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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JAVIER SOTO, an individual,)	CV 18-03836-RSWL-GJSx
Plaintiff,)	
)	
v.)	ORDER re: Defendant's
)	Motion to Dismiss [24]
)	
INTERNATIONAL PAPER)	
COMPANY, a New York)	
corporation; and DOES 1)	
through 20, inclusive,)	
)	
Defendants.)	
)	
)	

Currently before the Court is Defendant International Paper Company's ("Defendant") Motion to Dismiss [24] ("Motion"). Having reviewed all papers submitted pertaining to this Motion, the Court **NOW FINDS AND RULES AS FOLLOWS:** the Court **GRANTS in part and DENIES in part** Defendant's Motion.

1 I. BACKGROUND

2 A. Factual Background

3 Defendant International Paper Company ("Defendant")
4 hired Plaintiff Javier Soto ("Plaintiff") as a truck
5 driver on July 22, 1985. First Am. Compl. ("FAC") ¶
6 18, ECF No. 22. Defendant has a policy in place that
7 makes employees eligible for early retirement benefits
8 when they reach the age of fifty-five. Id. ¶ 20.
9 Plaintiff alleges that Defendant has a policy of
10 terminating employees on the cusp of reaching fifty-
11 five, and that Defendant has terminated other employees
12 on the cusp of fifty-five, thus preventing them from
13 becoming eligible for early retirement. Id. ¶ 21.
14 Soon after Plaintiff turned fifty-four, Plaintiff's
15 supervisor, Jessie Pauletino,¹ "began berating Plaintiff
16 and looking for any pretext to reprimand or criticize
17 Plaintiff." Id. ¶ 22. Plaintiff alleges that
18 Pauletino's actions were "solely out of meanness to
19 Plaintiff and for his own personal gratification due to
20 Plaintiff's age." Id.

21 On December 6, 2016, Plaintiff hit a fence post
22 while driving Defendant's truck at a loading site in
23 San Diego. Id. ¶ 23. Plaintiff reported the accident
24 to Pauletino and wrote a report as instructed. Id.
25 The following day, Pauletino took away Plaintiff's keys

26
27 ¹ Jessie Pauletino was previously included as a defendant in
28 Plaintiff's initial Complaint. However, Pauletino was never
served, and Plaintiff did not include Pauletino as a defendant in
Plaintiff's First Amended Complaint.

1 and sent Plaintiff for a drug screening, which
2 Plaintiff passed. Id. ¶ 24. Plaintiff alleges there
3 was no indication that he was under the influence and
4 that Pauletino demanded Plaintiff take a drug test
5 solely to harass Plaintiff and invade his privacy
6 rights. Id. Plaintiff claims that using the accident
7 as pretext, Defendant terminated Plaintiff on January
8 12, 2017, less than a month before Plaintiff turned
9 fifty-five. Id. ¶ 25.

10 **B. Procedural Background**

11 On March 8, 2018, Plaintiff filed his Complaint [1-
12 2] in Los Angeles Superior Court. Defendant removed
13 the case to this Court on April 23, 2018 [1].
14 Defendant filed a Motion to Dismiss [5], which this
15 Court granted with leave to amend [21] on July 16,
16 2018.² Plaintiff filed his First Amended Complaint [22]
17 on August 6, 2018, alleging claims for age
18 discrimination, failure to prevent discrimination,
19 wrongful termination, and violation of ERISA.
20 Defendant filed the instant Motion [24] on August 20,
21 2018. Plaintiff timely opposed [25], and Defendant
22 timely replied [26].

23 ///

25 ² The Court granted Defendant's Motion to Dismiss as to the
26 following claims as preempted by ERISA: discrimination under
27 FEHA, failure to prevent discrimination, and wrongful
28 termination. See Order re Mot. to Dismiss, ECF No. 21. The
Court also granted Defendant's Motion to Dismiss as to
Plaintiff's harassment claim. See id. Plaintiff re-alleged all
claims in his FAC except for the harassment claim. See FAC.

1 factual allegations, a plaintiff must provide more than
2 "labels and conclusions" or "a formulaic recitation of
3 the elements of a cause of action." Bell Atl. Corp. v.
4 Twombly, 550 U.S. 544, 555 (2007).

5 **B. Discussion**

6 1. Age Discrimination

7 To allege age discrimination under the California
8 Fair Employment and Housing Act ("FEHA"), a plaintiff
9 must plead sufficient facts to establish plaintiff: (1)
10 was a member of a protected class, (2) was qualified
11 for the position or performing competently in the
12 position held, (3) suffered an adverse employment
13 action, and (4) there was some other circumstance
14 suggesting discriminatory motive. Guz v. Bechtel Nat'l
15 Inc., 100 Cal. Rptr. 2d 352, 379 (Cal. 2000) (citations
16 omitted).

17 Here, Plaintiff sufficiently pleads the first
18 element. Plaintiff is in a protected class because he
19 was fifty-four years old when the alleged termination
20 occurred. FAC ¶ 25; Nidds v. Schindler Elevator Corp,
21 113 F.3d 917 (9th Cir. 1996)(stating that a protected
22 class includes ages 40-70). Plaintiff also
23 sufficiently pleads the third element, because his
24 termination constitutes adverse employment action. FAC
25 ¶ 25; Guz, 100 Cal. Rptr. 2d at 379 (providing
26 termination as an example of an "adverse employment
27 action").

28 As to the second element, Plaintiff alleges that he

1 "performed all of [his] job duties satisfactorily
2 before [he] was wrongfully terminated" Id. ¶
3 18. Without more facts, this is conclusory and
4 insufficient to plead the second element. See Vizcaino
5 v. Areas USA, Inc., CV 15-417-JFW (PJWx), 2015 WL
6 13573816, at * 4 (C.D. Cal. Apr. 17, 2015) (finding
7 plaintiff's allegation he was "qualified" and
8 "perform[ed] competently" insufficient absent factual
9 support to plead this same factor but in regards to
10 gender discrimination).

11 Further, as to the fourth element, Plaintiff must
12 plead sufficient facts alleging a discriminatory motive
13 was present. Marquez v. Am. Red Cross, No. CV 09-6409
14 GAF (AGRx), 2009 U.S. Dist. LEXIS 139373, at *9 (C.D.
15 Cal. Nov. 5, 2009)(citing Nidds, 113 F.3d at 917).
16 However, ERISA preempts an employee's FEHA age
17 discrimination claim if the alleged discrimination was
18 motivated in part by the employee's "participation in
19 an employee benefit plan." Martinez v. Maxim Prop.
20 Mgmt., No. C-97-01944 SI, 1997 U.S. Dist. LEXIS 13175,
21 at *11 (N.D. Cal. Aug. 27, 1997); see Stone v.
22 Travelers Corp., 58 F.3d 434, 437 (9th Cir.
23 1995)(finding state law discrimination claim preempted
24 by ERISA when the claim "relate[d] to an ERISA plan").
25 An age discrimination claim however "is not preempted
26 to the extent it relies on theories independent of the
27 benefit plan." Sorosky v. Burroughs Corp., 826 F.2d
28 794, 800 (9th Cir. 1987).

1 Here, in Plaintiff's original Complaint, Plaintiff
2 relied on the following allegations to plead facts
3 supporting a discriminatory motive: (1) Plaintiff is
4 "informed and believes" Defendant has a policy of
5 terminating employees on the cusp of age fifty-five,
6 preventing early retirement eligibility, Compl. ¶ 20,
7 ECF No. 1-2; (2) soon after Plaintiff turned fifty-four
8 his supervisor Pauletino began berating him out of
9 "meanness" and "due to Plaintiff's age", *id.* ¶ 21; (3)
10 after Plaintiff hit a post driving Defendant's truck,
11 Pauletino took his keys and sent him for drug screening
12 "solely with the intent to harass Plaintiff and violate
13 Plaintiff's privacy rights", *id.* ¶¶ 22-23; (4)
14 Defendant terminated Plaintiff less than a month before
15 turning fifty-five, *id.* ¶ 24; and (5) Plaintiff's
16 termination was "substantially motivated" by his age,
17 *id.* ¶ 25. This Court previously found Plaintiff's age
18 discrimination claim preempted by ERISA³ because these
19 allegations, taken with the Complaint as a whole,
20 "provide[] only one plausible motive for Defendant's
21 alleged discrimination: denying Plaintiff early
22 retirement benefits." Order re Mot. to Dismiss 7:1-21,

24 ³ Section 514(a) of ERISA contains a preemption clause
25 stating that the statute "shall supersede any and all State laws
26 insofar as they may now or hereafter relate to any employee
27 benefit plan." 29 U.S.C. § 1144(a). "State law causes of action
28 relate to an employee benefit plan if they have 'a connection
with or reference to such a plan.'" *Sorosky v. Burroughs Corp.*,
826 F.2d 794, 799-800 (9th Cir. 1987) (quoting *Shaw v. Delta Air
Lines, Inc.*, 463 U.S. 85, 97 (1983)).

1 ECF No. 21.

2 Plaintiff's FAC is identical except for two
3 additions: the allegation that Pauletino took his keys
4 and sent him for drug screening to harass and violate
5 Plaintiff's privacy rights "*due to his age*"; and that
6 Plaintiff is "informed and believes that younger
7 employees under the age forty (40) have had similar
8 accidents to Plaintiff's . . . but were not terminated,
9 and were not subjected to drug screenings." FAC ¶¶ 24,
10 26. These two additions however do not provide
11 sufficient facts to support that, when reading the
12 Complaint as a whole, there is a rationale for
13 Plaintiff's treatment other than to deny early
14 retirement benefits.

15 First, adding "due to his age" to the end of the
16 allegation that Pauletino took Plaintiff's keys and
17 sent him for drug screening does not represent a
18 plausible theory capable of withstanding a motion to
19 dismiss, because it still does not provide "facts that
20 would create an inference of discriminatory animus or
21 to show that others outside the protected class were
22 treated more favorably." Marquez, 2009 U.S. Dist.
23 LEXIS 139373, at *10-11. The Court previously found
24 Plaintiff's allegation that his "termination was
25 substantially motivated by Plaintiff's age," while it
26 did represent a motive independent of the early
27 retirement benefits, was insufficient and conclusory
28 for this exact reason. Order re Mot. to Dismiss 7:1-

1 10. This allegation is no different, Plaintiff simply
2 adds "due to his age" without pleading any supporting
3 facts that would show Pauletino harassed Plaintiff out
4 of animus to Plaintiff's age.

5 Second, Plaintiff's allegation regarding the
6 retention of younger employees does not show a
7 plausible theory for termination independent of the
8 employee benefit plan. Plaintiff does not allege who
9 the younger employees are or what the circumstances of
10 their accidents were. There is no information to
11 determine whether these alleged accidents were similar
12 to Plaintiff's. See Menzel v. Scholastic, Inc., 2018
13 U.S. Dist. LEXIS 44833, at *5 (N.D. Cal. Mar. 19,
14 2018)("[W]hile facts may be alleged upon information
15 and belief, that does not mean that conclusory
16 allegations are permitted. A conclusory allegation
17 based on information and belief remains insufficient
18 under Iqbal/Twombly.").

19 Further, when read with the rest of the Complaint
20 as a whole, this allegation supports the strong
21 implication that Defendant's motive to terminate
22 Plaintiff was to avoid early retirement benefits. For
23 example, Plaintiff pleads that Defendant has a policy
24 of "terminating employees on the cusp of reaching the
25 age of fifty-five" and there were instances when
26 Defendant "terminated other employees on the cusp of
27 reaching the age of fifty-five (55), thus preventing
28 such employees from becoming eligible for early

1 retirement." FAC ¶ 21. Plaintiff's allegation that
2 employees under the age of forty retained their jobs
3 supports this motivation. Without more, Plaintiff has
4 not alleged sufficient facts to create the inference
5 that Plaintiff was terminated due to his age, and not
6 as an effort to avoid paying Plaintiff early retirement
7 benefits. See Wood v. Prudential Ins. Co. of Am., 207
8 F.3d 674, 677 (3d Cir. 2000)(holding that ERISA
9 preempted a state law discrimination claim because
10 Plaintiff "provide[d] no rationale for [Defendant's]
11 treatment other than to avoid paying benefits to him
12 and to his dependants").

13 Thus, the Court **GRANTS** Defendant's Motion to
14 Dismiss as to Plaintiff's age discrimination claim
15 because it remains subject to ERISA preemption.

16 2. Failure to Prevent Discrimination and Wrongful
17 Termination

18 Plaintiff's second claim for failure to prevent
19 discrimination is also a claim brought under FEHA, and
20 preempted by ERISA for the same reasons as above.
21 Plaintiff's third claim for wrongful termination is
22 likewise preempted by ERISA. See Felton v. Unisource
23 Corp., 940 F.2d 503, 508 (9th Cir. 1991)("It is
24 well-settled in this circuit that a wrongful
25 termination claim based on the theory that the employer
26 intended to avoid pension or insurance payments is
27 preempted by ERISA.").

28

1 Even if these claims were not preempted, both
2 parties agree that Plaintiff's second claim for failure
3 to prevent discrimination, and third claim for wrongful
4 termination, are derivative of Plaintiff's age
5 discrimination claim. Indeed, "[a] FEHA claim for
6 failure to prevent discrimination requires a plaintiff
7 to demonstrate, among other things, that discrimination
8 occurred." Ceja-Corona v. CVS Pharmacy, Inc., 664
9 Fed.App'x. 649, 651 (9th Cir. 2016) (citing Trujillo v.
10 N. Cty. Transit Dist., 63 Cal. App. 4th 280, 286 (1998)
11 ("holding that there is no failure to prevent
12 discrimination if discrimination did not occur")).
13 "Under California law, if an employer did not violate
14 FEHA, the employee's claim for wrongful termination in
15 violation of public policy fails." Taub v. Fleischman-
16 Hillard, Inc., 256 Fed.Appx. 170, 172 (9th Cir. 2007)
17 (citing Esberg v. Union Oil Co., 121 Cal. Rptr. 2d 203,
18 210-211 (Cal. 2002)).

19 Thus, because the Court has dismissed Plaintiff's
20 claim for age discrimination as preempted by ERISA, the
21 Court also **GRANTS** Defendant's Motion to Dismiss
22 Plaintiff's claims for failure to prevent
23 discrimination and wrongful termination.

24 3. ERISA

25 "Section 510 of ERISA, 29 U.S.C. § 1140, prohibits
26 an employer from terminating an employee in order to
27 prevent the vesting of pension rights." Ritter v.
28 Hughes Aircraft Co., 58 F.3d 454, 457-58 (9th Cir.

1 1995). "To establish a prima facie case of a violation
2 under [Section] 510, Plaintiff must show (1) [he]
3 participated in a statutorily protected activity, (2)
4 [he] suffered an adverse employment action, and (3) a
5 causal connection between the two." Medina v. S. Cal.
6 Permanente Med. Grp., No. CV 16-3109 PSG GCx, 2017 WL
7 3575278, at *4 (C.D. Cal. July 21, 2017) (citing Kimbro
8 v. Atl. Richfield Co., 889 F.2d 869, 881 (9th Cir.
9 1989)). Plaintiff must also "put forth sufficient
10 evidence to establish [Defendant's] 'specific intent to
11 interfere with [his] benefit rights.'" Lessard v.
12 Applied Risk Mgmt, 307 F.3d 1020, 1024 (9th Cir. 2002)
13 (citing Ritter, 58 F.3d at 457).

14 The parties do not dispute the first three
15 elements, and, instead, focus their arguments on the
16 "specific intent" requirement. However, a brief
17 analysis of these elements reveals Plaintiff has
18 pleaded sufficient facts to satisfy the three elements.

19 As to the first element, Plaintiff alleges that
20 Defendant has a policy in place for employees to be
21 eligible for early retirement benefits upon reaching
22 the age of fifty-five, and that Plaintiff would have
23 been entitled such benefits but terminated when he was
24 less than a month before Plaintiff turned fifty-five.
25 FAC ¶¶ 20, 65. This is sufficient to plead the first
26 element. See Karamsetty v. Wells Fargo & Co., 967 F.
27 Supp. 2d 1305, 1329-30 (N.D. Cal. 2013) (finding
28 plaintiff's participation in a benefit plan the

1 "statutorily protected activity"); Dytrt v. Mountain
2 State Tel. & Tel. Co., 921 F.2d 889, 896 (9th Cir.
3 1990) (citation omitted) ("Section 510 prevents an
4 employer from arbitrarily discharging an employee whose
5 pension rights are about to vest.").

6 Plaintiff also sufficiently pleads the second
7 element because he suffered an adverse employment
8 action when he was terminated by Defendant. FAC ¶ 25.
9 See Guz, 100 Cal. Rptr. 2d at 379 (providing
10 termination as an example of an "adverse employment
11 action").

12 As to the third element, Plaintiff alleges that
13 Defendant terminated Plaintiff in an effort to
14 interfere with Plaintiff's attainment of early
15 retirement benefits. See FAC ¶ 28. While Plaintiff
16 does not allege facts showing he attempted to exercise
17 rights under ERISA, he was a month away from turning
18 fifty-five and could not have exercised his rights at
19 the time. Plaintiff's allegations that he was almost
20 fifty-five when terminated, and that it was Defendant's
21 practice to terminate employees on the cusp of reaching
22 fifty-age to avoid paying benefits provides a plausible
23 inference that Plaintiff's imminent ability to exercise
24 his rights under ERISA caused the adverse action of his
25 termination.

26 Finally, to establish Defendant's specific intent,
27 Plaintiff must plead facts showing that the desire to
28 avoid paying Plaintiff his early retirement benefits

1 was the motivating force behind his discharge. Kimbro
2 v. Atlantic Richfield Co., 889 F.2d 869, 881 (9th Cir.
3 1989). Plaintiff alleges he would have been eligible
4 for early retirement benefits when he turned fifty-
5 five, but that Defendant has a policy of terminating
6 employees on the cusp of reaching age fifty-five. FAC
7 ¶¶ 20-21. Plaintiff further alleges that soon after he
8 turned fifty-four, his supervisor began berating and
9 criticizing him. Id. ¶ 22. Finally, Plaintiff alleges
10 that less than a month before he turned fifty-five,
11 Defendant terminated Plaintiff using Plaintiff's
12 accident as pretext. Id. ¶ 25. From this series of
13 allegations, the Court can infer that Plaintiff alleges
14 Defendant intended to interfere with Plaintiff's early
15 retirement benefits.⁴ See Kimbro, 889 F.2d at 881
16 (stating that "timing of a discharge may in certain
17 situations create the inference of reprisal"); Dister
18 v. Cont'l Group Inc., 859 F.2d 1108, 1115 (2d Cir.
19 1988) (holding that termination of an employee four
20 months before the employee's pension rights vested and
21 the savings to the employer from the termination were
22 sufficient to create an inference of discrimination).

23 Defendant argues that Plaintiff's allegation that
24

25 ⁴ The Court notes that Plaintiff alleged these same facts in
26 his original Complaint, and the Court found that the allegations
27 strongly implied that Defendant's motivating factor for
28 terminating Plaintiff was to interfere with Plaintiff's early
retirement benefits. Order re Motion to Dismiss 6:19-22, 8:9-12,
17-20.

1 the motivation for terminating his employment "could
2 have" involved interfering with his right to receive
3 early retirement benefits is speculative and
4 insufficient to establish specific intent. However,
5 Plaintiff's allegation does not fail simply because
6 Plaintiff pleads the intent to interfere with his ERISA
7 benefits "could" be the reason for his termination as
8 opposed to the reason being discrimination or
9 Plaintiff's accident. See Gitlitz v. Compagnie
10 Nationale Air France, 129 F.3d 554 (11th Cir. 1997) ("A
11 plaintiff is not required to prove that inference with
12 ERISA rights was the sole reason for the discharge but
13 must show more than the incidental loss of benefits as
14 a result of the discharge."). Plaintiff is required to
15 plead a plausible inference of Defendant's specific
16 intent. See Powers v. AT&T, No. 15-cv-0124-JSC, 2015
17 WL 5188714, at *7 ("A plaintiff pleading a Section 510
18 claim must allege facts to plausibly establish that the
19 employer took the adverse employment action with the
20 specific intent"). Contrary to Defendant's
21 argument, the above-referenced allegations and the FAC
22 as a whole plead sufficient facts to establish a
23 plausible inference Defendant intended to interfere
24 with Plaintiff's ERISA rights to withstand a motion to
25 dismiss.

26 Thus, the Court **DENIES** Defendant's Motion to
27 Dismiss as to Plaintiff's ERISA claim.

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1 4. Leave to Amend

2 Rule 15(a) provides that a party may amend their
3 complaint once "as a matter of course" before a
4 responsive pleading is served. Fed. R. Civ. P. 15(a).
5 After that, the "party may amend the party's pleading
6 only by leave of court or by written consent of the
7 adverse party and leave shall be freely given when
8 justice so requires." Id. If any amendment to the
9 pleadings would be futile, leave to amend should not be
10 granted. See Thinket Ink Info. Res., Inc. v. Sun
11 Microsystems, Inc., 368 F.3d 1053, 1061 (9th Cir. 2004)
12 (quoting Saul v. United States, 928 F.2d 829, 843 (9th
13 Cir. 1991)). Further, "[t]he district court's
14 discretion to deny leave to amend is particularly broad
15 where plaintiff has previously amended the complaint."
16 Ascon Props., Inc. v. Mobil Oil Co., 866 F.2d 1149,
17 1160 (9th Cir. 1989) (citation omitted). Here,
18 Plaintiff was given an opportunity to amend his
19 complaint. However, despite the instructions of the
20 previous Order, Plaintiff pleaded the same facts with
21 only one new paragraph in his FAC that was still
22 insufficient to avoid ERISA preemption. This suggests
23 that Plaintiff cannot plead facts that would avoid
24 ERISA preemption, and consequently, the Court **DENIES**
25 **LEAVE TO AMEND.**

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1 **III. CONCLUSION**

2 Based on the foregoing, the Court **GRANTS**
3 Defendant's Motion to dismiss **WITHOUT LEAVE TO AMEND** as
4 to the following claims: (1) age discrimination, (2)
5 failure to prevent discrimination, and (3) wrongful
6 termination. The Court **DENIES** Defendant's Motion as to
7 Plaintiff's claim for violation of ERISA § 510.

8 Defendant's Answer to the First Amended Complaint
9 [22] is due 14 days from the date of this order.

10 **IT IS SO ORDERED.**

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12 DATED: November 13, 2018

s/ RONALD S.W. LEW

13 **HONORABLE RONALD S.W. LEW**
14 Senior U.S. District Judge
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