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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
SOUTHERN DIVISION**

**DAVE DELGIACCO,  
Plaintiff,**

**vs.**

**COX COMMUNICATIONS, INC.; COX  
ENTERPRISES, INC.; COX  
COMMUNICATIONS CALIFORNIA,  
LLC; and COXCOM, LLC,  
Defendants.**

**Case No.: SACV 14-0200 DOC(DFMx)**

**ORDER**

**GRANTING DEFENDANT COX  
COMMUNICATIONS, INC.'S MOTION  
FOR SUMMARY JUDGMENT [48]**

**GRANTING IN PART AND DENYING IN  
PART DEFENDANTS COX  
COMMUNICATIONS CALIFORNIA,  
LLC'S AND COXCOM, LLC'S MOTIONS  
FOR SUMMARY JUDGMENT [49]**

**DENYING AS MOOT DEFENDANT COX  
ENTERPRISES, INC.'S MOTION FOR  
SUMMARY JUDGMENT [50]**

**DENYING PLAINTIFF'S MOTION FOR  
SANCTIONS [52]**

**SETTING MANDATORY SETTLEMENT  
CONFERENCE WITH MAGISTRATE  
JUDGE MCCORMICK ON MONDAY,  
APRIL 13, 2015, AT 11:00 A.M.**

**SETTING BRIEFING SCHEDULE FOR  
MOTIONS IN LIMINE [74] [75] [76] [77]  
[78] [79] [80] [81] [82] [83] [84] [85] [86]  
[87] [88] [90] [91] [92]**

**REQUIRING LODGING OF AMENDED  
FINAL PRETRIAL ORDER [93]**

1 Before the Court are Defendant Cox Communications, Inc.’s Motion for Summary  
2 Judgment (“CCI Mot.”) (Dkt. 48), Defendants Cox Communications California, LLC’s and  
3 CoxCom, LLC’s Motion for Summary Judgment (“CCC Mot.”) (Dkt. 49), Defendant Cox  
4 Enterprises, Inc.’s Motion for Summary Judgment (“CEI Mot.”) (Dkt. 50), and Plaintiff’s  
5 Motion for Sanctions (“Sanctions Mot.”) (Dkt. 52).

## 6 **I. Background**

7 This case arises from Plaintiff Dave DelGiaccio’s claim that his employer suspended him  
8 for taking Family Medical Leave Act (FMLA) leave and that his employer failed to reasonably  
9 accommodate his need to check his blood sugar levels to manage his type II diabetes. *See*  
10 *generally* Compl. (Dkt. 1).

### 11 **A. Facts**

#### 12 **1. Plaintiff’s Job**

13 Plaintiff worked as a retention representative for “Cox,” a cable television and internet  
14 services provider, in Orange County, California from approximately May 2008 to December  
15 2011. The parties dispute which Cox entities actually employed Plaintiff. This issue is discussed  
16 in greater detail *infra*. His job was to answer phone calls from customers who wanted to cancel  
17 service, to resolve customer concerns and issues, and to upsell services. CCC-PAF Nos. 1-2.<sup>1</sup>

18 His direct supervisor from 2009 to October 2011 was Erica Wilson. Wilson’s  
19 replacement Mariza Garcia was Plaintiff’s direct supervisor from November 2011 until his  
20 suspension on December 7. Erica Wilson Dep. 162:1-163:16. Wilson, and later Garcia, oversaw  
21 Plaintiff’s work on a day-to-day basis. They, in conjunction with their boss, retention  
22 department manager Jessica Allsopp, made decisions on scheduling the work day of Plaintiff  
23 and approximately twelve other retention representatives. CCC-SUF Nos. 13, 28, 95. In 2011,  
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26  
27 <sup>1</sup> The Court will refer to Plaintiff’s Additional Facts submitted in connection with Defendants Cox  
28 Communications California, LLC, and CoxCom, LLC’s Motion as “CCC-PAF” (Dkt. 53-1) and Defendants’  
undisputed facts as “CCC-SUF” (Dkt. 49-2). Similarly, the Court will refer to Plaintiff’s Additional Facts  
submitted in connection with Defendants Cox Communications, Inc.’s Motion as “CCI-PAF” (Dkt. 54-1) and  
Defendants’ undisputed facts as “CCI-SUF” (Dkt. 48-2).

1 the human resources employee who consulted with Plaintiff's department was Chona Boretti.  
2 CCC-SUF No. 21.

3 Plaintiff had two fifteen-minute rest breaks and a half-hour lunch break provided every  
4 day. In addition to regular breaks, all agents were permitted to use a "personal" code in their  
5 phone system to temporarily stop calls for personal needs, such as going to the bathroom. CCC-  
6 SUF Nos. 49-50. The expectation of Plaintiff's position was that he would be available to  
7 answer phone calls 88% of the day, excluding meal and rest breaks. Plaintiff can recall only one  
8 month, in 2010 or 2011, when Erica Wilson raised any issues with his occupancy level on the  
9 phones. CCC-SUF Nos. 54-55. Plaintiff sometimes smoked during his rest breaks. He  
10 sometimes sent personal emails and joked and bantered with his friends at Cox in person or over  
11 chat messages during the workday. CCC-SUF Nos. 58-59.

## 12 **2. Plaintiff's Health Issues and Alleged Requests for Accommodations**

13 Plaintiff was first diagnosed with type II diabetes in January 2010. CCC-SUF No. 36. At  
14 the time of his diagnosis, he was educated on the course of care he should follow for diabetes,  
15 including the need to "test your blood before you eat, test your blood after you eat, test your  
16 blood if you're not feeling well." CCC-SUF No. 37. The blood test would take 30 seconds to a  
17 couple of minutes. After his diagnosis in January 2010, Plaintiff needed to test his blood from  
18 one to ten times a day. He usually tested his blood from one to four times per day during work  
19 hours. He usually tested his blood at his desk or sometimes in his car, both during and outside of  
20 rest break and meal break times. CCC-SUF Nos. 38-44, 46. Sometimes Plaintiff took  
21 intermittent FMLA leave during a workday, ranging in duration from a few minutes to a few  
22 hours, to test his blood sugar levels. On the days when he took FMLA leave, he may have tested  
23 his blood sugar other times during that same day, without needing to take FMLA leave for that  
24 other testing. CCC-SUF No. 47.

25 From August 2010 to January 2011, Plaintiff took FMLA leave first to care for his wife  
26 while she was dying from cancer, and after her death, to take care of his own post-traumatic  
27 stress disorder ("PTSD"), anxiety disorder, and major depressive disorder. CCC-PAF Nos. 23-  
28 25. Prior to returning from caring for his wife and himself, he was asked to identify any medical

1 restrictions that he may have, and his doctor stated that he was prepared to “resume his duties  
2 from a medical perspective as of 1/3/11.” CCC-SUF No. 61. When Plaintiff returned from leave  
3 in January 2011, he says everyone was “Very professional, very congenial, very welcoming.”  
4 CCC-SUF No. 135.

5 **a. Request for “Medical” Code**

6 After returning to work, Plaintiff claims to have asked his supervisor Erica Wilson about  
7 a code that he could use to log off the phone system, without any adverse consequences, such  
8 that he could take additional short breaks during his shift to check his blood sugar levels and  
9 manage his diabetes. CCC-PAF No. 12. Plaintiff claims that he was told there was no code and  
10 that there was no other alternative accommodation available, even though Cox in fact did have a  
11 “medical” code for its employees. CCC-PAF Nos. 14-15.

12 **b. Request to Stand Up and Walk Around**

13 Plaintiff also claims that he vocalized a need for accommodation to Erica Wilson.  
14 Plaintiff testified at his deposition that he recalls

15 going in and talking to Erica that I’m a diabetic, and I need accommodations. And  
16 one of the accommodations that I need was for my neuropathy. You know, Erica  
17 was a fantastic supervisor over there at Cox, you know, directing me towards  
18 Chona. As you can see. I spoke to Erica about my medical condition, and then she  
19 directed me to Chona. . . . Chona was in human resources department.

19 CCC-SUF Nos. 63-64.

20 On July 7, 2011 at 5:27 p.m., Plaintiff sent an email to Chona Boretti in HR stating that  
21 he spoke to his supervisor about his medical condition and its “nothing that seems to be serious,  
22 although she mentioned I should speak to you to document. My medical condition requires that I  
23 walk around at times to increase circulation in my legs to slow the progression of the disease,”  
24 and inquired if he could get a code to log off the phones so he could get up and move around.  
25 CCC-SUF No. 66. Boretti responded in writing the next morning stating “it appears from your  
26 information below that you are not seeking a medical leave of absence but requesting temporary  
27 restrictions to be made at work due to a medical condition you have,” and that she needed a  
28 doctor’s note “indicating the specific restriction and how long a period these restrictions would

1 be for.” She gave examples such as “no bending, kneeling, walking on right leg for two weeks  
2 beginning 6.8.11” for specificity to be included in the note. Her letter concluded, “due to HIPPA  
3 regulations, please do not disclose the specific medical condition you have.” CCC-SUF No. 67.  
4 Neither Plaintiff nor Boretti recall Plaintiff providing her a medical note. Plaintiff claims he  
5 provided medical documentation to Cox’s FMLA administrator. DelGiacco Decl. ¶ 24 (Dkt. 53-  
6 3).

7 In 2011, Cox contracted with an ergonomics consultant, Mike Gee, who runs a company  
8 called Pro-Fit Ergonomic Solutions, and he engaged in workplace assessments, including  
9 recommending changes to work stations to avoid injury. In 2011, Gee visited company offices  
10 every week or two and met with employees who had been identified as needing his assistance  
11 with ergonomic related issues. Plaintiff believes that either his supervisor or Boretti sent Gee an  
12 email, instructing Gee to contact Plaintiff. Plaintiff states that Gee “came over, he  
13 accommodated, he put a thing on my desk that I could lift it up so I could stand up.” Gee also  
14 provided Plaintiff some exercises he could do. Plaintiff had a wireless headset in 2011. For a  
15 time, Plaintiff could walk around the office while on the phone without limitation, but later he  
16 was told he had to stay closer to his own desk. CCC-SUF Nos. 77-83.

### 17 **c. Request for Private Space**

18 Plaintiff also claims to have vocalized a need for accommodation to Mariza Garcia.  
19 Garcia became Plaintiff’s supervisor in November 2011, after transferring from another  
20 department. CCC-SUF Nos. 84-85. Plaintiff claims there was a nurse who worked for Aetna  
21 who suggested to him that he test in “a private area where he can be calm.” He never asked for  
22 or was provided a note from this nurse discussing this suggestion to test in a private area. On  
23 November 16, 2011, Plaintiff sent an email to Garcia stating, “Mariza . . . did you find out about  
24 a place to test my glucose [sic] levels? No big . . . . just checking. . . .” CCC-SUF Nos. 86-88.  
25 Garcia summarized Plaintiff’s concerns in an email to Chona Boretti in HR in November 2011,  
26 and Boretti responded to her with specific questions. CCC-SUF No. 89. Plaintiff claims he never  
27 heard back from Garcia or anyone else at Cox. DelGiacco Decl. ¶ 9. Garcia recalls telling him  
28 he could use an empty office or a locking bathroom close to him. Garcia Decl. ¶ 10 (Dkt. 49-3).

### 3. Plaintiff's Suspension

1  
2 On December 7, 2011, Plaintiff was suspended from his job after a meeting with his  
3 supervisor Garcia, her supervisor Jessica Allsopp, and HR representative Chona Boretti.  
4 Defendants maintain that Plaintiff was suspended because he mishandled some customer calls  
5 by intentionally hanging up on them or transferring them to other departments. Defendants claim  
6 that Garcia and Allsopp discovered these allegedly mishandled calls on December 6, 2011 when  
7 Allsopp used tapes of calls handled by Plaintiff and others to train Garcia on using Qfiniti  
8 software to monitor agents' calls. *See* CCC-SUF Nos. 101-114. The problematic calls included  
9 calls where Plaintiff disconnected before the customer did, where Plaintiff allegedly transferred  
10 a customer who wished to disconnect to the sales department, where Plaintiff allegedly  
11 transferred to tech a customer who wished to cancel voicemail, and where Plaintiff allegedly  
12 improperly told a customer who wished to cancel in two weeks that it was too soon and they  
13 should go to a retail store. *See* CCC-SUF Nos. 112-113. That day, Allsopp called and emailed  
14 her boss, Pablo Pareja, about the issues she identified with Plaintiff's calls. CCC-SUF No. 140.  
15 The next day, on December 7, she sent an email to the IT department seeking records that would  
16 show which calls where Plaintiff hung up before the customer. CCC-SUF No. 112.

17 Plaintiff does not dispute that handling calls in the manner described would be against the  
18 company's policy. CCC-SUF Nos. 116-118, 124, 129. However, he vigorously disputes that he  
19 actually mishandled any calls. He asked at the December 7 meeting to listen to the calls, but  
20 Allsopp refused to allow him to listen to the calls. CCC-PAF Nos. 79-80, 83. The tapes of the  
21 calls have since disappeared. The only records left are Allsopp's notes and a spreadsheet sent by  
22 the IT department.

23 Plaintiff was told on December 7 that it would be about a week until the investigation  
24 was completed. CCC-SUF No. 141. On December 12, Plaintiff certified that he was disabled  
25 and unable to work due to a medical condition as of December 6, 2011. CCC-SUF No. 131. He  
26 has not returned since. Cox made the decision to fire him a few days after he went on medical  
27 leave. However, they never formally notified Plaintiff of their decision. CCC-PAF No. 4.  
28

1                                   **B. Procedural History**

2                   Plaintiff has filed three complaints with California’s Department of Fair Employment and  
3 Housing (DFEH) alleging that Cox discriminated against him on the basis of disability. The first  
4 was on September 14, 2012. CCC-SUF No. 3. The second and third were after this lawsuit  
5 began, on January 8, 2014 and March 9, 2015. CCC-SUF No. 1; Mazda Decl. Ex. L (Dkt. 53-2).

6                   Plaintiff brought suit in Orange County Superior Court on July 23, 2013, alleging two  
7 causes of action: (1) discrimination and retaliation for taking FMLA leave; and (2) disability  
8 discrimination in violation of the California Fair Employment and Housing Act (FEHA),  
9 specifically, failure to reasonably accommodate Plaintiff’s disability and failure to engage in an  
10 interactive process with Plaintiff. *See generally* Compl.

11                   The lawsuit was removed to federal court on February 11, 2014. Notice of Removal (Dkt.  
12 1). The instant Motions for Summary Judgment and Motion for Sanctions were filed on March 2  
13 and 5, 2015, respectively (Dkts. 48, 49, 50, 52). After briefing was completed, oral argument  
14 was held on April 2 (Dkt. 94).

15                                   **II. Legal Standard**

16                   Summary judgment is proper if “the movant shows that there is no genuine dispute as to  
17 any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P.  
18 56(a). Summary judgment is to be granted cautiously, with due respect for a party’s right to have  
19 its factually grounded claims and defenses tried to a jury. *Celotex Corp. v. Catrett*, 477 U.S.  
20 317, 327 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). The court must  
21 view the facts and draw inferences in the manner most favorable to the non-moving party.  
22 *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1992); *Chevron Corp. v. Pennzoil Co.*, 974  
23 F.2d 1156, 1161 (9th Cir. 1992). The moving party bears the initial burden of demonstrating the  
24 absence of a genuine issue of material fact for trial, but it need not disprove the other party’s  
25 case. *Celotex*, 477 U.S. at 323. When the non-moving party bears the burden of proving the  
26 claim or defense, the moving party can meet its burden by pointing out that the non-moving  
27 party has failed to present any genuine issue of material fact as to an essential element of its  
28 case. *See Musick v. Burke*, 913 F.2d 1390, 1394 (9th Cir. 1990).

1           Once the moving party meets its burden, the burden shifts to the opposing party to set out  
2 specific material facts showing a genuine issue for trial. *See Liberty Lobby*, 477 U.S. at 248-49.  
3 A “material fact” is one which “might affect the outcome of the suit under the governing law . . .  
4 .” *Id.* at 248. A party cannot create a genuine issue of material fact simply by making assertions  
5 in its legal papers. *S.A. Empresa de Viacao Aerea Rio Grandense v. Walter Kidde & Co., Inc.*,  
6 690 F.2d 1235, 1238 (9th Cir. 1982). Rather, there must be specific, admissible evidence  
7 identifying the basis for the dispute. *Id.* The court need not “comb the record” looking for other  
8 evidence; it is only required to consider evidence set forth in the moving and opposing papers  
9 and the portions of the record cited therein. Fed. R. Civ. P. 56(c)(3); *Carmen v. S.F. Unified Sch.*  
10 *Dist.*, 237 F.3d 1026, 1029 (9th Cir. 2001). The Supreme Court has held that “[t]he mere  
11 existence of a scintilla of evidence . . . will be insufficient; there must be evidence on which the  
12 jury could reasonably find for [the opposing party].” *Liberty Lobby*, 477 U.S. at 252.

### 13           **III. Discussion**

#### 14           **A. Cox Enterprises, Inc. Motion for Summary Judgment**

15           On March 11, 2015, the parties stipulated for Plaintiff to dismiss all claims against Cox  
16 Enterprises, Inc. (Dkt. 57). Accordingly, Cox Enterprises, Inc.’s Motion for Summary Judgment  
17 is DENIED AS MOOT.

#### 18           **B. Whether Cox Communications, Inc. is Plaintiff’s Employer for FMLA 19           and FEHA Purposes**

20           Defendant Cox Communications, Inc. (“CCI”) argues that Plaintiff’s claims against CCI  
21 should be dismissed because CCI is not Plaintiff’s employer within the meaning of the FMLA or  
22 FEHA, unlike its subsidiaries Defendants CoxCom, LLC (“CoxCom”) and Cox  
23 Communications California, LLC (“CCC”).<sup>2</sup>

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27 <sup>2</sup> Since Defendants do not argue that any of them lack the financial resources to pay Plaintiff should he prevail on  
28 his claims, ordinarily the Court would not expect to see a dispute over which entity is Plaintiff’s true employer.  
However, because the parties dispute whether Plaintiff properly exhausted his administrative remedies against  
CoxCom and CCC, *see infra*, determining whether CCI is Plaintiff’s employer has taken on heightened  
importance.



1 The FMLA defines an employer as “any person engaged in commerce or in any industry  
2 or activity affecting commerce who employs 50 or more employees for each working day during  
3 each of 20 or more calendar workweeks in the current or preceding calendar year,” including  
4 “any person who acts, directly or indirectly, in the interest of an employer to any of the  
5 employees of such employer” and “any successor in interest of an employer.” 29 U.S.C. §  
6 2611(4). FEHA defines an “employer” as “any person regularly employing five or more  
7 persons, or any person acting as an agent of an employer, directly or indirectly . . .” Cal. Gov’t  
8 Code § 12926(d). A parent corporation can be treated as a single employer with its subsidiaries  
9 under “integrated enterprise” or “joint employer” tests developed by the courts. Based on these  
10 statutory definitions, a parent corporation can also be held liable if it acted as its subsidiary’s  
11 agent.

12 The Court will address each test in turn.

### 13 **1. Integrated Enterprise Test**

14 The integrated enterprise test is often used by federal courts and has been adopted for  
15 FEHA claims. The test has four factors: (1) interrelation of operations, (2) common  
16 management, (3) centralized control of labor relations, and (4) common ownership or financial  
17 control. *Laird v. Capital Cities/ABC, Inc.*, 68 Cal. App. 4th 727, 737 (1998). To demonstrate a  
18 triable issue of fact on the “interrelations of operations” prong at summary judgment,

19 the plaintiff must do more than merely show that officers of the subsidiary report  
20 to the parent corporation or that the parent benefits from the subsidiary’s work.  
21 Since these facts exist in every parent-subsidiary situation, such a showing would  
22 create a triable issue of material fact in every case. What the plaintiff must show,  
23 rather, is that the parent has exercised control “to a degree that exceeds the control  
normally exercised by a parent corporation.”

24 *Id.* at 738 (quoting *Frank v. U.S. W., Inc.*, 3 F.3d 1357, 1362 (10th Cir. 1993)). To satisfy the  
25 centralized control of labor relations prong, often considered the most important, the parent must  
26 control the subsidiary’s day-to-day employment decisions, not just make broad general policy  
27 statements about employment matters. *Id.* Defendants concede that the fourth factor is met.  
28

1 However, common ownership or control alone is never enough to establish parent liability. *Id.* at  
2 738. Therefore, the Court must consider whether the first three factors have been met.

3 The relevant facts are as follows:

4 Plaintiff's 2011 W-2 identified "CoxCom, Inc." as his employer. CCC-SUF No. 12.  
5 CoxCom is a wholly-owned subsidiary of CCI. CCI-PAF No. 235. CoxCom was organized as a  
6 corporation until mid-2011, when it was reformed into CoxCom, LLC. In 2011, CoxCom owned  
7 and operated the cable system in Orange County where Plaintiff worked. CCC-SUF Nos. 8-9. In  
8 January 2012, CCC was formed as a wholly-owned subsidiary of CoxCom to hold and operate  
9 all CoxCom's California cable television assets, which consist of cable systems in San Diego,  
10 Orange County, Palos Verde, and Santa Barbara. CCC-SUF No. 10.

11 In December 2011, CCI had 89 officers and CoxCom had 56 officers. Of these, 14  
12 persons were simultaneously officers of both CCI and CoxCom. CCI and CoxCom also had one  
13 director in common at that time. CCI-SUF Nos. 10, 35. This factor weighs against finding CCI  
14 to be an integrated enterprise with its subsidiaries.

15 CCI provides a number of services for CoxCom and CCC employees in California. Some  
16 are services that support local personnel. For instance, CCI has a human resources department  
17 that provides support for its subsidiaries' human resources personnel. Sangston Dep. 34:17-  
18 35:11. CCI develops training materials and provides training in areas where CCI believes it is  
19 important to have consistent messaging across its subsidiaries, such as ethics. Local subsidiaries  
20 also develop and conduct much of their own training in areas such as product and service  
21 offerings, installation, and programming. *Id.* at 10:12-14:4, 27:14-29:8, 45:15-46:25. Similarly,  
22 the local subsidiaries have their own public affairs and government relations personnel, but CCI  
23 provides support in those areas. *Id.* at 35:25-36:12. CCI also provides support with email and  
24 records retention, IT, tax, accounting, payroll administration, marketing and sales, technology  
25 and engineering. *Id.* at 36:18-38:21.

26 Some functions are maintained only at CCI. For instance, CCI interfaces with UNUM, a  
27 third-party vendor that administers an FMLA leave program for all Cox employees throughout  
28 the country. *Id.* at 36:13-17. CCI's legal department functions as the legal department for all of

1 its subsidiaries. CCI employs Joe Freeman, a senior employment attorney who provides legal  
2 advice to human resources personnel regarding CCI and CCI subsidiaries' employees. *Id.* at  
3 10:12-14:4, 37:2-5. CCI's legal department issues litigation holds and conducts electronic  
4 discovery, including in this case. *Id.* at 60:21-61:15.

5 In 2014, as part of a broad decision to take certain functions out of the local market and  
6 "into a center of excellence model," CCI made the decision to close the Rancho Santa Margarita  
7 call center, where Plaintiff worked, and to lay off employees who had worked there. *Id.* at  
8 43:19-44:16.

9 These facts do not satisfy the integrated enterprise test. The most important factor is  
10 whether CCI and CoxCom had centralized control over employment decisions. The fact that  
11 local supervisors and HR personnel could consult with CCI's HR department or legal  
12 department on HR issues and the fact that CCI decided to close the Rancho Santa Margarita call  
13 center, which by necessity meant laying off or transferring employees, do not demonstrate that  
14 CCI was involved in the day-to-day employment decisions of CoxCom or CCC. Nor does the  
15 fact that CCI, through UNUM, handled FMLA administration for its subsidiaries. *Cf. Laird*, 68  
16 Cal. App. 4th at 739 (holding that the fact that the parent corporation maintained pension plans  
17 and other benefits for its subsidiary's employees was insufficient to create a triable issue of fact  
18 regarding interrelation of operations). The fact that local subsidiaries maintain their own HR,  
19 public affairs, government relations, and other staff and develop their own training and the fact  
20 that CCI and CoxCom's have a few officers and directors in common, also goes against a  
21 finding that CCI and its subsidiaries had interrelated operations generally, as they do not show  
22 that CCI had a stronger degree of control than a parent normally has over a subsidiary. Thus, the  
23 Court concludes that Plaintiff cannot hold CCI liable under an integrated enterprise theory.

## 24 **2. Joint Employer Test**

25 Courts have used a variety of multi-factor tests to determine whether a defendant is a  
26 joint employer.<sup>3</sup> What the tests all have in common is their focus on the extent to which the

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27  
28 <sup>3</sup> Courts applying the joint employment test for a FEHA claim have considered factors such as:

1 defendant has day-to-day control over the plaintiff's work and over employment decisions over  
2 plaintiff, including hiring, firing, and rate of pay. *Vernon v. State*, 116 Cal. App. 4th 114, 124-  
3 25, 128 (2004); *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir.  
4 1983), *disapproved of on other grounds by Garcia v. San Antonio Metro. Transit Auth.*, 469  
5 U.S. 528 (1985). The inquiry tends to be intensely fact-dependent and the ultimate determination  
6 is based on the totality of the circumstances; there is no magical formula. *Vernon*, 116 Cal. App.  
7 4th at 125; *Bonnette*, 704 F.2d at 1470.

8 As the facts above demonstrate, CCI did not have day-to-day control over Plaintiff's  
9 employment. "Cox Communications" was listed on Plaintiff's earning statements. However,  
10 CoxCom was the employer listed on Plaintiff's 2011 W-2, which makes CoxCom the  
11 presumptive employer for FEHA purposes. Cal. Gov't Code § 12928. Plaintiff was also paid  
12 from CoxCom's budget. Terri Wilson Decl. ¶ 10 (Dkt. 48-3). In addition, it may be true that  
13 CCI made the decision to close the Rancho Santa Margarita call center in 2014; that CCI  
14 contracted with UNUM to administer FMLA leave; and that Joe Freeman in CCI's legal  
15 department was consulted when Plaintiff was suspended. It may also be true that "Cox  
16 Communications" provided Plaintiff's employee guidebook. DelGiacco Decl., Ex. D. These  
17 facts, however, are insufficient to show that CCI had the kind of "comprehensive and immediate  
18 level of 'day-to-day' authority over employment decisions" necessary to find that CCI was  
19

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20 payment of salary or other employment benefits and Social Security taxes, the ownership of the  
21 equipment necessary to performance of the job, the location where the work is performed, the  
22 obligation of the defendant to train the employee, the authority of the defendant to hire, transfer,  
23 promote, discipline or discharge the employee, the authority to establish work schedules and  
24 assignments, the defendant's discretion to determine the amount of compensation earned by the  
25 employee, the skill required of the work performed and the extent to which it is done under the  
26 direction of a supervisor, whether the work is part of the defendant's regular business operations,  
27 the skill required in the particular occupation, the duration of the relationship of the parties, and  
28 the duration of the plaintiff's employment.

*Vernon v. State*, 116 Cal. App. 4th 114, 125 (2004). Courts applying the joint employment test in FLSA claims  
(also applied in FMLA claims) tend to look in particular at four factors: "whether the alleged employer (1) had the  
power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of  
employment, (3) determined the rate and method of payment, and (4) maintained employment records." *Bonnette*  
*v. California Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983), *disapproved of on other grounds by*  
*Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

1 Plaintiff's joint employer. *Vernon*, 116 Cal. App. 4th at 128. Plaintiff has not shown, for  
2 instance, that CCI was responsible for supervising Plaintiff's everyday work, or for making  
3 specific decisions regarding his accommodations, suspension, or termination. Accordingly, the  
4 Court concludes that Plaintiff cannot hold CCI liable under a joint employer theory.

### 5 **3. Agency Theory**

6 "[T]o establish a parent corporation's liability for acts or omissions of its subsidiary on an  
7 agency theory, a plaintiff must show more than mere representation of the parent by the  
8 subsidiary in dealings with third persons. The showing required is that a parent corporation *so*  
9 *controls the subsidiary* as to cause the subsidiary to become *merely* the agent or instrumentality  
10 of the parent[.]" *Laird*, 68 Cal. App. 4th at 741 (internal quotation marks omitted) (second  
11 alteration in original). Based on the record described above, there is insufficient evidence to  
12 show that CoxCom was merely an agent of CCI as opposed to a separate corporate entity with  
13 its own employees, budget, and operations. The Court thus concludes that Plaintiff cannot hold  
14 CCI liable under an agency theory.

### 15 **4. Conclusion**

16 In summary, Plaintiff does not have sufficient evidence to show that CCI was his  
17 employer for FEHA or FMLA purposes. Accordingly, the Court GRANTS CCI's Motion for  
18 Summary Judgment.

### 19 **C. FMLA Claim**

20 Defendants argue that Plaintiff's FMLA claim should fail as a matter of law because  
21 Plaintiff cannot prove that his taking FMLA leave was a negative factor in the decision to  
22 suspend him.

23 The FMLA entitles "employees to take reasonable leave for medical reasons, or the birth  
24 or adoption of a child, and for the care of a child, spouse, or parent who has a serious health  
25 condition." 29 U.S.C. § 2601(b). The Act permits an employee to take up to twelve weeks of  
26 leave during a twelve-month period. *Id.* § 2612. The Act makes it "unlawful for an employer to  
27 interfere with, restrain, or deny the exercise of or the attempt to exercise" an employee's rights  
28 under the FMLA. 29 U.S.C. § 2615(a)(1). "Interference" includes the "us[ing] the taking of

1 FMLA leave as a negative factor in employment actions, such as hiring, promotions or  
2 disciplinary actions.” 29 C.F.R. § 825.220(c).

3 The Ninth Circuit has held that the familiar *McDonnell-Douglas* burden-shifting  
4 framework often used in discrimination cases does not apply to FMLA interference cases. Thus,  
5 a plaintiff does not need to prove that the employer’s stated non-discriminatory reason for taking  
6 action against him or her was pretextual. Instead, a plaintiff “need only prove by a  
7 preponderance of the evidence that her taking of FMLA-protected leave constituted a negative  
8 factor in the decision to terminate her. She can prove this claim, as one might any ordinary  
9 statutory claim, by using either direct or circumstantial evidence, or both.” *Bachelder v. Am. W.*  
10 *Airlines, Inc.*, 259 F.3d 1112, 1125 (9th Cir. 2001) (emphasis added). Here, to survive summary  
11 judgment, Plaintiff must show that there is a “triable issue of material fact on whether [his  
12 employer] considered [his] FMLA qualified leave as a factor in [his suspension], thus causing  
13 interference with [his] rights under FMLA.” *Xin Liu v. Amway Corp.*, 347 F.3d 1125, 1137 (9th  
14 Cir. 2003).

15 Defendants argue that mishandling calls was a legitimate business reason for suspending  
16 Plaintiff and that Plaintiff does not have sufficient evidence to prove that Cox’s reason was  
17 pretextual. However, as the Ninth Circuit has explained, “there is no room for a *McDonnell*  
18 *Douglas* type of pretext analysis when evaluating an ‘interference’ claim under [the FMLA].”  
19 *Bachelder*, 259 F.3d at 1131. “[T]he regulations clearly prohibit the use of FMLA-protected  
20 leave as a negative factor *at all*.” *Id.* Thus, “[t]he question . . . is not whether [Cox] had  
21 additional reasons for the discharge, but whether [Plaintiff’s] taking of . . . FMLA-protected  
22 leave was used as a negative factor in [his] discharge.” *Id.*

23 Here, there is a triable issue of material fact as to whether Plaintiff’s intermittent FMLA  
24 leave in November 2011 was a negative factor in Plaintiff’s employer’s decision to suspend him.  
25 His intermittent leave took place close in time to his suspension, which “provides supporting  
26 evidence of a connection between the two events.” *Xin Liu*, 347 F.3d at 1137; *see also Levine v.*  
27 *TERROS, Inc.*, No. CV08-1458-PHX-MHM, 2010 WL 864498, at \*8 (D. Ariz. Mar. 9, 2010)  
28 (denying summary judgment based on temporal proximity). Plaintiff’s employer was aware that

1 Plaintiff had taken FMLA leave within the last year to care for his wife and that there had been  
2 “numerous issues” regarding the tracking of his leave, “[t]o the point when it almost became a  
3 legal situation.” Terri Wilson Dep. Ex. 41 (Dkt. 53-2) (July 6, 2011 email from Chona Boretti to  
4 another employee describing Plaintiff’s “history”). There is evidence that Plaintiff performed  
5 well at his job for the previous two years based on his supervisor Erica Wilson’s deposition  
6 testimony. He received a positive review from Wilson on October 24, 2011, only a few weeks  
7 before he was suspended for allegedly mishandling calls. Erica Wilson Dep. 162:2-166:15; Terri  
8 Wilson Dep. 505:13-20, 510:6-24, 520:14-521:12, Ex. 96. Also, while Defendants claim that  
9 Plaintiff mishandled calls, Plaintiff states in his declaration that he “never intentionally hung up  
10 on a customer while [he] worked at Cox.” DelGiacco Decl. ¶ 31. The evidence supporting  
11 Defendants’ story that Plaintiff was suspended because of mishandling calls may make it less  
12 likely that a jury will find that Plaintiff’s intermittent FMLA leave was a factor in Defendants’  
13 decision. However, reading Plaintiff’s evidence in the light most favorable to him, he has  
14 produced sufficient evidence for a rational jury to find that his FMLA leave was a negative  
15 factor.

16 Accordingly, the Court DENIES summary judgment on Plaintiff’s FMLA claims.

#### 17 **D. FMLA Punitive and Emotional Distress Damages**

18 Defendants argue that Plaintiff is not entitled to punitive and emotional distress damages  
19 for his FMLA claim because the FMLA does not allow for such damages. The Court agrees. *See*  
20 *Farrell v. Tri-Cnty. Metro. Transp. Dist. of Oregon*, 530 F.3d 1023, 1025 (9th Cir. 2008).  
21 Accordingly, the Court DISMISSES Plaintiff’s request for punitive and emotional distress  
22 damages for his FMLA claim.

#### 23 **E. Administrative Exhaustion of Plaintiff’s FEHA Claims**

24 California Government Code § 12960 “provides that an employee bringing an FEHA  
25 claim must exhaust the administrative remedy by filing an administrative complaint with the  
26 DFEH . . . .” *Acuna v. San Diego Gas & Elec. Co.*, 217 Cal. App. 4th 1402, 1412 (2013). A  
27 plaintiff cannot sue in court until the DFEH issues a right-to-sue notice. *See* Cal. Gov’t Code §  
28

1 12965(b) (providing that the right-to-sue notice “shall indicate that the person claiming to be  
2 aggrieved may bring a civil action”).

3 Defendants raise a number of arguments why Plaintiff’s FEHA claims should be barred  
4 for failure to exhaust his administrative remedies. These arguments fall into three major  
5 categories: (1) Plaintiff’s 2012 DFEH complaint did not describe the facts with sufficient  
6 particularity; (2) Plaintiff’s 2012 DFEH complaint did not name the correct employers; and (3)  
7 Plaintiff’s DFEH complaints were filed too late. The Court addresses each argument in turn.

### 8 **1. Factual Particularity of 2012 DFEH Complaint**

9 Defendants argue that Plaintiff’s September 14, 2012 DFEH complaint did not describe  
10 the facts or the nature of the FEHA violation with sufficient particularity. In his 2012 DFEH  
11 complaint, Plaintiff stated that, on or before December 6, 2011, “Cox Enterprises, Inc. and Cox  
12 Communications, Inc. [collectively “Cox”] discriminated against me because of my disability  
13 and my age. Cox also failed to accommodate my disability. Cox also interfered with my rights  
14 to take FMLA and CFRA leave, and then retaliated against me for taking an FMLA leave.”  
15 CCC-SUF No. 4.

16 It is true that California Government Code § 12960(b) requires the administrative  
17 complaint to “set forth the particulars” of the alleged unlawful practice. If the 2012 DFEH  
18 complaint was a court pleading being evaluated under the *Iqbal/Twombly* standard, Defendants  
19 may have a good argument that the complaint is overly vague and conclusory, such that Plaintiff  
20 should not be allowed to proceed. However, Defendants have not provided any binding legal  
21 authority for the proposition that a court can or should deny a plaintiff access to the courts based  
22 on a factually vague DFEH complaint where the DFEH has already issued a right-to-sue letter.  
23 This is not a case in which plaintiff is suing on a different theory than he alleged in his DFEH  
24 complaint. *See Hobson v. Raychem Corp.*, 73 Cal. App. 4th 614, 631 (1999), *disapproved of on*  
25 *other grounds by Colmenares v. Braemar Country Club, Inc.*, 29 Cal. 4th 1019 (2003)  
26 (dismissing disability discrimination claim based on depression, stress, and alcoholism where  
27 the plaintiff’s DFEH complaint mentioned only colitis). Rather, Defendants’ objection is limited  
28 to the lack of particularity in the DFEH complaint allegations.



1           It may be true that a vague DFEH complaint impedes the employer's and the DFEH's  
2 ability to investigate and thus goes against FEHA's purpose of encouraging alternate resolutions  
3 before a dispute is brought to court. *See Rojo v. Kliger*, 52 Cal. 3d 65, 83 (1990) (“[T]he  
4 exhaustion requirement serves the important policy interests embodied in the act of resolving  
5 disputes and eliminating unlawful employment practices by conciliation . . . as well as the  
6 salutary goals of easing the burden on the court system, maximizing the use of administrative  
7 agency expertise and capability to order and monitor corrective measures, and providing a more  
8 economical and less formal means of resolving the dispute.”). It was on this basis that the court  
9 in *Foster v. Bank of Am., Nat. Ass’n*, No. 1:13-CV-1188-LJO-BAM, 2014 WL 4092311 (E.D.  
10 Cal. Aug. 14, 2014), a case cited by Defendants, held that a plaintiff who had alleged no specific  
11 facts about her employer's conduct against her could not bring certain FEHA claims against her  
12 employer because she had failed to exhaust her administrative remedies.

13           This Court, however, believes that policy concerns about enforcing California  
14 Government Code § 12960(b) are better addressed to DFEH or the state legislature. In recent  
15 years, DFEH has adopted a policy of issuing right-to-sue letters as a matter of course without  
16 reviewing administrative complaints in much detail. *See* Cal. Code Regs. tit. 2, § 10005  
17 (allowing complainants to waive investigation by DFEH in favor of obtaining an immediate  
18 right-to-sue notice). Thus, in many cases, there is no real administrative investigatory or  
19 conciliatory process anymore. If the DFEH's practice is not to investigate, it does not make  
20 sense for the Court to bar litigants from court for failing to give DFEH enough detail to  
21 investigate. As long as the complaint initiating the lawsuit is sufficiently detailed, the employer  
22 is still able to investigate and nothing prevents the parties from reaching an out-of-court  
23 settlement even during the course of litigation. Thus, so long as a plaintiff's DFEH complaint  
24 identifies the discrimination alleged in the lawsuit, he has filed his DFEH complaint within the  
25 statute of limitations, and he has obtained a right-to-sue notice, the Court is not concerned with  
26 the level of factual specificity in the DFEH complaint in evaluating whether the plaintiff has  
27 exhausted his administrative remedies.

28

1           Accordingly, the Court will not dismiss Plaintiff’s FEHA claims based on the vagueness  
2 of his DFEH complaint.

### 3                                   **2. Employers Named in 2012 DFEH Complaint**

4           Defendants argue that Plaintiff’s FEHA claims against CCC and CoxCom should be  
5 barred because Plaintiff’s September 14, 2012 DFEH complaint did not name them as  
6 respondents and the 2014 and 2015 DFEH complaints, which did name them as respondents,  
7 were untimely. The Court disagrees.

8           With regard to the first argument, a FEHA plaintiff must exhaust his administrative  
9 remedies against each party against whom he wishes to bring suit. Each defendant of the lawsuit  
10 must be identified in the caption or body of the plaintiff’s administrative complaint. *Cole v.*  
11 *Antelope Valley Union High Sch. Dist.*, 47 Cal. App. 4th 1505, 1509-10 (1996). Here, the 2012  
12 DFEH complaint named “Cox Communications, Inc.” and “Cox Enterprises, Inc.” as  
13 respondents. The body of the complaint refers to these two entities as “collectively ‘Cox.’”  
14 Defendants fault Plaintiff for failing to list CoxCom as a respondent, given that Plaintiff’s 2011  
15 W-2 identified “CoxCom, Inc.” as his employer. CCC-SUF No. 12. Under California  
16 Government Code § 12928, “there is a rebuttable presumption that ‘employer’ . . . includes any  
17 person or entity identified on the employee’s [W-2].” However, given that CoxCom, Inc. was re-  
18 organized into CoxCom, LLC just a year before the 2012 DFEH complaint was filed and given  
19 that all of Plaintiff’s employment-related paperwork except his W-2 referenced “Cox  
20 Communications” and “Cox Enterprises” rather than “CoxCom,” it was understandable that  
21 Plaintiff mistakenly listed “Cox Communications, Inc.” as opposed to “CoxCom, Inc.” In any  
22 event, the body of the complaint refers to “Cox” as a collective entity and Plaintiff promptly  
23 filed a second DFEH complaint against CCI, CEI, CoxCom, CCC and “any other entity named  
24 ‘Cox’ that employed Dave DelGiaccio” in January 2014, once defense counsel notified him that  
25 CoxCom and CCC were DelGiaccio’s employers. Mazda Decl. ¶ 11, Ex. K. In addition,  
26 Defendants admit that CCI’s legal department serves all of CCI’s subsidiaries, including  
27 CoxCom, Sangston Dep. 37:2-5, and the record shows that the legal department received notice  
28 of the 2012 DFEH complaint. Mazda Decl., Exs. N-P (Dkt. 54-2). Thus, Defendants cannot be

1 heard to complain that they did not receive adequate notice of Plaintiff's claims, regardless of  
2 which Cox entity technically employed him.

3         Given the circumstances, the Court accepts the reference to "Cox" and "Cox  
4 Communications" in the 2012 DFEH complaint as sufficiently broad to include CoxCom and  
5 CCC. In light of FEHA's remedial purpose, punishing Plaintiff with a narrow reading of "Cox"  
6 and "Cox Communications" would lead to an inequitable result, especially given the fact that all  
7 of the Cox entities received actual notice of his 2012 DFEH complaint. *See Elkins v. Derby*, 12  
8 Cal. 3d 410, 414 (1974) ("[R]egardless of whether the exhaustion of one remedy is a  
9 prerequisite to the pursuit of another, if the defendant is not prejudiced thereby, the running of  
10 the limitations period is tolled (w)hen an injured person has several legal remedies and,  
11 reasonably and in good faith, pursues one."), *cited with approval in McDonald v. Antelope*  
12 *Valley Cmty. Coll. Dist.*, 45 Cal. 4th 88, 102 (2008) (approving of equitable tolling of FEHA  
13 statute of limitations when tolling would support the legislative purposes behind FEHA); *cf.* Cal.  
14 Gov't Code § 12960(d)(2) (extending the statute of limitations period for filing a DFEH  
15 complaint if the complainant later discovers that his or her employer is actually someone other  
16 than the entity listed on the W-2).

17         Because the Court concludes that the 2012 DFEH complaint named CCC and CoxCom,  
18 the Court does not address the parties' additional arguments about whether the continuing  
19 violation doctrine saves Plaintiff's 2014 and 2015 DFEH complaints from the one-year statute  
20 of limitations.

### 21                                 **3. Timeliness of 2012 DFEH Complaint**

22         Defendants argue that Plaintiff's FEHA claims are time-barred to the extent that they rely  
23 on events occurring before September 14, 2011. Plaintiff argues that his DFEH complaints were  
24 timely filed under the continuing violation doctrine.

25         Generally, the administrative complaint must be filed within one year of the alleged  
26 unlawful practice. Cal. Gov't Code § 12960(d). Some statutory exceptions apply. For instance,  
27 the one-year period can be extended "[f]or a period of time not to exceed one year following a  
28 rebutted presumption of the identity of the person's employer under Section 12928, in order to

1 allow a person allegedly aggrieved by an unlawful practice to make a substitute identification of  
2 the actual employer.” *Id.* § 12960(d). Additionally, the continuing violation doctrine allows for a  
3 plaintiff to hold a defendant liable for acts of discrimination that fall outside of the one-year  
4 statute of limitations if “it is sufficiently connected to unlawful conduct within the limitations  
5 period.” *Richards v. CH2M Hill, Inc.*, 26 Cal. 4th 798, 802 (2001). It requires that: (1) the  
6 actions inside and outside the limitations period be sufficiently similar in kind; (2) they occur  
7 with sufficient frequency; and (3) they not have acquired a degree of “permanence.” *Id.* For  
8 example, “when an employer engages in a continuing course of unlawful conduct under the  
9 FEHA by refusing reasonable accommodation of a disabled employee or engaging in disability  
10 harassment . . . the statute of limitations begins to run . . . either when the course of conduct is  
11 brought to an end, as by the employer’s cessation of such conduct or by the employee’s  
12 resignation, or when the employee is on notice that further efforts to end the unlawful conduct  
13 will be in vain.” *Id.* at 823-24.

14 Here, Plaintiff claims to have sought accommodations related to testing his blood sugar  
15 levels throughout 2011, including in November 2011 when he asked his supervisor Mariza  
16 Garcia if there was a private area where he could test his blood sugar levels. Erica Wilson Dep.  
17 39:11-42:8, CCC-SUF Nos. 63-67, 84, 88. The parties also dispute whether Cox ever required to  
18 take intermittent FMLA leave as an accommodation and whether he was even eligible to take  
19 FMLA leave before November 2011. Plaintiff allegedly did not actually start taking intermittent  
20 FMLA leave until November 2011. DelGiacco Decl. ¶ 24. Thus, a triable issue of material fact  
21 exists as to whether Plaintiff’s September 14, 2012 DFEH complaint was timely filed under the  
22 continuing violations doctrine.

23 Accordingly, the Court DENIES Defendants’ Motion for Summary Judgment as to  
24 Plaintiff’s FEHA claims on this basis.

1                   **F. FEHA Failure to Provide a Reasonable Accommodation and Failure to**  
2                   **Engage in Interactive Process Claims**

3                   Plaintiff alleges that his employers violated FEHA by failing to provide reasonable  
4 accommodations related to his need to check his blood sugar levels to manage his diabetes and  
5 by suspending him.

6                   **1. Legal Standard**

7                   FEHA makes it unlawful for an employer “to bar or to discharge the person from  
8 employment . . . or to discriminate against the person in compensation or in terms, conditions, or  
9 privileges of employment” based on the person’s disability. Cal. Gov’t Code § 12940(a).

10                  FEHA separately requires employers to make reasonable accommodations for “known  
11 physical or mental disabilit[ies] of an . . . employee.” *Id.* § 12940(m). Courts have interpreted  
12 “reasonable accommodation” within the meaning of FEHA as “a modification or adjustment to  
13 the workplace that enables the employee to perform the essential functions of the job held or  
14 desired.” *Nadaf-Rahrov v. Neiman Marcus Grp., Inc.*, 166 Cal. App. 4th 952, 974 (2008). The  
15 statute itself provides examples of reasonable accommodations, such as

- 16  
17                  (1) Making existing facilities used by employees readily accessible to, and usable  
18 by, individuals with disabilities.  
19                  (2) Job restructuring, part-time or modified work schedules, reassignment to a  
20 vacant position, acquisition or modification of equipment or devices, adjustment  
21 or modifications of examinations, training materials or policies, the provision of  
22 qualified readers or interpreters, and other similar accommodations for individuals  
23 with disabilities.

24 Cal. Gov’t Code § 12926(p). When an employee needs time away from the job for treatment or  
25 recovery, allowing the employee to take leave or extending leave may be a reasonable  
26 accommodation if “the leave is likely to be effective in allowing the employee to return to work  
27 at the end of the leave, with or without further reasonable accommodation, and does not create  
28 an undue hardship for the employer.” Cal. Code Regs. tit. 2, § 11068(c). However, if “an  
employee can work with a reasonable accommodation other than a leave of absence, an

1 employer may not require that the employee take a leave of absence.” *Id.* When multiple  
2 accommodations are potentially available,

3  
4 [a]n employer . . . is required to consider any and all reasonable accommodations  
5 of which it is aware or which are brought to its attention by the applicant or  
6 employee, except ones that create an undue hardship. The employer . . . shall  
7 consider the preference of the applicant or employee to be accommodated, but has  
8 the right to select and implement an accommodation that is effective for both the  
9 employee and the employer . . . .

9 *Id.* § 11068(e).

10 FEHA also requires employers “to engage in a timely, good faith, interactive process  
11 with the employee . . . to determine effective reasonable accommodations, if any, in response to  
12 a request for reasonable accommodation by an employee . . . with a known physical or mental  
13 disability or known medical condition.” Cal. Gov’t Code § 12940(n).

14  
15 Typically, an applicant or employee triggers the employer’s obligation to  
16 participate in the interactive process by requesting an accommodation. (§ 12940,  
17 subd. (n).) Although it is the employee’s burden to initiate the process, no magic  
18 words are necessary, and the obligation arises once the employer becomes aware  
19 of the need to consider an accommodation. Each party must participate in good  
20 faith, undertake reasonable efforts to communicate its concerns, and make  
21 available to the other information which is available, or more accessible, to one  
22 party. Liability hinges on the objective circumstances surrounding the parties’  
23 breakdown in communication, and responsibility for the breakdown lies with the  
24 party who fails to participate in good faith.

25 *Gelfo v. Lockheed Martin Corp.*, 140 Cal. App. 4th 34, 62 (2006).

## 26 **2. Analysis**

27 Defendants make two main arguments why Plaintiff’s failure to reasonably accommodate  
28 and failure to engage in the interactive process claims should fail: (1) Plaintiff did not make  
clear in 2011 why he needed the accommodations he wanted; and (2) Plaintiff still has not  
demonstrated today that those accommodations were necessary and reasonable. The Court will  
address each argument in turn.

1 Defendants' first argument is that they were never properly notified of what specific  
2 limitations necessitated the three accommodations requested by Plaintiff. The Court disagrees.  
3 Here, Plaintiff's supervisor Erica Wilson drove him to the hospital in April 2011 when Plaintiff  
4 had a diabetic episode. CCC-PAF No. 6. Plaintiff asked Wilson for a specific "medical" code  
5 that would allow him to log off the phone system to monitor his blood sugar and manage his  
6 diabetes without adversely affecting his job performance record. Erica Wilson Dep. 39:11-  
7 41:10. He told Wilson and HR representative Chona Boretti that he needed to be able to stand up  
8 and walk around during the workday because of his neuropathy. CCC-SUF No. 63-64, 66. In  
9 November 2011, he asked his new supervisor Mariza Garcia about getting access to a private  
10 place where he could check his glucose levels. CCC-SUF No. 88. Emails being exchanged  
11 between HR personnel and Plaintiff's managers show that they were aware that Plaintiff needed  
12 to check his blood sugar levels during the workday and that he was asking for a place other than  
13 his desk or car where he could do so. Terri Wilson Dep. Ex. 48 (Dkt. 49-3). Under the "no  
14 magic words" standard, these circumstances are enough to make an employer aware that  
15 Plaintiff had disability-related work limitations and that the employer should begin engaging in  
16 the interactive process of identifying a suitable accommodation. Thus, Plaintiff has raised a  
17 genuine dispute of material fact as to whether Defendants were aware of his limitations.

18 There are also triable issues of material fact regarding who broke off the interactive  
19 process first. Defendants claim that Plaintiff never provided medical documentation of specific  
20 restrictions requiring additional breaks or a private place to test his blood sugar levels. However,  
21 it is not clear that Cox ever asked Plaintiff to provide documentation in response to these  
22 specific requests, although HR representative Chona Boretti did ask Plaintiff for medical  
23 documentation regarding his standing/walking around request. Plaintiff claims that he did  
24 provide documentation to his employer's FMLA administrator even though an earlier instruction  
25 by Boretti that he should not name his specific medical condition due to Health Insurance  
26 Portability and Accountability Act (HIPAA) privacy concerns made him think that perhaps she  
27 did not want medical documentation. DelGiacco Decl. ¶ 24. With regard to the request for a  
28 "medical" code, Plaintiff asserts that he was told he had to use intermittent FMLA leave even

1 though he had already used up all of his FMLA leave for that year to take care of his wife when  
2 she was ill with cancer. DelGiacco Decl. ¶¶ 10, 12. Defendants claim that HR representative  
3 Boretti never told him that. Boretti Decl. ¶ 7 (Dkt. 49-3). With regard to the request for a private  
4 room, Defendants claim that Plaintiff’s supervisor Mariza Garcia told him he could use an  
5 empty office or a locking men’s room. Garcia Decl. ¶ 10. Plaintiff claims that no one ever got  
6 back to him. DelGiacco Decl. ¶ 9. Because triable issues of material fact abound, summary  
7 judgment cannot be granted on Plaintiff’s interactive process claim.

8 Defendants’ second argument is that Plaintiff’s claims fail because, even after going  
9 through the litigation process, he still has not identified a reasonable accommodation to which  
10 he was entitled at the time. If Plaintiff was not entitled to the accommodations he asked for  
11 because they were not “reasonable,” then Defendants cannot be held liable for failure to provide  
12 a reasonable accommodation. Defendants argue that, if Plaintiff cannot identify a reasonable  
13 accommodation, then he also cannot prevail on his interactive process claim. The Court agrees.

14 The California courts are split on whether an employer can still be held liable for failure  
15 to engage in the interactive process even if it turns out that no reasonable accommodation was  
16 available. In *Wysinger v. Auto. Club of S. California*, 157 Cal. App. 4th 413 (2007), a manager  
17 of the Auto Club’s Santa Barbara office wanted to be reassigned to Ventura because his daily  
18 commute to Santa Barbara aggravated his arthritis. The jury found that the employer did not fail  
19 to provide a reasonable accommodation, but the employer did fail to engage in the interactive  
20 process. The court upheld the jury verdict, stating that “the jury could find there was no failure  
21 to provide a required accommodation because the parties never reached the stage of deciding  
22 which accommodation was required. [The employer] prevented this from happening by its  
23 refusal to engage in the interactive process.” *Id.* at 425. This result suggests that an employer  
24 can be held liable for failure to interact even if no reasonable accommodation was required. The  
25 court in *Nadaf-Rahrov v. Neiman Marcus Grp., Inc.*, 166 Cal. App. 4th 952 (2008), on the other  
26 hand, held that an employer can be held liable for failure to engage in the interactive process  
27 only if a reasonable accommodation was possible, *id.* at 980-83, and that “the burden of proving  
28 the availability of a reasonable accommodation rests on the employee.” *Id.* at 984.



1           *Scotch v. Art Inst. of California-Orange Cnty., Inc.*, 173 Cal. App. 4th 986 (2009),  
2 reconciled *Wysinger, Nadaf-Rahrov*, and other cases thus: “[D]uring the interactive process  
3 itself the employee does not have the same access to information about possible  
4 accommodations as the employer does. But . . . through the litigation process, including  
5 discovery, the employee must be able to identify a reasonable accommodation that would have  
6 been available during the interactive process” in order to prevail on a failure to engage in  
7 interactive process claim. *Id.* at 1018. The Court finds this reasoning persuasive because it  
8 incentivizes employers to provide information about potential reasonable accommodations  
9 during the interactive process (since that information will come out in discovery anyway) and it  
10 gives employees leverage to hold employers accountable to their obligation to engage in the  
11 interactive process without burdening employees with the responsibility to articulate reasonable  
12 accommodations before they gain access to information in the employer’s possession. *See id.*  
13 (“An employee cannot necessarily be expected to identify and request all possible  
14 accommodations during the interactive process itself because [e]mployees do not have at their  
15 disposal the extensive information concerning possible alternative positions or possible  
16 accommodations which employers have . . .”) (internal quotation marks omitted) (alteration in  
17 original). Thus, this Court holds that Plaintiff cannot prevail on his failure to engage in  
18 interactive process claim unless he can show that a reasonable accommodation was available at  
19 the time.

20           Here, Defendants argue that unlimited breaks were not a reasonable accommodation  
21 because an essential function of Plaintiff’s job was to be at his desk answering the phone. To the  
22 extent that Plaintiff’s request for a “medical” code was a request to be paid for doing no work,  
23 that would be unreasonable. However, reading the evidence in the light most favorable to him,  
24 Plaintiff likely simply wanted permission to take more breaks than he normally received, within  
25 some reasonable limit. Defendants further argue that Plaintiff did not need additional breaks to  
26 check his blood sugar levels because he already had sufficient regular break times and flexibility  
27 to take additional breaks during his shifts. What constitutes a reasonable accommodation is a  
28 question of fact. *Lujan v. Pac. Mar. Ass’n*, 165 F.3d 738, 743 (9th Cir. 1999). Since there are

1 genuine disputes of fact as to what Plaintiff's limitations actually were and what Defendants  
2 knew about Plaintiff's limitations, the Court cannot find that Plaintiff's requested  
3 accommodations were per se unreasonable. Thus, the Court will leave the question of  
4 reasonableness to the jury.

5 Accordingly, the Court DENIES Defendants' Motion for Summary Judgment as to  
6 Plaintiff's failure to accommodate and failure to engage in an interactive process FEHA claims.

### 7 **G. FEHA Punitive Damages**

8 Defendants argue that Plaintiff is not entitled to punitive damages on his FEHA claim  
9 because (1) Defendants did not act with malice by making routine, ordinary business decisions  
10 and (2) none of the individuals making decisions regarding Plaintiff's requests for  
11 accommodations were "managing agents" of CoxCom or CCC.

#### 12 **1. Legal Standard**

13 In order to obtain punitive damages for his FEHA claims against his corporate employer,  
14 Plaintiff must show by clear and convincing evidence that an officer, director, or managing  
15 agent of the corporation "had advance knowledge of the unfitness of the employee and  
16 employed him or her with a conscious disregard of the rights or safety of others or authorized or  
17 ratified the wrongful conduct for which the damages are awarded or was personally guilty of  
18 oppression, fraud, or malice." Cal. Civ. Code § 3294(a)-(b). "Malice" is defined as "conduct  
19 which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is  
20 carried on by the defendant with a willful and conscious disregard of the rights or safety of  
21 others." Cal. Civ. Code § 3294(c)(1).

22 The California Supreme Court has interpreted the term "managing agent" "to include  
23 only those corporate employees who exercise substantial independent authority and judgment in  
24 their corporate decisionmaking so that their decisions ultimately determine corporate policy."  
25 *White v. Ultramar, Inc.*, 21 Cal. 4th 563, 566-67 (1999). "Corporate policy" refers to "formal  
26 policies that affect a substantial portion of the company and that are the type likely to come to  
27 the attention of corporate leadership." *Roby v. McKesson Corp.*, 47 Cal. 4th 686, 715 (2009).  
28 The ability to hire and fire other employees is not sufficient by itself to make someone a

1 managing agent. *White*, 21 Cal. 4th at 577. “The scope of a corporate employee’s discretion and  
2 authority under [the *White*] test is . . . a question of fact for decision on a case-by-case basis.” *Id.*  
3 at 567.

4 “For purposes of determining an employer’s liability for punitive damages, ratification  
5 generally occurs where, under the particular circumstances, the employer demonstrates an intent  
6 to adopt or approve oppressive, fraudulent, or malicious behavior by an employee in the  
7 performance of his job duties.” *Coll. Hosp. Inc. v. Superior Court*, 8 Cal. 4th 704, 726 (1994).  
8 “Corporate ratification in the punitive damages context requires actual knowledge of the conduct  
9 and its outrageous nature.” *Id.*

## 10 **2. Analysis**

### 11 **a. Scope of Plaintiff’s FEHA Claims**

12 Some of the higher-level Cox employees who could potentially be managing agents only  
13 knew about some but not all of the actions that lower-level employees took with respect to  
14 Plaintiff’s requests for accommodations and suspension. Thus, as a preliminary matter, the  
15 Court must ascertain what is within the scope of Plaintiff’s FEHA claims. Based on the parties’  
16 briefing and oral arguments, there appear to be four potential actions or omissions at issue: (1)  
17 not providing a “medical” code that Plaintiff could use to take additional breaks without  
18 negative consequences; (2) not allowing him flexibility to stand and walk around instead of sit at  
19 his desk; (3) not providing a private, sanitary place where he could check his blood sugar levels;  
20 and (4) stopping him from taking the accommodation of intermittent FMLA leave by  
21 suspending him.

22 Defendants argue that Plaintiff did not plead any of these failures except the first one in  
23 his complaint. This is not quite accurate. The complaint states:

24  
25 Mr. DelGiacco repeatedly asked about obtaining a reasonable accommodation for  
26 checking his blood sugar levels at work to avoid any episodic reactions. He also  
27 inquired about a code that he could use to log off the phone system so that he  
28 could check his sugar levels throughout his shift. Cox had accommodated similar  
requests from employees in Mr. DelGiacco’s same position who were pregnant or  
who were breast feeding. However, Cox consistently and repeatedly denied Mr.

1 DelGiacco any type of reasonable accommodation so that he could check his  
2 blood sugar (a procedure that only takes a few minutes to conduct).

3 Compl. ¶ 13. Although the complaint does not provide specific accommodations Plaintiff asked  
4 for besides the “medical” code, the complaint is clear that he did ask for other types of  
5 accommodations. Plaintiff testified in his deposition and emails were produced during discovery  
6 showing that he asked for permission to walk around to improve blood circulation in his legs.  
7 *See supra* Part I.A.2.b. His testimony and emails also revealed that he asked for a private space  
8 in which to test his blood sugar levels. Defendants themselves recognized that these issues were  
9 raised during discovery, as they brought up these issues in their statement of uncontroverted  
10 facts accompanying CCC’s and CoxCom’s motion for summary judgment. *See* CCC-SUF Nos.  
11 63-92.

12 The Ninth Circuit held in *Pickern v. Pier 1 Imports (U.S.), Inc.*, 457 F.3d 963 (9th Cir.  
13 2006), that a district court need not address allegations raised for the first time after the close of  
14 discovery and in response to a motion for summary judgment if the plaintiff’s pleadings did not  
15 provide sufficient notice of those allegations. *Id.* at 965. Here, however, Plaintiff’s complaint did  
16 provide notice that Plaintiff’s FEHA claim was factually based on more than the “medical” code  
17 request and those issues were explored in discovery, as demonstrated by Defendants (not  
18 Plaintiff) being the first to raise them at the summary judgment stage. Since Defendants do not  
19 and could not claim that they were prejudiced by lack of time to develop their defenses, the  
20 Court is not persuaded that Plaintiff’s failure to plead his standing/walking and private room  
21 requests with greater particularity at the start of the case should, alone, preclude him from  
22 raising those issues at trial. This is particularly so in light of the fact that Rule 15(b) allows  
23 amendment of pleadings to conform to the evidence even during and after trial, so long as the  
24 other party is not prejudiced.

25 The analysis of Plaintiff’s suspension is a little different. Plaintiff argues that his  
26 suspension was a failure to provide a reasonable accommodation under § 12940(m) because his  
27 suspension cut off his ability to take intermittent FMLA leave. However, Plaintiff has provided  
28 no legal authority for this theory. The Court has considered that the suspension could be

1 interpreted as Defendants forcing Plaintiff to take a full-time leave of absence even though he  
2 could work with another reasonable accommodation, such as intermittent leave. FEHA  
3 regulations provide that, if “an employee can work with a reasonable accommodation other than  
4 a leave of absence, an employer may not require that the employee take a leave of absence.” Cal.  
5 Code Regs. tit. 2, § 11068(c). Section 11068(c), however, addresses what an employer should  
6 do when deciding between a leave of absence and other forms of accommodation; it is not a  
7 prohibition against employers suspending employees. There is no evidence here that Defendants  
8 thought of the suspension as a potential way to accommodate Plaintiff’s diabetes. Thus,  
9 Plaintiff’s suspension theory fails under § 12940(m).

10       It seems to this Court that the suspension could more viably support a cause of action  
11 under California Government Code § 12940(a), which prohibits discrimination in the terms and  
12 conditions of employment, as opposed to causes of action under §§ 12940(m) or (n), which  
13 require employers to provide reasonable accommodations and to engage in an interactive  
14 process to identify reasonable accommodations. However, Plaintiff has not explicitly pled a  
15 cause of action under § 12940(a), nor has Plaintiff requested that the Court grant leave to amend  
16 the complaint to plead such a cause of action or that the Court consider at the summary  
17 judgment stage whether Plaintiff may be entitled to relief under § 12940(a).<sup>4</sup> Thus, the Court  
18 will not *sua sponte* construe Plaintiff’s suspension-as-a-failure-to-accommodate theory as a  
19 request to consider his entitlement to relief under § 12940(a).

20       Accordingly, the Court considers Plaintiff’s FEHA claims limited at this stage to the first  
21 three omissions, not including Plaintiff’s suspension.

---

22  
23 <sup>4</sup> Rule 8 requires the plaintiff to plead facts supporting *claims for relief*, not causes of action, statutes or legal  
24 theories. *Alvarez v. Hill*, 518 F.3d 1152, 1157 (9th Cir. 2008). “Even when the plaintiff is represented by counsel,  
25 and counsel initially misconceived the proper legal theory of the claim,” plaintiff can prevail on summary  
26 judgment if the plaintiff is entitled to relief on some other legal theory and requests such relief in opposing  
27 summary judgment. *Id.* at 1158 (internal quotation marks omitted); *see also Crull v. GEM Ins. Co.*, 58 F.3d 1386,  
28 1391 (9th Cir. 1995) (holding that district court erred in granting summary judgment to defendant after holding  
that plaintiffs’ state law claims were preempted by ERISA even though plaintiffs’ had asked in their opposition to  
defendants’ summary judgment motion that the court consider whether plaintiffs were entitled to relief under  
ERISA in the event that their state law claims were preempted). Here, unlike the plaintiffs in *Alvarez* and *Crull*,  
Plaintiff has not articulated or argued a § 12940(a) theory even at the summary judgment stage. Rather, Plaintiff  
has insisted that his suspension is failure to accommodate under § 12940(m), which the Court has held is not a  
viable legal theory.

1 **b. Relevant Facts**

2 The Court now considers whether summary judgment on FEHA punitive damages is  
3 appropriate. The following persons occupied the following roles within Cox and played the  
4 following roles in decisions regarding Plaintiff's requested accommodations and suspension:

5 Plaintiff's immediate supervisors were first Erica Wilson and then Mariza Garcia. They  
6 supervised a team of 13 retention representatives. Their authority to impose discipline and make  
7 personnel decisions was limited to the roughly 13 members of their employee teams. CCC-SUF  
8 Nos. 97. Wilson knew about Plaintiff's diabetes and spoke to him about his need for  
9 accommodations. She allegedly failed to provide him the "medical" code that he asked for.  
10 Garcia also knew about Plaintiff's diabetes because Plaintiff asked her for a private space where  
11 he could check his glucose levels. Garcia allegedly failed to respond to Plaintiff's request.  
12 Garcia and her supervisor Jessica Allsopp were the ones who first listened to the tapes where  
13 Plaintiff allegedly mishandled calls. Garcia, Allsopp, and HR representative Chona Boretti  
14 attended the December 7, 2011 meeting where they informed Plaintiff he was being suspended.

15 HR representative Chona Boretti communicated with Plaintiff about his need for  
16 accommodations for his diabetes, in particular his standing/walking request. She participated in  
17 email chains about his request for a private room. She was aware that his previous experience  
18 with Cox's FMLA administrator had almost led to legal problems. Boretti did not supervise  
19 anyone as part of her work at Cox, nor did she develop human resources policies for Cox. CCC-  
20 SUF Nos. 99-100.

21 Jessica Allsopp was Erica Wilson's and then Garcia's supervisor. In 2011, Allsopp  
22 supervised between 50-150 employees. CCC-PAF No. 201. There is some evidence that she was  
23 involved in granting Plaintiff intermittent FMLA leave. Terri Wilson Dep. 101:3-102:20. She  
24 participated in email chains discussing his request for a private space to test his blood sugar. *Id.*  
25 Ex. 47, 48. She and Garcia were the ones who initially discovered the tapes of Plaintiff allegedly  
26 mishandling calls. She participated in the decision to suspend and terminate Plaintiff.

27 Allsopp's boss in 2011 was Pablo Pareja, director of sales and retention. Terri Wilson  
28 Decl. ¶ 3. He was notified about the mishandled calls when Allsopp discovered them. He

1 participated in the decision in December 2011 to suspend and terminate Plaintiff. Terri Wilson  
2 Dep. 273:3-274:6; Terri Wilson Decl. ¶ 6.

3 In 2011, Terri Wilson was Boretti's supervisor. CCC-SUF No. 23; CCC-PAF No. 203. In  
4 2011, she was the Director of People Services for Cox for all of California and she reported to  
5 Sharon Smith, Vice President of People Services for California. Terri Wilson Decl. ¶¶ 1, 4-5. In  
6 2011, Wilson had the authority to hire and fire within the HR department and she had to approve  
7 suspension and termination decisions for employees in other departments, altogether totaling  
8 2,800 employees in California. Terri Wilson Dep. 503:13-19. Wilson was involved in  
9 discussions with Boretti and Joe Freeman regarding Plaintiff taking intermittent FMLA leave.  
10 *Id.* at 101:3-102:6, 270:1-22. She participated in the decision to suspend and terminate Plaintiff.  
11 Terri Wilson Decl. ¶ 6.

12 Joe Freeman is the Executive Director, Assistant General Counsel for CCI, four levels  
13 below the CEO of CCI. He provides employment related advice regarding all 18,000 employees  
14 of CCI and its subsidiaries. In 2011, he provided such advice regarding 20,000 employees.  
15 CCC-PAF Nos. 204-206. He discussed Plaintiff's taking intermittent FMLA leave with Boretti  
16 and Terri Wilson. Terri Wilson Dep. 101:3-102:6, 270:1-22. He was consulted for his legal  
17 opinion when Allsopp, Pareja, Boretti, and Terri Wilson made the decision to terminate  
18 Plaintiff. *Id.* at 368:19-370:2.

### 19 **c. Evidence Supporting Punitive Damages**

20 It is beyond dispute that Boretti, Wilson, and Garcia were not managing agents for §  
21 3294(b) purposes, as they did not occupy positions from which they could determine corporate  
22 policy. Thus, their conduct, even if malicious, cannot support an award of punitive damages  
23 unless someone who was a managing agent within the company authorized or ratified their  
24 actions. Alternatively, a managing agent could have acted with malice themselves.

25 Freeman cannot serve as managing agent because he was employed by CCI, not CCC or  
26 CoxCom. In any event, there is no evidence in the record that he was a decision-maker with  
27 regard to Plaintiff's accommodation requests, as opposed to someone merely consulted for legal  
28 advice. Thus, his conduct cannot support an award of punitive damages.

1 Pareja was a higher-level employee who may have determined CoxCom's or CCC's  
2 corporate policy. However, even if Pareja is a managing agent, Plaintiff has not provided  
3 evidence that Pareja even knew about Plaintiff's diabetes or about his requests for  
4 accommodations at all, let alone that Pareja authorized or ratified any of the actions his  
5 subordinates took with regard to Plaintiff's requests. Thus, Pareja's conduct cannot support an  
6 award of punitive damages either.

7 Terri Wilson could be a managing agent because she was second-in-command of the HR  
8 department for California, had the authority to hire and fire within her own department, and had  
9 to sign off on all termination decisions of employees below the director level are sufficient to  
10 find her a managing agent. Unlike Pareja, there is some evidence that she was aware of  
11 Plaintiff's history of seeking accommodations. (Boretti asked her to ask Freeman for advice  
12 about whether Plaintiff was eligible to take intermittent FMLA leave. Terri Wilson Dep. 101:3-  
13 102:20.) However, Plaintiff has not directed the Court to evidence showing whether Wilson  
14 approved of requiring Plaintiff to take intermittent FMLA leave even though he potentially was  
15 not eligible for it and whether she believed that that constituted a reasonable accommodation  
16 under FEHA. Thus, her conduct cannot support an award of punitive damages.

17 With regard to Allsopp, even if she could be a managing agent, Plaintiff has not directed  
18 the Court to evidence that Allsopp knew about Plaintiff's request for a "medical" code or his  
19 request for permission to stand up and walk around during his shift. Allsopp was aware of his  
20 request for a private room to test his glucose, but there is no evidence that she authorized or  
21 ratified Garcia's or Boretti's alleged failure to respond to Plaintiff's request. Thus, her conduct  
22 cannot support an award of punitive damages either.

23 Accordingly, the Court holds that Plaintiff cannot recover punitive damages on his failure  
24 to reasonably accommodate and failure to engage in the interactive process claims.

#### 25 **H. Spoliation of Evidence**

26 Plaintiff argues that Defendants should be sanctioned for destroying the tapes of the calls  
27 that Plaintiff supposedly mishandled and for which he was suspended. Plaintiff seeks sanctions  
28 ranging from terminating sanctions to various evidentiary sanctions.



1 **1. Legal Standard**

2 “Spoliation of evidence is ‘the destruction or significant alteration of evidence, or the  
3 failure to properly preserve property for another’s use as evidence in pending or reasonably  
4 foreseeable litigation.’” *Lifetouch Nat’l Sch. Studios, Inc. v. Moss-Williams*, Case No. C10-  
5 05297 RMW (HRL), 2013 U.S. Dist. LEXIS 148360, at \*7 (N.D. Cal. Oct. 15, 2013) (quoting  
6 *Zubulake v. UBS Warburg LLD*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003)). “A federal trial court  
7 has the inherent discretionary power to make appropriate evidentiary rulings in response to the  
8 destruction or spoliation of relevant evidence.” *Glover v. BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir.  
9 1993).

10 Most courts use the three-part test set forth in *Zubulake*:

11 A party seeking sanctions for spoliation of evidence must prove the following  
12 elements: (1) the party having control over the evidence had an obligation to  
13 preserve it when it was destroyed or altered; (2) the destruction or loss was  
14 accompanied by a culpable state of mind; and (3) the evidence that was destroyed  
15 or altered was relevant to the claims or defenses of the party that sought the  
16 discovery of the spoliated evidence[.]

17 *Montoya v. Orange County Sheriff’s Dep’t*, Case No. 11-cv-1922, 2013 U.S. Dist. LEXIS  
18 180682, at \*19-20 (C.D. Cal. Oct. 15, 2013) (internal quotation marks omitted). “Litigants have  
19 an obligation to preserve evidence from the moment that litigation is reasonably anticipated.”  
20 *Apple Inc. v. Samsung Elecs. Co.*, 881 F. Supp. 2d 1132, 1136 (N.D. Cal. 2012) (“*Apple I*”).  
21 “This is an objective standard, asking not whether the party in fact reasonably foresaw litigation,  
22 but whether a reasonable party in the same factual circumstances would have reasonably  
23 foreseen litigation.” *Micron Tech., Inc. v. Rambus Inc.*, 645 F.3d 1311, 1320 (Fed. Cir. 2011).

24 If a party is found to have spoliated evidence, the court then determines whether and  
25 which sanctions are appropriate. Courts choose “the least onerous sanction corresponding to the  
26 willfulness of the destructive act and the prejudice suffered by the victim.” *Apple Inc. v.*  
27 *Samsung Electronics Co.*, 888 F. Supp. 2d 976, 992 (N.D. Cal. 2012) (“*Apple II*”). “Ultimately,  
28 the choice of appropriate spoliation sanctions must be determined on a case-by-case basis, and

1 should be commensurate to the spoliating party's motive or degree of fault in destroying the  
2 evidence." *Id.* at 992-93.

## 3 **2. Analysis**

4 Here, the relevance prong is easily satisfied. The tapes are key to understanding the  
5 motivation behind the decision to suspend and to eventually terminate Plaintiff. Without ever  
6 having heard the tapes, it is much more difficult for Plaintiff to refute Defendants' descriptions  
7 of the tapes.

8 However, because it is not clear when or in what circumstances the tapes were lost, it is  
9 not clear whether Defendants had a duty to preserve or what Defendants' state of mind was at  
10 the time the tapes were lost. The tapes could have been destroyed as early as December 7, 2011,  
11 the day that Plaintiff was suspended, or they could have been deleted 30 days or more later,  
12 pursuant to Cox's normal retention policies.

13 Defendants clearly had a duty to preserve evidence after December 3, 2012, when  
14 Defendants received Plaintiff's demand letter. Before that point, however, Defendants would  
15 only have had a duty if there was a reasonable expectation of litigation. There is evidence that  
16 Defendants recognized at the time they suspended him that Plaintiff's experiences with Cox's  
17 FMLA administrator UNUM while he was on FMLA leave caring for his wife had once almost  
18 led to legal troubles. But, the Court cannot say that a reasonable person in Defendants' situation  
19 would have expected Plaintiff to sue Defendants regarding his suspension. As Defendants point  
20 out, after his troubles with UNUM, Plaintiff came back to work without bringing a lawsuit. Of  
21 course, being suspended for cause is different from feeling harassed by an employer's FMLA  
22 administrator and it is not uncommon for an employee upset by a sudden adverse employment  
23 action to sue their employers. However, ultimately, "[a] general concern over litigation does not  
24 trigger a duty to preserve evidence. [A party has] no duty to preserve relevant documents or  
25 evidence until a potential claim was identified or future litigation was probable." *Realnetworks,*  
26 *Inc. v. DVD Copy Control Ass'n, Inc.*, 264 F.R.D. 517, 526 (N.D. Cal. 2009).

27 Plaintiff argues that Defendants had a separate legal duty to preserve the tapes under 29  
28 C.F.R. § 1602.14, which states:

1  
2 Any personnel or employment record made or kept by an employer (including but  
3 not necessarily limited to requests for reasonable accommodation, application  
4 forms submitted by applicants and other records having to do with hiring,  
5 promotion, demotion, transfer, lay-off or termination, rates of pay or other terms  
6 of compensation, and selection for training or apprenticeship) shall be preserved  
7 by the employer for a period of one year from the date of the making of the record  
8 or the personnel action involved, whichever occurs later.

9 Defendant argues that this regulation does not apply to the tapes because the tapes are not  
10 “personnel or employment record[s]” within the meaning of the regulation. There is not much  
11 case law on point. However, the Seventh Circuit has held that “[e]mployers are not required to  
12 keep every single piece of scrap paper that various employees may create during the termination  
13 process. It is sufficient that the employer retains only the actual employment record itself, not  
14 the rough drafts or processes which may lead up to it.” *Rummery v. Illinois Bell Tel. Co.*, 250  
15 F.3d 553, 558-59 (7th Cir. 2001). That case involved an employer who asked its managers to fill  
16 out ranking sheets and write evaluation notes to rank at-risk employees who would be  
17 terminated. The Seventh Circuit affirmed a district court’s finding that § 1602.14 only required  
18 the employer to preserve the summary sheet containing the final rankings, not each manager’s  
19 rankings and evaluation notes. *Id.* Here, similar to the ranking sheets in *Rummery*, the tapes  
20 were the raw material on which the employer’s personnel decision was based, but they were not  
21 the actual employment records that the employer was required to keep.

22 Even if the tapes were squarely employment or personnel records under § 1602.14, the  
23 Court still would not be inclined to find spoliation as Plaintiff has not demonstrated that  
24 Defendants acted with a culpable state of mind. Defendants preserved and produced a number of  
25 documents related to the calls at issue. Allsopp explained that, although she sometimes  
26 downloaded calls off of the Qfiniti system onto her local computer, it was not her normal  
27 practice to save all of the tapes that she reviewed for disciplinary issues. Allsopp Decl. ¶¶ 6-7  
28 (Dkt. 58-1, Ex. 7). Plaintiff insinuates that Defendants must be hiding something because they  
did not produce Allsopp as their Rule 30(b)(6) witness and because their 30(b)(6) witness did  
not have clear answers about the tapes. However, Plaintiff does not explain why he did not

1 simply subpoena Allsopp as a percipient witness. Without stronger evidence that Allsopp or  
2 other employees willfully caused the tapes to be deleted or that it was grossly negligent for them  
3 to do so because they should have foreseen a lawsuit involving the tapes, the Court is not  
4 inclined to find spoliation or to grant an adverse inference instruction or other sanctions at this  
5 time.

#### 6 **IV. Disposition**

7 For the reasons discussed above, the Court ORDERS as follows:

8 (1) Cox Enterprises, Inc.'s Motion for Summary Judgment is DENIED AS MOOT;

9 (2) CCI's Motion for Summary Judgment is GRANTED and Plaintiff's claims against CCI  
10 are DISMISSED WITH PREJUDICE;

11 (3) CCC and CoxCom's Motion for Summary Judgment is GRANTED IN PART and  
12 DENIED IN PART as follows:

13 a. Plaintiff is not entitled to punitive or emotional distress damages on his FMLA  
14 claims;

15 b. Plaintiff is not entitled to punitive damages on his failure to reasonably  
16 accommodate and failure to engage in the interactive process FEHA claims;

17 c. Triable issues of material fact remain as to:

18 i. Whether Plaintiff's taking intermittent FMLA leave in November 2011 was  
19 a negative factor in Defendants' decision to suspend him;

20 ii. Whether Plaintiff timely filed his September 14, 2012 DFEH complaint;

21 iii. Whether Defendants failed to provide reasonable accommodations; and

22 iv. Whether Defendants failed to engage in an interactive process with  
23 Plaintiff; and

24 (4) Plaintiff's Motion for Sanctions is DENIED.


25  
26 The Court also hereby ORDERS as follows:  
27  
28

1 (5) Plaintiff shall file oppositions to Defendants' motions in limine on or before **Tuesday,**  
2 **April 7, 2015.** Defendants shall also file oppositions to Plaintiff's motions in limine by  
3 that date;

4 (6) The parties shall lodge an amended proposed final pretrial order consistent with this order  
5 on or before **Thursday, April 9, 2015;** and

6 (7) The parties are ordered to attend a mandatory settlement conference with Magistrate  
7 Judge Douglas F. McCormick on **Monday, April 13, 2015, at 11:00 a.m.**

8 DATED: April 6, 2015

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10 \_\_\_\_\_  
11 DAVID O. CARTER  
12 UNITED STATES DISTRICT JUDGE  
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