

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MARCI SCIANNA and AMY
LAMSON,

Plaintiffs,

v.

COSTCO WHOLESALE
CORPORATION,

Defendant.

Case No. 18-cv-03145-NC

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT**

Re: Dkt. No. 56

Plaintiffs Marci Scianna and Amy Muscato Lamson bring claims for age discrimination, retaliation, breach of contract, and various wage and hour violations against their long-time employer, Costco. Dkt. No. 1. Costco moves for summary judgment on all claims. Dkt. No. 56. The Court FINDS that no genuine disputes of material fact exist as to the plaintiffs' age discrimination, retaliation, or various wage and hour claims, and further FINDS that the evidence shows that Costco is entitled to judgment as a matter of law as to all of the plaintiffs' claims except their breach of contract claim. The Court FINDS that there exist genuine issues of material fact as to whether Costco had good cause to terminate the plaintiffs, because the plaintiffs have presented evidence that they may have had an implied contract with Costco authorizing the conduct for which they were terminated. The motion for summary judgment is DENIED as to the plaintiffs' breach of contract claim.

1 **I. Background**

2 **A. Undisputed Facts**

3 **1. Plaintiffs Amy Lamson and Marci Scianna**

4 Plaintiff Amy Lamson started working for Costco at its Santa Cruz warehouse in
5 1994. Dkt. No 56, Ex. A (Lamson Dep.) 42:1–3. Lamson worked as an Administration
6 Supervisor from 1997 to 2012, until Costco determined that her position “no longer
7 existed” and reclassified her as an hourly employee. Dkt. No. 62, Ex. 2 (Lamson
8 Declaration) ¶ 1. Her duties as Administration Supervisor included maintaining the
9 payroll and timekeeping system (called Work Force Central, or “WFC”), writing employee
10 schedules, approving and inputting schedule changes, processing and approving vacation
11 and sick time requests, and processing payroll. Lamson Decl. ¶ 2. When she was
12 reclassified as an hourly employee in 2012, none of Lamson’s duties or responsibilities
13 changed (though her pay decreased). Id. These were her job responsibilities at the time of
14 her termination in 2017. Id. Lamson was 43 years old at the time of her termination.
15 Lamson Dep. 11:21–22.

16 Plaintiff Marci Scianna started working for Costco at its Santa Cruz warehouse in
17 1995. Dkt. No. 56, Ex. B (Scianna Dep.) 48:5–7. Scianna was Lamson’s backup Payroll
18 Clerk, and shared Lamson’s duties. Dkt. No. 62, Ex. 3 (Scianna Declaration) ¶ 1–3. She
19 was reclassified as an hourly employee in 2000, but still regularly filled in as a supervisor
20 and retained the same duties and responsibilities as before her reclassification. Scianna
21 Decl. ¶ 3. She had the same WFC access as Lamson. Scianna Dep. 57:14–58:18. Scianna
22 was 42 years old at the time of her termination in 2017. Compl. at ¶ 1.

23 Generally, Costco warehouses are led by a general manager, three assistant general
24 managers, and individual department managers. Lamson Decl. ¶ 3. The Administration
25 Department at the Santa Cruz warehouse had no individual department manager as of at
26 least 1997. Id. ¶ 4; Scianna Decl. ¶ 4. In lieu of a named Administration Department
27 manager, Lamson fulfilled managerial responsibilities as Administration Supervisor until
28 her reclassification in 2012. Id. Even after her position title changed in 2012, her duties

1 did not change. Lamson Decl. ¶ 3. Scianna similarly performed managerial duties.
2 Scianna Decl. ¶ 5. For instance, they both ran inventories, drafted counseling notices and
3 sat in on counseling and suspension meetings, managed facilities including remodels,
4 processed member claims, and handled worker’s compensation and OSHA claims.
5 Lamson Decl. ¶ 6; Scianna Decl. ¶ 5. Scianna performed tasks typically reserved to
6 managers, such as opening the front of the store by herself and removing jewelry from the
7 vault and, at one point, holding an internal key to the warehouse. Scianna Decl. ¶ 5, 7. In
8 2016, Lamson and Scianna represented the Santa Cruz warehouse at a WFC conference for
9 which Scianna was instructed to change her name badge to “Admin Manager” to attend.
10 Id. ¶ 6.

11 Lamson and Scianna both had manager-level access to systems relating to their
12 payroll duties. An Assistant General Manager gave them both manager codes to the
13 Money In, Money Out system. Scianna Decl. ¶ 7. They had manager-level WFC access.
14 Id. Scianna had an Administration Manager profile and password as well as a manager
15 email address and profile. Id.

16 Costco Santa Cruz managers and employees regularly contacted Lamson and
17 Scianna while they were not scheduled to work because Lamson and Scianna were so
18 knowledgeable about warehouse operations. Lamson Decl. ¶ 16. They received texts and
19 calls while off the clock almost daily, even in the middle of the night, but never reported
20 this time worked to Costco because they saw it as doing their part for the team and felt
21 happy to help out. Scianna Decl. ¶ 8; Lamson Decl. ¶ 16.

22 **2. Costco Santa Cruz’s Scheduling Policies and Practices**

23 At the Santa Cruz Costco warehouse, employee schedules were posted three weeks
24 in advance. Lamson Dep. 54:3–5. Lamson was responsible for posting the schedule for
25 the Administration Department; she printed and posted a hard copy in the employee break
26 room and in the office. Scianna Dep. 58:2–10. If an employee in any department wanted
27 to make a change to a schedule after it was posted, he or she could do so by
28 communicating with their supervisor or a manager. Id. At the Santa Cruz Costco

1 warehouse, scheduling changes were generally accommodated when possible and requests
2 were granted unless they created a problem with coverage. Lamson Decl. ¶ 11; Dkt. No.
3 62, Ex. F (Addie Finnell Deposition) 44:18–45:3. Schedules were fluid and they
4 continually changed up until the last minute to accommodate employees’ needs. Dkt. No.
5 62, Ex. 4 (Anna Gizycki Declaration) ¶ 7. There was no written process for requesting a
6 schedule change, such as a form, and no formal mechanism for confirming or auditing
7 schedule changes. Lamson Decl. ¶ 11. Changes to employee schedules were not
8 documented anywhere except in WFC. Id.

9 Employees swiped in and out of work using a physical time clock in the warehouse.
10 Lamson Decl. ¶ 9. If unable to swipe in or out, employees used a physical “Exception
11 Log” noting the time they clocked in or out of work. Id. A manager had to approve
12 entries to the Exception Log. Id. Lamson and Scianna were then responsible for manually
13 entering Exception Log data into the WFC system. Id. If an employee swiped in more
14 than three minutes past his or her scheduled start time, the WFC system flagged a “tardy”
15 with a red box around the entry. Id. ¶ 13; Lamson Dep. 149:9–14; Scianna Dep. 65:19 –
16 67:7. Managers could “excuse” a tardy before it was entered onto an employee’s record.
17 Id. The official Costco policy required a manager to issue a counseling notice to an
18 employee after three tardies in one month, but if a counseling notice was not issued within
19 three days, the tardy would lapse and no notice could be issued. Finnell Dep. 53:18–20.
20 The policy of issuing counseling notices for tardies was selectively enforced at the Santa
21 Cruz warehouse and many incidents lapsed because no notices were issued. Lamson Decl.
22 ¶ 13. Though Costco policy stated that three counseling notices for tardies could be cause
23 for termination, no evidence in the record suggests that a termination for tardies ever
24 occurred at the Santa Cruz Warehouse. None of the warehouse employees or supervisors
25 in this case could recall any employee being terminated for tardies at any warehouse.
26 Lamson Decl. ¶ 14; Christiansen Dep. 63:9–64:4; Boggiano Dep. 34:8–14; McKenzie Dep.
27 71:8–10; Finnell Dep. 53:21–25.

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1 **3. Lamson’s and Scianna’s Terminations**

2 In January 2017, Jeremy Christiansen became the General Manager of the Santa
3 Cruz Costco warehouse. Lamson Dep. 59:8–60:10. Lamson, Scianna, and other
4 employees felt that Christiansen began a campaign to change the warehouse culture upon
5 arrival. Lamson Decl. ¶ 17. Some employees felt that Christiansen disproportionately
6 disciplined older, more experienced employees and favored younger, less experienced
7 employees because he preferred a workforce that was easier to control. Dkt. No. 62, Ex. 5
8 (Ismael Torres Declaration), ¶ 7.

9 In May 2017, Costco’s regional office conducted a routine unannounced warehouse
10 operational audit of the Santa Cruz warehouse. Lamson Dep. 98:13–99:3. These occurred
11 once or twice per year. Id. The May 2017 audit of the Santa Cruz warehouse was
12 performed by Regional Operations Auditor Tamara Mayo-Neville. Neville Dep. 70:12–
13 20. During her audit, Neville found that Lamson and Scianna had made changes to one
14 another’s schedules in WFC and that these changes appeared to be intended to avoid being
15 charged with tardies. Id. 81:32–82:21. For example, on April 1, 2017, Scianna was
16 scheduled to start work at 7:30 a.m. but she clocked in at 7:34 a.m.; the next day, Lamson
17 changed Scianna’s start time in WFC to 7:45 a.m. to remove the tardy. Lamson Dep.
18 222:20–224:6, Ex. 16.

19 Neville reported her findings to General Manager Christiansen and recommended a
20 review by Costco’s Central Payroll Department in Washington. Id; Christiansen Dep.
21 110:22–111:18. Christiansen responded that he needed permission from Darby Greek,
22 regional manager, to involve Central Payroll. Id. He requested and received permission
23 from Greek and told Neville to contact Central Payroll. Id. Theresa Ramirez from Central
24 Payroll subsequently reviewed Lamson’s and Scianna’s WFC entries. Ramirez found the
25 following issues:

- 26 1. Lamson and Scianna had made changes to one another’s schedules in WFC
27 which appeared to be intended to avoid being charged with tardies. Id. 81:32–
28 82:21.

1 2. Lamson and Scianna had made changes to the schedule of Lamson’s husband,
2 Greg, who also worked at the Santa Cruz warehouse. Scianna Dep. 158:3–21.

3 3. Lamson and Scianna had and used supervisor and manager access codes that
4 were not appropriate for their positions. Neville Dep. 87:25–122:1.

5 These findings were sent to Neville, who sent them to Greek. Greek Decl. ¶ 6.
6 Greek relayed the findings to Christiansen. Greek Decl. ¶ 7. On June 8, 2017, Greek
7 directed Christiansen to suspend Lamson and Scianna pending investigation and
8 termination. Greek Decl. ¶¶ 7–8. Christiansen suspended Lamson on June 12, 2017, and
9 Scianna on June 19, 2017. Lamson Dep. 123:20–124:8; Scianna Dep. 154:21 – 155:12.
10 Both plaintiffs admitted to having made the scheduling changes but stated that they were
11 previously given permission to make those changes by their former supervisor Anthony
12 McKenzie. Lamson Dep. 136:21–139:21; Scianna Dep. 190:10–15. Christiansen and
13 Finnell met with Lamson and Scianna and terminated them for falsification of time records
14 on June 22, 2019. Lamson Dep. 243:9–18; Scianna Dep. 309:10–310:24.

15 **B. Procedural History**

16 Plaintiffs filed their case in Santa Cruz Superior Court. Dkt. No. 1. Their complaint
17 alleges causes of action for: age discrimination in violation of the Fair Employment and
18 Housing Act; retaliation in violation of FEHA; failure to prevent discrimination in
19 violation of FEHA; punitive damages under FEHA; failure to pay minimum wages and
20 overtime premiums in violation of the Labor Code; failure to provide meal periods and rest
21 breaks in violation of the Labor Code; inaccurate paystubs in violation of the Labor Code;
22 and breach of contract. Dkt. No. 1, Ex. A. Costco removed the case to this Court. Dkt.
23 No. 1. All parties consented to the jurisdiction of a magistrate judge under 28 U.S.C. §
24 636(c). Dkt. Nos. 9, 11.

25 **II. LEGAL STANDARD**

26 Summary judgment may be granted only when, drawing all inferences and
27 resolving all doubts in favor of the nonmoving party, there is no genuine dispute as to any
28 material fact. Fed. R. Civ. P. 56(a); *Tolan v. Cotton*, 134 S. Ct. 1861, 1863 (2014);

1 Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). A fact is material when, under
2 governing substantive law, it could affect the outcome of the case. Anderson v. Liberty
3 Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute about a material fact is genuine if “the
4 evidence is such that a reasonable jury could return a verdict for the nonmoving party.” Id.
5 Bald assertions that genuine issues of material fact exist are insufficient. Galen v. Cnty. of
6 L.A., 477 F.3d 652, 658 (9th Cir. 2007).

7 The moving party bears the burden of identifying those portions of the pleadings,
8 discovery, and affidavits that demonstrate the absence of a genuine issue of material fact.
9 Celotex, 477 U.S. at 323. Once the moving party meets its initial burden, the nonmoving
10 party must go beyond the pleadings, and, by its own affidavits or discovery, set forth
11 specific facts showing that a genuine issue of fact exists for trial. Fed. R. Civ. P. 56(c);
12 *Barthelemy v. Air Lines Pilots Ass’n*, 897 F.2d 999, 1004 (9th Cir. 1990) (citing *Steckl v.*
13 *Motorola, Inc.*, 703 F.2d 392, 393 (9th Cir. 1983)). All justifiable inferences, however,
14 must be drawn in the light most favorable to the nonmoving party. *Tolan*, 134 S. Ct. at
15 1863 (citing *Liberty Lobby*, 477 U.S. at 255).

16 **III. DISCUSSION**

17 **A. Age Discrimination**

18 To make a prima facie showing of age discrimination, a plaintiff must establish: (1)
19 that she was in a protected class; (2) that she was performing competently in the position
20 she held; (3) that she suffered an adverse employment action; and (4) circumstances
21 suggesting discriminatory motive. *Guz v. Bechtel Nat’l Inc.*, 24 Cal. 4th 317, 355 (2000).
22 Once a plaintiff makes a prima facie showing, the burden shifts to the defendant to provide
23 a legitimate, nondiscriminatory reason for the adverse employment action. Id. If the
24 defendant does so, the plaintiff bears the final burden to prove that the adverse
25 employment action was a result of her protected status. Id. at 355–56. To establish
26 discrimination based on disparate discipline, the plaintiff must show that the employer
27 failed to discharge or similarly discipline another employee engaged in the same or similar
28 misconduct. *McGrory v. Applied Signal Technology, Inc.*, 202 Cal. App. 4th 1510, 1535

1 (2013). Similarly-situated individuals would have the same supervisor, standards, and
2 conduct without distinguishing circumstances. *Wills v. Superior Court*, 195 Cal. App. 4th
3 143, 172 (2011).

4 Here, the Court finds that the plaintiffs have made a prima facie showing of age
5 discrimination because their burden to make this showing is “minimal” and “light.”
6 *Sandell v. Taylor-Listug, Inc.*, 188 Cal. App. 4th 297, 310 (2010). Lamson and Scianna
7 have provided undisputed evidence to show that they were performing competently in their
8 positions and had been doing so for many years. Lamson Decl. ¶¶ 2–8; Scianna Decl. ¶¶
9 3–8. They were both terminated. Some circumstances, such as declarations from two
10 other Costco Santa Cruz employees who resigned due to feeling that General Manager
11 Jeremy Christiansen was “biased against older employees” and “favor[ed] younger
12 employees,” suggest discriminatory motive. Gyzicki Decl. ¶ 3; Torres Decl. ¶ 7.

13 Costco has provided a legitimate, nondiscriminatory reason for Lamson’s and
14 Scianna’s terminations: they changed one another’s schedules in WFC in an apparent
15 attempt to avoid tardies. Neville Dep. 81:32–82:21. Lamson and Scianna admitted to this
16 conduct. Lamson Dep. 136:21–139:21; Scianna Dep. 190:10–15. Now, the plaintiffs bear
17 the burden of presenting strong enough evidence to overcome Costco’s legitimate,
18 nondiscriminatory reason for their termination. *Guz*, 24 Cal. 4th at 362. The Court FINDS
19 that they have failed to do so.

20 **1. Jeremy Christiansen was Not the Decision-Maker**

21 The fundamental flaw with plaintiffs’ age discrimination claim is that they have not
22 provided evidence that the decision-makers at Costco who actually terminated them were
23 motivated to do so based on age discrimination. All of the plaintiffs’ evidence of
24 discriminatory motive is about Jeremy Christiansen. For instance, plaintiffs point to
25 Christiansen’s promotions of employees who were in their twenties as evidence that he
26 preferred younger workers. Lamson Decl. ¶ 17; Scianna Decl. ¶ 10. Other former Santa
27 Cruz warehouse employees shared sentiments regarding Christiansen’s animus towards
28 older employees. Gyzicki Decl. ¶ 3; Torres Decl. ¶ 7.

1 However, Costco’s un rebutted evidence clearly shows that Christiansen was not the
2 person who decided to terminate Lamson and Scianna. Costco has shown, through
3 declarations, deposition testimony, and email history, that Darby Greek was the primary
4 decision-maker throughout the plaintiffs’ suspensions, investigations, and terminations.
5 See Greek Decl. ¶¶ 7–20. Christiansen sent Greek the findings of the Central Payroll
6 audit. Greek Decl. ¶ 7; Christiansen Dep. 158:18–160:22. Greek told Christiansen to
7 suspend Lamson and Scianna. Greek Decl. ¶¶ 7–8 and Ex. B; Christiansen Dep. 159:13–
8 25. Greek discussed the situation with Jeff Abadir, Senior Vice President, and John
9 McKay, Executive Vice President. Greek Decl. ¶ 10, 15–17, Ex. C. Greek gathered other
10 information, such as statements from former managers, and sent those materials to Abadir
11 and McKay with a recommendation that Lamson and Scianna be terminated. *Id.* Abadir
12 and McKay approved the terminations. Greek Decl. Exs. F, G. Greek then directed
13 Christiansen to terminate Lamson and Scianna. *Id.* Plaintiffs have provided no evidence
14 that Greek, Abadir, or McKay harbored discriminatory motives—there is not even any
15 evidence that Greek, Abadir, or McKay knew Lamson’s or Scianna’s ages.

16 Nonetheless, plaintiffs argue that Christiansen influenced their terminations. They
17 argue that “[i]t is no coincidence that only five months after Christiansen’s hire as GM,”
18 the audit leading to their terminations began. Dkt. No. 62 at 23. They also show that
19 Christiansen was involved somewhat in the investigation and termination process. For
20 example, he helped authorize Neville to contact Central Payroll to request a full audit.
21 Neville Dep. 126:11–25. At Greek’s direction, Christiansen was the person who informed
22 Lamson and Scianna of their suspensions and took their statements and ultimately
23 terminated them. Lamson Decl. ¶ 23. He also sent information about the audit to Abadir
24 and Kevin Trejo, another employee from Costco Corporate (though Greek stated that she
25 directed Christiansen to send this email). Abadir Decl. Ex. A at 7–9; Greek Decl. ¶ 10.

26 Plaintiffs also provided a declaration from another former Costco employee who
27 stated that “warehouse managers would always say that Corporate was responsible” for
28 terminations “so as not to look like the ‘bad guy,’ but, in practice, Managers made the

1 discipline recommendations, and Corporate ‘rubber-stamped’ them.” Torres Decl. ¶ 7.
2 Whether or not that was generally true, the evidence presented by both parties in this case
3 shows that Christiansen was not the person who decided to terminate Lamson and Scianna.

4 No genuine issue of material fact exists as to the reality that Greek, with approval
5 from Abadir and McKay, was the decision-maker regarding the terminations. Plaintiffs
6 have not shown that Greek, Abadir, or McKay had a discriminatory motive.

7 **2. Plaintiffs Have Not Shown Animus Toward Older Employees**

8 The second problem with plaintiffs’ age discrimination claim is that their allegation is
9 actually more about discrimination based on tenure at Costco, not based on age. These
10 characteristics are correlated: a person who has worked at Costco for a longer period of
11 time is likely older. But an older person could also be very new to Costco. Plaintiffs’
12 allegations of General Manager Jeremy Christiansen favoring younger employees are only
13 loosely based on age—more precisely, they argue that Christiansen wanted to promote less
14 experienced workers who would be easier to control and tried to penalize more
15 experienced workers who were accustomed to a different workplace culture from before
16 Christiansen’s time. Lamson describes Christiansen as “edging out established employees,
17 and hiring and promoting new, inexperienced individuals” without apparent regard to those
18 individuals’ ages. Lamson Decl. ¶ 17. She similarly states that Christiansen was
19 “threatened by anyone who . . . knew the ins and outs of the – of the way Costco runs.”
20 Lamson Dep. 260:16–261:2. Scianna states that “[b]efore Jeremy Christiansen became
21 General Manager, it was commonplace for managers to delegate their duties to experienced
22 employees . . . [w]hen Christiansen arrives, he shut us out and began a campaign to change
23 the warehouse culture. He wanted to micromanage every aspect of the warehouse, and
24 experienced employees wouldn’t be so easily steamrolled.” Scianna Decl. ¶ 10.

25 This evidence certainly suggests that Christiansen wanted to change the warehouse
26 culture by giving leadership authority to newer employees who would execute his vision.
27 However, it does not necessarily show that he only favored those who were younger over
28 those who were older.

1 **3. Plaintiffs Have Not Shown Disparate Treatment**

2 Finally, plaintiffs have not supplied sufficient evidence of disparate treatment
3 between younger and older employees. The plaintiffs’ declarations estimate the ages of
4 some employees who were promoted by Christiansen (e.g., “Brittany Ferrell (Front End
5 Supervisor promoted to floor Manager) (aged early 20s)”). Lamson Decl. ¶ 17. They also
6 provide declarations stating that some younger employees were not disciplined as harshly
7 for similar misconduct. Scianna Decl. ¶ 11; Lamson Decl. ¶ 11; Torres Decl. ¶ 9; Gyzicki
8 Decl. ¶ 12 (however, at least one of these incidents predates Christiansen’s tenure,
9 describing a disciplinary issue from April 2014 (Torres Decl. ¶ 9)).

10 One problem with these anecdotes is that the witnesses did not testify to their
11 personal involvement in any of the incidents, so it is unclear whether their descriptions of
12 the events are speculative or are reliable. Another problem is that none of the incidents
13 seems to include a similarly-situated person as required under FEHA. McGrory, 202 Cal.
14 App. 4th at 1535. Plaintiffs have not provided evidence that these other individuals had
15 the same supervisor, same standards, or similar misconduct with no mitigating or
16 distinguishing characteristics. Wills, 195 Cal. App. 4th at 172. The descriptions presented
17 are vague, brief, and do not show sufficient similarities between the incidents.

18 Plaintiffs’ evidence of animus towards older employees is similarly weak. Two
19 former employees provided declarations stating that they resigned from their positions at
20 Costco due to feeling that Christiansen was biased against older employees. Gyzicki Decl.
21 ¶ 3; Torres Decl. ¶ 7. But neither were disciplined or terminated—they resigned
22 voluntarily. Unlike in *Johnson v. United Cerebral Palsy Foundation*, where plaintiffs
23 produced admissible declarations from employees who had experienced the same
24 discipline for the same conduct (there, terminations after notifying their employer of their
25 pregnancies), the declarations from Torres and Gyzicki do not show similarities to
26 Lamson’s and Scianna’s terminations. 143 Cal. App. 4th 750 (2009).

27 The undisputed evidence shows that the decision-makers of the terminations had no
28 discriminatory motivation, and that nonetheless General Manager Christiansen had a

1 preference for less experienced employees rather than strictly younger employees.
2 Moreover, plaintiffs have not provided evidence of disparate treatment of similarly-
3 situated individuals. The Court therefore GRANTS Costco’s motion for summary
4 judgment as to plaintiffs’ age discrimination claim. The claim is hereby DISMISSED.

5 **B. Retaliation**

6 Under FEHA, it is unlawful for an employer to discharge an employee because she
7 has opposed any practices forbidden by FEHA, including discrimination or harassment
8 based on age. Gov’t Code § 12940(h); *Nealy v. City of Santa Monica*, 234 Cal. App. 4th
9 359, 380 (2015). To make a prima facie showing of retaliation under FEHA, a plaintiff
10 must show: (1) that she was engaged in protected conduct; (2) that she suffered adverse
11 employment action; and (3) that there was a causal relationship between the protected
12 conduct and the adverse employment action. *Yanowitz v. L’Oreal USA, Inc.*, 36 Cal. 4th
13 1028, 1042 (2005).

14 Here, the Court has found that the plaintiffs have not shown that any discrimination
15 occurred, and so their claim for retaliation likewise fails. The motion for summary
16 judgment as to plaintiffs’ retaliation claim is GRANTED and the claim is hereby
17 DISMISSED.

18 **C. Failure to Prevent Discrimination**

19 Under FEHA, it is unlawful for an employer to “fail to take all reasonable steps
20 necessary to prevent discrimination and harassment from occurring.” Gov’t Code §
21 12940(k). To succeed on a claim that an employer failed to prevent discrimination under
22 FEHA, a plaintiff must show: (1) that she was subjected to actionable discrimination under
23 FEHA; (2) that her employer failed to take all reasonable steps to prevent that
24 discrimination; and (3) that this failure resulted in damages. *Taylor v. City of Los Angeles*
25 *Department of Water and Power*, 144 Cal. App. 4th 1216, 1235 (2006).

26 Here, the Court has found that the plaintiffs have not shown at the first step that
27 they were subjected to actionable discrimination under FEHA, so their claim for failure to
28 prevent that discrimination likewise fails. The motion for summary judgment as to

1 plaintiffs' failure to prevent discrimination claim is GRANTED and the claim is hereby
2 DISMISSED.

3 **D. Punitive Damages**

4 To seek punitive damages under FEHA, plaintiffs must provide clear and
5 convincing evidence that a corporate officer, director, or managing agent engaged in,
6 authorized, or ratified malicious, fraudulent, or oppressive conduct toward them based on a
7 FEHA-protected status. Civ. Code § 3294; Mathieu v. Norrell Corp., 115 Cal. App. 4th
8 1174, 1190 (2004). A "corporate officer, director, or other managing agent" means
9 someone with substantial "discretionary authority over significant aspects of a
10 corporation's business," including over "formal policies that affect a substantial portion of
11 the company and are the type to come to the attention of corporate leadership." White v.
12 Ultramar, Inc., 21 Cal. 4th 563, 566–67 (1999). The only such persons involved in this
13 case were Greek, Abadir, and McKay; as the Court found above, the plaintiffs have
14 presented no evidence that any of these officers engaged in, authorized, or ratified
15 malicious, fraudulent, or oppressive conduct toward them based on any FEHA-protected
16 status. The motion for summary judgment as to plaintiffs' punitive damages remedy under
17 FEHA is GRANTED and that remedy is hereby DISMISSED.

18 **E. Rest Break, Meal Break, Minimum Wage, and Overtime Violations**

19 Employers must make "good faith effort to authorize and permit rest breaks."
20 Brinker Rest. Corp. v. Superior Court, 53 Cal. 4th 1004, 1031 (2012). Similarly,
21 California law requires employers to "provide a meal break" to employees. Id. at 1040.
22 This means the employer "relieves its employees of all duty, relinquishes control over their
23 activities and permits them a reasonable opportunity to take an uninterrupted 30-minute
24 break, and does not impede or discourage them from doing so." Id. Employers need not
25 police either rest breaks or meal breaks to ensure that they occur. Id. An employer is not
26 liable for unpaid wages when the employee prevents the employer from acquiring
27 knowledge of uncompensated work time. Jong v. Kaiser Foundation Health Plan, Inc.,
28

1 225 Cal. App. 4th 391, 395 (2014). Labor Code section 203(a) states that if an employee
2 avoids payment, their employer is not liable for penalties.

3 Labor Code sections 1197 and 510 require employers to pay at least minimum wage
4 for all hours worked and overtime pay for any overtime worked. Labor Code sections 201,
5 202, and 203 impose a penalty for employers that do not pay all wages due at termination.

6 Plaintiffs bring claims for rest period and meal break violations, unpaid wages,
7 failure to pay wages due at termination, and overtime violations. Dkt. No. 1. These claims
8 all arise out of the same factual bases: that Lamson and Scianna worked “off-the-clock,” in
9 particular by responding to phone calls and text messages from other Costco employees
10 while they were not supposed to be working, including while on breaks at the warehouse
11 and during non-work hours while they were at home. Lamson Dep. 295:3 - 295:3-19,
12 286:1-288:20, 294:15-298:19, 305:9-312:2; Scianna Dep. 240:4-241:11, 351:8-353:23,
13 355:23-360:2). Lamson and Scianna both notified Costco about this off-the-clock work
14 during the investigation into their WFC schedule changes. *Id.* There is no dispute as to
15 the fact that neither Lamson nor Scianna reported any of their off-the-clock work time to
16 Costco at any point prior to their suspensions. *Id.*; Lamson Dep. 176:25-178:10, 255:2-23,
17 290:1-14, Ex. 23; Scianna Dep. 320:6-321:22, Ex. 62. Both plaintiffs state that they
18 understood Costco’s timekeeping and pay policies, that they knew how to report all time
19 worked, and that they were paid overtime and double time when they reported overtime
20 hours throughout their employment. Lamson Dep. 308:6-15, 263:23-264:11, 284:21-
21 285:25, 331:20-332:10; Scianna Dep. 336:10-12, 352:9-15, 238:5-8, 313:23-314:6, 336:3-
22 12. They also testified that their final paychecks were accurate. Scianna Dep. 311:5-
23 313:7, Ex. 60.)

24 Here, the undisputed evidence shows that Costco met its legal obligation in
25 providing both meal breaks and rest periods, even if it did not ensure that Lamson and
26 Scianna took those breaks. Lamson Dep. 331:20-332:10, 343:9-344:19, Exs. 34, 35.
27 Costco cannot be held liable for unpaid wages when the plaintiffs prevented Costco from
28 acquiring knowledge of the time that they worked. *Jong*, 225 Cal. App. 4th at 395.

1 Similarly, Costco is not liable for penalties if an employee “avoids payment.” Labor Code
2 § 203(a). By not reporting their off-the-clock work, Lamson and Scianna created a
3 situation in which Costco was not “willfully” failing to pay them. *Amaral v. Cintas Corp.*
4 No. 2, 163 Cal. App. 4th 1157, 1201 (2008). The motion for summary judgment as to
5 plaintiffs’ claims for rest break, meal period, minimum wage, and overtime violations is
6 therefore GRANTED and those claims are hereby DISMISSED.

7 **F. Breach of Contract**

8 The elements of a breach of contract claim, whether express or implied, are: (1) the
9 existence of a contract; (2) the plaintiff’s performance or excuse for nonperformance; (3)
10 the defendant’s breach; and (4) resulting damages to the plaintiff. *Coles v. Glaser*, 2 Cal.
11 App. 5th 384, 391 (2016); *Green Valley Landowners Assn. v. City of Vallejo*, 241 Cal.
12 App. 4th 425, 433. (2015). Employment relationships are fundamentally contractual. *Guz*,
13 24 Cal. 4th at 335. An employment contract that requires good cause for termination
14 requires that the employer come to a “reasoned conclusion” that is “supported by
15 substantial evidence gathered through an adequate investigation that includes notice of the
16 claimed misconduct and a chance for the employee to respond.” *Cotran v. Rollins Hudig*
17 *Hall Int’l, Inc.*, 17 Cal. 4th 93 (1998). An implied contract is one for which the “existence
18 and terms . . . are manifested by conduct.” Cal. Civ. Code § 1621.

19 Here, the parties dispute what contract existed in the first place. Costco argues that
20 the Employment Agreement controls; Plaintiffs argue that an implied contract, ratified by
21 the parties’ conduct, existed with different terms than the Employment Agreement.

22 The Employment Agreement between Costco and the plaintiffs stated that Costco had
23 the right to terminate employees for “good and sufficient cause.” *Lamson Dep.*, Exp 27;
24 *Scianna Dep.*, Ex. 64. The EA included specific grounds that constituted “good cause.”
25 *Id.* One such ground for termination was “falsifying of Company records or timecards,
26 including omitting facts or willfully giving wrong or misleading information.” *Id.* at
27 Section 11.3. But the EA also gave Costco the exclusive right to define “good cause.” *Id.*
28 at Section 4.8. The EA required that an Executive Vice President must review

1 terminations of long-term employees. *Id.* at 28.

2 Costco argues in its motion for summary judgment and reply brief that the EA was a
3 “satisfaction contract,” that is, that Costco was the sole judge of its own satisfaction of
4 plaintiffs’ performance and could terminate them for any subjective dissatisfaction so long
5 as it had a bona fide reason for doing so. Dkt. No. 56 at 19; Dkt. No. 63 at 2. Costco also
6 emphasizes that it was not limited to the explicit grounds for termination enumerated in the
7 EA when finding good cause to terminate—Costco argues that it could terminate for “**any**
8 good and sufficient cause it finds, not just the ‘Causes for Termination’ listed in Section
9 11.3.” Dkt. No. 63 at 2 (emphasis in original). But this argument is of no moment because
10 Costco did terminate Lamson and Scianna for causes listed in Section 11.3: Lamson was
11 terminated for “falsifying company documents” and Scianna was terminated for both
12 “falsifying company documents” and “jeopardiz[ing] order and safety.” Dkt. No. 62, Exs.
13 J-D000003, J-D000328 (termination forms).

14 Plaintiffs argue that they had an implied contract with Costco that allowed them to
15 make changes to one another’s schedules. Dkt. No. 62 at 17. It is undisputed that Lamson
16 and Scianna were authorized to make changes to schedules in WFC in general—indeed,
17 doing so was a core part of their job descriptions. Lamson Decl. ¶ 8. As the most senior
18 employee in the Administration department, Lamson’s job even included approving
19 schedule changes for other employees. Lamson Decl. ¶ 12. Moreover, Lamson and
20 Scianna were treated as managers for many years: with no individual manager for the
21 Administration department, they were given significant responsibility and authority to act
22 in a managerial role. Lamson Decl. ¶¶ 4–8. Costco’s Central Payroll may have reacted
23 with great shock at discovering the plaintiffs’ level of access and permission during their
24 audit of the Santa Cruz warehouse. But Costco never suggested that Lamson or Scianna
25 gained this access inappropriately or without authorization. Rather, Lamson and Scianna
26 performed the duties to which they were assigned by their supervisors, even when those
27 duties exceeded their job descriptions. Lamson Decl. ¶ 6.

28 There exists a genuine dispute of material fact as to whether Lamson and Scianna

1 were given explicit permission to change one another’s schedules in WFC. If they had this
2 permission, especially in context of their significant managerial authority overall, there
3 may have been an implied contract, the terms of which allowed this conduct. Such an
4 implied contract may mean that Costco lacked good cause for their terminations. If they
5 did not have this permission, then Costco may have had good cause to terminate them for
6 falsifying records.

7 Lamson says that she and Scianna were “instructed by Anthony McKenzie to change
8 the schedule to what [they] actually worked” because their job duties “were not time
9 sensitive to a starting shift time, as compared to other employees who were primarily in a
10 direct customer service role.” Lamson Decl. ¶ 12. Likewise, Scianna states that the
11 plaintiffs “were instructed by Anthony McKenzie to approve and make schedule changes
12 so as not to bother him about them every time.” Scianna Decl. ¶ 9. Former Front End
13 Supervisor Anna Gyzicki recalled that “Ms. Lamson’s and Ms. Scianna’s superiors,
14 including Anthony McKenzie, were certainly fully aware and accepting of these routine
15 practices” and even “personally heard Mr. McKenzie give Ms. Lamson and Ms. Scianna
16 authorization to alter their schedules in this way.” Gyzicki Decl. ¶ 9. Former manager of
17 the Meat Department Ismael Torres also knew Anthony McKenzie to be “certainly fully
18 aware of and accepting of these routine practices.” Torres Decl. ¶ 6. These statements are
19 consistent with those that the plaintiffs made immediately upon Central Payroll’s
20 discovery of the schedule changes. Lamson told Christiansen that McKenzie’s former
21 supervisor had given McKenzie “grief” about employees not working their posted
22 schedules, which was apparent based on the red box flag that appeared in WFC. Lamson
23 Dep. 136:21–137:10. Lamson said that McKenzie told her “to make sure [he didn’t] get
24 those red boxes anymore.” Lamson Dep. 137:18–139:21. The plaintiffs’ evidence
25 suggests that they were instructed to change their schedules in WFC not just for their own
26 sakes but also to help their former manager. This agreement may have created an implied
27 contract between the parties allowing Lamson and Scianna’s conduct.

28 Costco disputes this evidence. McKenzie told Christiansen, and Christiansen

1 communicated to his superiors, that this supposed permission to make schedule changes
2 was never authorized. Abadir Decl. Ex. A, 7–9; Christiansen Dep. 162:3–9, 126:1–127:25.
3 These contradictions create a genuine dispute as to material facts.

4 Due to this factual dispute, the Court is unable to determine what contract controls:
5 the Employment Agreement, or an implied contract. As the Court discussed above,
6 whether or not Lamson and Scianna had explicit permission to make schedule changes
7 goes to the question of whether an implied contract existed that allowed their conduct. The
8 question of what contract existed and what its terms were is a question for a factfinder, and
9 is thus inappropriate for the instant motion for summary judgment. The Court cannot
10 move on to the other elements of the plaintiffs’ breach of contract claim (the plaintiffs’
11 performance or excuse for nonperformance, the defendant’s breach, and resulting
12 damages) without first determining the terms of the relevant contract. It cannot do so on
13 the record presented. Therefore, Costco’s motion for summary judgment is DENIED as to
14 the plaintiffs’ breach of contract claim.

15 **IV. CONCLUSION**

16 The Court FINDS that no genuine issue of material fact exists for any of plaintiffs’
17 claims except their claim for breach of contract. The motion for summary judgment is
18 GRANTED as to plaintiffs’ age discrimination, failure to prevent discrimination,
19 retaliation, and various wage and hour claims and their punitive damages remedy.
20 Accordingly, those claims are DISMISSED. The Court finds that the plaintiffs have
21 shown that genuine issues must be decided by a factfinder as to their breach of contract
22 claim. Specifically, plaintiffs have created a triable issue as to the question of whether an
23 implied contract existed and, if so, what the terms of that implied contract were. The
24 motion for summary judgment as to the breach of contract claim is hereby DENIED.

25 **IT IS SO ORDERED.**

26
27 Dated: September 6, 2019


NATHANAEL M. COUSINS
United States Magistrate Judge