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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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JASON NIELSEN,

NO. CIV. 2:09-960 WBS KJN

Plaintiff,

MEMORANDUM AND ORDER RE:
MOTION FOR SUMMARY JUDGMENT

v.

TROFHOLZ TECHNOLOGIES, INC., a
California Corporation, ANDREW
PARKER, an individual, BRENNNA
PEDONE, an individual, YVONNE
GLENN, an individual, TROY
GLENN, an individual and DOES
1-10, inclusive,

Defendants.

_____ /

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Plaintiff Jason Nielsen brought this action alleging
that defendants Trofholz Technologies, Inc. ("TTI"), Andrew
Parker, Brenna Pedone, Yvonne Glenn, and Troy Glenn discriminated
against him based on gender and disability, retaliated against
him, created a hostile work environment, and wrongfully
terminated him. Defendants now move for summary judgment on all

1 claims pursuant to Federal Rule of Civil Procedure 56.

2 I. Standard

3 Summary judgment is proper "if the pleadings, the
4 discovery and disclosure materials on file, and any affidavits
5 show that there is no genuine issue as to any material fact and
6 that the movant is entitled to judgment as a matter of law."
7 Fed. R. Civ. P. 56(c). A material fact is one that could affect
8 the outcome of the suit, and a genuine issue is one that could
9 permit a reasonable jury to enter a verdict in the non-moving
10 party's favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242,
11 248 (1986). The party moving for summary judgment bears the
12 initial burden of establishing the absence of a genuine issue of
13 material fact and can satisfy this burden by presenting evidence
14 that negates an essential element of the non-moving party's case.
15 Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

16 Alternatively, the moving party can demonstrate that the
17 non-moving party cannot produce evidence to support an essential
18 element upon which it will bear the burden of proof at trial.

19 Id.

20 Once the moving party meets its initial burden, the
21 non-moving party "may not rely merely on allegations or denials
22 in its own pleading," but must go beyond the pleadings and, "by
23 affidavits or as otherwise provided in [Rule 56,] set out
24 specific facts showing a genuine issue for trial." Fed. R. Civ.
25 P. 56(e); Celotex Corp., 477 U.S. at 324; Valandingham v.
26 Bojorquez, 866 F.2d 1135, 1137 (9th Cir. 1989). In its inquiry,
27 the court must view any inferences drawn from the underlying
28 facts in the light most favorable to the nonmoving party, but may

1 not engage in credibility determinations or weigh the evidence.
2 Anderson, 477 U.S. at 255; Matsushita Elec. Indus. Co. v. Zenith
3 Radio Corp., 475 U.S. 574, 587 (1986).

4 II. Evidentiary Objections

5 "A trial court can only consider admissible evidence in
6 ruling on a motion for summary judgment." Orr v. Bank of Am., NT
7 & SA, 285 F.3d 764, 773 (9th Cir. 2002) (citing Fed. R. Civ. P.
8 56(e) and Beyene v. Coleman Sec. Servs., Inc., 854 F.2d 1179,
9 1181 (9th Cir. 1988)). Plaintiff has filed twenty-six
10 evidentiary objections to evidence defendants submitted in
11 support of their motion for summary judgment (Docket No. 47) and
12 defendants have filed twenty-six evidentiary objections of their
13 own. (Docket No. 60.)

14 "[T]o survive summary judgment, a party does not
15 necessarily have to produce evidence in a form that would be
16 admissible at trial, as long as the party satisfies the
17 requirements of Federal Rules of Civil Procedure 56." Fraser v.
18 Goodale, 342 F.3d 1032, 1036-37 (9th Cir. 2003) (citing Block v.
19 City of Los Angeles, 253 F.3d 410, 418-19 (9th Cir. 2001)). Even
20 if the non-moving party's evidence is presented in a form that is
21 currently inadmissible, such evidence may be evaluated on a
22 motion for summary judgment so long as defendants' objections
23 could be cured at trial. See Burch v. Regents of the Univ. of
24 Cal., 433 F. Supp. 2d 1110, 1119-20 (E.D. Cal. 2006).

25 The parties primarily target each others' statements of
26 undisputed facts, attacking the phrasing of the statements and
27 not the underlying evidence upon which they are made. Statements
28 of undisputed facts are not evidence, the admissibility of which

1 can be challenged under the Federal Rules of Evidence, but
2 summaries of the material facts contained in the cited evidence,
3 which the court reviews independently. See Local Rule 260; see
4 also Perma Research & Dev. Co. v. Singer Co., 410 F.2d 572, 579
5 (2d Cir. 1969) (holding that objections to an affidavit submitted
6 on a motion for summary judgment "must be precise" and "specify
7 which parts of the . . . affidavit should be stricken and why");
8 Charles Alan Wright et al., 10B Federal Practice & Procedure §
9 2738 (2010) ("[A] motion to strike should specify the
10 objectionable portions of the affidavit and the grounds for each
11 objection."). Consequently, those objections attacking the
12 statements of undisputed fact are not well taken and are
13 overruled.

14 In the interest of brevity, as the parties are aware of
15 the substance of their objections and the grounds asserted in
16 support of each objection, the court will not review the
17 substance or grounds of all the objections here. For the
18 purposes of this motion, plaintiff's objections 14-15, 19, and 20
19 are sustained on hearsay grounds and objections 16-17 are
20 sustained on personal knowledge grounds; the rest are overruled.
21 All of defendants' objections to the evidence cited in
22 Plaintiff's Separate Statement of Undisputed Facts are overruled.

23 III. Relevant Facts

24 Plaintiff worked for TTI beginning in 2004 (Griffin
25 Decl. Ex. D ("Yvonne Dep.") at 163:22-25), and became a program
26 manager in 2007. (Griffin Decl. Ex. C ("Nielsen Dep.") at 24:20-
27 22.) Defendant Andrew Parker became plaintiff's immediate
28 supervisor in December of 2007. (Nielsen Dep. at 48:5-7.)

1 Plaintiff first suspected that Parker was engaging in an affair
2 with Louann Kelsheimer, another employee at TTI, in May of 2009.
3 (Id. at 148:5-149:3.) Kelsheimer was a project coordinator at
4 TTI, and did not have any of the same job responsibilities as
5 plaintiff, nor did she report to plaintiff or Parker. (Id. at
6 152:3-4, 220:20-221:6; Griffin Decl. Ex. I ("Kelsheimer Dep.") at
7 10:9-12, 11:13-15, 14:14-17:23, 21:14-21, 21:24-22:2, 23:4-25:2,
8 42:25-43:1.) Plaintiff suspected that Parker and Kelsheimer were
9 involved in a romantic relationship because he observed
10 Kelsheimer "float[ing] around like a butterfly," Parker off-
11 loading Kelsheimer's responsibilities onto plaintiff, and distant
12 flirting between the two. (Nielsen Dep. at 149:16-150:2, 151:4-
13 20.)

14 Plaintiff approached defendant Brenna Pedone, the
15 manager of Human Resources, near the end of June of 2008
16 regarding his suspicions about the relationship. (Id. 159:1-5,
17 187:21-188:5, 224:23-225:13, 226:8-17.) Plaintiff claims that he
18 also complained to Pedone on July 23, 2008. (Id. at 188:6-13,
19 229:19-230:21, 231:25-232:17.) After some investigation, Pedone
20 reported the rumor to defendant Yvonne Glenn, the president of
21 TTI, who reported it to defendant Troy Glenn, the vice president,
22 without telling him the source of the rumor. (Griffin Decl. Ex.
23 F ("Pedone Dep.") at 126:1-128:1, 139:22-140:5; Yvonne Dep. at
24 240:24-241:22, 242:2-20.) In August of 2008, without telling him
25 the source of the rumor, Troy pulled Parker aside and told him
26 anything happening between him and Kelsheimer had better stop.
27 (Griffin Decl. Ex. E ("Troy Dep.") at 106:23-107:9, 107:22-
28 108:18.)

1 In June or July of 2008, Kevin Hayashi, another
2 employee at TTI, told plaintiff about and later provided him with
3 sexually suggestive emails between Kelsheimer and Parker.
4 (Nielsen Dep. at 188:17-189:6, 189:19-190:25.) Jon Rauer, the IT
5 manager at TTI, confirmed the existence of the emails to
6 plaintiff and told him they alluded to something sexual in
7 nature, but neither he nor Hayashi reported the e-mails to TTI
8 management. (Griffin Decl. Ex. H ("Rauer Dep.") at 8:16-17,
9 16:22-17:7, 17:25-18:23.)

10 In July of 2008, plaintiff and Parker had a brief
11 conversation during a car ride. (Nielsen Dep. at 163:10-164:7,
12 164:19-22, 165:20-166:6, 167:18-25.) They were discussing
13 business contracts and accounts when Parker told plaintiff he
14 needed to "get in line" and "quit causing ripples." (Id.)
15 Plaintiff believed Parker was referring to plaintiff's report of
16 the alleged relationship between Parker and Kelsheimer because of
17 Parker's "tone" and "body language." (Id.) Parker denies having
18 any knowledge that plaintiff told anyone at TTI about his alleged
19 relationship with Kelsheimer until sometime after October 7,
20 2008. (Griffin Decl. Ex. G ("Parker Dep.") at 203:5-21, 210:23-
21 211:6.)

22 Plaintiff alleges that Parker required him to create
23 agendas for weekly division meetings and perform other
24 administrative tasks not part of his job description beginning in
25 January or February of 2008. (Nielsen Dep. at 152:17-25, 153:6-
26 8, 153:14-154:5.) Plaintiff also alleges that Parker attempted
27 to make him and other employees conduct product pricing,
28 something that was not within their job responsibilities, in

1 March through June of 2008, but that they fought back and Parker
2 required Kelsheimer to do it instead. (Id. at 154:17-155:17,
3 158:14-18.) Plaintiff asserts that after June 2008, the only
4 tasks Parker off-loaded from Kelsheimer to him were minimal.
5 (Id. at 158:14-18.) Plaintiff is not aware of any job benefits
6 that Kelsheimer received that he or anyone else did not. (Id. at
7 220:8-13, 221:4-222:4.) Plaintiff was aware of one other inter-
8 office relationship but admits that there was nothing about that
9 relationship that impacted his work environment. (Id. at 248:14-
10 249:5.) He also believes that another employee, Lisa Salcedo,
11 received employment benefits such as extra vacation days as a
12 result of a relationship with a supervisor. (Id. at 253:23-
13 255:2.) Plaintiff also admits that he was not denied any
14 employment opportunities within TTI that were given to an
15 employee who submitted to sexual advances. (Id. at 256:6-10.)

16 In 2008, TTI's contract with one of its recurring
17 clients, California National Guard ("CNG"), was set to expire, so
18 TTI prepared a bid for a new contract. (Parker Dep. at 89:13-
19 91:11.) Plaintiff was in charge of managing TTI's relationship
20 with CNG, and TTI's practice was to give the lead to the program
21 manager on any proposals related to that employee's accounts.
22 (Nielsen Dep. at 70:1-4, 72:21-73:9.)

23 On May 11, 2008, plaintiff was involved in a motorcycle
24 accident and suffered broken bones and other injuries. (Nielsen
25 Dep. at 114:3-115:4, 115:15-17, 126:20-127:12.) Plaintiff
26 notified Parker of his motorcycle accident by e-mail at 12:48
27 a.m. the morning of May 12, 2008, and then notified Troy by e-
28 mail at 8:09 a.m. (Nielsen Dep. at 115:24-116:15, 117:16-118:13,

1 119:1-16.) In his email to Troy, plaintiff stated, "[T]his will
2 cause slight modification of how we run the proposal for CNG."
3 (Id. Ex. 6.) Plaintiff remembers a conversation with Troy where
4 Troy "allud[ed]" to the possibility of someone other than
5 plaintiff taking the lead on the CNG proposal, but based on
6 Troy's "body language and tone," plaintiff believed that his job
7 would be in jeopardy if he did not take the lead. (Id. at
8 121:10-122:18.)

9 The only accommodation requested by plaintiff as a
10 result of his injuries was voice recognition software, which he
11 received. (Id. at 123:7-18, 124:17-22; Parker Dep. at 99:4-
12 100:2; Pedone Dep. at 109:16-23, 110:21-25.) Yvonne also brought
13 a digital voice recorder to plaintiff's house, and various co-
14 workers offered plaintiff rides to and from the office. (Nielsen
15 Dep. 124:23-125:6, 127:5-12.)

16 About halfway through the process of preparing the CNG
17 proposal, Troy discovered that plaintiff had reorganized the
18 outline of the proposal contrary to earlier discussions and
19 determined that it had to be rewritten. (Troy Dep. at 144:8-
20 145:17.) After TTI submitted the completed proposal, plaintiff
21 admitted in an e-mail to the proposal team that he had "poorly
22 lead [sic] a proposal team and it showed." (Nielsen Dep. 134:4-
23 12, 135:11-21, Ex. 8.) TTI was ultimately awarded the CNG
24 contract. (Parker Dep. at 101:8-10.)

25 On August 7, 2008, Parker placed plaintiff on an
26 unofficial performance improvement plan ("PIP"). (Nielsen Dep.
27 at 169:21-170:4, 172:2-11, Ex. 9.) Parker identified areas where
28 plaintiff needed to increase his performance and effectiveness,

1 including meeting deadlines and improving communication. (Id. at
2 172:20-173:8, Ex. 9.) On October 7, 2008, plaintiff met with
3 Parker and Pedone to discuss his PIP. (Id. at 232:23-233:9.)
4 Parker pointed out specific examples of plaintiff's deficiencies,
5 and indicated that plaintiff was still failing through continued
6 missed deadlines and substandard performance. (Id. at 233:10-
7 234:4; Parker Dep. at 154:12-155:22, 156:11-157:12, 159:13-
8 160:19, 164:13-165:19, 166:7-11; Pedone Dep. at 148:6-19, 149:1-
9 150:15.) At the meeting, Pedone allegedly told plaintiff that he
10 should be performing at a higher level based on his salary
11 (Nielsen Dep. at 234:1-4.), and Parker allegedly asked plaintiff
12 to resign. (Id. at 173:18-20.)

13 Immediately after that meeting, plaintiff called Yvonne
14 and met with her. For the first time, he told her about his
15 belief that Parker was attempting to push him out of the company
16 because of plaintiff's disclosure of Parker's alleged
17 relationship with Kelsheimer. (Id. at 235:23-237:1, 237:16-19;
18 Yvonne Dep. at 265:1-266:8, 296:6-23.) He also informed her for
19 the first time about his belief that Parker and Kelsheimer were
20 exchanging inappropriate e-mails. (Nielsen Dep. at 236:12-237:1,
21 237:16-19; Yvonne Dep. at 265:10-266:8.)

22 The next day, plaintiff presented a note from his
23 physician indicating that he required a thirty-day medical leave
24 of absence, which was granted. (Nielsen Dep. at 237:20-25,
25 238:5-10.) Plaintiff requested a second thirty-day leave the
26 next month, which was also granted. (Id. at 242:20-25.) Under
27 its leave policy, TTI generally has permitted leaves of absence
28 for personal reasons for up to thirty-days, but has not permitted

1 employees to take off more than sixty days. (Yvonne Dep. at
2 92:16-93:1, 93:6-20.)

3 During plaintiff's leave, TTI lost its single largest
4 professional services contract. (Pedone Dep. at 170:17-172:25;
5 Troy Dep. at 141:12-17.) As a result, TTI was forced to
6 terminate a number of employees and substantially reorganize its
7 workforce. (Id.) TTI eliminated all division director positions
8 as well as several business development, engineering, and other
9 professional services staff positions, and eliminated one of five
10 program manager positions, which was plaintiff's position.
11 (Pedone Dep. at 170:17-172:25; Troy Dep. at 126:11-25, 154:18-22;
12 Yvonne Dep. at 254:8-13, 254:21-255:12.)

13 Following his two thirty-day leaves of absence,
14 plaintiff requested a third leave, this time for sixty additional
15 days. (Pedone Dep. at 162:14-21; Yvonne Dep. at 271:14-20.)
16 Plaintiff contends that this request was granted. He provides a
17 document purporting to grant leave signed by Sharlee Davis, the
18 human resources coordinator; defendants contend that the document
19 was not valid because Pedone, not Davis, had the authority to
20 grant leave. (Mem. of P. & A. in Supp. of Pl.'s Opp'n to Defs.'
21 Mot. for Summ. J. ("Pl.'s Opp'n") at 5, Ex. 28; see Pedone Dep.
22 at 163:13-18, 165:22-166:8, 166:22-167:3.) Plaintiff also
23 provides an "Employee Separation Report" dated December 30, 2008
24 (Pl.'s Opp'n Ex. 29), which states that his employment ended by
25 "Voluntary Resignation" because he "failed to return from leave
26 of absence." (Id.) Plaintiff alleges that, regardless of the
27 explanation given in the Employee Separation Report, he was
28 terminated on December 30, 2008. (Pl.'s Opp'n at 5.)

1 On April 8, 2009, plaintiff filed this action against
2 defendants, alleging gender discrimination in violation of the
3 Fair Employment and Housing Act ("FEHA"), Cal. Gov't Code §
4 12940; disability discrimination in violation of FEHA;
5 retaliation in violation of FEHA; hostile work environment
6 harassment in violation of FEHA; wrongful termination in
7 violation of public policy; and sexual harassment in violation of
8 Title VII. (Docket No. 1.) Defendants now move for summary
9 judgment, or in the alternative partial summary judgment,
10 pursuant to Federal Rule of Civil Procedure 56.

11 IV. Discussion

12 Plaintiff's claims for discrimination, retaliation, and
13 wrongful termination are subject to the McDonnell Douglas burden-
14 shifting analysis used at summary judgment to determine whether
15 there are triable issues of fact for resolution by a jury.¹

16 Under McDonnell Douglas,

17 a plaintiff must first establish a prima facie case of
18 discrimination [or other illegal conduct]. The burden
19 then shifts to the employer to articulate a legitimate,
20 nondiscriminatory reason for its employment action. If
21 the employer meets this burden, the presumption of
22 intentional discrimination [or other illegal conduct]
disappears, but the plaintiff can still prove disparate
treatment by, for instance, offering evidence
demonstrating that the employer's explanation is
pretextual.

23 Raytheon Co. v. Hernandez, 540 U.S. 44, 49 n.3 (2003) (internal
24 citation omitted).

26 ¹ Guz v. Bechtel Nat'l Inc., 24 Cal. 4th 317, 354 (2000)
27 (discrimination); Loggins v. Kaiser Permanente Int'l, 151 Cal.
28 App. 4th 1102, 1108-09 (4th Dist. 2007) (retaliation and wrongful
termination); see McDonnell Douglas Corp. v. Green, 411 U.S. 792
(1973).

1 Because of the similarities between Title VII and FEHA,
2 "California courts frequently seek guidance from Title VII
3 decisions when interpreting the FEHA and its prohibitions against
4 sexual harassment." Lyle v. Warner Bros. Television Prods., 38
5 Cal. 4th 264, 278 (2006); see Guz v. Bechtel Nat'l Inc., 24 Cal.
6 4th 317, 354 (2000) (same regarding discrimination).

7 A. FEHA Gender Discrimination Claim Against TTI

8 FEHA makes it unlawful for "an employer, because of . .
9 . sex . . . to discharge the person from employment . . . or to
10 discriminate against the person in compensation or in terms,
11 conditions, or privileges of employment." Cal. Gov't Code §
12 12940(a). To make a prima facie showing of sex discrimination, a
13 plaintiff must:

14 provide evidence that (1) he was a member of a protected
15 class, (2) he was qualified for the position he sought or
16 was performing competently in the position he held, (3)
17 he suffered an adverse employment action, such as
18 termination, demotion, or denial of an available job, and
19 (4) some other circumstance suggests discriminatory
20 motive.

21 Guz, 24 Cal. 4th at 355. Plaintiff has failed to satisfy the
22 third and fourth prongs of this test.

23 Plaintiff's theory of gender discrimination is that
24 Parker's alleged romantic relationship with Kelsheimer resulted
25 in Kelsheimer receiving favors not accorded to other employees
26 and Parker passing on some of Kelsheimer's work assignments to
27 plaintiff and other employees. The viability of this claim
28 depends on the so-called "paramour" theory of gender
discrimination. More precisely, this claim advances the theory
that a supervisor's personal relationship with a co-worker
coupled with favoritism can constitute discrimination.

1 Under California law, "a romantic relationship between
2 a supervisor and an employee does not, without more, give rise to
3 a sexual discrimination or sexual harassment claim under either
4 the FEHA or the public policy of the state." Proskel v. Gattis,
5 41 Cal. App. 4th 1626, 1631 (4th Dist. 1996). The Proskel court
6 cited the Equal Employment Opportunity Commission to support its
7 conclusion:

8 Not all types of sexual favoritism violate Title VII. It
9 is the Commission's position that Title VII does not
10 prohibit isolated instances of preferential treatment
11 based upon consensual romantic relationships. An
12 isolated instance of favoritism toward a "paramour" (or
a spouse, or a friend) may be unfair, but it does not
discriminate against women or men in violation of Title
VII, since both are disadvantaged for reasons other than
their genders.

13 Id. at 1630 (citing EEOC Notice No. 915-048 (Jan. 12, 1990)).

14 Federal law is also instructive. One District of
15 Columbia Circuit decision tacitly endorsed the paramour theory of
16 discrimination in dicta. See King v. Palmer, 778 F.2d 878 (D.C.
17 Cir. 1985), abrogated on other grounds by St. Mary's Honor Ctr.
18 v. Hicks, 509 U.S. 502 (1993) (stating that "unlawful sex
19 discrimination occurs whenever sex is for no legitimate reason a
20 substantial factor in the discrimination.") Aside from this
21 decision, however, "every other federal court which has
22 considered the propriety of the 'paramour' theory has rejected it
23 as a Title VII cause of action." Alberto v. Bank of Am., No. C-
24 94-1283, 1995 WL 562170, at *4 (N.D. Cal. Sept. 13, 1995); see
25 Tenge v. Phillips Modern Ag Co., 446 F.3d 903, 908-09 (8th Cir.
26 2006) (termination of an employee based on the employee's
27 consensual sexual conduct with a supervisor is not a violation of
28 Title VII); Ackel v. Nat'l Commc'ns, Inc., 339 F.3d 376, 382 (5th

1 Cir. 2003); Schobert v. Ill. Dep't of Transp., 304 F.3d 725, 733
2 (7th Cir. 2002) (Title VII does not prevent employers from
3 favoring employees because of personal relationships); Womack v.
4 Runyon, 147 F.3d 1298, 1300 (11th Cir. 1998); Taken v. Okla.
5 Corp. Comm'n, 125 F.3d 1366, 1370 (10th Cir. 1997); Becerra v.
6 Dalton, 94 F.3d 145, 149-50 (4th Cir. 1996); DeCintio v.
7 Westchester Cnty. Med. Ctr., 807 F.2d 304 (2d Cir. 1986). Each
8 of these courts reasoned that "when an employer discriminates in
9 favor of a paramour, such an action is not sex-based
10 discrimination, as the favoritism, while unfair, disadvantages
11 both sexes alike for reasons other than gender." Ackel, 339 F.3d
12 at 382 (citing Green v. Adm'rs of Tulane Educ. Fund, 284 F.3d
13 642, 656 n.6 (5th Cir. 2002)).

14 While favoritism with more might constitute
15 discrimination under the paramour theory in California, plaintiff
16 has failed to meet his burden. The only adverse employment
17 action he cites in support of his gender discrimination claim is
18 that he was required to complete some of Kelsheimer's work
19 assignments. He also stated in his deposition that he heard Troy
20 state that he "wanted pretty women in as many positions as
21 possible" (Nielsen Dep. at 255:10-14), but did not provide any
22 evidence of adverse employment actions that resulted. Even
23 assuming that being given extra work constitutes an adverse
24 employment action, plaintiff has failed to show that he was
25 treated disparately based on his gender. Rather, any advantages
26 given Kelsheimer were solely based on her relationship with
27 Parker. Plaintiff does not claim he suffered any other type of
28 gender-based discrimination. Given these facts as well as the

1 overwhelming weight of authority cited above, the court finds
2 plaintiff's claim of gender discrimination under FEHA fails as a
3 matter of law and will accordingly grant TTI's motion for summary
4 judgment on that claim.

5 B. FEHA Disability Discrimination Claim Against TTI

6 FEHA also prohibits discrimination based on disability.
7 Cal. Gov't Code § 12940(a). To establish a prima facie case of
8 disability discrimination, a plaintiff must show that: (1) he or
9 she suffered from a disability; (2) could perform the essential
10 duties of the job with or without reasonable accommodations,
11 i.e., he was a "qualified individual"; and (3) was subjected to
12 an adverse employment action because of the disability. Brundage
13 v. Hahn, 57 Cal. App. 4th 228, 236 (2d Dist. 1997); see also
14 Green v. State of Cal., 42 Cal. 4th 254, 262 (2007) (a plaintiff
15 bears the burden as part of a prima facie case to show he could
16 perform "essential job duties" with or without accommodation).

17 It is undisputed that plaintiff suffered from a
18 temporary disability. His complaints of "adverse employment
19 action" can be split into two categories: those actions during
20 his employment and the alleged termination. For the first
21 category, defendants do not dispute that plaintiff was physically
22 able to perform the essential duties of his job with or without
23 reasonable accommodation. Instead, the issues are whether
24 plaintiff was subjected to an adverse employment action and
25 whether that action occurred because of his disability.

26 Plaintiff's only contentions are that "Troy Glenn repeatedly
27 attacked . . . his effectiveness and work on the [CNG] project,"
28 he was "required to work 30 days straight" without being offered

1 a special work arrangement, he was "given conflicting
2 instructions and directions" about the project, and Pedone "never
3 offered [him] assistance." (Pl.'s Opp'n at 13.) Most of these
4 claims describe a stressful work environment but have nothing to
5 do with plaintiff's disability. See Arteaga v. Brink's, Inc.,
6 163 Cal. App. 4th 327, 344 (2d Dist. 2008) ("The FEHA does not
7 guarantee employees a stress-free working environment. . . . It
8 is not a shield against harsh treatment at the workplace.")
9 (internal quotation marks and citation omitted). The only
10 allegations having anything to do with plaintiff's disability are
11 those regarding denial of any special assistance. However,
12 plaintiff admits that the only special accommodation he requested
13 was a digital voice recorder, which he was given. (Nielsen Dep.
14 at 123:7-18, 124:17-22; Parker Dep. at 99:4-100:2; Pedone Dep. at
15 109:16-23, 110:21-25.) Plaintiff does not claim that he was
16 treated differently than other employees, nor does he claim that
17 he requested accommodations that he was not given.

18 The other category of alleged discrimination involves
19 plaintiff's termination. Termination is indisputably an adverse
20 employment action. Construing the facts most favorably to
21 plaintiff, the court assumes that TTI granted the third leave of
22 absence but then terminated plaintiff on December 30, 2008.
23 Thus, the court does not decide whether the third leave of
24 absence constituted a "reasonable accommodation."

25 While the "Employee Separation Report" stating that
26 plaintiff's employment ended by "Voluntary Resignation" because
27 he "failed to return from leave of absence" (Pl.'s Opp'n Ex. 29)
28 is in conflict with plaintiff's contention that he was

1 terminated, it may be enough to satisfy the prima facie burden of
2 showing that employment action was taken "because of" his
3 disability. The burden then shifts to TTI, which has adequately
4 shown a legitimate reason for denying the request. TTI lost its
5 biggest contract during plaintiff's leave and had to undergo
6 major reorganization, which included cutting plaintiff's position
7 entirely. Plaintiff admitted that he poorly led the CNG proposal
8 team, and he had been placed on a performance improvement plan to
9 improve his work, especially regarding deadlines. TTI's
10 financial difficulties, coupled with the documented deficiencies
11 in plaintiff's work, provide a legitimate reason for plaintiff's
12 termination. See Diaz v. Eagle Produce Ltd. P'ship, 421 F.3d
13 1201, 1212 (9th Cir. 2008) (employer must give a reason why
14 plaintiff was included in the group that was terminated as part
15 of workforce reduction); see also Arteaga v. Brink's, Inc., 163
16 Cal. App. 4th 327, 344 (2d Dist. 2008) ("The employer may fire an
17 employee for a good reason, a bad reason, a reason based on
18 erroneous facts, or for no reason at all, as long as its action
19 is not for a discriminatory reason.") (internal quotations and
20 citations omitted). Defendants have provided a legitimate reason
21 for plaintiff's termination and plaintiff has provided no
22 argument or evidence that the company's financial situation
23 coupled with his poor performance was just a pretext to terminate
24 him because of his disability.

25 Accordingly, plaintiff's claim of disability
26 discrimination under FEHA fails as a matter of law and the court
27 will grant TTI's motion for summary judgment on that claim.

28 C. FEHA Hostile Work Environment Sexual and Disability

1 Harassment Claim Against All Defendants and Title VII

2 Sexual Harassment Claim Against TTI

3 FEHA makes it illegal for an employer "because of . . .
4 physical disability . . . [or] sex . . . to harass an employee .
5 . . ." Cal. Gov't Code § 12940(j)(1). Similarly, Title VII
6 prohibits sexual harassment that is so "severe or pervasive" as
7 to "alter the conditions of [the victim's] employment and create
8 an abusive working environment." Meritor Sav. Bank, FSB v.
9 Vinson, 477 U.S. 57, 67 (1986). FEHA and Title VII require the
10 same showing for a prima facie case:

11 To prevail on a hostile work environment claim under
12 California's FEHA, an employee must show that the
13 harassing conduct was severe enough or sufficiently
14 pervasive to alter the conditions of employment and
15 create a work environment that qualifies as hostile or
16 abusive to employees because of their sex [or
17 disability]. There is no recovery for harassment that is
18 occasional, isolated, sporadic, or trivial.

19 Hughes v. Pair, 46 Cal. 4th 1035, 1043 (2009) (internal quotation
20 marks and citations omitted); see Craig v. M & O Agencies, Inc.,
21 496 F.3d 1047, 1054-55 (9th Cir. 2007) (Title VII sexual
22 harassment). The environment must be both objectively and
23 subjectively offensive. Hughes, 46 Cal. 4th at 1044; see Harris
24 v. Forklift Sys., Inc., 510 U.S. 17, 21-22 (1993). In addition
25 to employers, employees are subject to personal liability for
26 harassment under FEHA but not Title VII. Cal. Gov't Code §
27 12940(j)(3).

28 1. Sexual Harassment Claims (FEHA and Title VII)

 Where "there is no conduct other than favoritism toward
a paramour, the overwhelming weight of authority holds that no
claim of sexual harassment or discrimination exists." Proskel v.

1 Gattis, 41 Cal. App. 4th 1626, 1630 (4th Dist. 1996); see, e.g.,
2 Candelore v. Clark Cnty. Sanitation Dist., 975 F.2d 588, 590 (9th
3 Cir. 1992) ("A co-worker's romantic involvement with a supervisor
4 does not by itself create a hostile work environment."). "An
5 exception to this general rule exists, however, if the workplace
6 affair entails 'widespread' sexual conduct to which other
7 employees are exposed, such as flagrant boasting about the
8 relationship and/or public displays of affection." Perron v.
9 Sec'y, Dep't of Health & Human Servs., No. 2:06-cv-02429 MCE GGH,
10 2007 WL 4219171, at *4 (E.D. Cal. Nov. 29, 2007) (quoting Miller
11 v. Dep't of Corrs., 36 Cal. 4th 446, 471 (2005)). In Miller, the
12 favoritism at issue included "abuse and harassment against
13 [plaintiffs] by [a] supervisor's paramour[], flagrant boasting by
14 the favored women, eyewitness accounts of public fondling,
15 admissions by the supervisor that he could not control his
16 paramours based on the sexual relationship between them, and
17 repeated promotions based on sexual favors rather than on
18 qualifications." Alaniz v. Robert M. Peppercorn, M.D., Inc., No.
19 2:05-CV-2576 MCE DAD, 2007 WL 1299804, at *6 (E.D. Cal. May 3,
20 2007).

21 In contrast, plaintiff's claim of a hostile work
22 environment is based on Parker's act of occasionally assigning
23 Kelsheimer's work to plaintiff and Troy's alleged statement that
24 he "wanted pretty women in as many positions as possible."
25 (Nielsen Dep. at 255:10-14.) Beyond the emails between Parker
26 and Kelsheimer, which were private and not meant to be viewed by
27 plaintiff or others, the only conduct of a sexual nature
28 plaintiff has shown is occasional flirting between Parker and

1 Kelsheimer. Plaintiff has shown nothing that could possibly be
2 construed as severe or pervasive. Plaintiff has also failed to
3 provide any evidence establishing that he was harassed "because
4 of" his gender.

5 Accordingly, plaintiff's claims of sexual harassment
6 based upon a hostile work environment under Title VII and FEHA
7 fail as a matter of law as to all defendants and the court will
8 grant defendants' motion for summary judgment on those claims.

9 2. Disability Harassment Claim (FEHA)

10 Harassment because of disability is subject to the same
11 standard as sexual harassment. Plaintiff's strongest, and indeed
12 only, contention is that he spoke to Troy after the accident and
13 "came away with the understanding" that his job would be in
14 jeopardy if he did not take the lead on the CNG proposal. (Pl.'s
15 Opp'n at 11.) It is unclear how requiring plaintiff to work on a
16 project constitutes harassment because of plaintiff's disability.
17 Harassment, like discrimination, occurs only where an employee is
18 treated differently and that difference was based on his
19 disability. Plaintiff did not request any accommodation on the
20 project, nor does he contend that he was unable to perform the
21 necessary work on the project. A mere "understanding" that an
22 employee is being told to do a job when the employer has no
23 reason to believe the employee cannot perform the job is
24 insufficient to show a prima facie case of harassment. See Avila
25 v. Continental Airlines, Inc., 165 Cal. App. 4th 1237, 1252 (2d
26 Dist. 2008) (to show failure to accommodate, the employee must
27 have requested an accommodation).

28 Plaintiff's other complaints about his treatment at

1 work, as discussed regarding his discrimination claim, similarly
2 have no relation to his disability: he claims that Troy
3 "attacked" his effectiveness, he was "required to work 30 days
4 straight," and he was "given conflicting instructions and
5 directions" regarding the proposal. (Pl.'s Opp'n at 11.)
6 Plaintiff does not contend that this treatment was any different
7 from the way non-disabled employees were treated. See Arteaga,
8 163 Cal. App. 4th at 344. Thus, plaintiff has failed to show
9 that he was harassed or subject to a hostile work environment
10 because of his disability; he certainly has not shown that the
11 harassment was severe and pervasive.

12 Accordingly, plaintiff's claim of disability harassment
13 based upon a hostile work environment under FEHA fails as a
14 matter of law as to all defendants and the court will grant
15 defendants' motion for summary judgment on that claim.

16 D. FEHA Retaliation Claim Against TTI

17 FEHA makes it illegal for an employer "to discharge,
18 expel, or otherwise discriminate against any person because the
19 person has opposed any practices forbidden under [FEHA] or
20 because the person has filed a complaint, testified, or assisted
21 in any proceeding under [FEHA]." Cal. Gov't Code § 12940(h).
22 FEHA retaliation claims are evaluated under federal law
23 interpreting Title VII cases. Flait v. N. Am. Watch Corp., 3
24 Cal. App. 4th 467, 475-76 (2d Dist. 1992).

25 A plaintiff establishes a prima facie case of
26 retaliation under FEHA by demonstrating: (1) he engaged in
27 protected activity; (2) he suffered an adverse employment action;
28 and (3) there is a causal link between the activity and the

1 employment action. Raad v. Fairbanks N. Star Borough Sch. Dist.,
2 323 F.3d 1185, 1197 (9th Cir. 2003); see Yanowitz v. L'Oreal USA,
3 Inc., 36 Cal. 4th 1028, 1042 (2005).

4 Plaintiff asserts that his complaints to Pedone
5 regarding the alleged affair between Parker and Kelsheimer were a
6 protected activity for purposes of his retaliation claim. An
7 employee's conduct may constitute protected activity for purposes
8 of a retaliation claim not only when the employee opposes conduct
9 that ultimately is determined to be unlawful, but also when the
10 employee opposes conduct that the employee reasonably and in good
11 faith believes is unlawful, whether or not that belief is
12 ultimately borne out. Yanowitz, 36 Cal. 4th at 1043. Even if
13 the alleged relationship between Parker and Kelsheimer is
14 insufficient to support a viable discrimination or harassment
15 claim, that fact alone does not defeat plaintiff's claim that he
16 reasonably believed his complaints to Pedone opposed unlawful
17 conduct. As a result, the court cannot rule out that plaintiff
18 engaged in protected activity, especially since it must resolve
19 all inferences in plaintiff's favor on a motion for summary
20 judgment.

21 With respect to whether he suffered an adverse
22 employment action, plaintiff has shown that he was reprimanded by
23 Parker and ultimately terminated. This evidence is sufficient to
24 constitute an adverse employment action for purposes of stating a
25 viable retaliation claim.

26 The more difficult inquiry concerns whether the adverse
27 employment actions are causally related to plaintiff's protected
28 activity. "The causal link between a protected activity and the

1 alleged retaliatory action 'can be inferred from timing alone'
2 when there is a close proximity between the two." Thomas v. City
3 of Beaverton, 379 F.3d 802, 812 (9th Cir. 2004) (citing
4 Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1065 (9th
5 Cir. 2002)). Plaintiff has established that his conversation
6 with Parker and subsequent implementation of the performance
7 improvement plan took place soon after plaintiff complained of
8 Parker's affair to Pedone. While not as close in time,
9 plaintiff's termination occurred within months of his protected
10 activity while he was on leave. Thus, plaintiff has met the
11 burden of showing a prima facie case of retaliation.

12 Once an employee establishes a prima facie case, the
13 employer is required to offer a legitimate, non-retaliatory
14 reason for the adverse employment action. Brooks v. City of San
15 Mateo, 229 F.3d 917, 928 (9th Cir. 2000); Yanowitz, 36 Cal. 4th
16 at 1042. If the employer produces a legitimate reason for the
17 adverse employment action, the presumption of retaliation is
18 removed, and the burden shifts back to the employee to prove the
19 reason is pretextual. Brooks, 229 F.3d at 928; Yamotiz, 36 Cal.
20 4th at 1042.

21 Defendants have offered a legitimate reason for placing
22 plaintiff on a performance improvement plan. Defendants provided
23 documentation of plaintiff's poor work performance and plaintiff
24 admitted that he did a poor job in leading the CNG proposal.
25 Plaintiff argues that evidence of his other, positive performance
26 reviews helps to establish pretext. However, those reviews
27 occurred before plaintiff held the position of program manager.
28 Indeed, defendants point out that plaintiff received negative

1 feedback from Parker in January 2008, before plaintiff had
2 engaged in any protected activity that could possibly lead to
3 retaliation. (See Parker Dep. Ex. 52.) Without more, plaintiff
4 cannot establish pretext. See Loggins v. Kaiser Permanente
5 Int'l, 151 Cal. App. 4th 1102, 1112 (4th Dist. 2007) ("temporal
6 proximity . . . does not, without more" establish pretext).

7 Regarding the termination, defendants explain that
8 plaintiff was terminated as a result of TTI's reorganization in
9 light of the loss of its biggest contract and because of
10 plaintiff's poor work performance. As explained above, this
11 decision is a legitimate reason for the adverse employment
12 action. Plaintiff argues that termination during a third leave
13 of absence, when nothing has changed since the first two leaves,
14 shows that defendants were retaliating against him. However,
15 defendants did show that something changed: the loss of TTI's
16 biggest contract led to a company reorganization that
17 necessitated the elimination of plaintiff's position. Plaintiff
18 has not given the court any reason to disbelieve defendants'
19 explanation. See Grozs v. Boeing Co., 455 F. Supp. 2d 1033, 1041
20 (C.D. Cal. 2006) (when an employee's position is completely
21 eliminated, pretext is difficult to establish).

22 Accordingly, plaintiff's claim of retaliation under
23 FEHA fails as a matter of law and the court will thus grant TTI's
24 motion for summary judgment on that claim.

25 E. Wrongful Termination in Violation of Public Policy
26 Claim Against TTI

27 "In order to sustain a claim of wrongful discharge in
28 violation of fundamental public policy, [a plaintiff] must prove

1 that his dismissal violated a policy that is (1) fundamental, (2)
2 beneficial for the public, and (3) embodied in a statute or
3 constitutional provision." Turner v. Anheuser-Busch, Inc., 7
4 Cal. 4th 1238, 1256 (1994) (footnotes omitted).

5 Plaintiff's claim for wrongful termination in violation
6 of public policy is derivative of his statutory claims. See
7 Sanders v. Arneson Prods., Inc., 91 F.3d 1351, 1354 (9th Cir.
8 1996) (citing Jennings v. Marralle, 8 Cal. 4th 121, 135-36
9 (1994)). As summary judgment has been granted on plaintiff's
10 other claims, summary judgment is similarly granted on the public
11 policy claim. See Cavanaugh v. Unisource Worldwide, Inc., No.
12 CIV-F-06-0119 AWI DLB, 2007 WL 915223, at *11 (E.D. Cal. Mar. 26,
13 2007). Accordingly, plaintiff's claim of wrongful termination in
14 violation of public policy fails as a matter of law and the court
15 will grant TTI's motion for summary judgment on that claim.

16 IT IS THEREFORE ORDERED that defendants' motion for
17 summary judgment be, and the same hereby is, GRANTED.

18 DATED: November 1, 2010

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21 WILLIAM B. SHUBB
22 UNITED STATES DISTRICT JUDGE
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