of his motion to strike the "self-serving" August 1, 2009 emails that QCDS submitted in support of its motion for summary judgment. (App. Br. p. 16.) Brown's motion to strike was made in conjunction with a summary judgment motion, and the trial court's ruling is therefore subject to de novo review. *Folsom v. Burger King*, 135 Wn. 2d 658, 663, 958 P.2d 301 (1998).

The emails in question were submitted as exhibits to the declaration of Kayla Miller, the Human Resources Director of QCDS. (CP 502-11.) The emails were especially damaging to Brown's claims – indeed, they were dispositive – because they showed that QCDS had decided to terminate Brown for performance reasons on August 1, 2009,

well before he claimed to have been injured on the job and had notified the company of a disability and/or a workers' compensation claim. (*See* CP 508-09.)

On appeal, Brown renews his argument to the trial court that the emails "were simply self-serving statements" and therefore inadmissible. (App. Br. p. 16-17.) He points to *W.W. Conner Co. v. McCollister & Campbell*, 9 Wn. 2d 407, 115 P.2d 370 (1941), where the court excluded a "self-serving" declaration of the existence of an express agreement.

However, the decision in *W.W. Conner Co.* – which has not been cited by any court in over 40 years – does not stand for the broad proposition that "self-serving" equates to "inadmissible." To the contrary, Washington appellate courts have since clarified that "there is no 'self-serving hearsay' bar that excludes an otherwise admissible statement." *State v. Pavlik*, 165 Wn. App. 645, 653, 268 P.3d 986 (2011) (citing *State v. King*, 71 Wn. 2d 573, 577, 429 P.2d 914 (1967) ("'self-serving' seems to be a shorthand way of saying that it was hearsay and did not fit into any of the recognized exceptions to the hearsay rule")).

As QCDS pointed out in opposition to Brown's motion to strike, regardless whether the emails were "self-serving," they were admissible under at least two exceptions to the hearsay rule, *viz.*, the state-of-mind exception under ER 803(3) and the business records exception under

ER 803(6). *See, e.g., Rice v. Offshore Systems, Inc.,* 167 Wn. App. 77, 87, 272 P.3d 865 (2012) (reports of employee's drunk and disorderly conduct were admissible under ER 803(3) to show employer's motive in terminating employee); *Domingo v. Boeing Employee's Credit Union*, 124 Wn. App. 71, 78-79, 98 P.3d 1222 (2004) (declaration of plaintiff's supervisor was admissible under ER 803(3) to show motivation for termination). *See also Hedenberg v. Aramark American Food Services, Inc.*, 476 F. Supp. 2d 1199, 1204 n.3 (W.D. Wash. 2007) (denying motion to strike declaration submitted to show supervisors then-existing state of mind).

In his appeal brief, Brown does not advance any argument challenging the application of ER 803(3) or 803(6) to the emails. Instead, apart from his argument that the emails are inadmissible simply because they are "self-serving," Brown's primary complaint is that he was denied "the ability to question and challenge the authenticity of [the] emails." (Br. p. 4, 18.) However, as noted above, Brown raised the same concern at the summary judgment hearing, but declined the trial court's explicit willingness to entertain a CR 56(f) continuance. (RP 5-6.) As a result, Brown waived any argument that additional discovery would have led to a disputed issue of fact as to the emails' authenticity. *See Avellaneda,*

supra, 167 Wn. App. at 485 n. 5. Lastly, Brown provides no basis to conclude that the emails had been "falsified" beyond sheer speculation.

C. The Trial Court Did Not Err in Granting QCDS Summary Judgment

Having established the proper scope of the record on review, *Sunbreaker*, 79 Wn. App. at 373, QCDS turns to Brown's assignments of error relating to the cross-motions for summary judgment. Brown assigns error to the trial court's decision to grant QCDS summary judgment on four of six[1] causes of action in his Amended Complaint: (1) "disability-based hostile work environment" leading to discharge; (2) "failure to accommodate" a disability; (3) retaliatory discharge for filing a workers' compensation claim; and (4) failure to provide Brown with meal and rest breaks under WAC 296-126-093.

The standard of review of an order of summary judgment is de novo, and this Court performs the same inquiry as the trial court, *viz.*, an examination of whether the record demonstrates the absence of any genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Sheehan v. Central Puget Sound Regional Transit Auth.*, 155 Wn. 2d 790, 796-77, 123 P.3d 88 (2005).

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1 Brown does not appeal the trial court's decision to grant QCDS summary judgment as to two causes of action, negligent infliction of emotional distress and age discrimination.

1. Brown's Disability-Based Hostile Work Environment Claim

A "disability based hostile work environment" required Brown to "prove (1) that he . . . was disabled within the meaning of the antidiscrimination statute, (2) that the harassment was unwelcome, (3) that it was because of the disability, (4) that it affected the terms or conditions of employment, and (5) that it was imputable to the employer." *Robel v. Roundup Corp.*, 148 Wn. 2d 35, 45, 59 P.3d 611 (2002).

In opposition to summary judgment, Brown did not address his claim of hostile work environment. (*See* CP 222-263.) QCDS, on the other hand, pointed to Brown's testimonial admissions that he was not disabled at the time of his hire, that he had no medical restrictions during his employment, and that no one at QCDS made any negative statements about his alleged workplace injury on August 9, 2010 – an alleged injury that, not inconsequentially, took place eight days after QCDS had decided to terminate his employment. (CP 118; 141; 165.)

On appeal, Brown points to a declaration in which he confirmed that he "had no medical restrictions," but alleged that three QCDS employees began "riding" him two weeks before his termination. (CP 36; 286-87.) Those employees told him that he "was not fast enough" in completing his routes and ignored his suggestion that a "lift gate would

assist [him] in completing [his] job assignments"; one employee, Chuck Brewer, "told [him] that [he] had to keep working in spite of [his] back injury." (CP 36.) That testimony, according to Brown, satisfied all elements of a hostile work environment claim under *Robel v. Roundup Corp.*, *supra*, 148 Wn.2d at 45.

Brown's argument on appeal fails. In *Robel*, after the plaintiff sustained a workplace injury and was assigned light duty, her coworkers repeatedly mocked and insulted her and accused her of lying about her injury. *See* 148 Wn.2d at 41 (coworkers "had a great time making fun of [Robel], calling [her] names[,] pretending to hurt their backs & yelling L&I."). There is no comparable evidence of harassment in this case, much less conduct that affected the terms and conditions of Brown's employment. In fact, Brown's complaints about his supervisors "riding" him about not being "fast enough" do not come close to the kind of "severe and pervasive" harassment that would constitute an actionable hostile work environment under Washington law. *See, e.g., Davis v. Fred's Appliance, Inc.*, 171 Wn. App. 348, 361-62, 287 P.3d 51 (2012) (harassment must be severe enough to affect conditions of employment; court considers "totality of circumstances, including the frequency and severity of harassing conduct, whether it was physically threatening or humiliating or merely an offensive utterance, and whether it unreasonably

interfered with the employee's work performance."); *Kirby v. City of Tacoma*, 124 Wn. App. 454, 465, 98 P.3d 827 (2004) ("[Y]elling at an employee or threatening to fire an employee is not an adverse employment action") (citations omitted).

In stark contrast to the plaintiff in *Robel*, Brown admitted that no one ever harassed him about any actual or perceived disability at any time. (CP 165.) He was not insulted, physically threatened, or humiliated, and he does not claim that his supervisors unreasonably interfered with his performance. *Davis*, 171 Wn. App. at 361-62. To the contrary, Brown admitted that there was nothing "unusual" about his supervisors' request that he complete his routes more quickly, that they made this request of other drivers, and that the request was "legitimate." (CP 129; 51:3-8.) In short, there is no evidence of "harassment."

In addition, as explained more fully in the next section, Brown's "disability based hostile work environment" claim also fails because he produced no evidence that he was actually "disabled."

2. <u>Brown's "Failure to Accommodate" Claim</u>

To establish a prima facie case for failure to accommodate a disability, Brown was required to show that (1) he had a qualifying disability; (2) he was qualified to perform the essential functions of the job with or without reasonable accommodation; and (3)(a) his disability either

had a "substantially limiting effect" upon his ability to perform his or her job; or (b) he placed QCDS on notice of the disability, and medical documentation established a "reasonable likelihood that engaging in job functions without an accommodation would aggravate the impairment to the extent that it would create a substantially limiting effect." RCW 49.60.040(7)(d); *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 145, 94 P.3d 930 (2004). *See also Johnson v. Chevron U.S.A., Inc.*, 159 Wn. App. 18, 28-29, 244 P.3d 438 (2010) (modifying elements of failure-to-accommodate claim to comport with 2007 amendments to WLAD).

Brown explains that the "main thrust" of his "failure to accommodate" claim relates to a "prior back injury" that occurred while in high school in 1980. (Br. p. 22.) According to Brown, he complained to three QCDS employees – Eric Lard, Steve McCraney, and Chuck Brewer – that, because of his back injury, he "could not move as fast as the other drivers, jumping in and out of the truck," and that "lift gates would greatly assist [him]." (CP 36.) As explained below, Brown's assertions were not sufficient to state a claim, and the trial court did not err in granting QCDS summary judgment.

(a) Brown's High School Back Injury Did Not Qualify as a "Disability"

To establish that he had a "disability" eligible for an accommodation, Brown was required to produce evidence of the existence of an impairment "in fact" – *i.e.*, an impairment that was either "medically cognizable or diagnosable" or that existed "as a record or history." RCW 49.60.040(7)(a); RCW 49.60.040(7)(d).

To satisfy this element on summary judgment, Brown submitted a declaration that he had back surgery in 1980 when he was in high school, which surgery resulted in two rods being inserted in his back for support. (CP 35-36.) However, Brown's testimony, standing alone, was not enough under CR 56; he needed to present medical evidence of a disability sufficient to meet the requirements of the WLAD. *See Simmerman v. U-Haul Co. of Inland Northwest*, 57 Wn. App. 682, 687, 789 P.2d 763, 687 (1990) (plaintiff was not entitled to have his own declaration asserting the existence of disability "considered at face value" on summary judgment). *See also Calhoun v. Liberty Northwest Ins. Corp.*, 789 F. Supp. 1540, 1547 (W.D. Wash. 1992) ("Ms. Calhoun has set forth no medical evidence that she suffered from a disability at the time of her discharge or that her doctor had set limits on the kind of work she could do upon her return. In fact, the only evidence plaintiff cites that she continued to suffer from any

disability are her own subjective statements that she experienced back and neck pains from stooping and bending while doing her file clerk duties. . . . Such subjective statements are insufficient to create a genuine issue of material fact that plaintiff had a handicap.").

Even if Brown had presented competent medical evidence of his high school back injury, there was no evidence that the injury had resulted in a "medically cognizable or diagnosable" impairment. To the contrary, at Brown's deposition, he admitted that he had passed a DOT physical without medical restrictions and did not believe he was "disabled in any way." (CP 116-118.) Brown also explained to his supervisor Lard: "I had an injury when I was a kid, and *everything is fine*. I've been doing physical work ever since then." (CP 138) (emphasis added).

(b) Brown's High School Back Injury Did Not Have a "Substantially Limiting Effect"

Brown also failed to present evidence that his high school back injury, even if a "disability" under the WLAD, had a "substantially limiting effect" on his ability to perform his job at QCDS. *See* RCW 49.60.040(7)(d).

On appeal, Brown points again to his declaration submitted in opposition to summary judgment, where he asserts that he "could not move as fast as the other drivers" because of his high school back injury.

(CP 37.) Again, however, Brown's own conclusory statement as to the "limiting effect" of his high school injury was not competent evidence under CR 56. *See Simmerman, supra*, 57 Wn. App. at 687 (plaintiff's declaration that he could not perform "heavy lifting because of the possibility of reinjuring [his] back" was insufficient evidence of disability; a party "may not rely on speculation, argumentative assertions that unresolved factual issues remain, . . . [and] must set forth specific facts that sufficiently rebut the moving party's contentions") (citation, quotation omitted).

Moreover, as with his admissions disclaiming any belief that he had a "disability," Brown's admissions in his deposition undercut any inference that his back injury had a "substantially limiting effect." Brown testified, *inter alia*, that he believed he could perform all of his duties for QCDS, that he had no medical restrictions at any time during his employment, that he was only a "little bit slower bending moving around," and that not having a lift gate only "slow[ed] me down a little bit." (CP 139-40.) As a matter of law, QCDS was not obligated to accommodate a disability that effected Brown's work performance only a "little bit." *See* RCW 49.60.040(7)(e) (to qualify for reasonable accommodation, "a limitation is not substantial if it has only a trivial effect").

(c) Brown Submitted No Medical Documentation that His High School Back Injury Would Be Aggravated Without an Accommodation

As an alternative basis for his failure-to-accommodate claim, Brown could have opted to submit evidence that he placed QCDS on notice of his high school back injury and that "medical documentation . . . establish[ed] a reasonable likelihood that engaging in job functions without an accommodation would aggravate the impairment to the extent that it would create a substantially limiting effect." RCW 49.60.040(7)(d)(ii); *Johnson*, *supra*, 159 Wn. App. at 30.

On appeal, Brown argues that, in opposing summary judgment, he submitted evidence that he placed QCDS on notice of his back injury, and he simply cites his declaration to that effect. (*See* App. Br. at p. 24) (citing CP 35-39). Brown ignores, however, that he failed to submit any "medical documentation" that his injury would be aggravated without an accommodation. *See, e.g., Johnson*, 159 Wn. App. at 31 (plaintiff met burden of showing "medical documentation" with doctor's "prescription" that accommodation of special tool would benefit plaintiff's bad back). Absent that necessary evidence – indeed, in the face of unrebutted evidence of Brown's DOT physical that he could perform his duties without limitation – the trial court did not err in granting QCDS summary judgment. *Simmerman,* 57 Wn. App. at 687.

(d) Brown's Secondary Failure-To-Accommodate Claim Arising from His Work Injury Also Fails

Lastly, Brown argues that the trial court erred in rejecting an alternate, secondary failure-to-accommodate theory arising from the alleged August 9, 2009 back injury that immediately preceded his termination. Brown contends that he notified his supervisor Chuck Brewer of that injury and that QCDS failed to engage in the interactive process and, ultimately, to provide him with a reasonable accommodation that might have allowed him "to continue working." (App. Br. p. 27.) Specifically, Brown argues that it was possible that he could have been transferred to a "warehouse position." (*Id.* p. 29.)

Brown's alternate claim fails for all the reasons that his primary claim fails: In opposition to summary judgment, Brown relied solely on his own declaration and provided no medical evidence of a disability or of the likelihood of aggravation of a disability absent an accommodation. *Simmerman,* 57 Wn. App. at 687.

His alternate claim also fails for two additional reasons. First, the unrebutted evidence on summary judgment was that QCDS had decided to terminate Brown's employment for performance reasons on August 1, 2009, eight days before his work injury. (CP 177-186, at 183-84.) As a matter law, QCDS was not required to revisit that decision. *See, e.g.*,

EEOC, *Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, Q&A 36 (rev. Oct. 17, 2002), available at http://www.eeoc.gov/policy/docs/accommodation.html ("Since reasonable accommodation is always prospective, an employer is not required to excuse past misconduct even if it is the result of the individual's disability."). *Cf. Josephinium Assoc. v. Kahli*, 111 Wn. App. 617, 630, 45 P.3d 627 (2002) ("failure to accommodate [disability] could not excuse . . . breach if the failure occurred after the breach, so post-notice conduct was irrelevant").

Second, even if QCDS had an obligation to revisit its termination decision (which it did not), and even if QCDS had a continuing obligation to accommodate Brown after his termination, as Brown contends, Brown failed to produce any evidence that a reasonable accommodation would have allowed him to perform the essential functions of any job at any time – whether as a delivery driver or a warehouse worker. On appeal, Brown simply asserts that "we will never know" the answer to that question. (App. Br. p. 27.) In fact, answering that question was an element of Brown's prima facie claim of disability and his burden in responding to a motion summary judgment under CR 56. *Riehl, supra*, 152 Wn.2d at 145 (employee must show that he "was qualified to perform the essential functions of the job with or without reasonable accommodation").

The only evidence in the record cuts against a finding that a reasonable accommodation was even possible: Brown admitted at his deposition that his physician had not released him to work in any capacity since his August 9, 2009 injury. (CP 142-43; CP 353-54) ("Q. Have you been released to perform any kind of work since you – essentially since you left employment at Golden State? A. No, sir, I haven't."). Accordingly, the trial court's grant of summary judgment was proper.

3. Brown's Retaliatory Discharge Claim

Brown alleges that QCDS terminated him in retaliation for pursuing worker's compensation benefits. To state a prima facie claim, Brown was required to show that (1) he exercised the statutory right to pursue worker's compensation benefits or communicated to QCDS his intent to do so; (2) he was then terminated; and (3) there was a causal connection between his pursuit of benefits and his termination. *Anica v. Wal-Mart Stores, Inc.*, 120 Wn. App. 481, 490-91, 84 P.3d 1231 (2004).

The trial court correctly granted QCDS summary judgment on Brown's retaliation claim for two reasons. First, Brown could not establish a "causal connection" as a matter of law. It was undisputed that QCDS decided to terminate Brown on August 1, 2009, a week before he was injured and sought worker's compensation benefits. (CP 177-86, at 184.) Brown also admitted that he did not file a claim for workers'

compensation benefits until after he was informed of his termination. (CP 159-61.) The timing of both QCDS's termination decision and Brown's claim justified summary judgment as a matter of law. *See Anica*, 120 Wn. App. at 490-91 (discharge must follow exercise of right to workers' benefits to show prima facie causation).

Second, QCDS articulated a legitimate reason for Brown's termination, *viz.*, his poor performance during his 90-day probationary period. (CP 177-86, at 184.) Accordingly, it was necessary for Brown to produce evidence showing that QCDS's reason was pretext or that his pursuit of workers' compensation benefits was a "substantial factor" motivating his termination. *Anica*, 120 Wn. App. at 492. By his own admission, however, Brown had received counseling about his poor performance before his alleged workplace injury, including a warning that, if he did not start timely completing his routes, he "probably wasn't going to be there." (CP 133.) Brown further agreed that completing routes timely was a "legitimate request." (CP 130.)

On appeal, Brown attacks the trial court's ruling in two ways, neither of which is well-founded. He first argues that the trial court erred in considering, and failing to strike, the evidence showing that QCDS decided to terminate him a week before his workplace injury. As

explained in Section (B), above, the trial court properly considered that evidence and found it dispositive. (RP 17-18.)

Brown also argues that there was evidence from which a jury could have concluded that QCDS's performance-based reason for his termination was pretext. Specifically, Brown contends that he "was doing as good as job as any other driver" and that similarly situated drivers had identical performance problems, but were not terminated. (App. Br. pp. 40-47.) When one checks Brown's citations to the record, his contentions are inadmissible, misstated, or unhelpful.

For example, Brown leads with the remarkable assertion that, in response to an interrogatory, QCDS admitted that "there were no complaints received about [Brown's] job performance." (App. Br. p. 40.) He cites to CP 278, which reveals something quite different: QCDS admitted that there were "no complaints received from or about [Brown] *alleging a form of unlawful employment practice*." (CP 278) (emphasis added). It is undisputed that, well before Brown was injured, QCDS was unhappy with his job performance and had made that known to him. (*See* CP 133) ("if I didn't speed up . . . I probably wasn't going to be there"). It is also undisputed that QCDS had decided to terminate Brown as a result. (*See* CP 184) ("[Brown] has been on U. Village [route] the past few nights and hasn't got past stop #5 before 1:00 am. We have had to send help to

him every night including Steve helping him on one of those nights. . . . U. Village is kicking his butt"; "we can get rid of him after 8/8, unless Eric wants to get rid of him earlier than that.").

Similarly unsupported is Brown's assertion that "many, if not most other drivers had [the] same issues as [him]." (App. Br. p. 41.) Brown points to a summary of a deposition in which his counsel asked Eric Lard whether, as of June 5, "it appears that most of those drivers had used up their 70-hour driving limit" (meaning that they had maxed out their available hours), and Lard responded that he was "not sure of that. No, I can't say that." (*See* CP 264-79, at 276-77.)

Brown also relies heavily on his own declaration and the declaration of Anthony Walton, both of which baldly assert that "other drivers" had similar performance issues. (*See* App. Br. pp. 42-44) (citing CP 290, 322, and 323). The conclusory assertions of Brown and Walton, lacking any specificity or documentary support, were not sufficient to overcome summary judgment. *See Lane v. Harborview Medical Center*, 154 Wn. App. 279, 288, 227 P.3d 297 ("A declaration that contains only conclusory statements without adequate factual support does not create an issue of material fact that defeats a motion for summary judgment.") (citing *Guile v. Ballard Community Hosp.*, 70 Wn. App. 18, 25, 851 P.2d 689 (1993)). The trial court did not err in granting summary judgment.

4. Brown's Meal and Rest Break Claim

Washington employers must allow hourly employees a paid rest period "of not less than ten minutes" for each four hours of working time and a meal period "*of* at least thirty minutes" during each shift of five hours or more. WAC 296-126-092. The law requires only that employers make required breaks available; "an employer does not have an obligation to schedule meal periods or rest breaks under WAC 296-126-092." *Pellino v. Brink's Inc.*, 164 Wn. App. 668, 691, 267 P.3d 383 (2011) (citing *White v. Salvation Army*, 118 Wn. App. 272, 283, 75 P.3d 990 (2003)).

QCDS moved for summary judgment against Brown's meal and rest break claim based on his admission that he knew he was allowed to take breaks, but that he had not taken them and "never told" anyone at QCDS. (CP 136.) "Washington law does not require that breaks be taken," and QCDS argued that it did not violate the law when Brown elected "not to take advantage of Washington's meal and rest break provision." *Eisenhauer v. Rite Aid Hdqrts.*, 2006 WL 1375064, at *3 (W.D. Wash. May 18, 2006). QCDS pointed to the numerous courts that had rejected missed break claims where the employer had no knowledge of missed breaks and/or did not pressure employees to miss breaks. *See, e.g., Brinker Restaurant Corp. v. Superior Court*, 273 P.3d 513, 536 (Cal.

2012) ("employees cannot manipulate the flexibility granted them by employers to use their breaks as they see fit to generate . . . liability.").

In opposition to summary judgment, Brown failed to submit competent evidence of a material dispute. He submitted two declarations, one that did not address his meal and rest break claim at all, (CP 287-93), and one in which he averred: "I had no time allowed for my lunch, nor my two 10 minute breaks. Nor was I paid for them." (CP 35-37, at 37.) That bald assertion, which simply restated Brown's allegations in his Complaint, was not sufficient to overcome summary judgment. *See Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.*, 122 Wn. App. 736, 743, 87 P.3d 774 (2004) (party opposing summary judgment may not rely on "mere allegations, denials, opinions, or conclusory statements but, rather must set forth specifics indicating material facts for trial.").

Brown also submitted a declaration from his attorney that purported to set out extensive excerpts from witness deposition testimony, including testimony from Eric Lard. (CP 264-279.) The content of that declaration was inadmissible, and QCDS appropriately asked the trial court to disregard it. *See* CP 325, 443. A party's attorney cannot introduce deposition testimony by way of a "summary" declaration; CR 56(e) requires that declarations attach "sworn or certified copies of all papers . . . referred to." *See Caldwell v. Yellow Cab Service, Inc.*, 2 Wn.

App. 588, 592, 469 P.2d 218 (1970) (purported deposition testimony quoted in counsel's declaration was not competent evidence and appropriate subject of motion to strike).[2]

Lastly, Brown submitted the declaration of Anthony Walton, a former co-worker who had worked with Brown for only "about two weeks." (CP 321-23.) Notably, Walton did not confirm that Brown had missed rest or meal breaks, even during the short period when Walton would have had personal knowledge. Instead, Walton stated that lunch and rest breaks were not "written into" route schedules and that drivers "had to work through" the breaks "for the most part." Again, Washington law did not require QCDS to schedule breaks, *Pellino*, 164 Wn. App. at 691, and Walton's statement that drivers "had" to work through breaks "for the most part" was neither specific to Brown, nor consistent with Brown's testimony: "I know we was allowed lunch and breaks in the field. [*sic*] . . . My situation is I just went out and just tried to get the job done." (CP 134, 136.) Brown "never told [QCDS] about that." (CP 136.)

On appeal, Brown points to the same evidence, including his own declaration, which is insufficient, and purported deposition testimony

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2 *See also Orr v. Bank of America, NT & SA*, 285 F.3d 764, 774 (9th Cir. 2002) ("A deposition or an extract therefrom is authenticated in a motion for summary judgment when it identifies the names of the deponent and the action and includes the reporter's certification that the deposition is a true record of the testimony of the deponent.").

quoted from his attorney's declaration, which is inadmissible. (App. Br. pp. 11-13.) Brown further argues that "[t]elling the employee . . . he/she can find time during the day to both take a meal break and a rest period is obviously not providing for these on the employer's time and is not scheduling them as required by law." As explained above, that is not a correct statement of what the law requires. *Pellino*, 164 Wn. App. at 691; *White*, 118 Wn. App. at 283. The trial court did not err in granting summary judgment.

CONCLUSION

For the foregoing reasons, QCDS requests that the Court affirm the trial court's rulings on the parties' cross-motions for summary judgment and dismiss Brown's appeal.

Respectfully submitted this 4th day of December, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of December, 2013, I served the foregoing **Respondents' Brief** on:

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