UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

JUSTIN SHEPHERD, Plaintiff, v. KOHL'S DEPARTMENT STORES, INC., Defendants.	No. 1:14-cv-01901-DAD-BAM ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (Doc. No. 46)

This matter is before the court on defendant's motion for summary judgment on all claims. A hearing on the motion was held on July 5, 2016. Attorneys Anthony Sperber and Kurt Dreger appeared at that hearing on behalf of plaintiff and attorney Leila Narvid appeared for the defendant. The court has considered the parties' briefs and arguments. For the reasons discussed below, the court will grant defendant's motion in part and deny it in part.

BACKGROUND

The facts of this case are largely undisputed. Plaintiff was hired by Kohl's to work as a material handler at its distribution center in Patterson, California in June 2006. As part of his hiring, he signed a written agreement which included a provision which stated he was an at-will employee. Plaintiff had generally positive attendance and performance reviews, and was promoted to assistant shift supervisor in 2007. Plaintiff experienced some negative performance reviews during 2010 and early 2011. In August 2011, plaintiff was diagnosed with acute and

chronic anxiety and received a recommendation for medical marijuana. Plaintiff did not disclose that recommendation for, or his use of, medical marijuana to his employer. In 2012, defendant updated its personnel policies to include exceptions to its drug testing and substance abuse policies, stating (as described further below) that employees in certain states, including California, who had a valid medical marijuana recommendation would not be discriminated against on that basis in hiring, termination, or other employment actions. Plaintiff testifies he reviewed those policies and relied on them in electing to continue using medical marijuana to treat his anxiety and to cease looking for a new job.

On January 14, 2014, plaintiff strained his back at work while unloading cargo from a trailer. His supervisor advised him to go to U.S. HealthWorks, which is defendant's health care provider for worker's compensation purposes. There is some dispute about whether plaintiff was told he would be required to take a drug test in order for treatment to be provided. Ultimately, he signed a form consenting to a drug test. Two days later, on January 16, 2014, plaintiff received a call from U.S. HealthWorks advising him he had tested positive for trace amounts of marijuana metabolites. Plaintiff knew he had used marijuana while off-duty several days prior to the injury and that metabolites of the drug remained in one's system for some time, and was therefore unsurprised by the test results.

Five days after the call from U.S. HealthWorks, on January 21, 2014, plaintiff was called into a meeting with Maurice Barrera and Irma Ochoa, respectively the local operations manager and human resources manager for defendant. Barrera and Ochoa asked plaintiff about his drug test results. Plaintiff advised them he used medical marijuana to treat his anxiety. Plaintiff showed Barrera and Ochoa the recommendation for his medicinal marijuana, which he had in his locker at work. At the end of the meeting, Barrera and Ochoa suspended plaintiff from work.

The next day, on January 22, 2014, plaintiff left a voicemail for Elizabeth Barnick, a corporate human resources director and Ochoa's superior. Barnick returned plaintiff's call on January 23, 2014, and was apparently unreceptive to any assertions that plaintiff was not under the influence at work, and only used marijuana in conjunction with his valid diagnosis for anxiety, stating, "You should have chosen a different medication." On January 24, 2014, Ochoa

left plaintiff a voicemail, saying he was terminated from employment, effective immediately, with no further explanation. Shortly thereafter, he received an "associate counseling form" from defendant, which asserted he had violated three of the company's guidelines: (1) he reported to work in a condition unfit to perform his duties or under the influence of a controlled substance; (2) he violated a safety rule pertaining to specific work areas; and (3) he acted "in conflict with the interest of Kohl's." (Doc. No. 54 at 7.) This suit followed.

This case was removed here on diversity grounds from Stanislaus County Superior Court on December 1, 2014. (Doc. No. 1.) Plaintiff's second amended complaint states seven state law causes of action: (1) disability discrimination in violation of California's Fair Employment and Housing Act ("FEHA"); (2) failure to engage in an interactive process in violation of the FEHA; (3) failure to reasonably accommodate in violation of the FEHA; (4) invasion of privacy in violation of the California Constitution; (5) wrongful termination in violation of public policy; (6) breach of implied contract and the covenant of good faith and fair dealing; and (7) defamation. (Doc. No. 44.) Defendant filed a motion for summary judgment on June 6, 2016. (Doc. No. 46.) Plaintiff filed an opposition on June 21, 2016. (Doc. No. 52.) Defendant filed its reply on June 28, 2016. (Doc. No. 56.)

LEGAL STANDARD

Summary judgment is appropriate when the moving party "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

In summary judgment practice, the moving party "initially bears the burden of proving the absence of a genuine issue of material fact." *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). The moving party may accomplish this by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials" or by showing that such materials "do not establish the absence or presence of a genuine dispute, or that the adverse party cannot produce admissible evidence to support the

fact." Fed. R. Civ. P. 56(c)(1)(A), (B). When the non-moving party bears the burden of proof at trial, "the moving party need only prove that there is an absence of evidence to support the nonmoving party's case." *Oracle Corp.*, 627 F.3d at 387 (citing *Celotex*, 477 U.S. at 325.). *See also* Fed. R. Civ. P. 56(c)(1)(B). Indeed, summary judgment should be entered, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *See Celotex*, 477 U.S. at 322. "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.* In such a circumstance, summary judgment should be granted, "so long as whatever is before the district court demonstrates that the standard for entry of summary judgment . . . is satisfied." *Id.* at 323.

If the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually does exist. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). In attempting to establish the existence of this factual dispute, the opposing party may not rely upon the allegations or denials of its pleadings but is required to tender evidence of specific facts in the form of affidavits, and/or admissible discovery material, in support of its contention that the dispute exists. *See* Fed. R. Civ. P. 56(c)(1); *Matsushita*, 475 U.S. at 586 n.11; *Orr v. Bank of America, NT & SA*, 285 F.3d 764, 773 (9th Cir. 2002) ("A trial court can only consider admissible evidence in ruling on a motion for summary judgment."). The opposing party must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome of the suit under the governing law, *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987), and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *See Wool v. Tandem Computers, Inc.*, 818 F.2d 1433, 1436 (9th Cir. 1987).

In the endeavor to establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at

trial." *T.W. Elec. Serv.*, 809 F.2d at 631. Thus, the "purpose of summary judgment is to 'pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.'" *Matsushita*, 475 U.S. at 587 (citations omitted).

"In evaluating the evidence to determine whether there is a genuine issue of fact," the court draws "all reasonable inferences supported by the evidence in favor of the non-moving party." *Walls v. Central Costa County Transit Authority*, 653 F.3d 963, 966 (9th Cir. 2011). It is the opposing party's obligation to produce a factual predicate from which the inference may be drawn. *See Richards v. Nielsen Freight Lines*, 602 F. Supp. 1224, 1244–45 (E.D. Cal. 1985), *aff'd*, 810 F.2d 898, 902 (9th Cir. 1987). Finally, to demonstrate a genuine issue, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts . . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita*, 475 U.S. at 587 (citation omitted).

ANALYSIS

1. The FEHA Claims

Plaintiff's first three causes of action allege defendant violated the FEHA. The analysis of each of these claims is instructed by the application of the decision in *Ross v. RagingWire Technologies*, 42 Cal. 4th 920 (2008). In *RagingWire*, the California Supreme Court held the FEHA was not impacted by the Compassionate Use Act, which ostensibly legalized medical marijuana in California. *Id.* at 924. That act, which provides immunity against criminal prosecution under two state statutes, made no other changes in the legal status of marijuana. *Id.* at 924. Because the understanding of the holding in that case informs the analysis of each of these claims, the FEHA claims are addressed in reverse order, starting with plaintiff's cause of action for failure to accommodate, which is squarely controlled by the decision in *RagingWire*.

a. Third Cause of Action – Failure to Accommodate Under the FEHA

California Government Code § 12940 states "[i]t shall be an unlawful employment practice . . . (a) For an employer, because of the . . . physical disability [or] medical condition . . . of any person, to refuse to hire or employ the person . . . or to bar or to discharge the person from

employment." *See also RagingWire*, 42 Cal. 4th at 925. Because an employer may discharge or refuse to hire someone who would be "unable to perform his or her essential duties even with reasonable accommodations," California Government Code § 12940(a)(1)–(2), the statute "inferentially requires employers in their hiring decisions to take into account the feasibility of making reasonable accommodations." *RagingWire*, 42 Cal. 4th at 925–26. However, the FEHA "does not require employers to accommodate the use of illegal drugs," as "[n]o state law could completely legalize marijuana for medical purposes because the drug remains illegal under federal law, even for medical users." *Id.* at 926 (citations and quotations omitted). Because the "operative provisions of the Compassionate Use Act (Health & Saf. Code, § 11362.5) do not speak to employment law," but rather merely provide immunity to criminal prosecution under California Health and Safety Code §§ 11357 and 11358, the court held that a "plaintiff cannot state a cause of action under the FEHA based on defendant's refusal to accommodate his use of marijuana." *Id.* at 928–31.

Since the decision in *RagingWire* conclusively forecloses his third cause of action for failure to reasonably accommodate in violation of the FEHA, plaintiff instead advances several other arguments. First, plaintiff argues defendant waived its right to rely on *RagingWire* as a defense because it implemented policies prohibiting discrimination against medical marijuana card holders who test positive for medical marijuana in 2012, four years after the *RagingWire* decision. (Doc. No. 52 at 40–41.) Second, plaintiff claims defendant is estopped from relying on *RagingWire* as a defense for similar reasons. (Doc. No. 52 at 41–44.) Third, plaintiff argues *RagingWire* is inapplicable, essentially because his FEHA claims are based on defendant's failure to follow its own policies. (Doc. No. 52 at 44–45.) Finally, plaintiff argues his FEHA claims are based on defendant's withdrawal of an already existing accommodation they provided to him, an issue not litigated in *RagingWire*. (Doc. No. 52 at 45–46.) None of plaintiff's arguments in this regard are persuasive.

"[W]aiver is the intentional relinquishment of a known right after knowledge of the facts." *Waller v. Truck Ins. Exch., Inc.*, 11 Cal. 4th 1, 31 (1995) (quotations and citations omitted). "The object of estoppel is to prevent a person from asserting a right which has come into existence by

contract, statute or other rule of law where, because of his conduct, silence or omission, it would be unconscionable to allow him to do so." *Westoil Terminals Co. v. Ind. Indem. Co.*, 110 Cal. App. 4th 139, 151–52 (2003).

In contrast to both of these affirmative defenses stands the California Supreme Court's holding in *RagingWire*. As defendant correctly argues, *RagingWire* did not "create a right" under the FEHA which employers can relinquish: it simply acknowledged a plaintiff cannot state a claim under the FEHA based on an employer's failure to accommodate medicinal marijuana usage. *See* 42 Cal. 4th at 931 ("[P]laintiff cannot state a cause of action under the FEHA based on defendant's refusal to accommodate his use of marijuana."). Put another way, it does not violate the FEHA to terminate an employee based on their use of marijuana, regardless of why they use it, and the Compassionate Use Act did not change that. *Id.* at 926–28. A defendant cannot waive into the ability to be sued for something that does not violate the law. *See, e.g.*, *Nyberg v. Portfolio Recovery Assocs., LLC*, Case. No. 3:15-cv-01175-PK, 2016 WL 3176585, at *3 (D. Ore. June 2, 2016) ("[F]ailure to state a claim for relief is a negative defense, not an affirmative defense."); *Phelps v. City of Parma*, Case No. 1:14-cv-00085-EJL-REB, 2015 WL 893112, at *2 (D. Idaho Mar. 2, 2015) (noting that, even if negative defenses were stricken from the pleadings, plaintiff "would still have the burden of proving his *prima facie* case and Defendants would still be entitled to argue that he does not state a claim upon which relief can be granted").

To the extent plaintiff attempts to argue around the holding in *RagingWire* by asserting his FEHA claim is based on defendant's failure to follow its own policies, the court is unpersuaded. (Doc. No. 52 at 45.) Plaintiff presents no authority, and this court has found none, suggesting a cognizable FEHA claim can be based simply on an employer's failure to abide by policies not required by FEHA. While the failure to abide by its own policies may be a breach of an implied-in-fact contract, for the reasons discussed below, refusing to accommodate an employee's marijuana usage does not violate FEHA. *See RagingWire*, 42 Cal. 4th at 931.

Similarly, plaintiff's attempt to distinguish *RagingWire* by characterizing his termination as a withdrawal of a pre-existing accommodation is unavailing. The undisputed evidence before

the court on summary judgment establishes that the first time defendant knew of either plaintiff's disability or his medical marijuana recommendation was on January 21, 2014, when plaintiff advised Ochoa and Barrera of these facts in his meeting following his positive drug test. (Doc. No. 53 at 3, 6.) Plaintiff was terminated via voicemail three days later, and was suspended in the intervening time. In no sense of the word can defendant be described as having accommodated plaintiff's use of marijuana given these undisputed facts. Given the above, defendant's motion for summary judgment must be granted as to plaintiff's third cause of action.

b. Second Cause of Action – Failure to Engage in an Interactive Process Under FEHA

California Government Code § 12940 states it is "an unlawful employment practice . . . [f]or an employer . . . to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition." Cal. Gov't Code § 12940(n). California courts have held this requirement requires employers to engage in an interactive process "only if a reasonable accommodation was possible." *Nadaf-Rahrov v. Neiman Marcus Grp., Inc.*, 166 Cal. App. 4th 952, 980–81 (2008). *See also Nealy v. City of Santa Monica*, 234 Cal. App. 4th 359, 379 (2015); *Scotch v. Art Inst. Of Cal.-Orange Cty., Inc.*, 173 Cal. App. 4th 986, 1018–19 (2009). "[T]he employee who brings a section 12940(n) claim bears the burden of proving a reasonable accommodation was available before the employer can be held liable under the statute." *Nadaf-Rahrov*, 166 Cal. App. 4th at 984.

Obviously, defendant cannot be compelled to accommodate plaintiff's medicinal marijuana use. *See RagingWire*, 42 Cal. at 930. To the extent the only remedy sought by plaintiff from the interactive process was one this court cannot force defendant to accept—i.e., that plaintiff be allowed to use medical marijuana or at least not be terminated because of his use—this claim must fail. It would be futile to compel a process seeking only a result the employer could not be made to accept. *See Swonke v. Sprint, Inc.*, 327 F. Supp. 2d 1128, 1137 (N.D. Cal. 2004) ("The Court cannot impose upon the employer an obligation to engage in a

process that was guaranteed to be futile."). At the hearing on the pending motion, however, plaintiff's counsel represented that, if given a chance to participate in the interactive process, plaintiff would have switched medications or stopped using marijuana, rather than lose his job. However, there is no evidentiary support in the record before this court on summary judgment for this contention, upon which plaintiff would bear the burden of proving at trial. Accordingly, summary judgment must be granted for defendant on this claim. *See Oracle Corp.*, 627 F.3d at 387.

Even assuming plaintiff could provide evidence of another alternative for accommodating his anxiety at trial, his claim in this regard must still fail. This is because there is no causal link between defendant's decision to terminate plaintiff and its failure to engage in the interactive process. The undisputed evidence before this court on summary judgment is that, for all of defendant's agents involved in this decision, plaintiff's positive test reflecting his use of marijuana was the sole reason for his termination. There is no evidence before the court that defendant was actually motivated by plaintiff's disability rather than his chosen treatment for the disability.[1] Whether defendant's agents possessed the erroneous belief that a positive test for marijuana metabolites necessary implied plaintiff was impaired at work is immaterial. There is simply no evidence before the court on summary judgment that, had plaintiff engaged in an interactive process, he would not have been terminated for testing positive for marijuana. Without a causal link between the failure to engage in the interactive process and plaintiff's ultimate termination, there can be no recovery since the damages to plaintiff are not connected to defendant's alleged violation of the law. *See Scotch*, 173 Cal. App. 4th at 1018–19. Summary judgment in favor of defendant is therefore appropriate with respect to plaintiff's second cause of action as well.

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[1] Plaintiff's counsel argued at the hearing on the pending motion that discrimination on the basis of a medication for a disability is tantamount to discrimination on the basis of the disability itself. While that is undoubtedly true for medications generally seen as benign, there is no reason to believe it to be true for treatments the efficacy and legality of which are still contested at both the state and federal levels of government.

c. First Cause of Action – Disability Discrimination in Violation of FEHA

Finally, summary judgment in favor of defendant is also appropriate as to plaintiff's first cause of action for the reasons already addressed above: namely, there is no evidence before the court at this stage of the litigation that plaintiff was terminated because of his disability, rather than because of the manner in which he chose to treat his disability.

While a plaintiff generally has an initial burden of establishing a *prima facie* case of intentional discrimination, when an employer moves for summary judgment on a disparate treatment claim in a FEHA case, "'the burden is reversed . . . because the defendant who seeks summary judgment bears the initial burden.'" *Dep't of Fair Emp't & Hous. v. Lucent Techs., Inc.*, 642 F.3d 728, 745 (9th Cir. 2011) (quoting *Hanson v. Lucky Stores, Inc.*, 74 Cal. App. 4th 215, 224 (1999)). *See also Jackson v. Kaplan Higher Education*, LLC, 106 F. Supp. 3d 1118, 1123 (E.D. Cal. 2015); *Gunther v. Xerox Corp.*, Case No. 13-cv-04596-HSG, 2015 WL 5769619, at *7 (N.D. Cal. Oct. 2, 2015) (assessing plaintiff's prima facie showing in light of this standard). Therefore, "[t]o prevail on summary judgment, [the employer is] required to show either that (1) plaintiff could not establish one of the elements of [the] FEHA claim or (2) there was a legitimate, nondiscriminatory reason for its decision to terminate plaintiff's employment." *Lucent Techs., Inc.*, 642 F.3d at 745 (quotations omitted).

"'Disparate treatment' is intentional discrimination on prohibited grounds." *DeJung v. Superior Court of Sonoma Cty.*, 169 Cal. App. 4th 533, 549 n. 10 (2008). The FEHA prohibits discrimination in the workplace based on an employee's disability.[2] Cal. Gov't Code § 12940(a). Generally, California courts utilize the same burden-shifting test adopted in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), requiring plaintiff's to show the following in order to set out a *prima facie* case:

> (1) he was a member of a protected class, (2) he was qualified for the position he sought or was performing competently in the position he held, (3) he suffered an adverse employment action,

[2] Defendant contests whether plaintiff has come forward with sufficient evidence that he suffers from a disability. Since defendant is entitled to summary judgment with respect to this cause of action on a different basis, as discussed below, the court does not reach this issue.

> such as termination, demotion, or denial of an available job, and (4) some other circumstance suggests discriminatory motive.

Guz v. Bechtel Nat'l Inc., 24 Cal. 4th 317, 354–55 (2000). "While the plaintiff's *prima facie* burden is not onerous, he must at least show actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were based on a prohibited discriminatory criterion." *Id.* at 355 (internal quotations and citations omitted).

In this case, it is undisputed plaintiff was terminated because he tested positive for marijuana. (Doc. No. 53 at 4) (noting dispute concerning whether plaintiff's failure to disclose his marijuana use to defendant played any role in his termination, but no dispute as to whether the reason for termination was his positive marijuana test). This is not only conceded by plaintiff, but often highlighted in his opposition to the pending motion. (*See, e.g.*, Doc. No. 52 at 17, 19, 34, 36–39, 60–61.) Again, there is no evidence before the court on summary judgment that plaintiff was fired because of his anxiety and not because of the manner in which he chose to treat that condition. Accordingly, defendant is entitled to summary judgment in its favor as to this FEHA claim as well.

3. Invasion of Privacy

The California Constitution specifically provides for a right to privacy. Cal. Const. art. 1 § 1. To state a cause of action for a violation of the right to privacy, plaintiff has the burden to prove three elements: "(1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy." *Kraslawsky v. Upper Deck Co.*, 56 Cal. App. 4th 179, 185 (1997) (quoting *Hill v. Nat'l Collegiate Athletic Ass'n*, 7 Cal. 4th 1, 39–40 (1994)). These elements are to "be utilized to screen out claims that do not involve a significant intrusion on a privacy interest protected by the state constitutional privacy provision." *Loder v. City of Glendale*, 14 Cal. 4th 846, 893 (1997). "A 'reasonable' expectation of privacy is an objective entitlement founded on broadly based and widely accepted community norms." *Hill*, 7 Cal. 4th at 36. "Whether plaintiff has a reasonable expectation of privacy in the circumstances and whether defendant's conduct constitutes a serious

invasion of privacy are mixed questions of law and fact." *Id.* at 40. "If the undisputed material facts show no reasonable expectation of privacy or an insubstantial impact on privacy interests, the question of invasion may be adjudicated as a matter of law." *Id.* The analysis warrants a case-by-case inquiry: "requirements . . . imposed on private employers by the California constitutional right to privacy will depend upon the application of the elements and considerations we have discussed to the employer's special interests and the employee's reasonable expectations prevailing in a particular employment setting." *Id.* at 55.

Drug testing can give rise to privacy concerns. *See Loder*, 14 Cal. 4th at 897; *Hill*, 7 Cal. 4th at 41–43. However, "[a]dvance notice of drug testing minimizes . . . [any] intrusion on privacy interests." *Smith v. Fresno Irrigation Dist.*, 72 Cal. App. 4th 147, 161 (1999). Further, informed consent diminishes the reasonable expectation of privacy. *Hill*, 7 Cal. 4th at 43. Consent is "generally viewed as a factor in the balancing analysis, and not as a complete defense to a privacy claim." *Kraslawsky*, 56 Cal. App. 4th at 193. Company policies regarding drug testing can be taken into account, *id.* at 187–88, as can an employee's understanding of what the policies meant, *Luck v. S. Pac. Transp. Co.*, 218 Cal. App. 3d 1, 25 (1990).

Here, the evidence on summary judgment establishes plaintiff was aware he could be drug tested long before he was injured. Plaintiff's declaration in opposition to summary judgment states, while he was "never impaired at work, I was still uneasy about the possibility of a drug test, and the possible negative consequences of one," which lead him to look for other prospective employers prior to Kohl's adopting its medical marijuana policies. (Doc. No. 54 at ¶ 11.) After defendant adopted its new policies in 2012, plaintiff understood that "as long as I used the medicine at home and not close to a shift, I would be protected from getting fired *even if [I] tested positive*." (Doc. No. 54 at ¶ 11) (emphasis added). Plaintiff testified at his deposition that he was screened for drug use when he began his employment. (Doc. No. 48-1 at 9.) Plaintiff also signed several forms during his employment acknowledging that he could be drug tested. (Doc. No. 48-1 at 10–11.) While plaintiff argues that defendant's policies changed in 2012, rendering the 2006 consent form he signed invalid (Doc. No. 52 at 51), nothing in defendant's changed policies indicates employees would not be drug tested. Moreover, plaintiff's own declaration

indicates he remained aware he could be drug tested even after those new policies were put into place. Simply put, it is undisputed plaintiff knew he could be drug tested; he simply believed he would not be fired as the result of a positive test.

Plaintiff also argues he should not have been drug tested at all in response to his injury, because company policy only called for drug testing after an accident if it either (1) "involved damage to company property that is outside of normal daily wear and tear on the building or equipment" or (2) occurred on "power or non-power related equipment, which requires any Associate to seek medical treatment." (Doc. No. 55-7 at 4.) In actuality, defendant's policy *mandates* drug testing in those situations, but does not limit it to only those situations. (*See id.*) Indeed, elsewhere the same policy says, "Kohl's reserves the right to require an Associate to submit to a breath, blood and/or urine alcohol/drug test when . . . the Associate has been involved in a workplace accident."[3] (Doc. No. 55-7 at 3.) Plaintiff cannot create a reasonable expectation of privacy out of a policy that generally permits alcohol and drug testing. Given the evidence before the court on summary judgment, no reasonable jury could conclude plaintiff had a reasonable expectation of privacy such that he could not be drug-tested following a workplace accident.[4] As such, summary judgment in favor of the defendant on this cause of action is called for.

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[3] To the extent plaintiff attempts to characterize the harm he suffered as an "injury" but not an "accident" (*see* Doc. No. 52 at 50), in order to suggest this general provision does not apply to him, the court is not persuaded. An "accident" is "an event or condition occurring by chance or arising from unknown or remote causes." Webster's Third New International Dictionary (unabridged) ed: Philip Babcock Gove 2002. An "injury" is "an act that damages, harms, or hurts." *Id.* The two terms are not opposed, and a single incident can be correctly labeled as both an injury and an accident. Here, plaintiff has presented no evidence that his injury did not occur by chance, or did not arise from an unknown cause. Plaintiff has presented no reason why this injury would not fall within the ambit of defendant's policy of allowing testing following a workplace "accident."

[4] Plaintiff's suggestion that his specific consent to the 2014 drug test was coerced (*see* Doc. No. 52 at 52), does not preclude the granting of summary judgment. As plaintiff himself acknowledges, he knew he could be drug-tested, but merely thought he would not be fired for testing positive for marijuana. (Doc. No. 54 at ¶ 11.)

4. Wrongful Termination in Violation of Public Policy

As plaintiff concedes in his opposition, his fifth cause of action for wrongful termination in violation of public policy is subject to dismissal if defendant prevails on summary judgment with respect to his FEHA and privacy claims. Accordingly, and for the reasons set forth above, summary judgment in favor of defendant is also proper on plaintiff's wrongful termination in violation of public policy cause of action.

5. Breach of Implied Contract and the Covenant of Good Faith and Fair Dealing

Defendant contends plaintiff was an at-will employee, as demonstrated by his signing of a form acknowledging as such when he commenced his employment in 2006. (*See* Doc. No. 53 at 10.) Plaintiff replies that defendant's policies were amended in 2012 to specifically protect individuals who are medical marijuana users in certain states from being terminated or discriminated against on that basis. (*See* Doc. No. 52 at 54–58.) According to plaintiff, these new policies therefore became terms of his employment agreement in 2012 and part of an implied contract, and thereby bound defendant not to breach them. (*Id.*)

In California, "[a]n employment, having no specified term, may be terminated at the will of either party on notice to the other." Cal. Lab. Code § 2922. At-will employment "may be ended by either party at any time without cause, for any or no reason." *Guz v. Bechtel Nat'l Inc.*, 24 Cal. 4th 317, 335 (2000) (quotations and citations omitted). "While the statutory presumption of at-will employment is strong, it is subject to several limitations." *Id.* Parties are free to agree to other limitations on an employer's termination rights. *Id.* at 336. While a "good cause" limitation is the most common, "[t]he parties may reach any contrary understanding, otherwise lawful, 'concerning either the term of employment or the grounds or manner of termination.'" *Id.* (quoting *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 680 (1988)).

"The contractual understanding need not be express, but may be implied in fact, arising from the parties' conduct evidencing their actual mutual intent to create such enforceable limitations." *Id.* The California Supreme Court has identified several factors that may bear upon the existence and content of an implied-in-fact contractual limitation on discharging an employee, including personnel policies or practices of the employer, the employee's longevity of service,

actions or communications by the employer reflecting assurance of continued employment, or standard industry practices. *Id.* at 336–37. "California law permits employers to implement policies that may become unilateral implied-in-fact contracts when employees accept them by continuing their employment." *Gorlach v. Sports Club Co.*, 209 Cal. App. 4th 1497, 1508 (2012) (citing *Asmus v. Pacific Bell*, 23 Cal. 4th 1, 11 (2000)). A court is to look at the totality of the circumstances, with an eye toward "seek[ing] to enforce the *actual* understanding" of the parties to the agreement. *Guz*, 24 Cal. 4th at 337 (quoting *Foley*, 47 Cal. 3d at 677).

"Cases in California and elsewhere have held that at-will provisions in personnel handbooks, manuals, or memoranda do not bar, or necessarily overcome, other evidence of the employer's contrary intent, particularly where other provisions in the employer's personnel documents themselves suggest limits on the employer's termination rights." *Id.* at 339 (citations omitted). "On the other hand, most cases applying California law, both pre and post-*Foley*, have held that an at-will provision in an *express written agreement*, signed by the employee, *cannot* be overcome by proof of an implied contrary understanding." *Id.* at 340 n.10. This distinction has subsequently been articulated more fully by the California Supreme Court as follows: "[A] clear and unambiguous at-will provision in a written employment contract, signed by the employee, cannot be overcome by evidence of a *prior or contemporaneous* implied-in-fact contract requiring good cause for termination." *Dore v. Arnold Worldwide, Inc.*, 39 Cal. 4th 384, 389 (2006) (emphasis added). These statements by the state high court do not, of course, limit the ability to modify an at-will employment agreement *after* the contract is signed to add termination protections at a later time. *See also Weiner v. Fleischman*, 54 Cal. 3d 476, 488 (1991) ("[E]ven where a contract has been solemnized by a writing, an oral modification of that written contract may be proved by a preponderance of the evidence.").

Turning to the evidence before the court on summary judgment in this case, it is undisputed plaintiff was a medical marijuana cardholder. It is also undisputed plaintiff signed a statement acknowledging the at-will nature of his employment with defendant in 2006, when his employment commenced. Finally, neither party disputes that, in 2012, the company amended several of its written employment policies, including Policy 150 (the alcohol and substance abuse

policy) and Policy 126E (the drug testing policy) to include non-discrimination provisions concerning the use of medicinal marijuana in certain states. Specifically, the provision added to Policy 150 reads:

> K. State Specific Exceptions
>
> 1. Alaska, Arizona, California, Colorado, D.C., Maine, Michigan, Montana, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont: No person will be discriminated against in hiring, termination or in imposing any term or condition of employment or otherwise be penalized based upon either:
>
> a. The persons' status as a registered medical marijuana cardholder; or
>
> b. A registered medical marijuana cardholder's positive drug test for marijuana components or metabolites.

(Doc. No. 55-7 at 4.) The provision added to defendant's Policy 126E stated:

> IV. State Specific Requirements
>
> A. Alaska, Arizona, California, Colorado, D.C., Maine, Michigan, Montana, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont: No person will be discriminated against in hiring, termination or in imposing any term or condition of employment or otherwise be penalized based upon either:
>
> 1. The person's status as a registered medical marijuana cardholder; or
>
> 2. A registered medical marijuana cardholder's positive drug test for marijuana components or metabolites. Nothing in this policy prevents Kohl's from imposing discipline, up to and including termination for any Associate who used, possessed or was impaired by marijuana at any Kohl's location or in the performance of Kohl's business.

(Doc. No. 55-7 at 6.)

Defendant's person most knowledgeable, Tim Kuckelman, testified at his deposition in this matter that Kohl's "wanted to make sure as a company that we were not discriminating particularly against applicants and especially employees if they simply disclosed or the manager or supervisor became aware of the fact that they were in possession of a medical marijuana card." (Doc. No. 55-3 at 23–24.) Defendant's policies were enacted in recognition of the movement in medical marijuana laws in a number of states and were for the benefit of both the employees and the company, according to Kuckelman. (*Id.* at 24, 28). Plaintiff has submitted a declaration in

opposition to the pending motion stating that, while he did not remember when he saw the revised drug testing policies, he believed he "reviewed them on the Company's intranet site very soon after they were announced," because he "made a point of staying up to date on new policies." (Doc. No. 54 at 3.) Further, plaintiff states that he "understood the policies to very clearly say that as long as I used the [medical marijuana] at home and not close to a shift, I would be protected from getting fired even if I tested positive." (Doc. No. 54 at 4.) This led plaintiff to abandon his efforts to look elsewhere for a job. (Doc. No. 54 at 4.)

The existence and content of employer agreements not to terminate based on certain assurances are particularly fact-driven inquiries. As the California Supreme Court has recognized:

> Every case thus turns on its own facts. Where there is no express agreement, the issue is whether other evidence of the parties' conduct has a "tendency in reason" to demonstrate the existence of an actual mutual understanding on particular terms and conditions of employment. If such evidence logically permits conflicting inferences, a question of fact is presented.

Guz, 24 Cal. 4th at 337. *See also Melbye v. Accelerated Payment Technologies*, No. 10cv2040-IEG (JMA), 2012 WL 90477, at * 9 (S.D. Cal. Jan. 11, 2012) (denying defendant's motion for summary judgment on the grounds that disputed issues of material fact existed as to whether there was an implied in-fact agreement between the parties despite the written policies in place with respect to the terms of employment). Here, a reasonable jury could conclude from defendant's policies and plaintiff's testimony that the parties agreed, subsequent to his 2006 acknowledgment of the at-will nature of his employment, that plaintiff would not be discriminated against for his medicinal marijuana use, since he was a registered medical marijuana cardholder. Thus, defendant has not established it is entitled to summary judgment as to plaintiff's sixth cause of action for breach of an implied contract and the covenant of good faith and fairdealing.[5]

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[5] In its motion for summary judgment defendant advanced numerous other arguments concerning plaintiff's sixth cause of action. (*See* Doc. No. 46 at 4, 25–28.) However, at the hearing on the pending motion defense counsel conceded with respect to those other arguments, noting they were actually only applicable to plaintiff's invasion of privacy claim.

6. Defamation

Defendant asserts it is entitled to summary judgment on plaintiff's seventh cause of action for defamation both because its activity is protected by the common interest privilege and plaintiff has presented insufficient evidence of malice. (Doc. No. 46 at 28–30.) Plaintiff agrees the common interest privilege is applicable here in general, but argues that defendant lost its protection here because it acted with malice or reckless disregard. (Doc. No. 52 at 60–62.)

"A claim for defamation requires proof of a false and unprivileged publication that exposes the plaintiff 'to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation.'" *McGarry v. University of San Diego*, 154 Cal. App. 4th 97, 112 (2007) (quoting Cal. Civ. Code § 45). A communication is privileged, and thus cannot be the basis for a defamation claim, when it is made without malice by one person with an interest in the communication to another interested party. Cal. Civ. Code § 47(c). If the privilege applies and there is no demonstration of malice, the privilege is a complete defense to defamation. *See King v. United Parcel Serv., Inc.*, 152 Cal. App. 4th 426, 442 (2007). "The malice necessary to defeat a qualified privilege is 'actual malice' which is established by a showing that the publication was motivated by hatred or ill will towards the plaintiff or by a showing that the defendant lacked reasonable grounds for belief in the truth of the publication and therefore acted in reckless disregard of the plaintiff's rights." *Noel v. River Hills Wilsons, Inc.*, 113 Cal. App. 4th 1363, 1370–71 (2003) (quoting *Sanborn v. Chronicle Pub. Co.*, 18 Cal. 3d 406, 413 (1976)). Evidence sufficient to establish negligence is insufficient to establish malice, because the defendant must have shown "a reckless or wanton disregard for the truth, so as to reasonably imply a wilful [sic] disregard for or avoidance of accuracy." *Id.* at 1371 (quoting *Roemer v. Retail Credit Co.*, 3 Cal. App. 3d 368, 371–72 (1970)).

Here, the Associate Counseling Form (the "termination form") states plaintiff sought medical treatment and "was tested for drugs per company policies and protocol. The result of that Drug test was positive for a controlled substance." (Doc. No. 54 at 7.) According to the termination form, this violated three of Kohl's policies: (1) "[r]eporting to work in a condition unfit to perform your duties or under the influence of alcohol, illegal non[-]prescription drugs or

other intoxicants or controlled substances. Using, consuming or selling illegal non-prescription drugs, alcohol or other intoxication or controlled substances on Company property"; (2) "Violating Safety rules pertaining to specific work areas"; and (3) "Acting in conflict with the Interest of Kohl's." (Doc. No. 54 at 7.) There is also no dispute that the only evidence of plaintiff's impairment at work was the positive test result for marijuana metabolites. Plaintiff has come forward with evidence on summary judgment that marijuana metabolites may be detectable in a person's urine for up to 30 days after use, though impairment from the drug would last only a few hours. (*See* Doc. No. 55-1 at 2–3.) He also has provided a declaration stating he "had a personal policy of not using the medicine within several days of working," and testified at his deposition that he had not used marijuana for "several days" before he worked in January 2014. (Doc. Nos. 54 at 4; 55-5 at 8, 11.) Based on this evidence, a reasonable jury could find plaintiff was not in a condition unfit to perform his job, was not under the influence of alcohol or other drugs at work, and/or was not using, consuming, or selling alcohol or other drugs at work. Further, given the dearth of evidence presented by defendant of plaintiff's purported impairment, a reasonable jury could conclude these statements were made with a "reckless or wanton disregard for the truth," thus establishing malice and removing the protections of the common interest privilege. *See Noel*, 113 Cal. App. at 1371.[6]

Therefore, the undersigned concludes defendant has not established it is entitled to summary judgment as to plaintiff's defamation claim.

7. Punitive Damages

Finally, defendant argues it is entitled to summary judgment with respect to plaintiff's claim for punitive damages because plaintiff cannot prove the decision-makers behind his

[6] Defendant's arguments that such conduct is at most merely negligent, and not reckless, are unavailing. A jury could determine that, given the complete lack of evidence available to defendant's employees Barrera, Ochoa, and Barnick from which to conclude plaintiff was ever impaired at work, that the defendant acted recklessly in so documenting in plaintiff's termination form. (*See* Doc. No. 55-1 at 27–28, 32–34, 36–37, 59; No. 55-2 at 12–13, 20–22, 38–42.) Further, plaintiff's statements that he did not believe Barrera, Ochoa, and Barnick had a personal vendetta against him, even if admissible, fail to conclusively establish that they did not act in reckless disregard of the truth in documenting his termination. (*See* Doc. No. 48-1 at 42–43, 49.)

termination had a sufficiently high enough level of discretion to warrant imposition of punitive damages against the defendant corporation. (Doc. No. 46 at 30.) Plaintiff concedes Ochoa and Barrera do not meet the test for corporate punitive liability, but asserts their decisions were ratified by Barnick, defendant's Human Resources Director, and Dallas Moon, a corporate officer and defendant's Vice President of Employment and Labor Law, thereby establishing punitive damages liability. (Doc. No. 52 at 62–64.)

California Civil Code § 3294 allows for punitive damages in non-contract claims "where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice." Cal. Civ. Code § 3294(a). Corporate employers are not liable for punitive damages based on the acts of their employees unless an officer, director, or managing agent authorized or ratified the act of oppression, fraud, or malice. *Id.* § 3294(b). Generally, these terms require acting in "conscious disregard" of the plaintiff's rights. *Id.* § 3294(c). The California Supreme Court has held this statute restricts "corporate punitive damage liability to those employees who exercise substantial independent authority and judgment over decisions that ultimately determine corporate policy." *White v. Ultramar, Inc.*, 21 Cal. 4th 563, 573 (1999). *See also Garcia v. New Albertson's, Inc.*, No. 2:13-CV-05941-CAS (JCGx), 2014 WL 4978434, at * 7 (C.D. Cal Oct. 3, 2014). "In order to demonstrate that an employee is a true managing agent [§ 3294(b)] a plaintiff seeking punitive damages would have to show that the employee exercised substantial discretionary authority over significant aspects of a corporation's business." *Id.* at 577. Corporate policies generally include the "general principles which guide a corporation, or rules intended to be followed consistently over time in corporate operations." *Taylor v. Tress, Inc.*, 58 F. Supp. 3d 1092, 1106 (E.D. Cal. 2014) (quoting *Cruz v. HomeBase*, 83 Cal. App. 4th 160, 167 (2000)). These are "formal policies that affect a substantial portion of the company and that are the type likely to come to the attention of corporate leadership." *Roby v. McKesson Corp.*, 47 Cal. 4th 686, 714–15 (2009). Finally, punitive damages are generally available for violations of FEHA, *see Weeks v. Baker & McKenzie*, 63 Cal. App. 4th 1128, 1147–48 (1998), subject to the limitations noted above.

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Plaintiff argues Human Resources Director Barnick "most likely is a managing agent." (Doc. No. 52 at 63.) *White* makes clear it is plaintiff's burden to demonstrate a given employee has sufficient discretionary authority to warrant the imposition of punitive damages. *White*, 21 Cal. 4th at 577 ("[A] plaintiff seeking punitive damages would have to show that the employee exercise substantial discretionary authority over significant aspects of a corporation's business."). In *White*, the court found there was sufficient discretionary authority because the manager in question oversaw eight stores and sixty-five employees, and had been delegated most, if not all, of the responsibility for managing these stores, as established by testimony from the manager's supervisors. 21 Cal. 4th at 577. In *Roby*, the California Supreme Court assumed a mid-level manager could be a corporate officer, but concluded that actions by a single supervisor, combined with the one-time failure of higher-level managers "to take prompt responsive action," was insufficient to establish a "conscious disregard" of that plaintiff's rights. 47 Cal. 4th at 715–16.

The only evidence before the court concerning Barnick's status as a managing agent is the deposition testimony of Ochoa, who stated Barnick was her supervisor and held the title of Human Resources Director, and that when an employee was to be terminated, the decision was made jointly by Ochoa and Barnick, with approval from "corporate, HR director [presumably Barnick], and legal." (Doc. No. 55-1 at 25–26, 48–49.) This is not sufficient evidence from which a jury could determine that Barnick's job responsibilities involved the exercise of "substantial discretionary authority over significant aspects of a corporation's business." *White*, 21 Cal. 4th at 577. Rather, this evidence demonstrates only that Barnick was one of several people from whom approval was sought prior to a decision to terminate an employee. It says nothing about Barnick's role in "determin[ing] corporate policy." *Id.* at 573. Nor, even if Barnick is a managing agent, is a one-time failure to take responsive action to an immediate supervisor's decision sufficient to establish a "conscious disregard" of plaintiff's rights. *See Roby*, 47 Cal. 4th at 715–16. Defendant is therefore entitled to summary judgment in its favor with respect to plaintiff's claim for punitive damages.

Plaintiff also takes the position that Moon, who is indisputably a corporate officer, ratified the termination decision by rejecting the demand letter sent to him by plaintiff's counsel. (Doc.

No. 52 at 63.) As indicated at the hearing on the pending motion, this argument is completely unpersuasive. While Moon is a corporate officer, Federal Rule of Evidence 408 provides that "conduct or a statement made during compromise negotiations about the claim" is "not admissible . . . either to prove or disprove the validity . . . of a disputed claim." Correspondence between counsel for the purpose of compromise negotiations is generally excludable under Rule 408. *See E.E.O.C. v. Gear Petroleum, Inc.*, 948 F.2d 1542, 1545 (10th Cir. 1991). The purpose of Rule 408 is to encourage compromise and settlement of existing disputes. *Josephs v. Pac. Bell*, 443 F.3d 1050, 1064 (9th Cir. 2005). Exposing a corporate defendant to a punitive damages claim merely for responding to a demand letter from plaintiff's counsel would create an extraordinary disincentive to even acknowledge receipt of such a communication, let alone engage in actual settlement negotiations. Exposure to an award of punitive damages cannot be supported by such a slender reed.

CONCLUSION

Given the foregoing, defendant's motion for summary judgment (Doc. No. 46) is granted in part and denied in part, as follows:

1. Defendant's motion for summary judgment is granted as to plaintiff's first, second, and third causes of action (the FEHA claims), fourth cause of action (the invasion of privacy claim), and fifth cause of action (the wrongful termination claim). Defendant's motion is also granted as to plaintiff's request for the award of punitive damages on any remaining claims.

2. Defendant's motion for summary judgment is denied as to plaintiff's sixth cause of action (breach of contract and the implied covenant of good faith and fair dealing) and seventh cause of action (defamation).

IT IS SO ORDERED.

Dated: **August 2, 2016**

Dale A. Drozd
UNITED STATES DISTRICT JUDGE