UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

TIMOTHY JOSEPH, Plaintiff, v. TARGET CORPORATION, a Minnesota corporation; DEBBIE HEEKE; SONYA MOORE; et al., Defendants.	No. 2:12-cv-01962-KJM-EFB ORDER

This matter is before the court on the motion by Target Corporation (Target), Debbie Heeke, and Sonya Moore (collectively "defendants") for summary judgment. Defs.' Mot. Summ. J., ECF No. 31 (Defs.' Mot). Plaintiff Timothy Joseph opposes the motion. Opp'n, ECF No. 36. The court decides the matter without a hearing. As explained below, the court DENIES in part and GRANTS in part defendants' motion.

I. EVIDENTIARY OBJECTIONS

Plaintiff makes several objections to defendants' evidence submitted with their motion. Pl.'s Obj. to Evidence, ECF Nos. 36-1, 36-2, 36-3, 36-4. Because the court does not consider the materials to which plaintiff objects in ruling on the instant motion, the court need not address plaintiff's objections. *See Norse v. City of Santa Cruz*, 629 F.3d 966, 973 (9th Cir. 2010).

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Even if the court were to consider the evidence to which plaintiff objects, it would not change the conclusions reached below.

Defendants also object to portions of plaintiff's evidence. Obj. to Pl.'s Evidence, ECF No. 50-2. Defendants object specifically to (1) Exhibits A, B, C, D, and R attached to the Declaration of Lynn Garcia in support of plaintiff's opposition (ECF Nos. 42, 43, 47), saying they lack foundation or personal knowledge, citing Federal Rule of Evidence 602, or are not properly authenticated, citing Federal Rule of Evidence 901; (2) several statements made in depositions as vague, conclusory, hearsay, lacking personal knowledge or foundation; and (3) to several statements made in plaintiff's and other's sworn declarations for being irrelevant, lacking personal knowledge, or being vague, conclusory, or hearsay. *Id.*

To the extent defendants object on the basis of relevance, such objections "are all duplicative of the summary judgment standard itself . . . [the court] cannot rely on irrelevant facts, and thus relevance objections are redundant." *Burch v. Regents of Univ. of California*, 433 F. Supp. 2d 1110, 1119 (E.D. Cal. 2006).

The court also finds little merit generally in the objections on the basis of lack of personal knowledge. Plaintiff recounts his experiences in the course of employment, and the other declarants state their relationship with plaintiff and recount their observations in working at Target with plaintiff. To the extent plaintiff or other declarants make statements regarding matters to which they do not have personal knowledge, or which constitute legal conclusions, the court does not rely on them in resolving the pending motion. To the extent the court does rely on plaintiff's declarations or depositions, it finds the statements cited to be based on the declarants' personal knowledge and overrules the objection.

To the extent defendants argue plaintiff's or other declarants' statements misstate the evidence, those objections are also overruled as "go[ing] to the weight of the evidence, not the admissibility of the testimony." *Galvan v. City of La Habra*, No. SACV 12-2103 JGB, 2014 WL 1370747, at *4 (C.D. Cal. Apr. 8, 2014); *Stonefire Grill, Inc. v. FGF Brands, Inc.*, 987 F. Supp. 2d 1023, 1034 (C.D. Cal. 2013).

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Defendants' numerous hearsay objections also will not be sustained at this stage. *Quanta Indem. Co. v. Amberwood Dev. Inc.*, No. CV-11-01807-PHX-JAT, 2014 WL 1246144, at *3 (D. Ariz. Mar. 26, 2014) ("evidence containing hearsay statements is admissible only if offered in opposition to the motion"). On summary judgment, "objections to the *form* in which the evidence is presented are particularly misguided where, as here, they target the non-moving party's evidence." *Burch*, 433 F. Supp. 2d at 1119 (emphasis in original).

The court considers carefully the objections to the documents defendants argue are not properly authenticated, specifically Exhibits A, B, C, and D attached to the Garcia Declaration. Defendants do not say these documents, consisting of copies of other Target employees' Corrective Action Reports and copies of plaintiff's medical records, contain inaccurate information, but question the conclusions plaintiff draws from them. "[W]here the objecting party does not contest the authenticity of the evidence submitted, but nevertheless makes an evidentiary objection based on purely procedural grounds," such as that the documents have not been properly authenticated, then the court should consider the evidence. *Tompkins*, 2011 WL 3875643, at *7; *see also Schwarz v. Lassen Cnty. ex rel. Lassen Cnty. Jail*, No. 2:10-CV-03048-MCE, 2013 WL 5425102, at *10 (E.D. Cal. Sept. 27, 2013) (plaintiff able to authenticate the documents at trial or provide evidence in admissible form). Moreover, the documents themselves do not have any indicia of unreliability, Exhibit A consists of documents produced by defendants during discovery, and defendants do not point to any particular aspect of any document to undermine its authenticity. With the exception of Exhibit A-2, which appears to be aggregated Corrective Action data but is not self-authenticating, the Corrective Action Reports provided by plaintiff appear identical in form to plaintiff's own Corrective Action Reports; the medical records are files produced by medical providers in response to subpoenas. *See King v. San Joaquin Cnty. Sheriff's Dep't*, No. CIV S-04-1158 GEB KJM P, 2009 WL 577609, at *3 (E.D. Cal. Mar. 5, 2009), *adopted*, No. 2:04CV1158 GEB KJM P, 2009 WL 959958 (E.D. Cal. Apr. 6, 2009) (plaintiff's submitted copies of medical records containing his identifying information authenticated by their contents, substance and distinctive characteristics).

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The court may infer authenticity, and does so here for the purposes of the motion as to Exhibits A-1, B, C, and D. *Thomas v. Quintana*, No. CV 10-2671-JGB CWX, 2014 WL 5419418, at *3 (C.D. Cal. Oct. 22, 2014) ("The characteristics of the records themselves in terms of appearance, contents, and substance allow the Court to conclude that the documents have been authenticated by their distinctive characteristics and that they are what they appear to be."). Defendants' objection to Exhibit A-2, however, is sustained.

The court finds defendants' remaining numerous objections to several of plaintiff's statements offered in the form of sworn depositions and declarations, including plaintiff's own sworn declaration, are premature in the summary judgment context. *See Estate of Hernandez-Rojas ex rel. Hernandez v. United States*, No. 11CV522 L DHB, 2014 WL 4829459, at *4 (S.D. Cal. Sept. 29, 2014). As in *Burch*, "[t]he court cannot ignore the fact that a non-movant in a summary judgment setting is not attempting to prove its case, but instead seeks only to demonstrate that a question of fact remains for trial" *Burch*, 433 F. Supp. 2d at 1121 (quoting *Lew v. Kona Hosp.*, 754 F.2d 1420, 1423 (9th Cir. 1985)). In these circumstances, "treat[ing] the opposing party's papers more indulgently than the moving party's papers" is appropriate. *Id.*; *see also Scharf v. U.S. Atty. Gen.*, 597 F.2d 1240, 1243 (9th Cir. 1979). The remaining objections to plaintiff's evidence are overruled. Of course, this determination will not preclude defendants' objecting at trial on any of the grounds not sustained here.

II. UNDISPUTED FACTS[1]

The claims in this employment discrimination case arise out of plaintiff's employment and termination from defendant Target. *See generally* Compl., ECF No. 1.

Plaintiff, an African American, began working at Target in May 1995 as a warehouse worker. Joseph Decl. ¶ 1 Ex. A, ECF No. 49. Among his duties were to load and unload cartons from trailers, check receipts, key entries into a handheld computer and verify

[1] The parties have each submitted statements of material facts with their moving papers, in accordance with Local Rule 260. Defendants, with their motion, submitted a Separate Statement of Undisputed Material Facts (UMF), ECF No. 31. With his opposition, plaintiff submitted a Separate Statement of Additional Material Facts (AMF). The court has examined the record to determine whether the submitted facts are supported and there exists a genuine dispute. If a fact is disputed, it is not included in this section.

figures. Moore Dep. 127:18-25; Heeke Dep. 131:15-132:1; Cason Dep. 44:1-15, 47:11-20, 50:8-51:12, 51:22-52:5. Plaintiff received positive employment reviews throughout his employment (ECF Nos. 49-2, 49-3), with the only incident prior to 2010 occurring on or about June 12, 2009, when he was issued a Corrective Action for an unsafe act because he sat on a conveyor belt known as an "extendoveyer." Joseph Decl. ¶ 8. He also worked as a team trainer, responsible for training new employees coming to his department. *Id*. ¶ 3.

Although the nature and extent of plaintiff's disability remains disputed, it is undisputed plaintiff suffered a heart attack on November 13, 2009, and as a result, had difficulties with memory loss. Physician's Supplementary Certificate, ECF No. 49-4 Ex. E (noting plaintiff "has short-term memory loss [and] cognitive issues from the cardiac arrest"). Following his heart attack, plaintiff took a leave of absence from work beginning November 13, 2009. *Id*. ¶¶ 9-13, 16; UMF 3. Plaintiff returned to work on March 1, 2010. *Id*. Before returning to work, plaintiff was treated by a neurologist, Dr. Halima Karim. Karim Dep. Ex. O, ECF No. 46-4 26:23-25. Dr. Karim testified that a patient cannot entirely recover from short-term memory loss, but can "work fine with some help" such as "taking notes." *Id*. 21:18-23. She expects plaintiff to permanently experience problems with 5-20 percent of his memory. *Id*. 31:9-12; 41:9-20. His memory is worsened by stress. *Id*. 49:1-4. Upon his return to work, plaintiff required assistance on a few basic aspects of the job, such as using the handheld scanner. Joseph Dep. 68:13-24, 103:2-104:20. He explained to his coworkers he was having trouble with his memory. Joseph Decl. ¶ 17.

After his return to work, defendant Team Leader Heeke had discussions on at least two occasions with plaintiff about his bathroom breaks. *Id*. ¶¶ 28, 40. In these discussions, she advised him to take breaks at better times, and to use the bike provided to travel to the restroom to shorten the length of the break. *Id*. On another occasion, plaintiff placed a record-breaking number of cartons from the trailer to the processing line, which is part of his job duties. *Id*. ¶ 36. However, he was reprimanded for being in the trailer for too long, as such ceaseless repetitive movement could result in injury. *Id*. On another occasion, he was reprimanded for being on the forklift too long and "standing around." Joseph Dep. 418:24-419:4, 421:12-422:12. On yet

another occasion, Team Leader and defendant Moore asked plaintiff while he was working if he could handle the heat inside the trailer. Joseph Dep. 185:19-186:9.

Target's Counseling and Corrective Action Policy provides that any Team Member who receives three corrective actions in a rolling one year period, regardless of whether the corrective action is counseling, a written warning, or a final warning, will receive a "Final Warning for Multiple Violations." Heeke Decl. ¶ 6, ECF No. 31-4. According to the policy, any team Member who receives any additional corrective action for negative performance or conduct during the subsequent one-year period will be terminated. *Id*. There is some discretion in issuing these corrective actions, and assessing the type of corrective action issued. Bumbernick Dep., 74:14-75:17, 76:9-77:6.

In March 2010, shortly after his return to work, plaintiff informed Group Leader Lance Cason plaintiff was having trouble remembering procedures. Joseph Decl. ¶ 24.

On or about April 9, 2010, plaintiff received a second Corrective Action[2] for Negligent Conduct from Group Leaders Lance Cason and Sonya Moore. Ex. G, ECF No. 49-6. They concluded plaintiff had failed to immediately report a safety incident, namely his dropping of a "chep pallet."[3] *Id*.

Plaintiff received a performance review on April 19, 2010. Ex. H, ECF No. 49. The review noted plaintiff's need for improvement in some areas, including reliability, safety, and productivity. *Id*. The review stated plaintiff is an "asset" due to his "experience and depth of knowledge." *Id*. It also noted that since plaintiff's return, he "indicated some challenges remembering some aspects of receiving." *Id*.

On May 25, 2010, plaintiff received a third Corrective Action (Final Warning) for disorderly conduct from Group Leader Debbie Heeke for tossing a box to another employee. Ex. J, ECF No. 49-9. Plaintiff received this as a final warning because plaintiff had, with this notice,

[2] The first was issued on June 2, 2009, when plaintiff was disciplined for standing on a conveyor belt. Joseph Decl. ¶ 8. The Corrective Action was to expire on December 12, 2009, but was extended to cover the time plaintiff was on leave. Ex. E, ECF No. 49-5.

[3] The parties do not define "chep pallet," but it appears such a pallet is a transport structure that supports goods and makes it easier for warehouse workers to move heavy containers. *See* CHEP Pallets, http://www.chep.com/pallets (last visited Jan. 15, 2015).

accumulated three Corrective Actions in a rolling 12-month period. Ex. K, ECF No. 49-10. In June 2010, plaintiff began taking intermittent Family Medical Leave Act (FMLA) leave for stress. Joseph Decl.¶ 25. The letter from Target to plaintiff considering his request for leave called this a "serious health condition." Ex. I, ECF No. 49-8. On or about July 22, 2010, Target investigated a complaint made by a Team Member, Rodrigo Fajardo, that plaintiff had yelled at him for being on the forklift. Podsakoff Dep. 76:9-79:6, 80:2-81:16.

Plaintiff was terminated on July 27, 2010, based on Heeke's recommendation and approved by Human Resources Manager Kylie Podsakoff. Heeke Decl. ¶ 28 & Ex. C. He was 53 years old at the time. Joseph Decl. ¶¶ 34, 42. Plaintiff sought review of his termination by a separate Human Resources review process. Joseph Dep. at 31:22-25. In a conversation with a Human Resources employee, Stephanie Gorgos, and subsequent written correspondence, plaintiff explained he believed his termination was unwarranted, he was experiencing short term memory loss and stress, and he had been treated unfairly after his heart attack and leave of absence. *Id*. 33:19-25, 366:22-25. The review process affirmed plaintiff's termination on August 27, 2010. Letter to Timothy Joseph from Target Human Resources Ex. B, ECF No. 50-1.

Plaintiff filed a complaint against defendants Target, Heeke and Moore with the California Department of Fair Employment and Housing ("DFEH") on March 28, 2011, and received a right-to-sue letter from the EEOC on April 4, 2012. Defs.' Mot. at 7; Compl. ¶ 39. His complaint alleged discrimination on the basis of race, color, disability, age, and denial of family medical leave. *Id*.

Plaintiff filed a complaint in state court on June 22, 2012, alleging sixteen claims under state and federal law: (1) discrimination in violation of California Government Codes §§ 12978 and 12940(a) (California Fair Employment and Housing Act ("FEHA")); (2) harassment in violation of California Government Code § 12940(j) (FEHA); (3) retaliation in violation of California Government Code § 12940(h) (FEHA); (4) failure to prevent discrimination, harassment, and retaliation in violation of California Government Code § 12940(k) (FEHA); (5) discrimination in violation of 42 U.S.C. § 12112 (Americans with Disabilities Act (ADA)); (6) failure to accommodate in violation of 42 U.S.C. § 12112(b)(5)(A) (ADA); (7) failure to

accommodate in violation of California Government Code § 12940(k) (FEHA); (8) failure to engage in interactive process in violation of California Government Code § 12940(n) (FEHA); (9) discrimination and retaliation in violation of the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. §§ 621 et seq., 29 U.S.C. §§ 215 et seq.; (10) discrimination on the basis of race, color, and national origin in violation of Title VII of the Civil Rights Act of 1964, codified at 42 U.S.C. §§ 2000e, et seq.; (11) discrimination on the basis of race, color, and national origin in violation of 42 U.S.C. § 1981, as amended, Civil Rights Act of 1866, as amended; (12) retaliation in violation of 42 U.S.C. § 1981, as amended, Civil Rights Act of 1866, as amended; (13) retaliation in violation of California Government Code § 12945.2(l), the California Family Rights Act (CFRA), and 29 U.S.C. § 2615 (FMLA); (14) wrongful termination in violation of public policy; (15) breach of covenant of good faith and fair dealing; (16) intentional infliction of emotional distress. ECF No. 1. Plaintiff seeks general, special, incidental, and consequential damages according to proof at time of trial, punitive damages, prejudgment interest, costs of suit and attorneys' fees, statutory civil penalties, and any such further relief the court deems just and proper. *Id*. at 38. Defendants removed the case to this court from Yolo County Superior Court on July 26, 2012. *Id*. Defendants now move for summary judgment on all of plaintiff's claims and his prayer for punitive damages. Defs.' Mot., ECF No. 31. Plaintiff opposes the motion (Opp'n, ECF No. 36), and defendants have replied. Reply, ECF No. 50.

III. SUMMARY JUDGMENT STANDARD

A court will grant summary judgment "if . . . 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). The "threshold inquiry" is whether "there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).[4]

[4] Rule 56 was amended, effective December 1, 2010. However, it is appropriate to rely on cases decided before the amendment took effect, as "[t]he standard for granting summary judgment remains unchanged." FED. R. CIV. P. 56, Notes of Advisory Comm. on 2010 amendments.

The moving party bears the initial burden of showing the district court "that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The burden then shifts to the nonmoving party, which "must establish that there is a genuine issue of material fact . . . ." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585 (1986). In carrying their burdens, both parties must "cit[e] to particular parts of materials in the record . . .; or show [] that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." FED. R. CIV. P. 56(c)(1); *see also Matsushita*, 475 U.S. at 586 ("[the nonmoving party] must do more than simply show that there is some metaphysical doubt as to the material facts"). Moreover, "the requirement is that there be no *genuine* issue of *material* fact . . . . Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson*, 477 U.S. at 248 (emphasis in original).

In deciding a motion for summary judgment, the court draws all inferences and views all evidence in the light most favorable to the nonmoving party. *Matsushita*, 475 U.S. at 587–88; *Whitman v. Mineta*, 541 F.3d 929, 931 (9th Cir. 2008). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita*, 475 U.S. at 587 (quoting *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 289 (1968)).

A court may consider evidence as long as it is "admissible at trial." *Fraser v. Goodale*, 342 F.3d 1032, 1036 (9th Cir. 2003). "Admissibility at trial" depends not on the evidence's form, but on its content. *Block v. City of L.A.*, 253 F.3d 410, 418–19 (9th Cir. 2001) (citing *Celotex Corp.*, 477 U.S. at 324). The party seeking admission of evidence "bears the burden of proof of admissibility." *Pfingston v. Ronan Eng'g Co.*, 284 F.3d 999, 1004 (9th Cir. 2002). If the opposing party objects to the proposed evidence, the party seeking admission must direct the district court to "authenticating documents, deposition testimony bearing on attribution, hearsay exceptions and exemptions, or other evidentiary principles under which the evidence in question could be deemed admissible . . . ." *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 385–86

(9th Cir. 2010). However, courts are sometimes "much more lenient" with the affidavits and documents of the party opposing summary judgment. *Scharf v. U.S. Atty. Gen.*, 597 F.2d 1240, 1243 (9th Cir. 1979).

IV. DISCUSSION

A. Disability Harassment and Discrimination (Claims 1, 2, 5, 6, 7)

Plaintiff alleges discrimination on the basis of disability in violation of the Fair Employment and Housing Act, California Government Codes 12940(j) and 12940(m) (FEHA), and the Americans with Disabilities Act, 42 U.S.C. § 12112 (ADA). He argues his disability and medical condition were a substantial factor in the decision to terminate him. Compl. ¶ 47. He contends he was subjected to unwarranted scrutiny, reprimands, counseling, warnings, and write-ups, and such actions were pretextual. *Id*. He further contends defendants failed to accommodate his disability in violation of the ADA and FEHA. Compl. ¶¶ 90, 97, 111.

Defendants argue plaintiff's disability claims must fail as a matter of law because plaintiff was not disabled under the applicable statutes, and even if he were, he cannot show any harassing behavior attributable to his disability. Defs.' Mot. at 9.

1. Disability: Threshold Determination

In determining whether plaintiff has established a prima facie case, the court must look to whether plaintiff has sufficiently met the standard of disability as defined by FEHA and the ADA. *E.E.O.C. v. United Parcel Serv., Inc*., 424 F.3d 1060, 1068 (9th Cir. 2005) (FEHA); *see Nunes v. Wal–Mart Stores, Inc*., 164 F.3d 1243, 1246 (9th Cir. 1999) (ADA). As FEHA and the ADA articulate different standards, the court will examine each in turn. *United Parcel Serv.*, 424 F.3d at 1068.

a. ADA

Under the ADA, "disability" is defined as "a physical or mental impairment that substantially limits one or more of the major life activities of the individual." 42 U.S.C. § 12102(2)(A). "An impairment is a disability . . . if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from

performing a major life activity in order to be considered substantially limiting." *Weaving v. City of Hillsboro*, 763 F.3d 1106, 1111 (9th Cir. 2014), *pet. for cert. filed*, 2014 WL 7463964 (U.S. Dec. 29, 2014) (No. 14-766) (citing 29 C.F.R. § 1630.2(j)(1)(ii)).

Here, plaintiff alleges memory loss, stress, and digestive issues as a result of his heart attack. Compl. ¶¶ 14, 28, 31. Plaintiff supplies medical records and the testimony of his neurologist, Dr. Karim, indicating plaintiff experiences a "mild short-term memory problem." Karim Dep. 6:14-15. His neuropsychologist, Dr. Robert Allen, notes the oxygen deprivation or "anoxia" that occurred in conjunction with his heart attack has caused memory loss. Allen Decl. at 2, ECF No 48. Plaintiff also offers declarations from his coworkers observing plaintiff had difficulty processing information. Brown Decl. 2:6-7; Corum Decl. 2:10-17, 3:20; Dye Decl. 2:4-7; Aceves Decl. 2:12-18, ECF Nos. 36, 37. His 2010 performance review noted plaintiff previously indicated "some challenges remembering some aspects of receiving." Performance Review Ex. H, ECF No. 49-7. After his heart attack, plaintiff was placed on a special high-fiber diet requiring milk consumption, though he is lactose intolerant. Joseph Decl. ¶ 28. As a result, plaintiff experienced issues in needing to use the bathroom more frequently, for which he was reprimanded. *Id.*

To qualify as disabled under the ADA, the disability must meet a high bar of severity, duration, and impact on plaintiff's ability to work. *Weaving*, 763 F.3d at 1106. It is disputed how much, if at all, plaintiff's alleged memory loss, stress, and digestive issues impacted his ability to work. Plaintiff has presented sufficient evidence such that a trier of fact could find his mental and physical deficits substantially limited his ability to perform his job. Defendants are not entitled to the finding that as a matter of law, plaintiff is not disabled under the ADA.

b. FEHA

FEHA requires only a "limitation" on a major life activity, but does not require the ADA's "substantial limitation." That distinction is intended to result in broader coverage under California law than under federal law. *Diaz v. Fed. Express Corp.*, 373 F. Supp. 2d 1034, 1048-49 (C.D. Cal. 2005) (discussing the distinction between FEHA and ADA standards for determining disability). As plaintiff here has met the higher burden of the ADA, he meets the

FEHA standard as well. *Bryan v. United Parcel Serv., Inc*., 307 F. Supp. 2d 1108, 1115 (N.D. Cal. 2004), *aff'd sub nom. E.E.O.C. v. United Parcel Serv., Inc*., 424 F.3d 1060 (9th Cir. 2005).

Therefore, the court turns to plaintiff's claims of harassment and discrimination as a result of his disability.

2. Harassment/Hostile Environment

Plaintiff contends as a result of his disability, he was reprimanded and targeted by his supervisors. He contends he was subjected to harassment and intimidation. Compl. ¶¶ 56, 88. Defendants contend plaintiff's harassment claims must fail because he cannot establish he was subjected to harassing conduct, or that any such conduct was severe or pervasive. Defs.' Mot. at 14.

FEHA makes it unlawful "[f]or an employer . . . or any other person, because of race, religious creed . . . physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age . . . to harass an employee[.]" Cal. Gov't Code § 12940(j)(1). The law specifically makes harassment by an employee unlawful. *See* Cal. Gov't Code § 12940(j)(3) ("An employer . . . is personally liable for any harassment prohibited by this section that is perpetrated by the employee, regardless of whether the employer . . . knows or should have known of the conduct and fails to take immediate and appropriate corrective action.").

The elements for a claim of hostile environment under FEHA are: (1) the plaintiff belongs to a protected group; (2) the plaintiff was subjected to unwelcome harassment because of being a member of that group; and (3) the harassment was sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment. *See Aguilar v. Avis Rent A Car System, Inc.*, 21 Cal. 4th 121, 130 (1999). To fulfill the "severe or pervasive" prong, a plaintiff must show a "concerted pattern of harassment of a repeated, routine, or generalized nature." *Id*. at 131. Isolated incidents that do not exist in a concerted pattern can also fulfill the "severe or pervasive" prong, but only if such isolated incidents consist of "a physical assault or the threat thereof." *Hughes v. Pair*, 46 Cal. 4th 1035 (2009) (quoting *Lyle v. Warner Bros. Television Prods.*, 38 Cal. 4th 264, 284 (2006)). Further, the prohibition of harassment "forbids

only behavior so objectively offensive as to . . . create a hostile or abusive work environment." *Lyle*, 38 Cal. 4th at 283. Whether an environment is hostile or abusive can be determined "only by looking at all the circumstances [including] the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id*. at 283 (citation omitted). Merely "offensive comments" in the workplace are not actionable. *See id*. (citation omitted).

In this case, in the months immediately preceding and after his heart attack, plaintiff avers he was subjected to "nitpicking" from his supervisor Moore. AMF 218. When Heeke became his supervisor, plaintiff offers evidence other employees noticed she treated plaintiff differently from other employees. Brown Decl., ECF No. 37-1, Corum Decl., ECF No. 37-2. Plaintiff was reprimanded on several occasions, and for actions for which other employees were not written up. Joseph Decl. ¶ 32; Dye Decl. ¶ 8; Aceves Decl. ¶ 12; Brown Decl. ¶ 17. Plaintiff claims Moore and Heeke would question him about being away from his work area, criticize him for not working fast enough, not having his name on a particular work list, not "flexing" or rotating to different jobs, and standing around during a slow period instead of finding other work to do. UMFs 42-48. Plaintiff complained to Jenine Smith in Human Resources, Dana Stansel, the General Manager, and Chris Whitehurst, another supervisor, about his reprimands. Joseph Decl. at 11. When Heeke was told plaintiff complained to Smith, plaintiff claims Heeke's hostile behavior increased. AMF 227. Plaintiff avers he became afraid to go to work every day for fear of getting in trouble with Heeke and Moore. Joseph Decl. at 9:25-28.

In the time leading up to his termination, plaintiff contends Heeke and Moore approached the plaintiff to talk about his heart attack in a manner that "looked a little bit hostile" and "would talk to him in close proximity to his face." Reply in Opp'n to Separate Statement at 22, ECF No. 37. Heeke and Moore would approach plaintiff twice a day and speak to him for more than a half hour at a time. Acevedo Decl. 32:15-33:1, ECF No. 47-1. Plaintiff offers sworn testimony from other employees stating they observed defendants Moore and Heeke watching the plaintiff. Brown Decl. ¶ 8, ECF No. 37-1; Corum Decl. ¶ 19, ECF No. 37-2. Another coworker

had "a perception [plaintiff] was being harassed." Slater Dep. at 72:13-73:24, ECF No. 47-2. The coworker also says Heeke would reprimand plaintiff on a daily basis for talking to other employees, but did not reprimand the employees to whom he was speaking. *Id.* at 38:16-39:17. Plaintiff concedes this behavior was not threatening, but states he was watched constantly by supervisors looking for a mistake. Reply at 40.

Given the record before the court, Heeke's and Moore's behavior does not rise to the level of severity such that a reasonable fact finder could find it abusive, physically threatening, or humiliating. Plaintiff does not establish a sufficient pattern of conduct or allege intimidating or demeaning comments. He avers only that he was watched and reprimanded when engaging in behavior that was contrary to Target policies. Such supervision and reprimands are not harassment, but behavior expected from supervisors. *See Lawler v. Montblanc N. Am., LLC*, 704 F.3d 1235, 1245 (9th Cir. 2013) ("Defendant's alleged [critical, questioning, instructive] conduct relates to business operations and, more specifically, to [defendant's] position as a manager. Such conduct does not constitute harassment under the FEHA."). Summary judgment is granted to defendants on this claim.

3. Discrimination

Analysis of plaintiff's discrimination claim proceeds under the burden-shifting framework established by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See Guz v. Bechtel Nat'l, Inc*., 24 Cal. 4th 317, 354 (2000); *see also Mamou v. Trendwest Resorts, Inc.*, 165 Cal. App. 4th 686, 713–15 (2008). "Under the three-part *McDonnell Douglas* test, the plaintiff bears the initial burden of establishing a prima facie case of employment discrimination." *Earl v. Nielsen Media Research, Inc.*, 658 F.3d 1108, 1112 (9th Cir. 2011) (citing *Noyes v. Kelly Services*, 488 F.3d 1163, 1168 (9th Cir. 2007)). "Generally, the plaintiff must provide evidence that (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, such as termination, demotion, or denial of an available job, and (4) some other circumstance suggests discriminatory motive." *Guz*, 24 Cal. 4th at 355.

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The plaintiff's burden is to show that the adverse action "is more likely that not" based on a prohibited discriminatory reason. *Id*. Meeting that burden raises a "presumption of discrimination." *Id*. The burden then shifts to the employer to rebut the presumption with admissible evidence of a "legitimate, non-discriminatory reason" for the action. *Id*. If defendants meet that burden, the burden shifts back to plaintiff to show the offered reason is pretextual. *Id*. Pretext can be shown "directly, by showing that unlawful discrimination more likely than not motivated the employer; or indirectly, by showing that the employer's proffered explanation is unworthy of credence because it is internally inconsistent or otherwise not believable." *Earl*, 658 F.3d at 1112–13 (citing *Chuang v. University of California Davis, Bd. of Trustees*, 225 F.3d 1115, 1127 (9th Cir. 2000)).

To argue pretext with circumstantial evidence, as plaintiff does here, plaintiff "must produce 'specific' and 'substantial' facts to create a triable issue . . ." *Earl*, 658 F.3d at 1113 (citing *Godwin v. Hunt Wesson, Inc*., 150 F.3d 1217, 1222 (9th Cir. 1998)); *see also Department of Fair Employment and Housing v. Lucent Technologies*, 642 F.3d 728, 746 (9th Cir. 2011) (citing *Morgan v. Regents of the Univ. of Cal*., 88 Cal. App. 4th 52 (2000)) ("An employee in this situation cannot simply show the employer's decision was wrong, mistaken or unwise. Rather, the employee must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence . . . and hence infer that the employer did not act for the . . . non-discriminatory reasons."). Plaintiff's burden is not particularly heavy. *Diaz v. Eagle Produce Ltd. P'ship*, 521 F.3d 1201, 1207 (9th Cir. 2008) (citing *Chuang*, 225 F.3d at 1124) ("As a general matter, the plaintiff in an employment discrimination action need produce very little evidence in order to overcome an employer's motion for summary judgment.").

As discussed above, plaintiff has satisfied the first *Guz* factor by showing he is a member of a protected class as a person with a disability. To satisfy the second *Guz* prong, plaintiff has shown a factfinder could find he was performing his job in an acceptable manner. Although his performance review in the relevant time period is below the standard of his previous

reviews, it states that plaintiff is an "asset" and does not indicate plaintiff was unable to perform his job duties; it says only that he was having challenges with work, and suggests these challenges may be attributable to his memory issues. Performance Review Ex. H at 3, ECF No. 49-7. The third prong is not disputed: his termination is an adverse employment action. Regarding the fourth prong, the record discloses inconsistent and unexplained motivations for plaintiff's termination. His alleged violations were infrequent, relatively minor, and not of the sort automatically giving rise to Corrective Actions. Joseph Decl. ¶ 8; Dye Decl. ¶ 8; Aceves Decl. ¶ 12. Plaintiff has sufficiently established a presumption of discrimination. *See Foster v. City of Oakland*, 649 F. Supp. 2d 1008, 1018 (N.D. Cal. 2009) (prima facie case of disability discrimination established where employer had actual notice of the disability at the time it occurred because plaintiff was severely injured at work and did not return to full time work for almost two months, complained he was having trouble focusing and verbalizing, and was terminated only approximately seven months later).

As explained above, Target has met its burden to demonstrate a legitimate, non-retaliatory reason for termination through plaintiff's documented Corrective Actions and "bottom performer" and "needs improvement" performance review.

The final step of the *McDonnell Douglas* analysis requires plaintiff to raise a genuine issue of fact concerning whether the facially legitimate reasons proffered by Target are pretextual. Having reviewed the record and all competent and admissible evidence, the court finds a reasonable trier of fact could infer plaintiff's termination was pretextual once the burden shifts back to plaintiff, as it does here. He offers testimony from other employees that they believed he was targeted and singled out for reprimands for issues related to his disability. *See, e.g.,* Acevedo Decl. ECF No. 47-1; Slater Dep. ECF No. 47-2; Dye Decl. ECF No. 36-8. The targeting began immediately after plaintiff returned from medical leave. *Id*. Plaintiff has presented triable issues of fact precluding summary judgment on his disability discrimination claims.

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4. Failure to Accommodate

Plaintiff claims a failure to accommodate his disability in violation of the ADA and California Government Code section 12940(m) (FEHA). Plaintiff alleges he asked for reasonable accommodations for his disability and mental condition (Compl. ¶¶ 90, 97, 111), defendants intentionally failed to reasonably accommodate him, and in fact "reprimanded him and made negative comments about his medical leave, his loss of memory, and his absences from work necessitated by plaintiff's recovery." *Id*. ¶ 90. In his opposition to defendants' motion for summary judgment, plaintiff further argues that because Target outsources administration of worker's compensation and FMLA matters to a third party, there are no "checks and balances" to assure a worker is accommodated. Opp'n at 10. Plaintiff contends this outsourcing "had to have been intentional" on Target's part, and resulted in a failure to adequately accommodate plaintiff's alleged disability. *Id.*

Defendants argue plaintiff never requested an accommodation for his disability beyond the leave he was granted. Although plaintiff in his opposition outlines some accommodations that would have been helpful - allowing him to take notes, temporarily restricting his job and work demands, providing him with a mentor -, defendants say there is no evidence plaintiff was prevented from doing these things or that accommodations were unavailable. Defs.' Mot. at 8. Defendants argue plaintiff's medical and FMLA leave was unobstructed and he did not request any accommodation beyond what he was granted, nor did he give notice he was experiencing issues requiring more accommodation. *Id*.

The record reflects plaintiff was released to work by his doctor without restrictions (Medical Release Ex. M, ECF No. 49-12), and the subsequent FMLA leave he requested was due to stress, not memory, cognitive, or digestive issues. FMLA Form Ex. I, ECF No. 49-8.

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> The FEHA provides, in pertinent part:
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> Reasonable accommodation' may include either of the following: (1) Making existing facilities used by employees readily accessible to, and usable by, individuals with disabilities (2) Job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

Cal. Gov't Code § 12926(o). This definition is virtually identical to the ADA's statutory definition of [reasonable accommodation], which is also by way of example. 42 U.S.C. § 12111(9); *see also* 29 C.F.R. § 1630.2(o)(2); *Nadaf-Rahrov v. Neiman Marcus Grp., Inc*., 166 Cal. App. 4th 952, 974 (2008). A California state appellate court found the regulations interpreting the ADA to be instructive in interpreting FEHA. *Nadaf-Rahrov*, 166 Cal. App. 4th at 974 . Relying principally on the federal regulations implementing the equal employment provisions of the ADA, the court defined "reasonable accommodation" as "a modification or adjustment to the workplace that enables the employee to perform the essential functions of the job held or desired." *Id.*

Determining whether reasonable accommodation has been made is a fact-specific individualized inquiry that takes into account the totality of the circumstances. *See Hanson v. Lucky Stores, Inc.*, 74 Cal. App. 4th 215, 228 n.11 (1999*)*; *Nunes*, 164 F.3d at 1247; *Zukle v. Regents Of The Univ. Of Cal.*, 166 F.3d 1041, 1048 (9th Cir. 1999). In the context of a summary judgment motion on the issue of failure to accommodate, a plaintiff must demonstrate he is a qualified individual with a disability and the employer failed to make a reasonable accommodation. *Jensen v. Wells Fargo Bank*, 85 Cal. App. 4th 245, 256 (2000). An employer can prevail on summary judgment if it, fundamentally, "establishes through undisputed facts that . . . reasonable accommodation was offered." *Id*. at 263; *see also Smith v. Sears, Roebuck & Co*., 207 F. Supp. 2d 1031, 1035 (N.D. Cal. 2002). The employer cannot prevail on summary judgment on a claim of failure to reasonably accommodate unless it establishes through undisputed facts that (1) reasonable accommodation was offered and refused; (2) there simply was no vacant position within the employer's organization for which the disabled employee was

qualified and which the disabled employee was capable of performing with or without accommodation; or (3) the employer did everything in its power to find a reasonable accommodation, but the informal interactive process broke down because the employee failed to engage in discussions in good faith. *See Jensen*, 85 Cal. App. 4th at 263.

Having reviewed the pleadings of record and all competent and admissible evidence submitted, the court finds a triable issue as to whether plaintiff was given reasonable accommodations for his alleged and perceived disabilities. Again, for purposes of this motion, plaintiff has established a question of fact as to his disability. It is disputed whether plaintiff's supervisor, Lance Cason, granted plaintiff intermittent FMLA stress leave to actually address plaintiff's disability. Cason Decl. ¶ 18; Joseph Decl. ¶ 24. The leave was granted after plaintiff submitted a doctor's certification stating he suffered from stress that made it difficult for him to perform his job. Joseph Decl. at 9. Medical leave is not a reasonable accommodation when the leave causes termination, or where the employer does not also address the underlying disability – memory loss, cognitive issues, and digestive issues. *Humphrey v. Mem'l Hosps. Ass'n*, 239 F.3d 1128, 1135–36 (9th Cir. 2001) (recognizing that a leave of absence may be a reasonable accommodation under the ADA only where it "would reasonably accommodate an employee's disability and permit him, upon his return, to perform the essential functions of the job"). Here, because plaintiff accepted the FMLA leave, defendant must demonstrate there were no other positions for plaintiff, or plaintiff failed to engage in good faith in an interactive process. *Jensen*, 85 Cal. App. at 261. Defendant has done neither. Summary judgment is denied as to this claim.

B. Failure to Prevent (Claim 4)

Defendants move for summary judgment on plaintiff's failure to prevent harassment or discrimination claim. They argue because he cannot sustain his statutory harassment and discrimination claims, his corresponding failure to prevent claim fails as a matter of law. The court has not dismissed all of plaintiff's statutory claims for discrimination and retaliation. Accordingly, summary judgment of the cause of action for failure to prevent such actions must be denied.

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C. Failure to Engage in the Interactive Process (Claim 8)

Under FEHA, it is unlawful for 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). "I[t] is the employee's initial request for an accommodation which triggers the employer's obligation to participate in the interactive process of determining one." *Spitzer v. Good Guys, Inc*., 80 Cal. App. 4th 1376, 1384 (2000) (internal quotation marks omitted). Here, it is undisputed that plaintiff did request an accommodation in the form of leave. Joseph Decl. ¶ 25; UMF 3.

"Once a disabled employee has given an employer notification of [his] disability and the desire for accommodation, there is a mandatory obligation to engage in an informal interactive process to clarify what the individual needs and identify the appropriate accommodation." *Snapp v. United Transp. Union*, 547 F. App'x 824, 825 (9th Cir. 2013) (internal citations and quotations omitted). In short, "[t]he interactive process requires communication . . . between employers and individual employees, and neither side can delay or obstruct the process." *Humphrey*, 239 F.3d at 1137. Ultimately, to succeed on an interactive process claim, the employee must show that a triable issue exists as to whether the employer "bears responsibility for the breakdown." *Nadaf–Rahrov*, 166 Cal. App. 4th at 985. "[A]n employer cannot prevail at the summary judgment stage if there is a genuine dispute as to whether the employer engaged in good faith in the interactive process." *Id*.

It is undisputed plaintiff did not ask for particular accommodations beyond the intermittent leave he was granted. However, no evidence in the record supports the conclusion Target fulfilled its duty in the interactive process by anticipating any potential disabilities arising from plaintiff's heart attack or engaging with plaintiff about his challenges and how they could be accommodated. Target knew plaintiff had been on leave for five months; it knew plaintiff was experiencing memory loss issues and he was challenged by these issues in performing his job. *See* Performance Review Ex. H, ECF No. 49-7. Nothing suggests plaintiff's supervisors or HR

staff discussed his options when he requested leave. Merely granting leave is not enough to show engagement in finding accommodation. *Dark v. Curry Cnty.*, 451 F.3d 1078, 1089 (9th Cir. 2006) ("[T]he duty to accommodate is a continuing duty that is not exhausted by one effort."). Rather, defendants had an "affirmative obligation to engage in an interactive process in order to identify, if possible, a reasonable accommodation that would permit [plaintiff] to retain his employment." *Id.* at 1088*; see also Nunes*, 164 F.3d at 1248 (reversing summary judgment where "the record contains no evidence that [defendant] considered any at-work accommodations to reduce the risks it feared"). Summary judgment is denied as to this claim.

D. Retaliation (Claim 3)

Plaintiff alleges retaliation in violation of the FEHA, California Government Code section 12940(h). He claims his protest of the alleged discriminatory acts was the motivating factors for his termination and harassment. He claims his FMLA and CFRA leaves of absence motivated "heightened scrutiny" of his performance, "singled him out for treatment" and resulted in his termination just five months after his return from FMLA leave. Compl. ¶ 62.

Defendants contend there are legitimate, non-retaliatory reasons for plaintiff's reprimands and termination and that no reasonable fact finder would find his termination to be retaliatory. Defs.' Mot. at 15.

Under the FEHA, it is unlawful for an employer "to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part." Cal. Gov't Code § 12940(h). To establish a prima facie case of retaliation under this section, a plaintiff must show: (1) he engaged in protected activity; (2) he was thereafter subject to adverse employment action; and (3) a causal link between the two. *Yanowitz v. L'Oreal USA*, Inc., 36 Cal. 4th 1028, 1042 (2005); *Mathieu v. Norrell Corp*., 115 Cal. App. 4th 1174, 1185 (2004). "Essential to a causal link is evidence that the employer was aware that the plaintiff had engaged in the protected activity." *Morgan*, 88 Cal. App. 4th at 70 (internal quotation marks omitted). As with the disability discrimination cause of action, analysis of the retaliation cause of

action proceeds under the *McDonnell Douglas* burden-shifting framework. *See Joaquin v. City of Los Angeles*, 202 Cal. App. 4th 1207, 1219–22 (2012).

It is undisputed that plaintiff suffered an adverse employment action after complaining to Jenine Smith, Dana Stansel, and Chris Whitehurst about his alleged harassment. Joseph Decl. ¶¶ 35-36. The question is whether a factfinder could find a causal link between the two. Plaintiff's evidence consists of sworn statements from coworkers who noticed he was being closely watched by group leaders upon his return to work. *See* Slater Dep., Acevedo Decl., Brown Decl., Dye Decl., ECF Nos. 47-1, 36-8, 37-1. In or about late April 2010, plaintiff went to two supervisors, Dana Stansel and Chris Whitehurst, and a Human Resources representative, Jenine Smith, to complain about his alleged harassment. Decl. of Joseph at 11. According to plaintiff, he was approached by defendant Heeke after his discussion with General Manager Dana Stansel about his alleged harassment. Joseph Decl. at 11. Later, on April 19, 2010, his performance review was generally positive, but he was labeled a "bottom performer" by Lance Cason even though his alleged violations were relatively minor and infrequent in the course of his employment. Performance Review, Ex. H, ECF No. 49-7. After returning from his first leave following his heart attack, between March and July of 2010, he was issued two Corrective Actions, twice as many as he had received in his previous fifteen years of employment. Joseph Decl. at 7-8, 9. Plaintiff was terminated in July 2010, two months after being placed on intermittent FMLA leave for stress in May. Ex. I, ECF No. 49-9.

The temporal proximity between plaintiff's complaints and termination is sufficient to defeat summary judgment. *See Arn v. News Media Grp.,* 175 F. App'x 844, 846 (9th Cir. 2006) (citing *Thomas v. City of Beaverton*, 379 F.3d 802, 812 (9th Cir. 2004) (Plaintiff's establishment of "temporal proximity alone is sufficient to establish a genuine issue of material fact as to whether a causal link exists."). The frequency of corrective actions after his heart attack, and his coworkers' observations also could lead a reasonable factfinder to find for plaintiff. *Savina v. Robert Reiser & Co.*, Inc., 363 F. App'x 494, 496 (9th Cir. 2010) (denying summary judgment where plaintiff relies not only on his own detailed testimony, but also on the

declarations of several former customers and a former co-worker). Summary judgment is denied as to plaintiff's retaliation claims under FEHA.

E. Discrimination on the Basis of Age (Claim 9)

Plaintiff, who was 53 years old at the time of his termination, claims a violation of the ADEA based on harassment and replacement by a younger individual. Compl. ¶ 130. Plaintiff offers as evidence only written Corrective Actions from 2009 to 2010, showing that employees under the age of forty who threw boxes or made comments similar to plaintiff's[5] exhibited that behavior on more than one occasion before it resulted in a Corrective Action. Decl. of Garcia Ex. A-1, ECF No. 43.

Under the ADEA, employers may not "fail or refuse to hire or . . . discharge any individual [who is at least forty years old] or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). The Supreme Court has identified two theories of employment discrimination: disparate treatment and disparate impact. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609 (1993) (citing *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335-36 n.15 (1977)). Plaintiff relies on disparate treatment. Compl. at 24.

The court evaluates ADEA claims that are based on circumstantial evidence of discrimination, as here, by using the three-stage burden-shifting framework provided by *McDonnell Douglas*. *Enlow v. Salem-Keizer Yellow Cab Co*., 389 F.3d 802, 812 (9th Cir. 2004). Under this framework, the employee must first establish a prima facie case of age discrimination. *Coleman v. Quaker Oats Co*., 232 F.3d 1271, 1281 (9th Cir. 2000). To make out such a case, it is essential that the employee demonstrate he was "(1) a member of the protected class (age 40–70); (2) performing his job in a satisfactory manner; (3) discharged; and (4) replaced by a substantially younger employee with equal or inferior qualifications." *Sims v. WorldPac, Inc., No*. C 12-05275

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[5] These comments were characterized by Target as "non-brand" utterances. To determine "non-brand" behavior, Human Resources generally considers whether profanity was used, whether the interaction occurred with a team observing it, or other mitigating factors. Plaintiff's yelling was considered to be "non-brand" behavior. AMF 126.

JSW, 2014 WL 4089201, at *3 (N.D. Cal. Aug. 19, 2014) (quoting *Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 917 (9th Cir. 1997)).

Although plaintiff alleges he "believes" he was replaced by someone younger than him (Compl. ¶ 135), he has not offered any evidence in support. He says he was treated less favorably than his colleagues under the age of forty, and produces examples of other employees' Corrective Actions issued only after similar behavior persisted for longer than his did. However, the age of the other employees is not discernible from any of plaintiff's documents. Plaintiff has not shown a reasonable factfinder could find any disparate treatment on the basis of age. Summary judgment is granted as to this claim.

F. Discrimination and Retaliation on the Basis of Race (Claims 10, 11, 12)

1. Title VII/FEHA

Defendants argue summary judgment should be granted as to plaintiff's claims of racial discrimination and harassment because plaintiff has failed to show a prima facie case of discrimination or harassment. Defs.' Mot. at 18. Plaintiff argues triable issues exist because plaintiff was disciplined for conduct other non-minority employees were not. Opp'n at 14.

Discrimination claims on the basis of race are analyzed under the *McDonnell Douglas* burden-shifting analysis. *Surrell v. California Water Service Co.*, 518 F.3d 1097, 1103, 1105 (9th Cir. 2008) (applying *McDonnell Douglas* to Title VII and section 1981 claims); *Guz*, 24 Cal.4th at 354 (applying *McDonnell Douglas* to FEHA claims). As discussed above, under *McDonnell Douglas*, plaintiff must first establish a prima facie case of discrimination by showing (1) he is a member of a protected class, (2) he was performing the position he held competently, (3) he suffered an adverse employment action, and (4) "circumstances . . . give rise to an inference of unlawful discrimination." *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *Guz*, 24 Cal. 4th at 355. If plaintiff meets this burden, the burden of production shifts to the employer to present legitimate reasons for the adverse employment action. *Burdine*, 450 U.S. at 254. An employer's reasons need not rest upon true information. *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1063 (9th Cir. 2002). Instead, courts "only require that an employer honestly believed its reasons for its actions, even if its reason is foolish or trivial or even

baseless." *Id*. (quotations omitted). "If the employer carries this burden, and plaintiff demonstrates a genuine issue of material fact as to whether the reason advanced by the employer was a pretext, then the case proceeds beyond the summary judgment stage." *Coons v. Sec'y of U.S. Dep't of Treasury*, 383 F.3d 879, 887 (9th Cir. 2004); *Reeves v. Sanderson Plumbing Products, Inc*., 530 U.S. 133, 143 (2000).

Here, there is no direct evidence and also no circumstantial evidence giving rise to an inference of discrimination on the basis of race. Nothing in the record suggests defendant treated African-Americans differently, or that plaintiff experienced harassment or adverse treatment as a result of his race at any point in his fifteen years with Target. Accordingly, plaintiff has not shown he could establish a prima facie case of racial discrimination under either Title VII or FEHA. Even if he were able to establish a prima facie case, defendants have produced evidence supporting their position they had legitimate reasons for terminating plaintiff. *See* Exs. F, G & H, ECF No 49. And, there is no evidence from which a reasonable factfinder could conclude the termination was pretextual for racial discrimination. *See Covington v. California Dep't of Soc. Servs*., No. C 12-04688 WHA, 2014 WL 1896335, at *8 (N.D. Cal. May 12, 2014). The court finds no triable issue as to discrimination or harassment on the basis of race under Title VII or FEHA, and summary judgment is granted as to this claim.

2. Section 1981

Plaintiff also claims discrimination in the form of harassment and retaliation on the basis of race in violation of 42 U.S.C. section 1981. Compl. ¶ 161. In fact, a claim under § 1981 can only be sustained on the basis of race. *See White v. Wash. Pub. Power Supply Sys*., 692 F.2d 1286, 1290 (9th Cir. 1982). Plaintiff contends employees that were not African-American were treated differently than African Americans, including himself, with regard to Corrective Actions. He points to evidence in the form of examples of Corrective Actions where non-African Americans who yelled, threw boxes, and caused safety incidents exhibited the behavior on more than one occasion before they received a Corrective Action. Reply in Opp'n to Separate Statement at 34-35; *see* Ex. A-1 to Decl. of Garcia.

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a. Harassment/Hostile Work Environment

A claim for hostile work environment may be brought under § 1981. *Manatt v. Bank of Am., NA*, 339 F.3d 792, 797 (9th Cir. 2003) (hostile work environment interferes with "enjoyment of all benefits . . . and conditions of the contractual relationship" of employment and "is therefore actionable under § 1981"). To survive summary judgment of a hostile work environment claim under § 1981, plaintiff must raise a triable issue of fact as to whether (1) he was "subjected to verbal or physical conduct" because of his race, (2) "the conduct was unwelcome," and (3) "the conduct was sufficiently severe or pervasive to alter the conditions of [plaintiff's] employment and create an abusive work environment." *Kang v. U. Lim Am., Inc.*, 296 F.3d 810, 817 (9th Cir. 2002).

Here, plaintiff does not establish any factual dispute as to any racially-motivated harassment. Plaintiff has not alleged comments or behavior indicating any harassment or that his reprimands were racially motivated, either explicitly or implicitly. Plaintiff has not demonstrated a reasonable fact-finder could determine plaintiff experienced a hostile work environment in violation of § 1981. The court grants defendants' motion for summary judgment on this claim.

b. Retaliation

Section 1981 does not include an express retaliation provision, but the Ninth Circuit has concluded it encompasses retaliation claims. *Manatt*, 339 F.3d at 795. Plaintiff's retaliation claim is analyzed under the same framework as a claim for retaliation under Title VII. *Id*. at 801; *Brooks v. City of San Mateo*, 229 F.3d 917 (9th Cir. 2000). Plaintiff bears the initial burden of establishing a prima facie case of retaliation by showing: (1) he engaged in a protected activity, such as the filing of a complaint alleging racial discrimination; (2) defendants subjected him to an adverse employment action; and (3) a causal link exists between the protected activity and the adverse action. *Manatt*, 339 F.3d at 800. If plaintiff makes out a prima facie retaliation claim, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for the adverse employment action. *See id.* If the employer articulates such a reason, plaintiff bears the ultimate burden of demonstrating the reason was merely a pretext for a discriminatory motive. *See id.*

Plaintiff has shown he is a member of a protected class who suffered an adverse employment action, but does not show he engaged in a protected activity, such as filing a racial discrimination complaint. Even assuming plaintiff can show he engaged in a protected activity, defendants have articulated a legitimate, non-discriminatory reason for termination because of plaintiff's Corrective Actions. As with the harassment claim above, plaintiff fails to meet his burden to show a factfinder could conclude the legitimate, non-retaliatory reason for termination was a pretext for racial discrimination. There are no circumstances from which a factfinder could infer plaintiff's race had anything to do with his reprimands or ultimate termination. Summary judgment is granted as to this claim.

G. CFRA/FMLA Claims (Claim 13)

Plaintiff argues defendants retaliated against him for taking medical leave protected by the FMLA and CFRA with heightened scrutiny at the workplace and eventual termination of his employment. Opp'n at 13. Defendants counter there is no evidence defendants treated plaintiff differently because of his medical leave, and defendants terminated plaintiff for legitimate non-retaliatory reasons. Defs.' Mot. at 18-19.

The CFRA adopts the language of the FMLA and California courts have held the same standards apply. *Liu v. Amway Corp.*, 347 F.3d 1125, 1132 n.4 (9th Cir. 2003). Accordingly, the analysis of the two claims merges.

Under the FMLA, it is unlawful for an employer to "use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions." *Bachelder v. Am. W. Airlines, Inc.*, 259 F.3d 1112, 1122 (9th Cir. 2001) (quoting FMLA implementing regulation, 29 C.F.R. § 825.220(c) (emphasis omitted)). If an employer uses an employee's taking of FMLA leave as a "negative factor" in making "adverse employment decisions," including hiring, promotions or disciplinary actions, the employer interferes with the employee's exercise of FMLA rights in violation of § 2615(a)(1). *Id*. at 1122–23; *see also Liu*, 347 F.3d at 1133 n.7 ("2615(a)(1) applies to employees who simply take FMLA leave and as a consequence are subjected to unlawful actions by the employer.") (emphasis omitted).

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To establish a retaliation claim under the FMLA, a plaintiff must show (1) he took "FMLA-protected leave"; and (2) it constituted "a negative factor" in an adverse employment decision. *Bachelder*, 259 F.3d at 1125. A plaintiff "can prove this claim, as one might any ordinary statutory claim, by using either direct or circumstantial evidence, or both." *Id*.

Here, it is undisputed plaintiff took medical leave provided for by the FMLA following a heart attack in 2009; he took additional leave for stress in 2010. Plaintiff has also pointed to facts suggesting his taking leave constituted a factor in defendants' disciplinary decisions and ultimately defendants' decision to terminate plaintiff's employment. For example, after plaintiff took a stress day in June 2010, plaintiff avers group leaders Heeke and Moore approached him and reminded him he had received his final warning and any future violations would result in termination. AMF 215. Further, plaintiff received an "exceeds expectations" for his annual review in 2009 despite lower than average productivity numbers; however, following his medical leave, plaintiff was identified as a "bottom performer" on his performance review in 2010 despite meeting expectations in three of six categories. Performance Review Ex. H at 3, ECF No. 49-7.

Drawing all inferences and viewing all evidence in the light most favorable to plaintiff as the nonmoving party, a reasonable trier of fact could conclude plaintiff was terminated because he took medical leave. *Anderson*, 477 U.S. at 250.

Accordingly, the court denies summary judgment on the FMLA and CFRA claim.

H. Common Law Claims

1. Termination in Violation of Public Policy (Claim 14)

Plaintiff alleges he was terminated in violation of the FMLA, CFRA, FEHA, and Title VII among other statutes. *See* Compl. at 1. Defendant contends no statutory violations occurred and consequently plaintiff cannot support his termination claim in violation of public policy. Defs.' Mot. at 19.

Under California law, employment is at-will unless the parties contract otherwise. *See* Cal. Lab. Code § 2922. California courts, however, have carved out a specific exception to this general rule: an employer will be liable if it terminates an employee in violation of public

policy. *Liu*, 347 F.3d at 1137 (citing *Stevenson v. Superior Court*, 16 Cal. 4th 880 (1997)). "When an employer's discharge of an employee violates fundamental principles of public policy, the discharged employee may maintain a tort action and recover damages traditionally available in such actions." *Tameny v. Atl. Richfield Co*., 27 Cal. 3d 167, 170 (1980). The policy in question "must involve a matter that affects society at large rather than a purely personal or proprietary interest of the plaintiff or employer." *Gilmore v. Union Pac. R. Co*., 857 F. Supp. 2d 985, 986 (E.D. Cal. 2012), *recon. denied in part*, No. CIV. S-09-2180 KJM, 2012 WL 3205233 (E.D. Cal. Aug. 2, 2012). The policy underlying a discharge claim may be based in federal or state law. *Green*, 19 Cal. 4th 87–88.

Courts have addressed the statutes on which plaintiff relies here: Discharge in violation of the CFRA constitutes wrongful discharge in violation of public policy. *Liu*, 347 F.3d at 1137 (citing *Nelson v. United Tech*., 74 Cal. App. 4th 597, 612 (1999)). Violation of the FMLA also constitutes a violation of public policy, *id*., as does termination in violation of Title VII. *McCarthy v. R.J. Reynolds Tobacco Co.*, 819 F. Supp. 2d 923, 937 (E.D. Cal. 2011).

Accordingly, because there are triable issues of material fact as to whether plaintiff was terminated in violation of the Title VII, FMLA, CFRA, and FEHA, the court denies summary judgment on the termination in violation public policy claim.

2. Breach of Covenant of Good Faith and Fair Dealing (Claim 15)

Plaintiff contends an employment contract existed between plaintiff and defendant that included an implied covenant of good faith and fair dealing. Compl. at 31; Opp'n at 15. Plaintiff further contends that defendant breached that covenant by harassing and ultimately terminating plaintiff. *Id.* Defendant argues plaintiff relies on nonexistent statutory violations to claim a breach of good faith and fair dealing. Defs.' Mot. at 19.

As a threshold matter, this claim must be predicated upon the existence of an underlying contract. *Mayfield v. Cnty. of Merced*, No. 1:13-CV-1619, 2014 WL 2574791, at *16 (E.D. Cal. June 9, 2014), *report and recommendation adopted*, No. 1:13-CV-1619, 2014 WL 3401177 (E.D. Cal. July 10, 2014); *see also Kim v. Regents of the University of California*, 80

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Cal. App. 4th 160, 164 (2000), *citing Smith v. City and County of San Francisco*, 225 Cal. App. 3d 38, 49 (1990).

Here, plaintiff alleges a contract exists because he was told by defendant prior to beginning work at defendant's warehouse that he would have a job as long as he came to work on time and did his job. Opp'n at 15. Defendant does not dispute this fact or the existence of an agreement. Defs.' Mot. at 19. For purposes of this motion, the court assumes an agreement exists and includes a term requiring both parties to act in good faith. *Foley v. Interactive Data Corp*., 47 Cal. 3d 654, 684 (1988) (all employment contracts include an implied covenant of good faith and fair dealing).

The court next considers whether a question of fact exists regarding defendants' alleged breach of the contract. The covenant of good faith and fair dealing "exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the benefits of the agreement actually made." *Tomada v. Home Depot U.S.A.*, Inc., No. 13-CV-1647, 2014 WL 2538792, at *17 (N.D. Cal. June 3, 2014) (citations and internal quotation marks omitted)). It requires only that, when a contract provides a party with discretion, that discretion be exercised in good faith and in accordance with fair dealing. *Id*.

As discussed above, defendant points to evidence of good cause for exercising its discretion to terminate plaintiff's employment, but it remains disputed whether this cause was pretextual. A dispute of material fact exists regarding the cause of plaintiff's termination and whether the termination was in good faith, or was the result of unlawful discrimination. As the court resolves all disputes in favor of the nonmoving party at this stage, the court denies the motion for summary judgment on this claim.

3. Intentional Infliction of Emotional Distress (Claim 16)

The elements of an IIED claim are: "(1) extreme and outrageous conduct by the defendant with the intent of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct." *Wynes v. Kaiser Permanente Hospitals*, 936 F. Supp. 2d 1171, 1194 (E.D. Cal. 2013).

Courts have set a high bar for what constitutes sufficiently outrageous conduct. *Haley v. Cohen & Steers Capital Mgmt.*, Inc., 871 F. Supp. 2d 944, 960 (N.D. Cal. 2012). The employer's conduct must be more than "mere profanity, obscenity, or abuse, without circumstances of aggravation . . . ." *Yurick v. Superior Court*, 209 Cal. App. 3d 1116, 1128 (1989). It must be so extreme and outrageous as to go "beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Alcorn v. Anbro Eng'g, Inc*., 2 Cal. 3d 493, 499 n.5 (1970).

Case law applying this standard confirms the heavy burden a party in plaintiff's shoes has. *See, e.g., Haley*, 871 F. Supp. 2d at 944 (rude and offensive comments about plaintiff's cancer diagnosis insufficient to establish IIED claim); *Schneider v. TRW, Inc*., 938 F.2d 986 (9th Cir. 1991) (plaintiff's supervisor's allegedly screaming, yelling, and making threatening gestures while criticizing her job performance insufficient); *Janken v. GM Hughes Electronics*, 46 Cal. App. 4th 55 (1996) (no intentional infliction of emotional distress for firing in violation of FEHA based on age); *Yurick v. Superior Court*, 209 Cal. App. 3d 1116 (1989) (comments that plaintiff was over forty and senile did not give rise to claim for intentional infliction of emotional distress); *Trerice v. Blue Cross of California*, 209 Cal. App. 3d 878 (1989) (plaintiff-employee presented with a termination package, then told she would still be employed, then told she would actually be terminated, and then presented with less advantageous termination package was not sufficient); *Ankeny v. Lockheed Missiles and Space Co.*, 88 Cal. App. 3d 531 (1979) (plaintiff-employee wrongly denied promotions and transferred from job to job, assigned inappropriate tasks, and personally insulted).

Even assuming without deciding that plaintiff has suffered the requisite degree of emotional distress, defendant's conduct does not rise to the level required for an IIED claim. Here, even if defendants supervised plaintiff more closely than other employees, spoke to plaintiff about his heart attack in a hostile manner, and inadequately trained its supervising employees on implementation of workplace policies, plaintiff has not established a cause of action for intentional infliction of emotional distress. Defendants' conduct is not so extreme and outrageous

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as to go "beyond all possible bounds of decency . . . ." *Alcorn*, 2 Cal. 3d at 499 n.5. Accordingly, the court grants defendants' motion for summary judgment on this claim.

I. Punitive Damages

Lastly, defendants move for summary judgment of plaintiff's prayer for punitive damages, contending there is no evidence to suggest any of its officers, directors or managing agents engaged in oppressive, fraudulent or malicious conduct in connection with any adverse employment actions against plaintiff. Defs.' Mot. at 19-20. Plaintiff contends he is entitled to punitive damages from all defendants: Moore and Heeke for their malicious conduct, and Target for its actions in allowing a system of discipline with unfettered discretion, giving rise to discriminatory actions. Opp'n at 19-20. He also contends Target is liable for punitive damages under a theory of ratification. He argues Target ratified the action in this case when it failed to investigate his termination in relation to his disability. *Id*.

Punitive damages are recoverable for FEHA violations. *Commodore Home Systems, Inc. v. Superior Court*, 32 Cal.3d 211, 220, 221 (1982) ("[I]n a civil action under [ ] FEHA, all relief generally available in noncontractual actions, including punitive damages, may be obtained"). Because one of the defendants is a corporation, the evidence ultimately must demonstrate an officer, director or managing agent of defendant committed, authorized or ratified an act of malice, oppression or fraud to create a genuine issue of material fact on punitive damages. *See White v. Ultramar, Inc*., 21 Cal. 4th 563, 569 (1999). Specifically, "[a]n employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice." *Id.* (citing § 3294, subd. (b)). If the employer is a corporate employer, as here, "the advance knowledge and conscious disregard, authorization, ratification or act of oppression must be on the part of an officer, director, or managing agent of the corporation." *Id.*

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Defendants Heeke and Moore are the only employees plaintiff says took adverse employment actions against him. Joseph Decl. ¶¶ 27, 43; *cf.* Compl. ¶ 31. Neither Heeke nor Moore, as "Group Leaders," were officers or directors of defendant Target. Heeke Decl. ¶¶ 2, 29, 33; Moore Decl. ¶¶ 2, 13, 17. Thus, punitive damages would be triable only if the evidence showed Heeke and Moore work for Target in managing agent capacities. "[B]y selecting the term 'managing agent,' and placing it in the same category as 'officer' and 'director,' the Legislature intended to limit the class of employees whose exercise of discretion could result in a corporate employer's liability for punitive damages." *White*, 21 Cal. 4th at 573. "In order to demonstrate that an employee is a true managing agent under section 3294, subdivision (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. No evidence in the record of this case would allow a reasonable factfinder to conclude that Heeke and Moore exercised managing agent discretion. While they assigned Corrective Actions, they could not be said to have any authority over significant aspects of Target's business, nor did they influence Target policy.

Corporate ratification does not salvage plaintiff's claim. "[R]atification generally occurs where, under the particular circumstances, the employer demonstrates an intent to adopt or approve oppressive, fraudulent, or malicious behavior by an employee in the performance of his job duties." *Coll. Hosp. Inc. v. Superior Court*, 8 Cal. 4th 704, 726 (1994). "Corporate ratification in the punitive damages context requires actual knowledge of the conduct and its outrageous nature." *Id.*; *see also* Cal. Civ. Code § 3294(b) (providing for imposition of punitive damages against a corporation only upon a showing of the requisite mental state of an officer, director or managing agent). The only potential opportunity for Target to have discovered the alleged conduct is through review of plaintiff's termination. That review was conducted by a Human Resources employee, Stephanie Gorgos, and plaintiff has not alleged let alone shown she was a director or managing agent. *See* Compl.; Opp'n at 18-19.

Without facts indicating ratification or that defendants Heeke and Moore had "substantial discretionary authority over vital aspects of [defendant's] business" and "ultimately

determined corporate policy," the court does not find whether any defendant qualified as a managing agent to be a triable issue. *Yeager v. Corr. Corp. of Am.*, 944 F. Supp. 2d 913, 931 (E.D. Cal. 2013) ("a triable issue on punitive damages could arise only if the evidence showed they were working for Defendant in managing agent capacities."). The court grants summary judgment for defendants on the issue of punitive damages.

V. CONCLUSION

For the foregoing reasons, the court orders as follows:

1. Defendants' Motion for Summary Judgment is GRANTED as to plaintiff's claims of: harassment on the basis of disability (claim 2); discrimination on the basis of age (claim 9); discrimination on the basis of race (claims 10, 11, 12); intentional infliction of emotional distress (claim 16); and his prayer for punitive damages.
2. Defendants' Motion for Summary Judgment as to all other claims is DENIED.

IT IS SO ORDERED.

DATED: January 23, 2015.

UNITED STATES DISTRICT JUDGE