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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

DAVID DOKES,
Plaintiff,
v.
SAFEWAY, INC.,
Defendant.

No. 2:15-cv-01157-TLN-DB

**ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT**

This matter is before the Court on the motion for summary judgment, or alternatively partial summary judgment, by Defendant Safeway, Inc., a Delaware corporation (“Defendant”), which argues there is no genuine dispute as to material facts of the essential elements of each of Plaintiff David Dokes’s (“Plaintiff”) claims for relief, and as a matter of law, judgment should be entered for Defendant. (ECF No. 11.) Plaintiff filed an opposition to Defendant’s motion.¹ (ECF No. 25.) Defendant filed a reply. (ECF No. 23.) The Court has carefully considered the arguments raised by the parties. For the reasons set forth below, the Court hereby GRANTS Defendant’s motion for summary judgment. (ECF No. 11.)

¹ The Court accepted Plaintiff’s Amended Opposition (ECF No. 25) as timely because it did not make any substantive changes to Plaintiff’s previously filed Opposition (ECF No. 22), and thus the Court subsequently precluded Defendant from filing a new reply because no new arguments were made within the Amended Opposition. (Min. Order, ECF No. 24.)

1 **I. FACTUAL AND PROCEDURAL BACKGROUND**

2 The following facts are undisputed.² Plaintiff Dokes, a member of United Food and
3 Commercial Workers Union Local 8 (hereinafter “UFCW Local 8”), was employed by Defendant
4 Safeway as the backup night crew manager in Safeway Store Number 1895-12 in Fair Oaks,
5 California (hereinafter “the subject store”). (ECF No. 12 ¶¶ 1, 13.)

6 On June 29, 2014, then-employee Kevin Fairchild (hereinafter “Fairchild”) was working
7 after his normal shift had ended and was working under Plaintiff’s supervision in the subject
8 store. (ECF No. 12 ¶ 2.) At approximately 3:00 a.m., Fairchild gave a case of beer in the subject
9 store to an individual named Fernando, who was known to both Plaintiff and Fairchild. (ECF
10 No. 12 ¶¶ 3, 5.) Fairchild took twenty dollars from Fernando and made change at the register, but
11 did not charge Fernando for the case of beer. (ECF No. 12 ¶ 4.) Plaintiff observed Fairchild
12 giving Fernando the case of beer, observed Fernando leaving the subject store with the beer
13 without Fernando having paid for it, and Plaintiff did not intervene. (ECF No. 12 ¶¶ 6, 19.)
14 Plaintiff’s actions in allowing Fernando to obtain a case of beer after hours without paying for it
15 was a violation of both store policy and state law. (ECF No. 12 ¶ 7.)

16 Safeway Loss Prevention Manager Tyler Patrick prepared a report of the incident and
17 emailed it to Safeway District Manager John Cain. (ECF No. 12 ¶ 9.) After reviewing the report
18 that Patrick prepared, Cain concluded that both Plaintiff and Fairchild committed and/or
19 participated in violations of store policy, including employee theft and illegal sale of alcohol, and
20 that both Fairchild and Plaintiff had not been truthful about the incident. (ECF No. 12 ¶ 9.) As a
21 result, Cain made the decision to terminate the employment of both Plaintiff and Fairchild. (ECF
22 No. 12 ¶ 10.) At the time that Cain made the decision to terminate both Plaintiff’s and Fairchild’s

23
24 ² Defendant filed a statement of undisputed material facts in support of its motion for summary judgment.
25 (ECF No. 12.) Plaintiff, who is represented by counsel, did not file a “concise ‘Statement of Disputed Facts,’ and the
26 source thereof in the record, of all additional material facts as to which there is a genuine issue precluding summary
27 judgment or adjudication” and/or did not “reproduce the itemized facts in the [Defendant’s] Statement of Undisputed
28 Facts and admit those facts that are undisputed and deny those that are disputed.” E.D. Cal. L.R. 260(b). Since
Plaintiff did not file a response to Defendant’s statement of facts, “the court may . . . consider the fact [identified by
the movant] undisputed for purposes of the motion [or] grant summary judgment if the motion and supporting
materials – including the facts considered undisputed – show that the movant is entitled to it”
Fed. R. Civ. P. 56(e)(2)–(3); *see also* Pretrial Scheduling Order, ECF No. 8 at 5:1–5.

1 employment, Cain had no knowledge of either employee's race and had no information or reason
2 to believe that Plaintiff had been forced to participate in illegal activity. (ECF No. 12 ¶¶ 11–12.)

3 Plaintiff's union contract, which was between UFCW Local 8 and Defendant, was in
4 effect when Plaintiff's employment was terminated in July 2014. (ECF No. 12 ¶ 14.) Under the
5 union contract, the employer had the right to discharge any employee for just cause and if the
6 discharged employee believed that he or she had been unjustly discharged, the employee had the
7 right to appeal to the employer through the union within ten days of termination. (ECF No. 12
8 ¶¶ 14, 16.) Cain based his decision to terminate Plaintiff on just cause for purposes of the union
9 contract. (ECF No. 12 ¶ 15.) Plaintiff filed a grievance through his union concerning his
10 termination. (ECF No. 12 ¶ 17.) After reviewing the videotape of the incident, the union
11 "informed Plaintiff that there was nothing that they could do because [from the] videotape . . . , it
12 appeared to the union representative that [P]laintiff knew Fernando very well." (ECF No. 12
13 ¶ 18.)

14 On April 16, 2015, Plaintiff filed a complaint against Defendant in the Superior Court of
15 the State of California, for the County of Sacramento, Case No. 34-2015-00178015. (ECF No. 1,
16 Ex. A.) On May 22, 2015, Defendant filed a Notice of Removal to this Court based on federal
17 question jurisdiction and supplemental jurisdiction, (ECF No. 1), and filed an Answer to
18 Plaintiff's Complaint, (ECF No. 4). In his Complaint, Plaintiff alleges the following nine causes
19 of action: (1) tortious discharge from employment in violation of public policy; (2) race
20 discrimination violation under California Government Code § 12900 (contained within the
21 California Fair Employment and Housing Act (hereinafter "FEHA")); (3) whistleblower
22 retaliation under California Labor Code § 1102.5(c); (4) retaliation violation under FEHA,
23 California Government Code § 12940(h); (5) failure to prevent retaliation violation under FEHA,
24 California Government Code § 12940(k); (6) breach of implied contract of continued
25 employment; (7) breach of covenant of good faith and fair dealing; (8) intentional infliction of
26 emotional distress; and (9) negligent infliction of emotional distress. (ECF No. 1, Ex. A.) In
27 response, Defendant filed an answer, denying Plaintiff's allegations and asserting nineteen
28 affirmative defenses. (ECF No. 4.)

1 Defendant seeks summary judgment sub judice based on the pleadings, arguing that all
2 nine of Plaintiff’s causes of action lack a genuine dispute as to material facts, or in the alterative
3 partial summary judgment for the causes of action this Court deems lack a genuine dispute as to
4 material facts. (ECF No. 11.) Plaintiff filed an opposition to Defendant’s motion for summary
5 judgment (ECF No. 25), and Defendant filed a reply to Plaintiff’s opposition (ECF No. 23).

6 II. STANDARD OF LAW

7 Summary judgment is appropriate when “the movant shows that there is no genuine
8 dispute as to any material fact and the movant is [therefore] entitled to judgment as a matter of
9 law.” Fed. R. Civ. P. 56(a); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970), *superseded*
10 *on other grounds*. “[The] party seeking summary judgment always bears the initial responsibility
11 of informing the district court of the basis for its motion, and identifying those portions of the
12 pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits,
13 if any, which it believes demonstrate the absence of a genuine issue of material fact.” *Celotex*
14 *Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (internal quotations omitted). “[W]here the
15 nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment
16 motion may properly be made in reliance solely on the pleadings, depositions, answers to
17 interrogatories, and admissions on file.” *Id.* at 324 (internal quotations omitted). Indeed,
18 summary judgment should be entered against a party who does not make a showing sufficient to
19 establish the existence of an element essential to that party’s case, and on which that party will
20 bear the burden of proof at trial.

21 If the moving party meets its initial responsibility, the burden then shifts to the opposing
22 party to establish that a genuine issue as to any material fact actually does exist. *Matsushita Elec.*
23 *Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585–87 (1986); *First Nat’l Bank of Ariz. v.*
24 *Cities Serv. Co.*, 391 U.S. 253, 288–89 (1968). In attempting to establish the existence of this
25 factual dispute, the opposing party may not rely upon the denials of its pleadings, but is required
26 to tender evidence of specific facts in the form of affidavits, and/or admissible discovery material,
27 in support of its contention that the dispute exists. Fed. R. Civ. P. 56(c). In proving that the
28 disputed fact is material, the opposing party must demonstrate the disputed fact “might affect the

1 outcome of the suit under the governing law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,
2 248 (1986) (citation omitted). In proving that the dispute is genuine, the opposing party must
3 demonstrate “the evidence is such that a reasonable jury could return a verdict for the nonmoving
4 party.” *Id.*

5 In the endeavor to establish the existence of a factual dispute, the opposing party need not
6 establish a material issue of fact conclusively in its favor. It is sufficient that “the claimed factual
7 dispute be shown to require a jury or judge to resolve the parties’ differing versions of the truth at
8 trial.” *First Nat’l Bank of Ariz.*, 391 U.S. at 289. Thus, the “purpose of summary judgment is to
9 ‘pierce the pleadings and to assess the proof in order to see whether there is a genuine need for
10 trial.’” *Matsushita*, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e) Advisory Committee Note to
11 1963 Amendment).

12 In resolving the summary judgment motion, the court examines the pleadings, depositions,
13 answers to interrogatories, and admissions on file, together with any applicable affidavits. Fed.
14 R. Civ. P. 56(c); *S.E.C. v. Seaboard Corp.*, 677 F.2d 1301, 1305–06 (9th Cir. 1982). The
15 evidence of the opposing party is to be believed, and all reasonable inferences that may be drawn
16 from the facts pleaded before the court must be drawn in favor of the opposing party. *Anderson*,
17 477 U.S. at 255 (citing *Adickes*, 398 U.S. at 158–59). Nevertheless, it is the opposing party’s
18 obligation to produce a factual predicate from which inferences may be drawn. *Richards v.*
19 *Nielsen Freight Lines*, 602 F. Supp. 1224, 1244–45 (E.D. Cal. 1985), *aff’d*, 810 F.2d 898 (9th Cir.
20 1987). Finally, to demonstrate a genuine issue that necessitates a jury trial, the opposing party
21 “must do more than simply show that there is some metaphysical doubt as to the material facts.”
22 *Matsushita*, 475 U.S. at 586 (citation omitted). “Where the record taken as a whole could not
23 lead a rational trier of fact to find for the non-moving party, there is no ‘genuine issue for trial.’”
24 *Id.* at 587 (citation omitted).

25 III. ANALYSIS

26 Defendant moves for summary judgment on Plaintiff’s following nine causes of actions:
27 (1) tortious discharge from employment in violation of public policy; (2) race discrimination
28 violation under California Government Code § 12900 (contained within the California Fair

1 Employment and Housing Act (hereinafter “FEHA”)); (3) whistleblower retaliation under
2 California Labor Code § 1102.5(c); (4) retaliation violation under FEHA, California Government
3 Code § 12940(h); (5) failure to prevent retaliation violation under FEHA, California Government
4 Code § 12940(k); (6) breach of implied contract of continued employment; (7) breach of
5 covenant of good faith and fair dealing; (8) intentional infliction of emotional distress; and (9)
6 negligent infliction of emotional distress. As an underlying issue to the subsequent causes of
7 action, the Court first addresses Plaintiff’s race discrimination cause of action. Similarly,
8 retaliation is an underlying issue to Plaintiff’s first and third causes of actions, and thus, follows
9 the Court’s discussion of the fourth and fifth causes of action on retaliation.

10 A. Second Cause of Action: Race Discrimination

11 Defendant seeks summary judgment on Plaintiff’s second cause of action, which alleges
12 race discrimination in violation of FEHA. (ECF No. 1, Ex. A ¶¶ 16–20.) Defendant argues
13 Plaintiff makes only conclusory, boilerplate allegations, and does not demonstrate that Plaintiff’s
14 alleged protected characteristics factored into Defendant’s decision to terminate Plaintiff’s
15 employment. (ECF No. 11 at 18:16–21:7.)

16 FEHA prohibits an employer from “discharg[ing] . . . from employment or . . .
17 discriminat[ing] against [an employee] in terms, conditions, or privilege of employment”
18 “because of race, . . . color, national origin, [or] ancestry . . .” Cal. Gov’t Code § 12940(a). In
19 evaluating discrimination claims under FEHA, California courts look to federal precedent
20 governing analogous federal discrimination laws. *Guz v. Bechtel Nat’l, Inc.*, 24 Cal. 4th 317, 354
21 (2000) (“Because of the similarity between state and federal employment discrimination
22 laws, California courts look to pertinent federal precedent when applying [its] own statutes.”)
23 (citations omitted).

24 To analyze disparate treatment claims, the United States Supreme Court in *McDonnell*
25 *Douglas Corp. v. Green* established a tripartite burden-shifting framework. 411 U.S. 792, 802–04
26 (1973); *see also Guz*, 24 Cal. 4th at 354 (“adopt[ing] the three-stage burden-shifting test
27 established by the United States Supreme Court for trying claims of discrimination . . . based on a
28 theory of disparate treatment[, which is known as the] *McDonnell Douglas* test”). Under the

1 *McDonnell Douglas* test, the plaintiff has the initial burden of establishing by a preponderance of
2 evidence a prima facie case of discrimination. *Guz*, 24 Cal. 4th at 354. Once a prima facie case
3 is shown, a presumption of discrimination arises and the burden shifts to the defendant to show
4 that the adverse employment action was taken for a legitimate, nondiscriminatory reason. *Id.* at
5 355–56. Stating a legitimate, nondiscriminatory reason negates the presumption of discrimination
6 and shifts the burden back to the plaintiff to demonstrate that the proffered reason is mere pretext
7 for discrimination. *Id.* at 356.

8 To show a prima facie case of race discrimination under FEHA, a plaintiff must show: (i)
9 he was a member of a protected class; (ii) he was performing competently in the position he held;
10 (iii) he suffered an adverse employment action; and (iv) the employer acted with a discriminatory
11 motive. *Zeinali v. Raytheon Co.*, 636 F.3d 544, 552 (9th Cir. 2011) (citing *Guz*, 24 Cal. 4th at
12 355); *Lawler v. Montblanc N. Am., LLC*, 704 F.3d 1235, 1242 (9th Cir. 2013). A plaintiff can
13 demonstrate discriminatory motive by showing “other similarly situated employees outside of the
14 protected class were treated more favorably, or other circumstances surrounding the adverse
15 employment action give rise to an inference of discrimination.” *Achal v. Gate Gourmet, Inc.*, 114
16 F. Supp. 3d 781, 800 (N.D. Cal. 2015) (citing *Slatkin v. Univ. of Redlands*, 88 Cal. App. 4th 1147,
17 1158 (2001)). A plaintiff also “must prove by a preponderance of the evidence that there was a
18 ‘causal connection’ between [his] protected status and the adverse employment decision.” *Mixon*
19 *v. Fair Emp’t & Hous. Comm’n*, 192 Cal. App. 3d 1306, 1319 (1987).

20 When an employer moves for summary judgment, however, “the burden is reversed . . .
21 because the defendant who seeks summary judgment bears the initial burden.” *Dep’t of Fair*
22 *Emp’t & Hous. v. Lucent Techs., Inc.*, 642 F.3d 728, 745 (9th Cir. 2011) (quoting *Hanson v.*
23 *Lucky Stores, Inc.*, 74 Cal. App. 4th 215, 224 (1999)). “Thus, [t]o prevail on summary judgment,
24 [the employer is] required to show either that (1) plaintiff could not establish one of the elements
25 of [the] FEHA claim or (2) there was a legitimate, nondiscriminatory reason for its decision to
26 terminate plaintiff’s employment.” *Id.* (alterations in original) (quoting *Avila v. Cont’l Airlines,*
27 *Inc.*, 165 Cal. App. 4th 1237, 1247 (2008)). If the employer meets its burden, the plaintiff-
28 employee must demonstrate either “that the defendant’s showing was in fact insufficient or . . .

1 that there was a triable issue of fact material to the defendant’s showing.” *Id.* at 746 (alterations
2 in original) (quoting *Hanson*, 74 Cal. App. 4th at 225 (1999)); *see also Nidds v. Schindler*
3 *Elevator Corp.*, 113 F.3d 912, 917–918 (9th Cir. 1997) (“[t]o . . . survive summary judgment,
4 [plaintiff] must produce enough evidence to allow a reasonable factfinder to conclude *either*: (a)
5 that the alleged reason for [plaintiff’s] discharge was false, *or* (b) that the true reason for his
6 discharge was a discriminatory one”) (emphasis in original) (citation omitted).

7 i. *Legitimate, Nondiscriminatory Reason*

8 To demonstrate a legitimate, nondiscriminatory reason for its decision to terminate
9 Plaintiff’s employment, Defendant “must show that the procedure by which [his employment]
10 was terminated was validly and fairly devised and administered to serve a legitimate business
11 purpose.” *Lucent Techs.*, 642 F.3d at 745–46 (quoting *Hanson*, 74 Cal. App. 4th at 223). “A
12 reason is ‘legitimate’ if it is ‘facially unrelated to prohibited bias, and which if true, would thus
13 preclude a finding of discrimination.’” *Reid v. Google, Inc.*, 50 Cal. 4th 512, 520 n.2 (2010)
14 (emphasis omitted) (citing *Guz*, 24 Cal. 4th at 356).

15 In moving for summary judgment Defendant argues that “Plaintiff . . . cannot establish a
16 *prima facie* case of racial discrimination on this record” and Defendant had a “legitimate non-
17 discriminatory basis for [Plaintiff’s employment] termination.” (ECF No. 11 at 19:1–2, 21:10.)
18 Specifically, Defendant argues that Plaintiff fails to establish the fourth element of a FEHA *prima*
19 *facie* case that the employer acted with a discriminatory motive: “[P]laintiff alleges nothing more
20 than that he is an African-American and his supervisors are not [P]laintiff cannot show
21 discrimination in the foundational sense that he was treated differently from similarly situated
22 employees who are not African-American.” (ECF No. 11 at 19:2–3, 19:9–11) (citation omitted).

23 In support, Defendant provides:

24 Kevin Fairchild, who is white, was terminated by Cain along with
25 [P]laintiff for the same activity. Indeed, [P]laintiff, as Fairchild’s
26 supervisor, bears greater responsibility since he was in a position of
27 authority, and could have halted the improper transaction, but did
28 nothing. There is thus no evidence of differential treatment on the
basis of race on this record: white and black employees were both
terminated for the same conduct. Significantly, District Manager
Cain, the decision maker, did not know the race of either [P]laintiff
or Fairchild when he made the decision to terminate them. DSE,

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Exh. D, ¶6.[]

(ECF No. 11 at 19:12–19) (footnote omitted). Defendant further argues that Defendant had a legitimate, non-discriminatory basis for terminating Plaintiff’s employment:

District Manager Cain based his decision to terminate [P]laintiff’s employment on three reasons: (1) that [P]laintiff had either engaged in or acquiesced in employee theft[,] (2) that he had either engaged in or acquiesced in a violation of state law and company policy prohibiting the after[-]hours sale of alcohol[, and] (3) that he had been untruthful in the investigation. DSE, Exh. D, ¶5(a)–(d); ¶7

. . . .

. . . District Manager Cain terminated [P]laintiff’s employment on the basis of the report he received from Loss Prevention Investigator Patrick, which showed at least three grounds for terminating [P]laintiff—[P]laintiff’s participation or at least acquiescence in employee theft; the illegal sale of alcohol; and employee dishonesty in the course of an investigation. Those are legitimate reasons as a matter of law. *See Garcia v. Amerisource Bergen*, 2011 WL 2038552 at *9 (employee theft legitimate non-discriminatory reason for termination); *McGrory [v. Applied Signal Tech., Inc.]*, 212 Cal. App. 4th [1510,] 1527–1528 [(2013)]; *Joaquin [v. City of L.A.]*, 202 Cal. App. 4th [1207,] 1226 [(2012)] (untruthfulness in an investigation is good cause for termination).

. . . .

. . . Cain was not aware of either [P]laintiff’s or Fairchild’s race when he terminated them [P]laintiff testified that he knew of no reason to believe that he was under investigation because of his race. DSE, Exh A(l) at 94:19–95:2. At his deposition, when asked for the basis for his belief, he stated “It’s the way—the way it pretty much went down. It just felt like there was other reasons besides, you know, other motivation fueled by that.” *Id.* at 93:15–20. Plaintiff’s combination of speculation and hearsay is insufficient to raise a triable issue of fact as to whether Safeway was motivated to terminate him because of his race. *See Hersant v. Department of Social Services*, (1997) 57 Cal. App. 4th 997, 1009.

(ECF No. 11 at 16:13–17, 21:13–20, 21:26–22:7.)

Defendant provides, and Plaintiff does not object to, the following store policy and state law that were in effect at the time of Plaintiff’s employment termination:

Under Safeway store policy in force in July of 2014, “failure to ring up purchases, removing Company property from the premises and borrowing money from the cash register . . . shall be classified as theft.” DSE, Exh. A(6); A(l) at 101:3–103:9. Theft of company property “shall be cause for discharge.” Employees “who give assistance to other employees or persons in a theft shall also be

1 discharged.” In addition, any employee who “aids and/or abets
2 another employee and/or other people in the misappropriation of
3 Company property will be subject to immediate discharge.” *Id.*
4 Misappropriation of Company property “shall include
5 unauthorized . . . removal and/or use of Company merchandise . . .
6 and shall be grounds for immediate discharge.” *Id.*

7 California Business and Professions Code section 25631
8 provides that any agent or employee of a business holding a license
9 to sell liquor “who sells, gives, or delivers to any persons any
10 alcoholic beverage or any person who knowingly purchases any
11 alcoholic beverage between the hours of 2 o’clock a.m. and
12 6 o’clock a.m. of the same day, is guilty of a misdemeanor.” Cal.
13 Bus. & Prof. Code § 23404 makes it unlawful for “any salesman to
14 aid or abet in the violation of any of the provisions of this division
15 or knowingly to become a party, either directly or indirectly, in the
16 violation of any of the provisions of this division.”

17 (ECF No. 11 at 8:5–21.) The facts taken as undisputed, *see supra* note 2, provide: “On June 29,
18 2014, at approximately 3:00 a.m., Kevin Fairchild gave a case of beer to an individual named
19 Fernando in store 1895-12. [DSE, Exh. A(2) 26:22–30:12; Exh. B, ¶¶10, 12, 14; Exh. B(1)
20 passim] . . . Plaintiff observed Fairchild giving Fernando the case of beer without Fernando
21 having paid for it, but did not intervene. [DSE, Exh. A(1) 69:1–70:21; 73:21–74:14; Exh. B, ¶¶10,
22 14; Exh. B(1) passim.] . . . Plaintiff’s actions in allowing Fernando to obtain a case of beer after
23 hours without paying for it was a violation of both store policy and state law. [DSE, Exh. A(1)
24 68:20–25; Exh. A(6); Exh. D, ¶5; Exh. C, ¶4; Cal. Bus and Professions Code §§25631; 23404.]”
25 (ECF No. 12 ¶¶ 3, 6–7) (brackets in original).

26 The record supports no genuine dispute as to the material fact that Plaintiff violated store
27 policy and state law because Plaintiff’s “observ[ation of] Fairchild giving Fernando the case of
28 beer without Fernando having paid for it [and] not interven[ing],” (*Id.*), constitute “fail[ing] to
ring up [the] purchase[of the case of beer,]” which is “classified as theft” and clearly a “cause for
discharge,” (ECF No. 11 at 8:5–8). Defendant has articulated a legitimate, nondiscriminatory
reason for terminating Plaintiff’s employment. *See Dumas v. New United Motor Mfg., Inc.*, 305
Fed. Appx. 445, 448 (9th Cir. 2008) (unpublished) (finding Defendant “proffered a legitimate,
non-discriminatory reason for terminating [Plaintiff]—his violation of company policy”); *Crews*
v. Trustees of Columbia Univ., 452 F. Supp. 2d 504, 523 (S.D.N.Y. 2006) (finding that theft is a
legitimate, non-discriminatory reason to discharge an employee). An employer “may decide that

1 participation in a theft . . . may render an employee unqualifi[ed] for employment, [as long as]
2 this criterion [is] applied, alike to members of all races.” *McDonald v. Santa Fe Trail Transp.*
3 *Co.*, 427 U.S. 273, 283 (1976) (citation omitted) (internal quotations omitted). Furthermore,
4 Defendant demonstrated that District Manager Cain terminated the employment of both Fairchild,
5 who is Caucasian, and Plaintiff, who is African-American, without any knowledge of their race at
6 the time of termination.³ Thus, Defendant has proffered a legitimate, non-discriminatory reason
7 for terminating Plaintiff’s employment, and the burden shifts to Plaintiff to establish pretext.

8 ii. *Pretext for Discrimination*

9 Once the employer has proffered a legitimate reason for the discharge, the burden shifts to
10 the plaintiff to raise a genuine issue of material fact as to whether this reason was a pretext for
11 discrimination. The Ninth Circuit explains how Plaintiff can show the requisite pretext:

12 [A] plaintiff can prove pretext in two ways: (1) indirectly, by
13 showing that the employer’s proffered explanation is “unworthy of
14 credence” because it is internally inconsistent or otherwise not
15 believable, or (2) directly, by showing that unlawful discrimination
16 more likely motivated the employer. These two approaches are not
exclusive; a combination of the two kinds of evidence may in some
cases serve to establish pretext so as to make summary judgment
improper.

17 *Chuang v. Univ. of Cal. Davis, Bd. Of Trustees*, 225 F.3d 1115, 1127 (9th Cir. 2000) (quoting
18 *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1220–22 (9th Cir. 1998)). “To establish that a
19 defendant’s nondiscriminatory explanation is a pretext for discrimination [by] rely[ing] on
20 circumstantial evidence, [Plaintiff must provide evidence that is] ‘specific’ and ‘substantial’ to
21 create a genuine issue of material fact.” *Cornwell v. Electra Cent. Credit Union*, 439 F.3d 1018,
22 1029 (9th Cir. 2006) (quoting *Godwin*, 150 F.3d at 1222 (“Such [circumstantial] evidence of
23 ‘pretense’ must be ‘specific’ and ‘substantial’ in order to create a triable issue with respect to
24 whether the employer intended to discriminate on the basis of [race].”)). A plaintiff may evince
25 “[d]isparate treatment [has] occur[red by showing] plaintiff [wa]s singled out on account of [his]

26 ³ The facts taken as undisputed, *see supra* note 2, provide: “On the basis of his belief that both [P]laintiff and
27 Fairchild had violated store policy by engaging in or participating in employee theft, illegal sales of alcohol, and
28 untruthfulness, Cain made the decision to terminate them both. [DSE, Exh. D, ¶6.] . . . At the time that he made the
decision to terminate [P]laintiff and Fairchild, Cain did not know the race of either employee. [DSE, Exh. D, ¶6.]”
(ECF No. 12 ¶¶ 10–11.)

1 race . . . and [wa]s treated less favorably than others similarly situated.” *Lelaind v. City & Cty of*
2 *S.F.*, 576 F. Supp. 2d 1079, 1091 (N.D. Cal. 2008) (citing *Cornwell*, 439 F.3d at 1028); *see also*
3 *Solano v. Regents of Univ. of Cal.*, 2005 WL 1984473, *4 (E.D. Cal. 2005) (“To establish a prima
4 facie case of race discrimination, plaintiff must prove . . . the employer treated similarly situated
5 individuals who are not in her protected class more favorably” (footnote omitted)).

6 Here, Plaintiff argues: “Defendants’ mistreatment of him, and ultimate termination, was at
7 least partially motivated by racial animus [and] Plaintiff’s race was a motivating factor for the
8 adverse employment actions Defendant imposed against him” because “Plaintiff is an African
9 American” and “all of the . . . named store employees, including his superiors, are white.” (ECF
10 No. 1, Ex. A ¶ 17.) Plaintiff concedes that he lacks direct evidence to prove pre-textual
11 discrimination, stating that he “can bring substantial responsive evidence to show that his
12 termination was pre-textual . . . [i]f Plaintiff is granted a bit more time, we may be able to find
13 direct evidence.” (ECF No. 25 at 11:1–2, 11:8–9.) However, Plaintiff offers the following as
14 indirect evidence to support his argument that Defendant discriminated against him:

15 [D]ue to political correctness and extensive sensitivity training,
16 there is very little overt and explicit racism that can be offered as
17 undeniable proof in this case. What we do have is a scenario where
18 a white employee, Kevin Fairchild, is coming to work late, working
19 off-the-clock, and receiving no discipline, even bragging to other
20 co-workers that he was not being disciplined. *Id.* Ex. A, 57:23–
60:23. Dovetailing with the history of lack of discipline of
[Fairchild] by his superiors, we have the fact that Kevin Fairchild
was even promoted to head clerk in the face of clear violations of
store rules. *Id.* Ex. A, 59:9–13.

21 . . . [W]hen Plaintiff reported [Fairchild]’s illegal acts to the
22 assistant store managers, Rodney Youngster and Jael Uhl, they took
23 no action whatsoever. Plaintiff reported [Fairchild]’s illegal act to
24 his direct supervisor John Novitsky, who also took no action.
25 According to Tyler Patrick’s Declaration, a full ten days later, “On
26 July 9, 2014 I received an email notification from Nate Reich, the
27 store manager at Store 1895-12, informing me that the Meat
28 Manager in his store reported to him that [Plaintiff] was telling
other employees that Head Clerk Kevin Fairchild had sold alcohol
to someone after 3:00 a.m.” *Defendant’s Supporting Evidence Re:*
Motion for Summary Judgment, Ex. B, ¶4. This statement
characterizes [Plaintiff] as the bad actor in the investigation, rather
than [Fairchild].

(ECF No. 25 at 11:20–12:5.)

1 Plaintiff has failed to demonstrate that a reasonable juror could conclude Defendant's
2 reasoning for discharge was false or that Defendant's discharge was motivated by discriminatory
3 animus. To argue that Fairchild had prior misconduct where Defendant did not discipline him
4 does not offer support for differential treatment between Caucasian and African-American
5 employees regarding the legitimate, non-discriminatory reason that Defendant provided for
6 terminating Plaintiff's employment. Plaintiff's allegations of a "history of lack of discipline of
7 [Fairchild] by his superiors," (ECF No. 25 at 11:24), as an argument for disparate treatment
8 between Caucasian and African-American employees fails to connect how Fairchild's actions are
9 related to being Caucasian or to Plaintiff being terminated from his employment. In fact, Plaintiff
10 does not proffer any evidence that other Caucasian employees were also not being disciplined for
11 similar behavior, and does not adduce any evidence that Plaintiff and/or other African-American
12 employees were disciplined for similar behavior. Absent such evidence, Plaintiff has evinced no
13 connection between his race and his employment termination to "give rise to an inference of
14 [racial] discrimination." *Reynaga v. Roseburg Forest Prod.*, 847 F.3d 678, 691 (9th Cir. 2017)
15 (citations omitted).

16 Assuming arguendo, Plaintiff's argument might carry weight if Fairchild had not been
17 terminated following the after-hours alcohol incident, while Plaintiff's employment was
18 terminated. However, Fairchild and Plaintiff, the only two employees involved in the incident,
19 were both terminated. This evinces that a similarly situated employee who was involved in the
20 same incident as Plaintiff, but whom is outside of Plaintiff's protected class, was not treated more
21 favorably, but rather was treated the same. Instead, Plaintiff's argument is a complaint about
22 Kevin Fairchild's behavior, regardless of his race, which provides no basis that employer-
23 Defendant treated the similarly situated individual, Fairchild, more favorably on account of him
24 not being in a protected class. Plaintiff has not shown that he was "singled out and treated less
25 favorably than others similarly situated on account of race." *Cornwell*, 439 F.3d at 1028
26 (citations omitted).

27 Furthermore, while Plaintiff concedes that District Manager Cain did not know the race of
28 Plaintiff or Fairchild at the time he decided to terminate their employment, Plaintiff alleges that

1 Cain based his decision on the investigative report which was drafted by Tyler Patrick, who had
2 knowledge of their races. Yet, this argument lacks any specificity as to how Patrick’s knowledge
3 of Fairchild’s and Plaintiff’s respective races led to or had any underlying impact on Cain’s
4 decision to terminate their employment. Plaintiff has adduced no evidence that causally links his
5 termination to his protected status. Absent “specific and substantial” evidence of discriminatory
6 pretense, Plaintiff does not meet his burden “to create a triable issue with respect to whether
7 [Defendant] intended to discriminate on the basis of [race].” *Godwin*, 150 F.3d at 1222 (citations
8 omitted).

9 Accordingly, the Court GRANTS Defendant’s motion for summary judgment as to
10 Plaintiff’s claim for discrimination based on race.

11 **B. Fourth and Fifth Causes of Action: Retaliation**

12 **i. *Cause of Action Four: Retaliation in Violation of FEHA***

13 Defendant seeks summary judgment on Plaintiff’s fourth cause of action, which alleges
14 that Defendant, in violation of FEHA, retaliated against Plaintiff for reporting his fellow
15 employee’s misconduct. (ECF No. 1, Ex. A ¶¶ 30–31.) Defendant argues that Plaintiff’s
16 allegations are “insufficient to support a claim of retaliation under FEHA [because i]n the absence
17 of any evidence that [P]laintiff was terminated because he opposed practices forbidden under the
18 FEHA, his FEHA based retaliation claim fails as a matter of law.” (ECF No. 11 at 22:14, 22:19–
19 21) (citation omitted).

20 FEHA prohibits an employer from “discharg[ing], expel[ling], or otherwise
21 discriminat[ing] against any [employee] because the [employee] has opposed any practices
22 forbidden under [FEHA, including race discrimination,] or because the [employee] has filed a
23 complaint, testified, or assisted in any proceeding under [FEHA].” Cal. Gov’t Code § 12940(h).
24 In determining FEHA retaliation claims in the context of motions for summary judgment,
25 California courts apply the same burden-shifting analysis, *supra* Part III(A), as for determining
26 discrimination claims under FEHA. *See Yanowitz v. L’Oreal USA, Inc.*, 36 Cal. 4th 1028, 1042
27 (2005) (citing *McDonnell Douglas*, 411 U.S. at 802–805). To establish a prima facie case
28 of retaliation, a plaintiff must “establish . . . that: 1) he engaged in a protected activity; 2) he

1 suffered an adverse employment decision; and 3) there was a causal link between the protected
2 activity and the adverse employment decision.” *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d
3 1054, 1064 (9th Cir. 2002); *see also Nazir v. United Airlines, Inc.*, 178 Cal. App. 4th 243, 287
4 (2009). Once the prima facie case is established:

5 [t]he burden of production then shifts to the defendant-employer to
6 articulate a legitimate, non-retaliatory explanation for the adverse
7 employment action. If the employer successfully rebuts the
8 inference of retaliation, the burden of production shifts back to the
9 plaintiff to show that the defendant’s proffered explanation is
10 merely a pretext for impermissible retaliation.

11 *Vallimont v. Chevron Energy Tech. Co.*, 434 Fed. App’x 597, 599–600 (9th Cir. 2011)
12 (unpublished) (quoting *Miller v. Fairchild Indus., Inc.*, 885 F.2d 498, 504 n.4 (9th Cir. 1989)
13 (citations omitted)). However, when an employer moves for summary judgment, “the burden is
14 reversed” and the defendant-employer “bears the initial burden . . . to show either that (1)
15 plaintiff[-employee] could not establish one of the elements of [the] FEHA claim or (2) there was
16 a legitimate, nondiscriminatory reason for its decision to terminate plaintiff[-employee]’s
17 employment.” *Lucent Techs.*, 642 F.3d at 745 (citations omitted). If the employer meets its
18 burden, the plaintiff-employee must demonstrate either “that the defendant’s showing was in fact
19 insufficient or . . . that there was a triable issue of fact material to the defendant’s showing.” *Id.*
20 at 746 (alterations in original) (citations omitted).

21 a. Protected Activity

22 Under a FEHA retaliation claim, “protected activity” includes an employee’s formal or
23 informal complaint to a supervisor regarding unlawful discrimination, and accordingly, an
24 employer’s adverse actions taken against the employee after such complaints may constitute
25 retaliation. *Passantino v. Johnson & Johnson Consumer Prod., Inc.*, 212 F.3d 493, 506 (9th Cir.
26 2000) (citing *Moyo v. Gomez*, 40 F.3d 982 (9th Cir. 1994) (allowing retaliation claim based on
27 informal protest of allegedly discriminatory policy)). However, “complaints about personal
28 grievances or vague or conclusory remarks that fail to put an employer on notice as to what
conduct it should investigate will not suffice to establish protected conduct.” *Yanowitz*, 36 Cal.
4th at 1047. The employee must “have alerted his employer to his belief that discrimination, not

1 merely unfair personal treatment, had occurred.” *Mayfield v. Sara Lee Corp.*, 2005 WL 88965,
2 *8 (N.D. Cal. 2005) (citing *Jurado v. Eleven–Fifty Corp.*, 813 F.2d 1406, 1412 (9th Cir. 1987)
3 (finding employee complaint regarding scheduling change not protected activity)); *see*
4 *also Lanagan v. Santa Cruz Cty Metro Transit Dist.*, 2010 WL 1838984, at *5–6 (N.D. Cal.
5 2010) (reporting co-employee’s negligence resulting in accidents was “not protected activity
6 [under FEHA] because it has nothing to do with the FEHA’s prohibitions”); *Lewis v. City of*
7 *Fresno*, 834 F. Supp. 2d 990, 1002 (E.D. Cal. 2011) (complaining of allocation of overtime
8 assignments in an email or informal grievance to superior was not a protected activity under
9 FEHA). “As a threshold matter, . . . an employee’s conduct may constitute protected activity for
10 purposes of the antiretaliation provision of the FEHA not only when the employee opposes
11 conduct that ultimately is determined to be unlawfully discriminatory under the FEHA, but also
12 when the employee opposes conduct that the employee reasonably and in good faith believes to
13 be discriminatory, whether or not the challenged conduct is ultimately found to violate the
14 FEHA.” *Yanowitz*, 36 Cal. 4th at 1043.

15 Defendant argues that Plaintiff did not engage in protected activity to establish the first
16 element of a FEHA retaliation claim: “Plaintiff alleges only that he was retaliated against for
17 reporting an unlawful sale of alcohol, which is not a ‘practice forbidden’ *under the FEHA*, which
18 governs employment discrimination.” (ECF No. 11 at 22:16–18) (emphasis in original) (citation
19 omitted). Defendant contends further, “[i]n the absence of any evidence that [P]laintiff was
20 terminated because he opposed practices forbidden under the FEHA, his FEHA based retaliation
21 claim fails as a matter of law.” (ECF No. 11 at 22:19–21) (citations omitted). In support of its
22 argument, Defendant argues:

23 [T]here is no evidence that [Defendant] coerced [P]laintiff to
24 engage in illegal activity: [P]laintiff himself concedes that he
25 voluntarily[] “participated” in an illegal sale of alcohol in that he
26 allowed his subordinate employee Fairchild to give the beer to the
27 customer Fernando. DSE, Exh. A(1) 69:1–11 70:21. The record
shows further that [P]laintiff was not pressured to “conceal” the
transaction; on the contrary, as [P]laintiff himself testified, at least
one Store Manager urged [P]laintiff to “say something.” *Id.*, Exh.
A(1) at 78:21–79:13.

28 (ECF No. 11 at 15:7–13) (footnotes omitted). Plaintiff argues that he engaged in protected

1 activity under FEHA:

2 Plaintiff did engage in an activity that is worth protecting. Plaintiff
3 reported to management that [Fairchild] violated state law in
4 committing a theft of store property, and sold a customer beer after
5 2:00 a.m. in violation of state law. The public has an interest in
6 protecting employees from termination for reporting the illegal acts
7 of coworkers. In its motion, Defendant concedes that “the
8 prohibition on after hours sales of alcohol constitutes a public
9 policy sufficient to support a ‘Tameny’⁴ claim.” *See Defendant’s*
10 *Memorandum in Support of its Motion for Summary Judgment*,
11 page 8, footnote 4. Part one of this test is therefore met as there is
12 no dispute from Defendant in this regard.

13 (ECF No. 25 at 9:13–19.) However, Plaintiff mischaracterizes Defendant’s argument and the
14 standard for determining retaliatory claims under FEHA. FEHA prohibits an employer from
15 “discharg[ing], expel[ling], or otherwise discriminat[ing] against any [employee] because the
16 [employee] opposed any practices forbidden under [FEHA, including race discrimination] or . . .
17 filed a complaint, testified, or assisted in any proceeding under [FEHA].” Cal. Gov’t Code §
18 12940(h). Plaintiff’s argument that he was engaged in activity that is “worth protecting” is
19 insufficient to establish he was engaged in “protected activity,” as prescribed by FEHA, by
20 reporting forbidden practices, namely discriminatory conduct. FEHA prohibits retaliatory action
21 by the employer for the employee’s reporting of discriminatory conduct based on sex, race,
22 disability, or another discriminatory basis set forth by FEHA, section 12940(a). *See e.g., Brooks*
23 *v. City of San Mateo*, 229 F.3d 917, 928 (9th Cir. 2000) (finding that “[a]sserting one’s civil
24 rights, as [Plaintiff] did by complaining of [and reporting a co-worker]’s conduct [of sexually
25 assaulting her at work] is a protected activity under . . . FEHA”). For there to be “a retaliation
26 claim[, the] employee [must have] complained of or opposed conduct that the employee
27 reasonably believe[d] to be discriminatory, even when a court later determines the conduct was
28 not actually prohibited by the FEHA.” *Yanowitz*, 36 Cal. 4th at 1043 (citations omitted).
However, Plaintiff has not adduced any evidence to support the argument that he reasonably
believed Fairchild’s conduct to be discriminatory at the time Plaintiff reported the incident to

⁴ In the case of *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167 (1980), the California Supreme Court held that at-will employees may recover tort damages if they can demonstrate that they were discharged in violation of a fundamental public policy. These claims are commonly referred to as *Tameny* claims.

1 management. . In fact, the record does not support the contention that Plaintiff’s reporting of any
2 of Fairchild’s prior misconduct related to racial discrimination at all. Defendant has
3 demonstrated that Plaintiff cannot identify a “protected activity” as defined by FEHA. Thus, the
4 burden shifts to Plaintiff.

5 b. Pretext for Discrimination

6 Once the burden shifts, the plaintiff-employee must demonstrate either “that the
7 defendant’s showing was in fact insufficient or . . . that there was a triable issue of fact material to
8 the defendant’s showing.” *Lucent Techs.*, 642 F.3d at 746 (alterations in original) (citation
9 omitted). “To . . . survive summary judgment, [Plaintiff] must produce enough evidence to allow
10 a reasonable factfinder to conclude *either*: (a) that the alleged reason for [Plaintiff’s]
11 discharge was false, *or* (b) that the true reason for his discharge was a discriminatory one.”
12 *Nidds*, 113 F.3d at 918 (emphasis in original) (footnote omitted) (citation omitted).

13 As discussed above, *supra* Part III(A)(ii), Plaintiff has failed to demonstrate that a
14 reasonable juror could conclude Defendant’s reason for discharging Plaintiff was motivated by
15 discriminatory animus. To qualify as “protected activity” under a FEHA retaliation claim, the
16 employee’s complaint must relate to “unlawful discrimination.” *See Yanowitz*, 36 Cal. 4th at
17 1046–47. Although courts have consistently recognized a wide range of activities that “qualify as
18 engaged in protected opposing activity,” the activity still “must oppose activity the employee
19 reasonably believes constitutes unlawful discrimination.” *Id.* at 1047 & n.7 (citing *EEOC v.*
20 *Crown Zellerbach Corp.*, 720 F.2d 1008, 1012–1014 (9th Cir. 1983) (writing letter to customer of
21 employer complaining about inadequacies in employer’s affirmative action program); *Payne v.*
22 *McLemore’s Wholesale & Retail Stores*, 654 F.2d 1130, 1136–1137 (5th Cir. 1981) (boycotting
23 and picketing of store); *Coleman v. Wayne State University*, 664 F. Supp. 1082, 1092 & n.5 (E.D.
24 Mich. 1987) (stating repeatedly in public and private that the university engaged in discriminatory
25 employment practices)). Without a discriminatory basis, there is no viable retaliatory claim under
26 FEHA.

27 Accordingly, the Court GRANTS Defendant’s motion for summary judgment as to
28 Plaintiff’s claim for retaliation.

1 ii. *Cause of Action Five: Failure to Prevent Retaliation in Violation of*
2 *FEHA*

3 Defendant seeks summary judgment on Plaintiff’s fifth cause of action, alleging
4 Defendant failed to prevent retaliatory action in violation of FEHA. (ECF No. 1, Ex. A ¶¶ 38–
5 44.) Defendant argues that it is entitled to summary judgment on the basis that Plaintiff’s
6 allegations are “insufficient to support a claim of retaliation under FEHA [and i]n the absence of
7 an underlying violation of the FEHA, there is no viable ‘failure to prevent’ claim as a matter of
8 law.” (ECF No. 11 at 22:14, 23:1–3) (citations omitted).

9 FEHA prohibits an employer from “fail[ing] to take all reasonable steps necessary to
10 prevent discrimination . . . from occurring.” Cal. Gov’t Code § 12940(k). Accordingly, a claim
11 of failure to prevent discriminatory retaliation requires a discriminatory act or animus.
12 “Employers should not be held liable to employees for failure to take necessary steps to prevent
13 such conduct, except where the actions took place and were not prevented.” *Trujillo v. N. Cty*
14 *Trans. Dist.*, 63 Cal. App. 4th 280, 289 (1998)). In the absence of showing an actionable
15 discrimination claim, there can be no violation of Government Code § 12940(k). *See Northrop*
16 *Grumman Corp. v. Workers’ Comp. Appeals Bd.*, 103 Cal. App. 4th 1021, 1035 (2002). The
17 Court has found no viable claim of discrimination, *see supra* Part III(A), or discriminatory
18 retaliation, *see supra* Part III(B)(i). Therefore, there can be no independent cause of action for
19 failure to prevent discriminatory retaliation under FEHA.

20 Accordingly, the Court GRANTS Defendant’s motion for summary judgment as to
21 Plaintiff’s claim for failure to prevent retaliation.

22 C. First and Third Causes of Action: Wrongful Termination

23 Defendant seeks summary judgment on Plaintiff’s first and third causes of action, alleging
24 Defendant wrongfully terminated his employment in violation of California Labor Code and
25 public policy.⁵ Defendant argues, “Plaintiff cannot establish that he was retaliated against as a
26 matter of law under [this] cause of action [because] there is no evidence that [Defendant] coerced
27 [P]laintiff to engage in illegal activity . . . [n]or can [P]laintiff establish that he was terminated

28 ⁵ Because the causes of action require identical analysis, the Court considers these claims in tandem.

1 because he reported the illegal sale of alcohol.” (ECF No. 11 at 8:19–9:15.) Plaintiff merely
2 states: “The first four causes of action in Plaintiff’s complaint . . . are all related and subject to a
3 similar analysis.” (ECF No. 25 at 8:28–93.)⁶ As discussed below, *infra* Part III(D) and note 7,
4 Plaintiff’s opposition to Defendant’s motion for summary judgment does not address these causes
5 of action. However, Plaintiff alleges in his Complaint in his first cause of action, as follows:

6 In July 2014, in violation of law and public policy, Defendant[]
7 terminated Plaintiff’s employment, because he exercised his legal
8 right not to engage in illegal business activity (i.e. selling alcohol
during prohibited hours and while the store was closed), or conceal
the same, and to duly report it to his supervisors.

9 . . . Defendant[] knew that firing Plaintiff for reporting, to
10 them, the illegal activity of a colleague was unlawful. Notwithstanding this knowledge, Defendant[] despicably subjected
11 Plaintiff to cruel and unjust treatment, including ultimate
12 termination. Defendant[’s] conduct warrants the assessment of
punitive damages.

13 (ECF No. 1, Ex. A ¶¶ 12–13.) Further, Plaintiff alleges in his Complaint in his third cause of
14 action that Defendant violated California Labor Code § 1102.5(c), as follows:

15 It is fundamental public policy of that State of California that no
16 employer retaliate against an employee who refuses to engage in an
17 activity that would result in a violation of law, or refuses to conceal
18 the illegal activity, as provided by California’s Whistleblower
statute, Labor Code § 1102.5(c) . . . Plaintiff refused to engage in
the active concealment of Fairchild’s illegal alcohol sale, much
more participate in it, and he reported the same to his various
supervisors.

19 . . . Defendant knowingly and intentionally retaliated against
20 Plaintiff by terminating his employment.

21 (ECF No. 1, Ex. A ¶¶ 23–24.) Without the benefit of Plaintiff’s argument in opposition, the
22 Court reads the complaint to allege Defendant violated public policy by retaliating against
23 Plaintiff for informing .

24 To establish a claim for wrongful discharge in violation of public policy, the plaintiff must
25 establish: “(1) an employer-employee relationship, (2) the employer terminated the plaintiff’s
26 employment, (3) the termination was substantially motivated by a violation of public policy, and
27 (4) the discharge caused the plaintiff harm.” *Yau v. Santa Margarita Ford, Inc.*, 229 Cal. App.

28 ⁶ See also, *infra* Part III(D) and note 7, for a discussion concerning Plaintiff’s failure to oppose this cause of
action in his opposition to Defendant’s motion for summary judgment.

1 4th 144, 154 (2014) (citation omitted).

2 As discussed, *supra* Part III(A) and (B), there is no viable claim for race discrimination or
3 retaliation. Accordingly, Plaintiff’s derivative claim for wrongful termination in violation of
4 public policy based on retaliation fails. *See Tumblin v. USA Waste of California, Inc.*, 2016 WL
5 3922044, at *8 (C.D. Cal. 2016) (citing *Sanders v. Arneson Prod., Inc.*, 91 F.3d 1351, 1354 (9th
6 Cir. 1996); *Tribble v. Raytheon Co.*, 414 Fed. App’x. 98, 100 (9th Cir. 2011) (“The district court
7 correctly concluded that Tribble’s ‘state law claim for wrongful termination of public policy fails
8 for the same reasons as his retaliation claim fails.’”).

9 Accordingly, the Court GRANTS Defendant’s motion for summary judgment as to the
10 wrongful termination claim.

11 **D. Sixth and Seventh Causes of Action: Contract-Based Claims Preempted**

12 Defendant moves for summary judgment on Plaintiff’s sixth and seventh causes of action,
13 which allege breach of implied contract of continued employment and breach of covenant of good
14 faith and fair dealing. (ECF No. 1, Ex. A ¶¶ 45–58.) Defendant contends that “on the[] face [of
15 Plaintiff’s allegations,] they require interpretation of the collective bargaining agreement in force
16 between [Defendant] and the UFCW and are thus preempted by § 301 of the federal Labor
17 Management Relations Act, 1947.” (ECF No. 11 at 23:7–11.)⁷ Plaintiff’s opposition to
18 Defendant’s motion for summary judgment does not address these causes of action.⁸ Both causes

19 _____
20 ⁷ Defendant removed this action from the Superior Court of the State of California, for the County of
21 Sacramento, to this Court based on federal question jurisdiction. (ECF No. 1.) Plaintiff did not object to Defendant’s
22 notice of removal or seek remand. However, even if no objection is made to removal, district courts have an
23 independent obligation to examine whether federal jurisdiction exists. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S.
24 215, 230 (1990). The Court possesses federal question jurisdiction under 28 U.S.C. § 1331, based on Plaintiff’s sixth
25 cause of action for breach of implied contract of continued employment and seventh cause of action for breach of
26 covenant of good faith and fair dealing, and supplemental jurisdiction over Plaintiff’s remaining claims under 28
27 U.S.C. § 1367(a). *See Rissetto v. Plumbers & Steamfitters Local 343*, 94 F.3d 597, 600 n.2 (9th Cir. 1996); *Chmiel v.*
Beverly Wilshire Hotel Co., 873 F.2d 1283, 1286 (9th Cir. 1989); *Young v. Anthony’s Fish Grottos, Inc.*, 830 F.2d
28 993, 999 (9th Cir. 1987). As discussed in this section, Plaintiff’s sixth and seventh causes of action are preempted by
Section 301 of the LMRA because the implied contract and covenant alleged to be breached require interpretation of
the Collective Bargaining Agreement. *See Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 209 (1985); *Milne*
Employees Ass’n v. Sun Carriers, 960 F.2d 1401, 1411 (9th Cir. 1991); *Cook v. Lindsay Olive Growers*, 911 F.2d
233, 238–39 (9th Cir. 1990).

⁸ When a summary judgment motion is unopposed, a district court must “determine whether summary
judgment is appropriate — that is, whether the moving party has shown itself to be entitled to judgment as a matter of
law.” *Leramo, M.D. v. Premier Anesthesia Medical Group*, 2011 WL 2680837 at *8 (E.D. Cal. 2011) (quoting
Anchorage Assocs. v. V.I. Bd. of Tax Review, 922 F.2d 168, 175 (3rd Cir. 1990)). A district court “cannot base the

1 of action are reviewed under the same legal framework and require identical discussion of facts
2 and legal analysis. For these reasons, the Court discusses these causes of actions in tandem.

3 Section 301 of Labor Management Relations Act (“LMRA”) provides federal jurisdiction
4 over “[s]uits for violation of contracts between an employer and a labor organization”, 29
5 U.S.C. § 185(a), and carries with it “a congressional mandate to the federal courts to fashion a
6 body of federal common law to be used to address disputes arising out of labor contracts.” *Allis-*
7 *Chalmers*, 471 U.S. at 209 (citing *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456 (1957)).
8 As a result of this expansive mandate, the “preemptive force of section 301 is so powerful as to
9 displace entirely any state cause of action for violation of contracts between an employer and a
10 labor organization.” *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 23
11 (1983).

12 When “[a] claim pleaded under state law” is determined to be preempted by § 301 of the
13 LMRA because it “requires the interpretation of a collective bargaining agreement[, it] is
14 transformed by § 301 of the LMRA into a claim arising under federal law.” *Rissetto*, 94 F.3d at
15 599 (citing *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 413 (1988); *Milne*
16 *Employees*, 960 F.2d at 1408). “[T]he pre-emptive effect of § 301 . . . extend[s] beyond [the]
17 suits alleging contract violations[and] require[s] that ‘the relationships created by [a collective-
18 bargaining] agreement’ be defined by application of ‘an evolving federal common law grounded
19 in national labor policy.’” *Allis-Chalmers*, 471 U.S. at 210–11 (quoting *Bowen v. United States*
20 *Postal Serv.*, 459 U.S. 212, 224–225 (1983)). Accordingly, “questions relating to what the parties
21 to [the collective bargaining] agreement agreed, and what legal consequences were intended to
22 flow from breaches of that agreement, must be resolved by reference to uniform federal law.”
23 *Allis-Chalmers*, 471 U.S. at 211. To ensure uniform federal interpretation of a collective
24 bargaining agreement (“CBA”), Section 301 “preempts state law claims that are based directly on
25

26 entry of summary judgment on the mere fact that the motion is unopposed, but, rather must consider the merits of the
27 motion.” *Id.* (quoting *United States v. One Piece of Real Property, etc.*, 363 F.3d 1099, 1101 (11th Cir. 2004)). A
28 court “need not *sua sponte* review all of the evidentiary materials on file at the time the motion is granted, but must
ensure that the motion itself is supported by evidentiary materials.” *Id.* (quoting *One Piece of Real Property*, 363
F.3d at 1101).

1 rights created by a collective bargaining agreement as well as claims that are substantially
2 dependent on an interpretation of a collective bargaining agreement.” *Beals v. Kiewit Pacific Co.,*
3 *Inc.*, 114 F.3d 892, 894 (9th Cir. 1997) (citing *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 394
4 (1987)). It is not dispositive that a complaint is framed without reference to a CBA, and Section
5 301 does not preempt every claim “concerning employment, or tangentially involving a provision
6 of a collective-bargaining agreement.” *Allis-Chalmers Corp.*, 471 U.S. at 211.

7 Accordingly, the Ninth Circuit employs a two-step analysis to determine whether Section
8 301 preempts a state law claim. *Burnside v. Kiewit Pacific Corp.*, 491 F.3d 1053, 1059 (9th Cir.
9 2007). First, the Court determines “whether the asserted cause of action involves a right
10 conferred upon an employee by virtue of state law, not by a CBA. If the right exists solely as a
11 result of the CBA, then the claim is preempted, and [the] analysis ends there.” *Id.* (citing *Allis-*
12 *Chalmers*, 471 U.S. at 212). “If, however, the right exists independently of the CBA,” then the
13 Court continues to step two of the analysis to consider “whether it is nevertheless ‘substantially
14 dependent on analysis of a collective-bargaining agreement.’ If such dependence exists, then the
15 claim is preempted by section 301; if not, then the claim can proceed under state law.” *Id.* (citing
16 *Caterpillar*, 482 U.S. at 394 (quoting *Int’l Brotherhood of Elec. Workers v. Hechler*, 481 U.S.
17 851, 859 n.3 (1987))). “A state law claim is not preempted under § 301 unless it necessarily
18 requires the court to interpret an existing provision of a CBA that can reasonably be said to be
19 relevant to the resolution of the dispute.” *Cramer v. Consol. Freightways, Inc.*, 255 F.3d 683,
20 693 (9th Cir. 2001), *as amended* (Aug. 27, 2001).

21 Here, Plaintiff alleges in his sixth cause of action that Plaintiff and Defendant “entered
22 into an implied contract” that “[b]ased on oral representations and/or conduct of Defendant[] . . .
23 Plaintiff . . . would be employed by Defendant[] so long as [Plaintiff’s] performance was
24 satisfactory, and that [D]efendant would not discharge [Plaintiff] without good and just cause.”
25 (ECF No. 1, Ex. A ¶¶ 46–47.) Relatedly, Plaintiff alleges in his seventh cause of action that “the
26 [implied] employment agreement referred to [in his sixth cause of action] contained an implied
27 covenant of good faith and fair dealing, which obligated Defendant[] to perform the terms and
28 conditions of the agreement fairly and in good faith and to refrain from doing any act that would

1 prevent or impede Plaintiff from performing any or all of the conditions of the contract that he
2 agreed to perform, or any at that would deprive Plaintiff of the benefits of the contract.” (ECF
3 No. 1, Ex. A ¶ 53.)

4 The implied covenant or contract claim is designed to protect the job security of
5 employees who at common law could be fired at will. *Young*, 830 F.2d at 999. Unionized
6 employees, however, experience no comparable lack of job security, whose employment
7 relationship is governed by a collective bargaining agreement. *Id.* “[When t]he collective
8 bargaining agreement guarantees the employer will [terminate] employees only upon just cause,”
9 as is the case here, “the agreement . . . provide[s] the same or greater protection of job security
10 that state . . . law seeks to provide for nonunionized employees.” *Stallcop v. Kaiser Found.*
11 *Hosps.*, 820 F.2d 1044, 1049 (9th Cir. 1987) (citations omitted). “The key to determining the
12 scope of preemption is not how the complaint is cast, but whether the claims can be resolved only
13 by referring to the terms of the collective bargaining agreement. A contrary result would frustrate
14 the federal interest in uniform federal interpretation of collective agreements, allowing ‘parties to
15 evade the requirements of § 301 by relabeling their contract claims’” *Young*, 830 F.2d at
16 999 (quoting *Allis-Chalmers*, 471 U.S. at 211). “[A]s long as the state-law claim can be resolved
17 without interpreting the [collective-bargaining] agreement itself, the claim is ‘independent’ of
18 the agreement for § 301 pre-emption purposes.” *Lingle*, 486 U.S. at 410.

19 Even though Plaintiff has framed his sixth and seventh causes of action as being based on
20 an “oral[] . . . employment contract with Defendant[,]” (ECF No. 1, Ex. A ¶¶ 46–47), and in
21 essence arguing such an implied contract is independent from the CBA, the Ninth Circuit has
22 explained that when “[P]laintiff’s claim cannot be resolved without interpreting the applicable
23 CBA . . . it is preempted.” *Cramer*, 255 F.3d at 691 (citing *Hechler*, 481 U.S. at 861–62).
24 Plaintiff’s claims for breach of implied contract and for breach of covenant are based on whether
25 or not Defendant terminated Plaintiff’s employment for good or just cause: “[Defendant]
26 orally . . . assure[d] Plaintiff on various occasions that his work performance was of good or high
27 quality, giving Plaintiff the reasonable belief that he would not be terminated arbitrarily [and]
28 Plaintiff would not be discharged unless there was good cause to do so,” (ECF No. 1, Ex. A ¶ 46);

1 and “Plaintiff . . . reasonably relied on Defendant[’s] representations that . . . Defendant[] would
2 not discharge him without good and just cause,” (ECF No. 1, Ex. A ¶ 54). However, to determine
3 the meaning of “good cause” and “just cause” in Plaintiff’s employment termination requires
4 interpretation of the CBA, which governs Plaintiff’s employment with Defendant. “[A]ny
5 independent agreement of employment concerning a job position covered by the CBA could be
6 effective only as part of the collective bargaining agreement.” *Beals*, 114 F.3d at 894 (citations
7 omitted) (alterations omitted); *see also Young*, 830 F.2d at 997–98 (explaining that an alleged oral
8 contract between employee and employer regarding employment reinstatement is controlled by
9 CBA since employee held position covered by collective bargaining agreement); *Stallcop*, 820
10 F.2d at 1048 (finding that alleged oral agreement made by employer in connection with
11 employee’s employment reinstatement was only effective as part of the collective bargaining
12 agreement). Therefore, “section 301 preempts the California state cause of action for breach of
13 the implied covenant of good faith and fair dealing when an employee enjoys comparable job
14 security under a collective bargaining agreement.” *Milne Employees*, 960 F.2d at 1411 (citing
15 *Cook*, 911 F.2d at 238–39); *see also Chmiel*, 873 F.2d at 1286; *Young*, 830 F.2d at 999).

16 Accordingly, the Court GRANTS Defendant’s motion for summary judgment as to
17 Plaintiff’s breach of implied contract and breach of covenant claims.

18 E. Eighth and Ninth Causes of Action: Infliction of Emotional Distress

19 i. *Cause of Action Eight: Intentional Infliction of Emotional Distress*

20 Defendant seeks summary judgment on Plaintiff’s eighth⁹ cause of action, which alleges
21 that Defendant intentionally inflicted emotional distress upon Plaintiff when Defendant
22 terminated Plaintiff’s employment. Defendant argues, “[a]s a threshold matter, to the extent that
23 [P]laintiff purports to bring a ‘distinct cause of action’ for intentional or negligent infliction of
24 emotional distress . . . directed at the intentional, malicious aspects of [D]efendant’s conduct such
25 claims are barred by the exclusivity provisions of California workers’ compensation law.” (ECF

26 ⁹ Defendant states “Plaintiff’s Seventh and Eighth Causes of Action are for, respectively, intentional and
27 negligent infliction of emotional distress.” (ECF No. 11 at 24:21–22.) However, Plaintiff’s claim for intentional
28 infliction of emotional distress is cause of action eight while his claim for negligent infliction of emotional distress is
cause of action nine. (ECF No. 1, Ex. A ¶¶ 59–72.)

1 No. 11 at 24:23–25:3) (citation omitted). Defendant alternatively argues, “[i]nsofar as [P]laintiff
2 means instead to state a claim based on his ‘*Tameny*’ and statutory claims, . . . [t]here is no
3 evidence sufficient to sustain the essential elements [because P]laintiff cannot establish that his
4 termination was in violation of either public policy or the FEHA.” (ECF No. 11 at 25:5–14)
5 (citation omitted).

6 Under California law, “[a] cause of action for intentional infliction of emotional distress
7 exists when there is (1) extreme and outrageous conduct by the defendant with the intention of
8 causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff’s
9 suffering severe or extreme emotional distress; and (3) actual and proximate causation of the
10 emotional distress by the defendant’s outrageous conduct.” *Hughes v. Pair*, 46 Cal. 4th 1035,
11 1050 (2009) (citations omitted) (internal quotations omitted). Extreme and outrageous conduct
12 must “exceed all bounds of that usually tolerated in a civilized community.” *Id.* at 1051 (citation
13 omitted) (internal quotations omitted). “Whether a defendant’s conduct can reasonably be found
14 to be [extreme and] outrageous is a question of law that must initially be determined by the
15 court” *Berkley v. Dowds*, 152 Cal. App. 4th 518, 534 (2007) (citation omitted).

16 “A simple pleading of personnel management activity is insufficient to support a claim of
17 intentional infliction of emotional distress, even if improper motivation is alleged.” *Janken v.*
18 *GM Hughes Electrs.*, 46 Cal. App. 4th 55, 80 (1996). “Managing personnel is not outrageous
19 conduct beyond the bounds of human decency, but rather conduct essential to the welfare and
20 prosperity of society.” *Id.* Personnel management activities include, “hiring and firing, job or
21 project assignments, office or work station assignments, promotion or demotion, performance
22 evaluations, the provision of support, the assignment or nonassignment of supervisory functions,
23 deciding who will and who will not attend meetings, deciding who will be laid off” *Id.* at
24 64–65.

25 Defendant argues for summary judgment on the grounds that there is “nothing on this
26 record that would even suggest ‘extreme or outrageous conduct’ undertaken with the intent to
27 inflict severe emotional injury against [P]laintiff” because “[P]laintiff admitted to conduct that
28 violated store rules, company policy regarding alcohol sales, and state law. That an employer

1 might discipline an employee who admittedly engages in such conduct hardly demonstrates either
2 outrageousness or an intent to inflict emotional injury.” (ECF No. 11 at 25:17–21) (emphasis
3 omitted). Defendant further argues, “[P]laintiff testified only that he was ‘depressed’ and ‘angry’
4 and that he was worried about supporting his family, but that his anxiety went away when he
5 started working again[, which] is neither ‘substantial nor enduring’ as a matter of law and thus
6 insufficient to sustain [P]laintiff[’]s claim of either intentional or negligent infliction of emotional
7 distress.” (ECF No. 11 at 25:22–26) (citations omitted).

8 As discussed above, *supra* Part III(D) and note 7, Plaintiff’s opposition to Defendant’s
9 motion for summary judgment does not address this cause of action. However, Plaintiff alleges in
10 his Complaint that “Defendant’s unlawful retaliation and termination of Plaintiff[’s
11 employment]” are “beyond all bounds of decency in a civilized society” and has caused Plaintiff
12 “to suffer from extreme emotional distress, including but not limited to: mental anguish, outrage,
13 frustration, severe anxiety about his family’s financial security, fear of harm to his employability,
14 anxiety about damage to his reputation, embarrassment among friends/family and colleagues, and
15 the disruption of his personal life.” (ECF No. 1, Ex. A ¶ 60.)

16 Plaintiff’s allegations do not provide any facts that evince Defendant’s conduct was
17 outside employment and supervisory duties. Plaintiff’s allegations are based on his termination
18 from his employment, which is an activity that California courts have expressly found to
19 constitute personnel management activity and is insufficient to sustain a claim of
20 intentional infliction of emotional distress. *Janken*, 46 Cal. App. 4th at 64–65.

21 Accordingly, the Court GRANTS Defendant’s motion for summary judgment as to
22 Plaintiff’s intentional infliction of emotional distress claim.

23 ii. *Cause of Action Nine: Negligent Infliction of Emotional Distress*

24 Finally, Defendant seeks summary judgment on Plaintiff’s ninth¹⁰ cause of action, which
25 alleges that Defendant negligently inflicted emotional distress upon Plaintiff when Defendant

26 ¹⁰ Defendant states “Plaintiff’s Seventh and Eighth Causes of Action are for, respectively, intentional and
27 negligent infliction of emotional distress.” (ECF No. 11 at 24:21–22.) However, Plaintiff’s claim for intentional
28 infliction of emotional distress is cause of action eight while his claim for negligent infliction of emotional distress is
cause of action nine. (ECF No. 1, Ex. A ¶¶ 59–72.)

1 terminated Plaintiff's employment. Defendant argues, "[P]laintiff testified only that he was
2 'depressed' and 'angry' and that he was worried about supporting his family, but that his anxiety
3 went away when he started working again[, which] is neither 'substantial nor enduring' as a
4 matter of law and thus insufficient to sustain [P]laintiff's claim of either intentional or negligent
5 infliction of emotional distress." (ECF No. 11 at 25:22–26) (citations omitted).

6 "Negligent infliction of emotional distress, which is simply the tort of negligence,
7 contains the traditional elements of duty, breach of duty, causation and damages." *Jacoves v.*
8 *United Merch. Corp.*, 9 Cal. App. 4th 88, 107 (1992) (citing *Burgess v. Supr. Ct.*, 2 Cal. 4th 1064,
9 1072 (1992)). The California Supreme Court has "made it clear that to recover damages for
10 emotional distress on a claim of negligence where there is no accompanying personal, physical
11 injury, the plaintiff must show that the emotional distress was 'serious.'" *Wong v. Tai Jing*, 189
12 Cal. App. 4th 1354, 1377 (2010) (citing *Molien v. Kaiser Found. Hosps.*, 27 Cal. 3d 916, 927–30
13 (1980)). "[S]erious [emotional] distress may be found where a reasonable man, normally
14 constituted, would be unable to adequately cope with the [emotional] stress engendered by the
15 circumstances of the case." *Molien*, 27 Cal. 3d at 928 (citation omitted) (internal quotations
16 omitted).

17 As discussed above, *supra* Part III(D) and note 7, Plaintiff's opposition to Defendant's
18 motion for summary judgment does not address this cause of action. However, Plaintiff alleges in
19 his Complaint that "Defendant acted carelessly and recklessly, and breached a duty [owed] to
20 Plaintiff, its employee, to exercise reasonable care and consideration in acknowledgement of
21 Plaintiff's right to exercise his legal right not to engage in illegal business activity or conceal the
22 same, and to duly report it to his supervisors[, and e]ach breach of duty resulted in economic and
23 general harm to Plaintiff" which included "extreme emotional distress." (ECF No. 1, Ex. A
24 ¶¶ 70–71.) The Court disagrees. There is no evidence that Defendant engaged in any conduct
25 that would have subjected a reasonable man, normally constituted, to mental stress with which
26 Plaintiff would be unable to adequately cope. *Molien*, 27 Cal. 3d at 928 (citation omitted).

27 Accordingly, the Court GRANTS Defendant's motion for summary judgment as to
28 Plaintiff's negligent infliction of emotional distress claim.

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IV. CONCLUSION

For the foregoing reasons, Defendant's Motion for Summary Judgment (ECF No. 11) is GRANTED.

IT IS SO ORDERED.

Dated: March 27, 2018



Troy L. Nunley
United States District Judge