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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DESDNIE HESS,

Plaintiff,

No. 3:21-cv-00093 WHA

v.

UNITED PARCEL SERVICE, INC.,

UPS.

**ORDER GRANTING MOTION TO
DISMISS**

INTRODUCTION

In this putative class action for COVID-19 workplace health and safety violations, defendant moves to dismiss the complaint entirely. Because plaintiff is not a current employee, she lacks standing to seek injunctive relief against defendant’s employment practices. The public nuisance tort claim is barred by the exclusive remedy rule of workers’ compensation. Plaintiff does not state a claim for business expense reimbursement. Therefore, the motion is **GRANTED**.

STATEMENT

Plaintiff Desdnie Hess is a former employee of defendant United Parcel Service, Inc., the multinational shipping and logistics giant. From about October 2019 to May 2020, plaintiff worked as a local sort supervisor at UPS’s distribution center in Santa Maria, California. Plaintiff made “schedules for warehouse associates and to oversee and direct them while they

1 unloaded delivery trucks, sorted packages, and re-loaded the sorted packages into semi-
2 truck[s]” (Compl. at ¶ 15).

3 Plaintiff alleges that UPS failed to take reasonable steps to limit the spread of COVID-19
4 among its employees while they worked for UPS in violation of the California Occupational
5 Health and Safety Act, Cal. Lab. Code §§ 6300 *et seq.*, and applicable regulations and
6 guidance. For example, plaintiff alleges (Compl. at ¶¶ 48–50, 52, 53, 55):

- 7 • UPS failed to ensure social distancing among its employees. There were
8 approximately 300 employees at the Santa Maria facility working side-by-side,
9 indoors, with only about 1.5–2 feet in between.
- 10 • UPS failed to adequately sanitize the Santa Maria facility or provide adequate
11 personal protective equipment (PPE). UPS did not adequately sanitize or clean
12 common areas or bathrooms. Employees regularly touched potentially
13 contaminated surfaces without gloves or access to sanitizing wipes.
- 14 • UPS did not provide its employees with face coverings until May 2020, well after
15 the virus was circulating. Even then, there were never enough face coverings for
16 all employees.
- 17 • UPS did not modify the ventilation or airflow systems at the Santa Maria facility.
- 18 • UPS did not provide a training or illness prevention program to educate its
19 employees about COVID-19.
- 20 • At least three employees at the Santa Maria facility contracted COVID-19. UPS
21 failed to take action to prevent others from being infected, did not do contact
22 tracing for the infected individuals, and did not notify employees who had been in
23 close contact with the infected individuals.
- 24 • Due to UPS’s failure to provide adequate sanitizer, cleaning supplies, masks and
25 other PPE, plaintiff and other employees had to buy those things themselves to
26 protect themselves from contracting COVID-19 while working for UPS.

1 In July 2020, plaintiff filed a complaint with the same allegations with the California
2 Department of Industrial Relations (*id.* at ¶ 59). Plaintiff also alleges that UPS operated all its
3 California facilities in a substantially similar fashion (*id.* at ¶ 51).

4 Plaintiff filed her complaint in Alameda County Superior Court. She brought four claims
5 for relief: public nuisance under California’s Civil Code § 3480; unfair competition under
6 California’s Business and Profession Code § 17200; reimbursement of business expenses
7 under California’s Labor Code §§ 2800, 2802; and declaratory relief. She also sought to
8 represent a class comprised of “All current and former non-exempt workers employed by
9 United Parcel Service, Inc. throughout California any time starting four years prior to the filing
10 of this Complaint until resolution of this action” (*id.* at ¶ 61).

11 UPS timely removed the action here. Jurisdiction is proper under 28 U.S.C. § 1332(a)
12 and (d). UPS moves to dismiss the complaint under FRCP 12(b)(1) and (6). This order
13 follows full briefing and a hearing held telephonically.

14 ANALYSIS

15 FRCP 8(a) requires a claim for relief to contain “a short and plain statement of the claim
16 showing that the pleader is entitled to relief.” “To survive a motion to dismiss, a complaint
17 must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is
18 plausible on its face.’ A claim has facial plausibility when the plaintiff pleads factual content
19 that allows the court to draw the reasonable inference that the defendant is liable for the
20 misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). In
21 making the plausibility assessment, all well-pled factual allegations are taken as true and all
22 reasonable inferences that can be drawn from the well-pled facts are drawn in favor of the
23 complaint. *See ibid.*

24 1. ARTICLE III STANDING.

25 Article III of the Constitution limits federal court jurisdiction to cases or controversies.
26 *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1547 (2016). “Standing to sue is a doctrine rooted in
27 the traditional understanding of a case or controversy.” *Ibid.* To have standing to sue in
28 federal court, the “plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable

1 to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable
2 judicial decision.” *Ibid.*

3 “To establish injury in fact, a plaintiff must show that he or she suffered ‘an invasion of
4 a legally protected interest’ that is ‘concrete and particularized’ and ‘actual or imminent, not
5 conjectural or hypothetical.’” *Id.* at 1548 (citation omitted). “For an injury to be
6 ‘particularized,’ it ‘must affect the plaintiff in a personal and individual way.’” *Ibid.* (citation
7 omitted).

8 Furthermore, “[s]tanding must be shown with respect to each form of relief sought,
9 whether it be injunctive relief, damages or civil penalties.” *Bates v. United Parcel Service,*
10 *Inc.*, 511 F.3d 974, 985 (9th Cir. 2007). Only current employees have standing to seek
11 injunctive relief against their employer’s employment practices. *Ellis v. Costco Wholesale*
12 *Corp.*, 657 F.3d 970, 988 (9th Cir. 2011).

13 UPS argues that plaintiff did not suffer an injury in fact because she did not actually
14 contract COVID-19 but was only exposed to an increased risk of doing so. An increased risk
15 of exposure to COVID-19, however, is an injury in fact for purposes of Article III standing.*
16 Most of those decisions involved increased risk of exposure in circumstances of civil
17 detention or incarceration. But the meaning of Article III does not change depending on the
18 type of case or claim.

19 UPS also argues that plaintiff’s harm is not redressable because she is no longer
20 employed by UPS. To the extent the argument is premised on plaintiff’s lack of standing to
21 seek injunctive relief, UPS is correct. Because plaintiff is no longer an employee of UPS, she
22 cannot seek injunctive relief or prospective relief of any kind directed at her former employer’s
23 employment practices. *Ellis v. Costco Wholesale Corp.*, 657 F.3d at 988.

24
25 _____
26 * *Texas Democratic Party v. Abbot*, 978 F.3d 168, 178 (5th Cir. 2020) (in person voting); *Zepeda*
27 *Rivas v. Jennings*, 445 F.Supp.3d 36 (N.D. Cal. April 29, 2020) (immigration detention) (Judge
28 Vince Chhabria); *Carranza v. Reams*, 2020 WL 2320174 (D. Colo. May 11, 2020) (pre-trial
detainment and post-conviction incarceration) (Chief Judge Philip A. Brimmer); *Prieto Refunjol v.*
Adducci, 461 F.Supp.3d 675 (S.D. Ohio May 14, 2020) (immigration detention) (Judge Sarah D.
Morrison); *Gutierrez-Lopez v. Figueroa*, 462 F.Supp.3d 973 (D. Ariz. May 27, 2020)
(immigration detention) (Judge Steven P. Logan).

1 In addition to injunctive and declaratory relief, however, plaintiff seeks compensatory
2 damages and civil and statutory penalties. UPS does not argue that such remedies would not
3 redress plaintiff's injury.

4 Therefore, the motion to dismiss for lack of subject-matter jurisdiction is **DENIED**.

5 **2. SECTION 17200.**

6 California's Unfair Competition Law prohibits unfair competition, broadly defined as
7 "any unlawful, unfair or fraudulent business act or practice. . . ." Cal. Bus. & Prof. Code §
8 17200. "By proscribing any unlawful business practice, section 17200 borrows violations of
9 other laws and treats them as unlawful practices that the unfair competition law makes
10 independently actionable." *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Telephone Co.*,
11 20 Cal.4th 163, 180 (1999) (cleaned up).

12 While the substantive scope of § 17200 is broad, its remedies are limited. The remedies
13 available to a private plaintiff under § 17200, as opposed to a district attorney or city or county
14 counsel, "are generally limited to injunctive relief and restitution." *Cel-Tech Commc'ns.*, 20
15 Cal.4th at 179.

16 As noted, plaintiff does not have standing to seek injunctive relief.

17 Nor has she stated a claim for restitution.

18 Restitution under Business and Professions Code section 17203 is
19 confined to restoration of any interest in money or property, real or
20 personal, which may have been acquired by means of such unfair
21 competition. A restitution order against a defendant thus requires
22 both that money or property have been lost by a plaintiff, on the
23 one hand, and that it have been acquired by a defendant, on the
24 other. Compensatory damages are not recoverable as restitution.

25 *Zhang v. Superior Court*, 57 Cal. 4th 364, 371 (2013) (citations omitted).

26 [A]n order for restitution [is] one compelling a UCL defendant to
27 return money obtained through an unfair business practice to those
28 persons in interest from whom the property was taken, that is, to
persons who had an ownership interest in the property or those
claiming through that person.

Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1144–45 (2003) (cleaned up).

Here, plaintiff alleges that because of UPS's failure to provide personal protective
equipment, masks, hand sanitizer, etc., she and other employees had to buy those things

1 themselves to protect themselves while working for UPS. She alleges she is entitled to
2 reimbursement for those purchases under California’s Labor Code, which she brings as a
3 separate claim for relief. She cannot recover those expenditures as restitution because the
4 money she spent did not pass to UPS; UPS did not acquire the money from plaintiff by means
5 of its alleged unfair competition. Plaintiff makes no allegations supporting the remedy of
6 restitution.

7 Therefore, because plaintiff lacks standing to seek injunctive relief, and because she
8 alleges no facts plausibly stating a claim for restitution, her § 17200 claim must be **DISMISSED**.
9 This order does not address UPS’s other arguments for dismissal of the § 17200 claim.

10 **3. PUBLIC NUISANCE.**

11 Under California law, a nuisance includes “[a]nything which is injurious to health”
12 Cal. Civ. Code § 3479. A public nuisance, as opposed to a private nuisance, is

13 one which affects at the same time an entire community or
14 neighborhood, or any considerable number of persons, although
15 the extent of the annoyance or damage inflicted upon individuals
16 may be unequal.

17 *Id.* § 3480.

18 UPS argues plaintiff’s public nuisance claim is barred by the exclusive remedy rule of
19 California’s Workers’ Compensation Law. Cal. Lab. Code §§ 3200 *et seq.* California Labor
20 Code § 3600(a) states in part,

21 Liability for the compensation provided by this division, in lieu of
22 any other liability whatsoever to any person except as otherwise
23 specifically provided in Sections 3602, 3706, and 4558, shall . . .
24 exist against an employer for any injury sustained by his or her
25 employees arising out of and in the course of the employment

26 Section 3602(a) states in part,

27 Where the conditions of compensation set forth in Section 3600
28 concur, the right to recover compensation is . . . the sole and
exclusive remedy of the employee . . . against the employer.

The “conditions of compensation” are present here. Plaintiff’s alleged harm arose out of
and in the course of her employment for UPS and was proximately caused by the employment.
Moreover, at the hearing on the instant motion, UPS represented that at the time of plaintiff’s

1 injury, UPS and plaintiff were subject to the compensation provisions of the Workers’
2 Compensation Law. The exceptions to the exclusive remedy rule of the Workers’
3 Compensation Law provided by Labor Code §§ 3602, 3706, and 4558 do not apply.

4 Plaintiff does not dispute this. Instead, she argues that the exclusive remedy rule does
5 not apply because (Dkt. No. 17 at 15):

6 Plaintiff and the putative class did not suffer an injury through the
7 normal operation of Defendant’s business—they were forced to
8 work in facilities that were rendered dangerous and unsafe by
virtue of Defendant’s non-compliance with applicable regulations
related to COVID-19.

9 Thus, plaintiff’s public nuisance tort claim is predicated on UPS’s alleged violations of
10 California’s Labor Code and applicable regulations and guidance (*see* Compl. at ¶¶ 33–47).
11 She is barred, however, from pursuing a tort claim or tort damages by the exclusive remedy
12 rule of the Workers’ Compensation Law. *See Shoemaker v. Myers*, 52 Cal.3d 1, 16 (1990).
13 The exclusive remedy rule applies only to claims for damages, however, not equitable relief.

14 To the extent plaintiff seeks to enforce UPS’s duty to provide “a place of employment
15 that is safe and healthful for the employees therein,” Cal. Lab. Code §6400(a), she has not
16 stated a claim under California’s Labor Code Private Attorneys General Act of 2004, *id.* §§
17 2698 *et seq.*

18 Therefore, the public nuisance claim is **DISMISSED**. This order does not address UPS’s
19 other arguments for dismissal of the public nuisance claim.

20 **4. LABOR CODE §§ 2800, 2802(a).**

21 Section 2800 of California’s Labor Code states, “An employer shall in all cases
22 indemnify his employee for losses caused by the employer’s want of ordinary care.”

23 Section 2802(a) states, “An employer shall indemnify his or her employee for all
24 necessary expenditures or losses incurred by the employee in direct consequence of the
25 discharge of his or her duties”

26 Plaintiff seeks to be reimbursed for the cost of face coverings, masks, hand sanitizer, and
27 cleaning supplies like sanitization wipes. UPS argues these items are not reimbursable as
28 business expenditures because they were generally usable in all circumstances when plaintiff

1 worked for UPS at the inception of the pandemic, in Spring 2020. This order agrees. Indeed,
2 the parties agree that by late May 2020, Santa Barbara County, where plaintiff worked,
3 required masks to be worn indoors in public generally. *See*
4 [https://countyofsb.org/uploadedFiles/phd/PROGRAMS/Disease_Control/Corona/Health%20](https://countyofsb.org/uploadedFiles/phd/PROGRAMS/Disease_Control/Corona/Health%20Officer%20Order%202020-10.pdf)
5 [fficer%20Order%202020-10.pdf](https://countyofsb.org/uploadedFiles/phd/PROGRAMS/Disease_Control/Corona/Health%20Officer%20Order%202020-10.pdf). Plaintiff points out that the order required businesses to
6 require their employees to wear a face covering while working; but the order does not say that
7 employers must supply the masks or reimburse employees for the costs of masks they use at
8 work. More fundamentally, the order reflects that the mask requirement was not an expense
9 UPS required its employees to incur for its benefit, but instead an obligation imposed on it by
10 law. The same is true of the other items plaintiff seeks reimbursement for. Plaintiff does not
11 show that she incurred these expenses for the benefit of UPS and she points to no law
12 specifically requiring UPS to reimburse her.

13 Therefore, the claim for business expense reimbursement under §§ 2800 and 2802(a) is
14 **DISMISSED.**

15 **5. DECLARATORY JUDGMENT.**

16 Plaintiff states a “claim” for declaratory judgment. A declaratory judgment is not a claim
17 but a remedy. Plaintiff states no claim for relief, declaratory or otherwise.

18 **CONCLUSION**

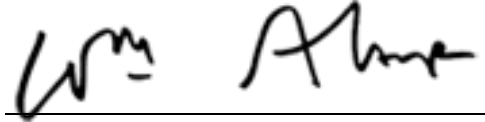
19 For the foregoing reasons, the complaint is **DISMISSED.**

20 Plaintiff may seek leave to amend the complaint. Plaintiff has **FOURTEEN DAYS** from
21 the date of this order to file a motion, noticed on the normal 35-day calendar, for leave to file
22 an amended complaint. A proposed amended complaint must be appended to the motion. In
23 the proposed amended complaint, plaintiff should bring only colorable claims. The motion
24 should explain how the amendments to the complaint address the defects identified in this
25 order as well as any problems identified by UPS in its motion potentially relevant to the
26 amended complaint but not addressed by this order.

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IT IS SO ORDERED.

Dated: April 29, 2021



WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE