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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

PETER TENERELLI, an individual,
Plaintiff,
v.
RITE AID CORPORATION; and DOES 1
through 100, inclusive,
Defendants.

No. 2:17-CV-01011-JAM-EFB

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

This case arises from Rite Aid's termination of Peter Tenerelli, a Pharmacy District Manager who had worked for Rite Aid for 34 years. Plaintiff Peter Tenerelli ("Tenerelli" or "Plaintiff") alleges he was unlawfully fired because of his age and his reporting of drug inventory discrepancies. Defendant Rite Aid Corporation (together with Rite Aid Hdqtrs. Corp., "Rite Aid" or "Defendant") maintains it fired Tenerelli for making threats of violence in the workplace. Defendant moves for summary judgment on all claims. Mot., ECF No. 16-1. Tenerelli opposes the motion. Opp'n, ECF No. 17.

For the reasons set forth below, this Court GRANTS Defendant's motion.¹

¹ This motion was determined to be suitable for decision without oral argument. E.D. Cal. L.R. 230(g). The hearing was scheduled for April 2, 2019.

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I. FACTS AND PROCEDURAL BACKGROUND

Defendant Rite Aid Corporation is a retail drug store chain incorporated in Delaware and with its principal place of business in Pennsylvania. Notice of Removal, ECF No. 1, at 4-5.

Plaintiff Peter Tenerelli worked for Rite Aid for over 34 years. Undisputed Facts (UF), ECF No. 17-1, ¶ 1. He began working for Rite Aid in June 1982 as a pharmacist in Washington state. Id. ¶ 2. At the time of his termination on December 8, 2016, Tenerelli worked as a Pharmacy District Manager in Rite Aid's Ranch Cordova, California District Office. Id. ¶ 4.

During the week of November 27, 2016, Tenerelli made a comment to his coworker, Christopher Morris, about the use of a gun at work. UF ¶¶ 24, 35, 43. On December 5, 2016, Morris shared Tenerelli's comment from the prior week with Human Resource District Manager Kristy Foster-Potts, and the next day reported the comment to his supervisor, West Coast Divisional Asset Protection Director Michelle Jones. Id. ¶¶ 27-28. On December 6, 2016, Morris provided a written statement to Jones detailing his recollection of Tenerelli's comment: "Pete entered the office that I was in and closed the door . . . He began the conversation by stating, 'I'm only telling you this because I like you. If you are ever in this office and you hear the sound of a metal slide going back (as he was motioning to load an assault rifle), that's your cue to get out of the that backdoor over there within 5-10 seconds!' He then went on to say, 'I'm starting at the office over there', as he pointed to the Regional Admin's office. He then said, 'After that, I'll be working my way down that back wall.' " Id. ¶¶ 31-32.

1 That same day, on December 6, 2016, Jones and Pharmacy
2 Regional Vice President Steve Barney interviewed Tenerelli at a
3 Starbucks next to the Rancho Cordova District Office, during
4 which Tenerelli gave his side of the story. UF ¶¶ 33-34. In the
5 interview, Tenerelli admitted to Jones and Barney that he made a
6 comment to Morris about shooting himself, but not any coworkers.
7 Id. ¶ 35. Jones' statement from her interview with Tenerelli
8 provides "Peter stated to us that he did have a conversation in
9 the office 'that if you ever heard a clicking sound, (mimicked
10 the sound of a gun), don't bother calling 911. I have given in
11 to the cruel cruel world.' " Id. ¶ 37.

12 That night, as requested, Tenerelli provided a written
13 statement to Jones and Barney which included: "I jokingly stated
14 that if he [Morris] heard a click or bang in my office not to
15 call 911 and do not resuscitate me stating 'good bye cruel
16 world'." Id. ¶ 43. In the written statement, Tenerelli further
17 explained his comment: "I stated this completely in levity in
18 response to my being overworked . . . Never at any time would I
19 harm myself or others. These comments were never specific and I
20 was just poking fun at myself." Tenerelli Written Statement, ECF
21 No. 16-5, at 15. Tenerelli was aware that Rite Aid had policies
22 related to violent and threatening behavior in the workplace and
23 understood that engaging in violent and threatening behavior in
24 the workplace was a serious matter that would not be tolerated.
25 UF ¶¶ 16-20.

26 Roger Ceballos, Rite Aid's Senior Director of Human
27 Resources, reviewed and relied on Morris' and Tenerelli's written
28 statements, along with Jones' statement from her interview of

1 Tenerelli in making the decision to terminate Tenerelli's
2 employment. UF ¶ 47. Ceballos made the decision to terminate
3 Tenerelli because his admitted comments violated Rite Aid's
4 workplace violence policy and standards of conduct. Id. ¶ 49.
5 Ceballos had no knowledge of any discrimination against
6 Tenerelli, nor had Tenerelli reported any such discrimination to
7 Ceballos. Id. ¶¶ 52-53. Similarly, Ceballos was not aware
8 Tenerelli had raised any issues with anyone else at Rite Aid
9 about the accuracy of drug inventory reporting, including on DEA
10 Form 106s, nor had Tenerelli raised such concerns to Ceballos.
11 Id. ¶¶ 57-58. Tenerelli, who was an at will employee, was
12 terminated effective December 8, 2016. UF ¶¶ 1, 5.

13 On April 6, 2017, Tenerelli filed a Complaint against Rite
14 Aid in the Superior Court of the State of California, County of
15 Sacramento (Case No. 34-2017-00210709), bringing six causes of
16 action: (1) Wrongful Termination in Violation of a Public Policy;
17 (2) Violation of the California Whistleblower Protection Act and
18 California Government Code § 1102.5(c); (3) Discrimination based
19 on Age in Violation of California Government Code § 12940(a);
20 (4) Breach of Implied Covenant of Good Faith and Fair Dealing;
21 (5) Breach of Employment Contract; (6) and Intentional Infliction
22 of Emotional Distress. EFC No. 1 at 16-29. On May 15, 2017,
23 Rite Aid removed the case to federal court on the basis of
24 diversity jurisdiction. Notice of Removal at 3.

25 On March 5, 2019, Rite Aid moved for summary judgment on all
26 six causes of action. Mot., ECF No. 16-1. Tenerelli opposed the
27 motion. Opp'n, ECF No. 17.

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1 II. OPINION

2 A. Age Discrimination

3 To defeat a claim of age discrimination on a motion for
4 summary judgment, an employer must show that (1) the plaintiff
5 could not establish one of the elements of his FEHA claim or
6 (2) there was a legitimate, nondiscriminatory reason for its
7 decision to terminate the plaintiff's employment. Lawler v.
8 Montblanc N. Am., LLC, 704 F.3d 1235, 1242 (9th Cir. 2013)
9 (citing Dep't of Fair Emp't & Hous. v. Lucent Techs., Inc.,
10 642 F.3d 728, 745 (9th Cir. 2011)). If the employer meets its
11 burden, the discharged employee must then raise a triable issue
12 of material fact as to whether the employer's proffered reason
13 for the termination was mere pretext for unlawful discrimination.
14 Lucent Techs., 642 F.3d at 746.

15 1. Prima Facie Case

16 Tenerelli carries the initial burden of establishing a prima
17 facie case of age discrimination. See McDonnell Douglas Corp. v.
18 Green, 411 U.S. 792, 802 (1973). To state a prima facie age
19 discrimination case under FEHA, Tenerelli must establish that:
20 (1) he was a member of a protected class (i.e., 40 years of age
21 or older); (2) he was performing competently in the position he
22 held; (3) he suffered an adverse employment action, such as
23 termination; and (4) some other circumstance suggests a
24 discriminatory motive. Santillan v. USA Waste of California,
25 Inc., 853 F.3d 1035, 1043 (9th Cir. 2017). It is undisputed that
26 Tenerelli has satisfied the first, second, and third elements.
27 Mot. at 12. The parties also agree there is no direct evidence
28 of age discrimination. Opp'n at 4.

1 Tenerelli has failed to put forward circumstances suggesting
2 a discriminatory motive in his termination. Roger Ceballos, Rite
3 Aid's Senior Director of Human Resources, made the decision to
4 terminate Tenerelli based on his admitted comment about shooting
5 a gun in the office. UF ¶¶ 42-44, 47-49. Tenerelli never
6 reported any age discrimination to Ceballos. Id. ¶ 52. Nor is
7 there any evidence - only pure speculation by Tenerelli - that
8 Ceballos had knowledge of age-related comments directed towards
9 Tenerelli. Id. ¶¶ 53, 78-83. "[S]tray remarks that are
10 unconnected to employment decisionmaking" do not support a FEHA
11 discrimination claim. Harris v. City of Santa Monica, 56 Cal.
12 4th 203, 231 (Cal. 2013).

13 2. Legitimate, Nondiscriminatory Reason

14 Tenerelli's claim of age discrimination also fails because
15 Rite Aid has articulated a legitimate, nondiscriminatory reason
16 for the termination. McDonnell Douglas, 411 U.S. at 802.
17 Tenerelli admitted, in a written statement provided to Rite Aid,
18 to commenting about shooting a gun at work which, even if made in
19 jest and directed at himself, was a violation of Rite Aid's
20 workplace violence policy and standards of conduct. UF ¶¶ 42-44,
21 49. It is undisputed that Tenerelli's admission to making this
22 comment, along with statements from Christopher Morris and
23 Michelle Jones regarding the comment, served as the basis for
24 Tenerelli's termination. UF ¶¶ 32, 35-37, 47-49.

25 3. Pretext

26 Where an employer provides a legitimate, nondiscriminatory
27 reason for the adverse employment action, the burden shifts back
28 to the employee to show that the employer's proffered reason was

1 simply a pretext for discrimination. McDonnell Douglas, 411 U.S.
2 at 804. Tenerelli fails to establish Rite Aid's reason for
3 terminating him was pretextual. Indeed, it is undisputed that
4 Rite Aid's reason for terminating Tenerelli was his admitted
5 statement regarding shooting a gun at work. UF ¶¶ 35-37, 42-44,
6 47-49. Tenerelli's argument that "Mr. Ceballos was not working
7 in a bubble and in fact may have had significant information that
8 would influence his decision to terminate" is pure speculation,
9 and comes nowhere close to the "specific" and "substantial"
10 circumstantial evidence needed to create a genuine issue of
11 material fact as to pretext. Cornwell v. Electra Cent. Credit
12 Union, 439 F.3d 1018, 1029 (9th Cir. 2006).

13 4. Conclusion

14 Thus, this Court grants summary judgment to Rite Aid on
15 Tenerelli's third cause of action for age discrimination under
16 FEHA. Moreover, to the extent this age discrimination claim is
17 also brought under the ADEA, summary judgment is likewise
18 warranted. Shelley v. Geren, 666 F.3d 599, 607 (9th Cir. 2012).

19 B. Retaliation

20 To establish a prima facie case of retaliation a plaintiff
21 must demonstrate (1) he engaged in a protected activity, (2) his
22 employer subjected him to an adverse employment action, and
23 (3) there is a causal link between the two. Mokler v. Cty. of
24 Orange, 157 Cal. App. 4th 121, 138 (Cal. Ct. App. 2007).

25 Tenerelli alleges he reported, to people he believed to be
26 members of upper management, that, based on certain drug
27 inventory discrepancies, he thought the DEA Form 106s he was
28 filling out and signing had the potential to be inaccurate.

1 UF ¶¶ 85, 88. Setting aside whether that reporting constitutes a
2 protected activity under California Labor Code § 1102.5 (see UF
3 ¶¶ 84-97), the undisputed facts show no causal link between this
4 activity and Tenerelli's termination. The decisionmaker on
5 Tenerelli's termination, Roger Ceballos, was not aware of any
6 concerns Tenerelli raised about allegedly inaccurate DEA Form
7 106s or any other similar reports. UF ¶¶ 50, 57-58. Tenerelli's
8 contention that "Mr. Ceballos is not isolated from others" (Opp'n
9 at 7) is insufficient to create a genuine issue of material fact
10 as to a causal link.

11 Thus, this Court grants summary judgment to Rite Aid on
12 Tenerelli's second cause of action for retaliation under
13 California Labor Code § 1102.5. Moreover, to the extent the
14 retaliation claim is brought under the California Whistleblower
15 Protection Act (California Government Code § 8547.8), summary
16 judgment is warranted because Tenerelli was not a state employee.
17 McKinney v. Apollo Grp., Inc., Case No. 07-cv-2373-WQH-CAB, 2010
18 WL 11442914, at *13 (S.D. Cal. Jan. 28, 2010).

19 C. Wrongful Termination in Violation of Public Policy

20 A claim for wrongful termination in violation of public
21 policy is a derivative claim which "requires a showing that there
22 has been a violation of a fundamental public policy embodied in
23 statute." Merrick v. Hilton Worldwide, Inc., 867 F.3d 1139, 1150
24 (9th Cir. 2017). Because Tenerelli's age discrimination and
25 retaliation claims fail as a matter of law, his derivative claim
26 of wrongful termination necessarily fails as well.

27 Thus, this Court grants summary judgment to Rite Aid on
28 Tenerelli's first cause of action.

1 D. Breach of Employment Contract and Breach of Implied
2 Covenant of Good Faith and Fair Dealing

3 “[T]here is a statutory presumption that employment is
4 terminable at will . . .” Eisenberg v. Alameda Newspapers, Inc.,
5 74 Cal. App. 4th 1359, 1386 (Cal. Ct. App. 1999); Cal. Labor Code
6 § 2922. Tenerelli argues “it can be inferred” from his 34 years
7 of employment with Rite Aid that he “had a reasonable belief that
8 he would only be terminated for good cause.” Opp’n at 8.

9 Contrary to Tenerelli’s unsupported assertion, it is undisputed
10 that he was an at-will employee and he never received anything
11 in writing from Rite Aid changing that status. UF ¶¶ 5, 15.
12 Thus, because Tenerelli was an at-will employee, his breach of
13 contract claim fails as a matter of law. Guz v. Bechtel Nat.
14 Inc., 24 Cal. 4th 317, 339-344 (Cal. 2000) (agreeing that “an
15 employee’s mere passage of time in the employer’s service, even
16 where marked with tangible indicia that the employer approves the
17 employee’s work, cannot alone form an implied-in-fact contract
18 that the employee is no longer at will.”) (emphasis in original).

19 Moreover, a terminated at-will employee cannot assert a
20 claim for breach of the implied covenant of good faith and fair
21 dealing. Horn v. Cushman & Wakefield W., Inc., 72 Cal. App. 4th
22 798, 819-820 (Cal. 1999) (affirming dismissal of implied covenant
23 claim by at-will employee because “[w]here there is no underlying
24 contract there can be no duty of good faith arising from the
25 implied covenant”). As with his breach of contract claim,
26 Tenerelli’s breach of implied covenant claim fails.

27 Thus, this Court grants summary judgment to Rite Aid on
28 Tenerelli’s fourth and fifth causes of action.

1 E. Intentional Infliction of Emotional Distress

2 California recognizes a cause of action for intentional
3 infliction of emotional distress (IIED) when: (1) there is
4 extreme and outrageous conduct by the defendant with the
5 intention of causing, or reckless disregard of the probability of
6 causing, emotional distress; (2) the plaintiff suffers severe or
7 extreme emotional distress; and (3) the defendant's outrageous
8 conduct is the actual and proximate causation of the emotional
9 distress. Lawler, 704 F.3d at 1245.

10 Tenerelli's IIED claim fails as a matter of law. Tenerelli
11 contends the "combination of the age harassment, the excessive
12 workload, and the stress of trying to protect the company from
13 their own policies built a level of stress that needed to be
14 released" and that his "very mellow release in light of the
15 stressors was to make a single comment" which "lead to the
16 outrageous act of termination." Opp'n at 9. But a termination
17 of employment alone is not sufficient to satisfy the standard for
18 extreme and outrageous conduct. Janken v. GM Hughes Elecs.,
19 46 Cal. App. 4th 55, 80 (Cal. Ct. App. 1996) ("A simple pleading
20 of personnel management activity is insufficient to support a
21 claim of intentional infliction of emotional distress, even if
22 improper motivation is alleged."); see also Lawler, 704 F.3d at
23 1245-1246. Moreover, distress from personnel decisions like the
24 assignment of an excessive workload or termination would fall
25 within the scope of workers' compensation, not IIED. Miklosy v.
26 Regents of Univ. of California, 44 Cal. 4th 876, 902 (Cal. 2008).

27 Thus, this Court grants summary judgment to Rite Aid on
28 Tenerelli's sixth cause of action.

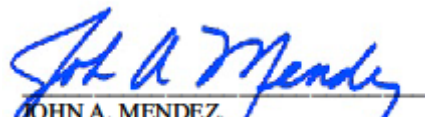
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III. ORDER

For the reasons set forth above, Defendant's Motion for Summary Judgment is GRANTED in its entirety. ECF No. 16.

IT IS SO ORDERED.

Dated: April 18, 2019



JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE