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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

KRIS ROBINSON,)	
)	2:12-cv-00604-GEB-CKD
Plaintiff,)	
)	
v.)	<u>ORDER GRANTING IN PART AND</u>
)	<u>DENYING IN PART DEFENDANT'S</u>
HD SUPPLY, INC.,)	<u>DISMISSAL MOTION</u>
)	
Defendant.)	
_____)	

Defendant HD Supply, Inc. ("HD Supply") moves under Federal Rule of Civil Procedure ("Rule") 12(b)(6) for dismissal of Plaintiff's complaint. Plaintiff Kris Robinson ("Robinson") filed an opposition brief.

I. LEGAL STANDARD

Decision on HD Supply's Rule 12(b)(6) dismissal motion requires determination of "whether the complaint's factual allegations, together with all reasonable inferences, state a plausible claim for relief." Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., 637 F.3d 1047, 1054 (9th Cir. 2011) (citing Ashcroft v. Iqbal, 556 U.S. 662, 678-79 (2009)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556

1 HD Supply also requests that judicial notice be taken of
2 "[t]he driving distance between the city centers of Sacramento and
3 Salinas, California, and the time[] it would take to drive that
4 distance." (Def.'s RJN 2:8-9.) However, in light of the issues decided
5 in this motion, this request is denied because these facts have no
6 bearing on the decision. See Ventura Mobilehome Communities Owners Ass'n
7 v. City of San Buenaventura, 371 F.3d 1046, 1052 n.5 (9th Cir. 2004)
8 (denying judicial notice request where the facts "d[id] not alter . . .
9 determination of the case").

10 III. ROBINSON'S ALLEGATIONS

11 This case concerns Robinson's termination from employment with
12 HD Supply. Robinson alleges he was employed as an Assistant
13 Transportation Manager with HD Supply from March 2008 to February 2010,
14 and that "his job duties included . . . scheduling truck drivers and
15 coordinating pick-ups and deliveries throughout Northern California."
16 (Pl.'s Compl. ("Compl.") ¶¶ 7-8.)

17 Robinson alleges that "[o]n or about January 11, 2010, [he]
18 informed Mary Sullivan [('Sullivan')], [HD Supply's] Distribution Center
19 Manager and [his] immediate supervisor, that he had recently been
20 diagnosed with Post Traumatic Stress Disorder ('PTSD') as a result of
21 events that occurred during his overseas service in the United States
22 Marine Corps." Id. ¶ 10. Robinson alleges that "on or about January 20,
23 2010, [Sullivan] instructed [him] to locate a driver who would be able
24 to make a delivery from Sacramento to Salinas on short notice." Id. ¶
25 12. "[Robinson] was concerned about this instruction . . . because he
26 knew that, based on the distance between these locations, this delivery
27 route would necessitate a violation of the U.S. Department of
28 Transportation Hours-of-Service Regulations[,] . . . [which] require,

1 *inter alia*, that employers . . . only permit their drivers to drive for
2 a maximum of 11 hours after 10 consecutive hours off duty." Id.

3 Robinson alleges he "shared his concern with [Sullivan], who
4 refused to rescind her order." Id. ¶ 13. "Thereafter, [Robinson]
5 consulted with [HD Supply's] Regional Transportation Manager, Bruce
6 Gagon ['Gagon'], and informed him of the situation." Id. "When making
7 this complaint, [Robinson] also suggested an alternative method of
8 accomplishing the delivery without violating any Department of
9 Transportation Regulations." Id.

10 Robinson alleges "[Gagon] advised [him] that if he was
11 uncomfortable with the instruction, he should ask [Sullivan] to issue
12 the order herself." Id. ¶ 14. Robinson further alleges he "complied with
13 this direction from [Gagon] and refused to issue the non-compliant
14 order." Id. Robinson alleges "[Sullivan] . . . told [him] that he would
15 be disciplined for insubordination if he maintained his refusal to
16 execute the order." Id. ¶ 15. Robinson alleges "[Sullivan's] . . .
17 threat to discipline [him] unless he participated in a practice that he
18 knew violated Federal law caused [him] extreme stress and anxiety[,]
19 . . . [which] exacerbated [his] pre-existing PTSD[.]" Id. ¶ 16. Robinson
20 alleges that "[i]n an attempt to defuse the volatile situation
21 [Sullivan] created, [Robinson] decided to take a walk in the warehouse
22 in order to calm down." Id. ¶ 17. Robinson alleges that "[b]ased on
23 [this] incident, [he] was suspended indefinitely." Id. ¶ 18.

24 Robinson alleges that "[b]ecause of the stress the suspension
25 caused him, [he] visited his physician's office and received a note from
26 [a] Nurse Practitioner . . . prescribing he take a 10-working-day leave
27 of absence." Id. ¶ 19. Robinson alleges that "[i]mmediately upon his
28 return [to work on February 9, 2010], [Sullivan] continued to discipline

1 [him] for his alleged pre-suspension insubordination." Id. ¶ 21.
2 Robinson alleges "[HD Supply] summarily terminated [his] employment the
3 next day, February 10, 2010[.]" Id. ¶ 22.

4 Robinson alleges that "[o]n or about March 22, 2010, [he] duly
5 presented a discrimination and harassment Complaint against [HD Supply]
6 to the [DFEH] . . . in compliance with the requirements of [FEHA.]" Id.
7 ¶ 6. Robinson alleges the following in the administrative complaint he
8 submitted to the DFEH:

9 I believe I was suspended and my employment was
10 terminated because of my disability (post traumatic
11 stress disorder). My belief is based on the
12 following:

13 A. On approximately January 11, 2010, I informed
14 Mary Sullivan . . . that I was diagnosed with
15 [PTSD].

16 B. On January 20, 2010, I was informed by Mary
17 Sullivan . . . that I was being suspended. Other
18 managers have committed infractions and were not
19 suspended. Therefore, I believe I was suspended
20 because of my disability[.]

21 C. On January 25, 2010, I was placed off work by my
22 physician.

23 D. On February 9, 2010, I returned to work.

24 E. On February 10, 2010, I was informed by Mary
25 Sullivan . . . that my employment was being
26 terminated for insubordination. Other managers have
27 committed infraction[s] and have not been
28 terminated. Therefore, I believe I was terminated
because of my disability[.]

23 (Def.'s RJN Ex. A.) Robinson alleges "DFEH issue[d] a Right-to-Sue
24 Notice . . . on January 25, 2011[,]" which Robinson attached to his
25 civil complaint. (Compl. ¶ 6 & Ex. A.)

26 Robinson alleges in his civil complaint that HD Supply
27 violated FEHA by discriminating against him because of his disability;
28 failing to provide a reasonable accommodation; failing to engage in the

1 interactive process; and failing to prevent discrimination. (Compl. ¶¶
2 38, 40, 48-57 & 74-75.) Robinson also alleges HD Supply violated
3 California Labor Code sections 1102.5 and 98.6 by terminating his
4 employment in retaliation for his refusal to follow Sullivan's order,
5 which Robinson alleges would have required him to violate federal law.
6 Id. ¶ 66. Robinson further alleges HD Supply's termination of his
7 employment violated California public policy against disability
8 discrimination and retaliation. Id. ¶¶ 27-31. Robinson also alleges a
9 claim for negligent hiring and retention. Id. ¶¶ 81-82.

10 IV. DISCUSSION

11 A. Failure to Exhaust Administrative Remedies

12 HD Supply argues the following claims should be dismissed
13 since "[Robinson] failed to exhaust his administrative remedies"
14 applicable to these claims: retaliation under Labor Code sections 1102.5
15 and 98.6; and FEHA claims for failure to provide him with a reasonable
16 accommodation and an interactive process, and to prevent discrimination
17 to which he was subjected. (Def.'s Mot. to Dismiss ("Mot.") 11:19-21.)
18 "[T]he rule [of exhaustion of administrative remedies] is that where an
19 administrative remedy is provided by statute, relief must be sought from
20 the administrative body and this remedy exhausted before the courts will
21 act." Campbell v. Regents of Univ. of Cal., 35 Cal. 4th 311, 321 (2005)
22 (internal quotation marks and citation omitted). HD Supply argues:

23 [Robinson's] administrative complaint is based upon
24 a claim that his employment was terminated because
25 of an alleged mental disability. The administrative
26 complaint does not contain any claims or facts that
27 an adverse action was taken against [him] for
retaliatory purposes or that HD [Supply] failed to
accommodate [him regarding his disability], failed
to engage in the interactive process, or failed to
prevent discriminatory acts.

28 (Mot. 11:14-19.)

1 **1. Retaliation Claim**

2 Robinson argues in his opposition brief:

3 [The] Retaliation claim is based on violations of
4 [Labor Code sections] 1102.5 and 98.6, and not the
5 FEHA. Therefore, there is no FEHA-based exhaustion
6 requirement for the Retaliation [claim]. For this
7 reason, [Robinson] will not offer further
8 opposition to [HD Supply's] 'failure to exhaust'
9 argument [regarding] the Retaliation claim.

10 (Pl.'s Opp'n ("Opp'n") p.5 n.1.) HD Supply rejoins that "[s]ections 98.6
11 and 1102.5 of the Labor Code [r]equire an [e]xhaustion of
12 [administrative r]emedies." (Def.'s Reply 1:24-2:18.)

13 Section 1102.5(c) proscribes "[a]n employer . . . [from]
14 retaliat[ing] against an employee for refusing to participate in an
15 activity that would result in a violation of state or federal statute,"
16 and "[r]emedies for [section] 1102.5 are specifically found in [section]
17 98.6(b)[.]" Manser v. Sierra Foothills Pub. Util. Dist., No.
18 CV-F-08-1250, 2010 WL 2465418, at *2 (E.D. Cal. June 15, 2010). "[I]n
19 order to bring a claim under section 1102.5 . . . , plaintiff must
20 exhaust his administrative remedies." Lund v. Leprino Foods Co., No.
21 CIV. S-06-0431, 2007 WL 1775474, at *4 (E.D. Cal. June 20, 2007) (citing
22 Campbell, 35 Cal. 4th at 333). Since Robinson fails to allege he
23 exhausted his administrative remedies applicable to his retaliation
24 claim, this claim is dismissed.

25 **2. Failure to Provide a Reasonable Accommodation and Failure to**
26 **Engage in the Interactive Process Claims**

27 Robinson argues he exhausted his administrative remedies
28 applicable to his FEHA claims, because his allegations that HD Supply
29 failed to provide him with a reasonable accommodation and an interactive
30 process are "like or reasonably related" to the disability
31 discrimination claims in his administrative complaint. (Opp'n 5:12-7:3.)

1 "In order to bring a civil action under FEHA, the aggrieved
2 person must exhaust the administrative remedies provided by law . . .
3 [by] filing a written charge with DFEH . . . and obtaining notice from
4 DFEH of the right to sue." Rodriguez v. Airborne Express, 265 F.3d 890,
5 896 (9th Cir. 2001) (internal quotation marks and citations omitted).

6 The scope of the administrative [complaint] defines
7 the scope of the subsequent civil action, and
8 unlawful conduct not included in an administrative
9 complaint is not considered by a court unless the
10 conduct is like or reasonably related to the
11 allegations in the administrative complaint, or can
12 reasonably be expected to grow out of an
13 administrative investigation.

14 Lelaind v. City & Cnty. of San Francisco, 576 F. Supp. 2d 1079, 1090
15 (N.D. Cal. 2008) (citations omitted). Further, where "additional claims
16 [in the civil complaint] . . . stem from the [same conduct] identified
17 in the [administrative] complaint, [the additional claims] would have
18 been uncovered during the course of a DFEH investigation." Ramirez v.
19 Silgan Containers, No. CIV F 07-0091, 2007 WL 1241829, at *5 (E.D. Cal.
20 Apr. 26, 2007).

21 Here, Robinson alleged in his administrative complaint that he
22 informed Sullivan that he had been diagnosed with PTSD and that he was
23 terminated because of this disability approximately one month later.
24 (Def.'s RJN Ex. A.) Since Robinson's claims alleging failure to provide
25 a reasonable accommodation and an interactive process stem from the same
26 conduct alleged in Robinson's administrative complaint, these claims
27 probably would have been uncovered during the course of a DFEH
28 investigation. Therefore, these claims "are reasonably . . . related to
the conduct identified in the administrative charge[," and HD Supply
has not demonstrated that Robinson failed to exhaust his administrative

1 remedies applicable to these claims. Ramirez, 2007 WL 1241829, at *5
2 (citations omitted).

3 **3. Failure to Prevent Discrimination Claim**

4 HD Supply argues Robinson failed to exhaust his administrative
5 remedies applicable to his failure to prevent discrimination FEHA claim.
6 (Mot. 11:14-21.) Robinson does not address this argument in his
7 opposition brief. Since Robinson did not allege in his administrative
8 complaint that HD Supply failed to prevent discrimination, and since
9 Robinson has not demonstrated that he has exhausted his administrative
10 remedies applicable to this claim, this claim is dismissed.

11 **B. Disability Discrimination Claim**

12 HD Supply argues, *inter alia*:

13 [FEHA] does not prohibit an employer from
14 discharging an employee that is unable to perform
15 his . . . essential duties because of his . . .
16 mental disability even with reasonable
17 accommodation. In this regard, [Robinson] fails to
18 allege 1) that his PTSD condition affected his
19 ability to perform his essential duties of
20 dispatching drivers[;] and 2) that his PTSD
21 required an accommodation to perform those
22 essential duties.

19 (Mot. 14:7-12.) Robinson counters that “[e]ven if this were true . . . ,
20 [it] would not be a valid ground upon which to base a motion to dismiss
21 [a] claim for disability discrimination.” (Opp’n p.8 n.2.)

22 “[A] prima facie case [of disability discrimination] requires
23 the plaintiff to show he . . . (1) suffered from a disability . . . ;
24 (2) could perform the essential duties of the job with or without
25 reasonable accommodations[;] and (3) was subjected to an adverse
26 employment action because of the disability[.]” Wills v. Super. Ct. of
27 Orange Cnty., 195 Cal. App. 4th 143, 159-60 (2011) (internal quotation
28 marks and citations omitted). Here, Robinson does not allege facts

1 supporting drawing a reasonable inference that he “could perform the
2 essential duties of [his] job with or without reasonable
3 accommodation[.]” Id. Therefore, his disability discrimination claim is
4 dismissed.

5 **C. Failure to Provide a Reasonable Accommodation and Failure to Engage**
6 **in the Interactive Process Claims**

7 HD Supply argues Robinson fails to state viable failure to
8 provide a reasonable accommodation and failure to engage in the
9 interactive process claims, since “[FEHA] requires that the employee
10 initiate the [interactive] process . . . [and Robinson] does not allege
11 that he sought out or initiated a request for a reasonable
12 accommodation.” (Mot. 16:16-19.) HD Supply also argues “[Robinson] does
13 not allege that he informed Sullivan, Gagon, or HD [Supply] of [his]
14 medical leave of absence.” Id. at 7 n.8. Robinson counters that an
15 employer’s “duty [to accommodate a disabled employee] arises even if the
16 employee has not requested any accommodation, so long as the employer is
17 aware of the disability.” (Opp’n 12:11-12.)

18 FEHA proscribes an employer from “fail[ing] to make reasonable
19 accommodation for the known . . . mental disability of an . . .
20 employee.” Cal. Gov’t Code § 12940(m). FEHA also imposes a duty on the
21 employer “to engage in a timely, good faith, interactive process with
22 the employee . . . [for the purpose of] determin[ing] effective
23 reasonable accommodations, if any, in response to a request for
24 reasonable accommodation by an employee . . . with a known . . . mental
25 disability.” Id. § 12940(n). Therefore, “[t]he duties of employers under
26 [sections] 12940(m) and 12940(n) are inextricably linked.” Kelley v.
27 Corrections Corp. of Am., 750 F. Supp. 2d 1132, 1140 (E.D. Cal. 2010)
28 (citation omitted).

1 “The employee bears the burden of giving the employer notice
2 of his . . . disability. Although no particular form of request is
3 required, the duty of an employer reasonably to accommodate an
4 employee’s handicap does not arise until the employer is aware of [the
5 employee’s] disability and [related] limitations.” Avila v. Cont’l
6 Airlines, Inc., 165 Cal. App. 4th 1237, 1252-53 (2008) (internal
7 quotation marks, citations, and alteration in original omitted).
8 Therefore, “[t]he interactive process is triggered either by a request
9 for accommodation by a disabled employee or by the employer’s
10 recognition of the need for such an accommodation.” Barnett v. U.S. Air,
11 Inc., 228 F.3d 1105, 1112 (9th Cir. 2000), *vacated in part on other*
12 *grounds*, U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (2002).

13 Here, Robinson fails to allege facts supporting drawing a
14 reasonable inference that HD Supply was aware of a need to engage in the
15 interactive process and to accommodate Robinson’s alleged mental
16 disability. Therefore, these claims are dismissed.

17 **D. Wrongful Termination in Violation of Public Policy Claims**

18 HD Supply argues Robinson’s “wrongful termination [claims are]
19 based upon two alleged activities: 1) HD [Supply] terminated his
20 employment because of his mental disability; and 2) HD [Supply]
21 terminated his employment [in] retaliation.” (Mot. 15:19-22.) HD Supply
22 argues that since Robinson “fail[s] to allege sufficient facts to
23 constitute a cause of action for either [underlying] claim,” the
24 derivative wrongful termination claims should also be dismissed. Id.
25 15:22-25. Robinson counters that “[t]o the extent [his] underlying
26 claims should not fail, neither should the Wrongful Termination
27 claim[s].” (Opp’n 11:26-27.)

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1 “To prevail on a claim of wrongful termination in violation of
2 public policy, a plaintiff employee must establish the existence of a
3 public policy, a nexus between [his] termination and the protected
4 activity related to that public policy, and damages resulting from the
5 termination.” Scheller v. Am. Med. Response, Inc., No. 1:08-CV-00798,
6 2010 WL 2991508, at *18 (E.D. Cal. July 28, 2010) (citation omitted).
7 “FEHA’s provisions prohibiting discrimination may provide the policy
8 basis for a claim for wrongful discharge in violation of public policy.”
9 Diaz v. Fed. Express Corp., 373 F. Supp. 2d 1034, 1065 (C.D. Cal. 2005)
10 (internal quotation marks and citation omitted). “[A] [v]iolation[] of
11 California Labor Code § 1102.5 can [also] support a [claim] for wrongful
12 termination in violation of public policy.” Ferretti v. Pfizer Inc., No.
13 11-CV-04486, 2012 WL 694513, at *7 (N.D. Cal. Feb. 29, 2012) (citation
14 omitted).

15 Since Robinson’s FEHA disability discrimination “claim fails,
16 his claim for wrongful termination in violation of public policy [based
17 on disability discrimination also] fails” and is dismissed. Hanson v.
18 Lucky Stores, Inc., 74 Cal. App. 4th 215, 229 (1999).

19 HD Supply argues Robinson’s wrongful termination in violation
20 of public policy claim based on retaliation should also be dismissed,
21 since “[Robinson] fails to state a claim for retaliation.” (Mot. 14:20-
22 21 & 15:17-25.) “To establish a prima facie case for retaliation under
23 [Labor Code] Section 1102.5, an employee must show (1) that he engaged
24 in protected activity, (2) that he was thereafter subjected to an
25 adverse employment action by his employer, and (3) that there was a
26 causal link between the protected activity and the adverse employment
27 action.” Love v. Motion Indus., Inc., 309 F. Supp. 2d 1128, 1134 (N.D.
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1 Cal. 2004) (citing Morgan v. Regents of Univ. of Cal., 88 Cal. App. 4th
2 52, 69 (2000)).

3 HD Supply argues Robinson "has not established that he was
4 engaged in a protected activity" since he "alleges . . . there was an
5 alternative [to Sullivan's order] that would not have violated any
6 [Department of Transportation] regulation[.]" (Mot. 15:2-4 & 15:8-14.)
7 However, Robinson alleges Sullivan "told [him] that he would be
8 disciplined for insubordination if he . . . refus[ed] to execute [her]
9 order[,]" which Robinson alleges would have violated federal law.
10 (Compl. ¶¶ 12 & 15.) A reasonable inference can be drawn from this
11 allegation that Robinson's refusal to carry out Sullivan's order was
12 protected activity under Labor Code section 1102.5; therefore, HD Supply
13 has not demonstrated that Robinson's wrongful termination claim based on
14 the public policy stated in Labor Code section 1102.5 should be
15 dismissed.

16 **E. Negligent Hiring and Retention Claim**

17 HD Supply argues "[Robinson] has failed to state a claim for
18 negligent hiring and retention[,]" since "[t]here are no facts alleged
19 that create a reasonable inference that HD [Supply] knew or should have
20 know[n] that unidentified actors were incompetent or unfit." (Mot. 18:5-
21 17.) Robinson counters that he alleges "he complained to [Gagon] . . .
22 about [Sullivan's] insistence on his compliance with an unlawful order"
23 and "following his suspension, [Robinson] took a 10-working-day leave of
24 absence based on [Sullivan's] conduct." (Opp'n 13:23-26.) Robinson
25 argues "despite [HD Supply's] knowledge of these facts, it permitted
26 [Sullivan] to resume her mistreatment of [Robinson] immediately upon his
27 return." Id. 13:27-28.

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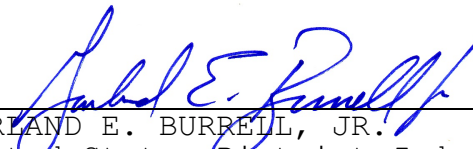
1 "An employer may be liable to a third person for the
2 employer's negligence in hiring or retaining an employee who is
3 incompetent or unfit." Delfino v. Agilent Techs., Inc., 145 Cal. App.
4 4th 790, 815 (2006) (internal quotation marks and citation omitted).
5 "Negligence liability will be imposed upon the employer if it knew or
6 should have known that hiring [or retaining] the employee created a
7 particular risk or hazard and that particular harm materializes." Id.
8 (internal quotation marks and citation omitted).

9 Here, Robinson fails to allege facts supporting a reasonable
10 inference that "[HD Supply] knew or should have known that hiring [or
11 retaining Sullivan] created a particular risk or hazard and that
12 particular harm materialize[d]." Id. Therefore, this claim is dismissed.

13 **V. CONCLUSION**

14 For the stated reasons, the dismissal motion is granted in
15 part and denied in part. Robinson is granted ten (10) days from date on
16 which this order is filed to file a First Amended Complaint in which he
17 addresses the deficiencies in any dismissed claim.

18 Dated: July 3, 2012

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21 _____
22 GARLAND E. BURRELL, JR.
23 United States District Judge
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