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**\*E-Filed 12/15/11\***

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

RANDALL G. HUCK,

No. C 10-01845 RS

Plaintiff,  
v.

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

KONE INC.,

Defendant.

I. INTRODUCTION

Plaintiff Randall Huck brings a claim for wrongful termination against his former employer, Kone, Inc. He advances a number of violations under the California Fair Employment and Housing Act (“FEHA”) and additionally charges defendant with intentional infliction of emotional distress. Defendant Kone moves for summary judgment on all of Huck’s claims. For the reasons described below, Kone’s motion for summary judgment is granted.

II. RELEVANT FACTS

On October 6, 2007, Plaintiff Huck started working at Kone, Inc., as the Western Regional Environmental Health and Safety Director. In the beginning of September the following year, Huck began experiencing pain and a substantially limited range of motion in his left arm. These

1 symptoms prevented Huck from performing routine tasks at work and he decided to seek medical  
2 attention. On September 19, 2009, Dr. Savant examined Huck and concluded that his condition was  
3 aggravated by typing. Savant suggested that Huck begin using dictation software at work to reduce  
4 the pain.

5 Immediately thereafter, Huck informed his supervisor, Dennis Viehweg, of the doctor's  
6 recommendation. In response, Kone provided him with "Dragon Speaking" dictation software.  
7 Despite such accommodation, Huck's pain did not subsist and he revisited Savant on January 16,  
8 2009. At this appointment, Savant diagnosed Huck with elbow tendinitis and carpal tunnel  
9 syndrome. Huck continued to work, relying on a prescribed elbow brace and dictation software to  
10 alleviate his symptoms.

11 On February 24, 2009, Huck woke up in extreme pain and realized that his left arm was  
12 inflamed. He called Savant who recommended that Huck stop working immediately and come in  
13 for further evaluation on March 6, 2009. After speaking with Savant, plaintiff drove to his doctor's  
14 office to get a note attesting to his need to take medical leave until March 6, 2009. Huck then  
15 reported to work, stopping on the way at OfficeMax to pick up posters for Viehweg. Shortly after  
16 he arrived at work, Huck ran into Viehweg. During this encounter, Huck asserts that he gave  
17 Viehweg the OfficeMax posters along with his doctor's note. He allegedly also told Viehweg that  
18 he would not be able to attend the meeting the next day. To buttress this claim, Huck provides his  
19 OfficeMax receipts and an email from Viehweg regarding the posters. (Pl's. Ex. 10). Huck further  
20 maintains that before leaving the office that day, he informed the Western Region Director of  
21 Human Resources, Rebecca Trotsky, of his upcoming temporary medical leave.

22 Pursuant to his doctor's advice, Huck stayed home the following day and instructed his wife,  
23 Zohra Evans-Huck, to manipulate manually his left shoulder and wrist. Plaintiff also alleges that on  
24 February 26, 2009, Viehweg phoned Huck to inquire into why he had missed the meeting the day  
25 before. Huck states that the conversation was hostile even after he reminded Viehweg of his current  
26 medical leave. He claims that Viehweg was so enraged that Huck feared losing his job. This  
27 anxiety allegedly led Huck to defy his doctor's orders and travel to Los Angeles on a pre-planned  
28

1 business trip the very same day.<sup>1</sup>

2 On February 26, 2009, Huck received an annual bonus of \$20,306.00. Eligible for a bonus  
3 up to 20% of his base salary, he received one pegged at 13%. Internal personnel documents support  
4 Huck's bonus, crediting his diligence and positive attitude at the office. (Pl's. Ex. 11).

5 Viehweg called Huck again on February 27, 2009, to inquire into why Huck's medical leave  
6 caused him to miss the local meeting on February 26, but did not prevent him from traveling for  
7 work. Huck explained that he had tried to comply with his doctor's orders by staying home on  
8 February 26, but after speaking with Viehweg that day, he worried about getting fired and decided  
9 to go to Los Angeles. Huck also explained that despite his best attempts to continue working, the  
10 trip had only exacerbated the pain. He was determined therefore to take his doctor's advice and stop  
11 working until his medical reevaluation in March.

12 On February 27, 2009, Huck went on a pre-planned business trip to Hawaii. In the  
13 Complaint he states that on the evening of February 27, Viehweg told him to cancel the trip. Huck  
14 attests that he decided to go despite Viehweg's directions, because the airfare and hotel were  
15 nonrefundable. Kone disputes this timeline, stating that Viehweg instructed plaintiff to cancel the  
16 business meeting on February 26, before he left for Hawaii. Huck's deposition supports defendant's  
17 sequence of events: in the deposition, Huck admits that Viehweg told him to cancel the meeting the  
18 day before he left for Hawaii. (Def's. Ex. B). Although Huck complied with Viehweg's request  
19 and canceled the meeting, he still went to Hawaii using the pre-paid flight and hotel reservations.  
20 Huck justifies his decision to go to Hawaii, in spite of Viehweg's instructions, by asserting that he  
21 hoped the trip would help him heal. He also thought it futile to let a prepaid trip go to waste.  
22 Furthermore, Huck contends that he sent Viehweg an email informing him of the decision to go on  
23 the trip.<sup>2</sup>

24 <sup>1</sup> Defendant Kone's motion for summary judgment does not mention this conversation.

25 <sup>2</sup> Prior to oral argument, there was no evidence in the record to support such correspondence. At the  
26 motion hearing, however, Huck submitted email correspondence in which he appears to inform  
27 Viehweg that he canceled the Hawaii meeting, but still intends to travel there for rehabilitation  
28 purposes. Defendant contests both the admissibility and trustworthiness of these emails, pointing to  
a number of format and structure irregularities: First, Huck presents a confirmation email stating  
that Viehweg read and received Huck's email about his plan to travel on February 27, 2009, at 8:46  
p.m. The email, however, was not sent until February 28, 2009 at 8:46. Additionally, the submitted  
emails contain different headers. While one places the "Sent" line above the "To" line, another  
email reverses the order. Finally, the dates of the emails do not follow a logical sequence. Huck

1 Defendant disagrees with much of plaintiff's narrative. Kone points out that in Huck's  
2 deposition he admits he did not inquire into whether the travel could be canceled or booked for  
3 another date. Furthermore, Kone's expense records reveal that Huck charged his rental car to the  
4 company credit card on March 1, 2009; a charge neither authorized nor prepaid. Defendant also  
5 emphasizes that Huck and Viehweg spoke while Huck was in Hawaii and states that Huck misled  
6 Viehweg into believing that he was still in California.

7 Huck disputes many of defendant's contentions. He maintains that he arranged for all non-  
8 prepaid trip charges to be charged to his account. This includes a number of charges at the Kamana  
9 Beach Hotel. (Pl's. Ex. 15). He also asserts that he submitted, or intended to submit, all of the  
10 prepaid expenses to Kone so that he could reimburse Kone for the trip. For this proposition, he  
11 refers to the Kone credit card policy regarding repayment of personal expenses, but offers no  
12 evidence that he actually submitted the appropriate forms. Furthermore, Huck insists he was  
13 unaware that the rental car was not a pre-paid expense. He states that on March 2, 2009, when he  
14 discovered he mistakenly had made unauthorized charges to the company credit card, he called his  
15 wife to make sure their joint account had sufficient funds to cover the rental car and other expenses.

16 On March 3, 2009, Viehweg emailed Kone employee, David Rickman, to investigate Huck's  
17 recent company charges. Rickman provided him with a list of the charges made to Huck's company  
18 card over the preceding several days, revealing that Huck had in fact been in Hawaii and that he had  
19 charged his rental car to the company credit card. According to company policy, unauthorized use  
20 of the company card represents grounds for disciplinary action. (Pl's. Ex. 15). It is for that reason  
21 Kone insists, that it decided to fire Huck on March 5, 2009. For support, defendant submits a  
22 "termination notice" stating that Huck "is being discharged for insubordination as well as misuse of  
23 company funds." (Def's. Ex. D).<sup>3</sup>

24 Huck's narrative of events is different. He claims that on March 3, 2009, Human Resources  
25 emails Viehweg on February 28, 2009, at 4:37 to explain that he received Viehweg's voicemail  
26 about canceling the Hawaii trip and requests Viehweg to "[p]lease let me know as soon as possible  
27 if you still want me to cancel." Then, in an email dated, February 27, 2009, at 7:45 p.m. Viehweg  
28 responds: "Yes. Cancel the trip." Huck subsequently responds in an email on February 28, 2009, at  
8:46 that he has canceled the meeting, but has decided to go on the trip.

<sup>3</sup> The termination notice is dated March 4, 2009 and signed on March 5, yet states that Huck's last day of work was March 6, 2009. An email from Trotsky, a Kone employee, however, supports the March 5 termination date. (Def's. Ex. F).

1 contacted him, directing him to fill out a short term disability form. (Pl’s. Ex. 16). On the same  
2 day, Huck received an email from Viehweg asking to meet on March 6. (Pl’s. Ex. 17). Huck  
3 explained to Viehweg that he had a doctor’s appointment and needed to postpone the meeting.  
4 Plaintiff then alleges that Viehweg responded by saying that Huck does “not get to decide when you  
5 work and when you don’t.” (Pl’s. Opp’n. to Mot. for Summ. J. at 7).

6 Huck received his disability papers on March 6, 2009. He filled them out immediately and  
7 returned them to Gloria Haut in Human Resources. On March 12, 2009, Haut emailed Huck to tell  
8 him that he was ineligible for disability benefits because he was fired on March 5, 2009, before  
9 Kone received his papers. Huck maintains that this is inaccurate because he was actually fired on  
10 March 6, 2009. To support the March 6 termination date, Huck notes discrepancies in defendant’s  
11 paperwork concerning his last day of work. He indicates that there are conflicting dates in his  
12 termination notice and that he received the short-term disability form from the Human Resources  
13 Department on March 6, 2009, a day after Kone maintains that he was fired.

14 On April 1, 2009, Huck obtained COBRA’s eligibility forms from Kone which included the  
15 American Recovery and Reinvestment Act (“ARRA”) premium reduction form. On April 13, 2009,  
16 he was informed that he was not ARRA eligible because he had been fired. Due to this ineligibility,  
17 Huck contacted the San Francisco Department of Labor (“DOL”) who told him that termination was  
18 not grounds for denial of ARRA reductions. After contacting Kone, the DOL representative was  
19 told that the cause for Huck’s termination was “gross misconduct,” thereby making Huck ineligible  
20 for ARRA.

21 Huck commenced this suit against his former employer in state court alleging disability  
22 discrimination, violations of California’s Fair Employment & Housing Act (“FEHA”), and  
23 intentional infliction of emotional distress.<sup>4</sup> Kone removed the case to this Court on the basis of  
24 diversity jurisdiction. It then moved for summary judgment.

### 25 III. LEGAL STANDARD

26 Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment “shall

27 <sup>4</sup> Although the Complaint states only one claim for relief, Huck’s pleadings and opposition papers  
28 suggest that he is also basing his wrongful termination claim on allegations of retaliation,  
harassment, failure to provide reasonable accommodation, failure to engage in the interactive  
process, and intentional infliction of emotional distress.

1 be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on  
2 file, together with the affidavits, if any, show that there is no genuine issue as to any material fact  
3 and that the moving party is entitled to a judgment as a matter of law.” The party who seeks  
4 summary judgment bears the initial responsibility of identifying an absence of a genuine issue of  
5 material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party satisfies this  
6 initial burden, it shifts to the non-moving party to present specific facts showing that there is a  
7 genuine issue for trial. Fed. R. Civ. P. 56(e); *Celotex*, 477 U.S. at 324. “Only disputes over facts  
8 that might affect the outcome of the suit under governing law” are material. *Anderson v. Liberty*  
9 *Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine issue exists if the non-moving party presents  
10 evidence from which a reasonable factfinder, viewing the evidence in the light most favorable to  
11 that party, could resolve the material issue in his or her favor. *Id.* at 248-49.

#### 12 IV. DISCUSSION

##### 13 A. Disability Discrimination Claim

14 It is not clear whether this claim and the allegation of failure to accommodate are being  
15 advanced within one claim for relief. Huck asserts, as evidence of discrimination, that defendant  
16 refused to accommodate his disability as required by FEHA. On multiple occasions he claims that  
17 he made requests for a temporary leave of absence which were denied. He states that Kone’s  
18 “discriminatory animus was obvious” from its “refusal to respect the nature of Huck’s medical  
19 leave.” (Compl. ¶ 27). Furthermore, Huck alleges that Kone decided to fire him instead of  
20 providing the reasonable accommodation of a temporary leave of absence.

21 Under FEHA, it is unlawful for an employer to “discharge [a] person from employment [or] .  
22 . . . discriminate against [a] person in compensation or in terms, conditions, or privileges of  
23 employment” because of his physical disability. *See* Cal. Gov. Code § 12940(a). When considering  
24 motions for summary judgment in cases arising under FEHA, federal courts apply the *McDonnell*  
25 *Douglas* three-step burden shifting analysis. *Zeinali v. Raytheon Co.*, 636 F.3d 544, 522 (9th Cir.  
26 2011); *Dept. of Fair Emp’t. & Housing v. Lucent Techs., Inc.*, 642 F.3d 728, 745 (9th Cir. 2011)  
27 (recognizing that federal courts must adopt California’s use of the Court’s burden shifting test when  
28 considering employment discrimination claims); *Guz v. Bechtel Nat. Inc.*, 24 Cal. 4th 317, 354

1 (2000). Under this framework, plaintiff must first establish a prima facie claim of disability  
2 discrimination. *Zeinali*, 636 F.3d at 552. If plaintiff effectively states this prima facie claim, the  
3 burden shifts to the employer to demonstrate a “legitimate, nondiscriminatory reason for the  
4 challenged action.” *Id.* at 552 (quoting *Dawson v. Entek Int’l*, 630 F.3d 928, 934-35 (9th Cir.  
5 2011)). Finally, if the employer makes a sufficient showing of a legitimate reason, the burden shifts  
6 back to the employee to prove that the employer’s asserted reason is a pretext for discrimination. *Id.*  
7 at 552-53.

8 1. Prima Facie Case of Disability Discrimination

9 To establish a prima facie case of disability discrimination under FEHA, a plaintiff must  
10 establish that: (1) he has a physical disability as defined by the statute; (2) he can fulfill the duties of  
11 employment with or without a reasonable accommodation; and (3) he was discriminated against on  
12 account of his disability. *See Zeinali*, 636 F.3d at 552 (citing *Guz v. Bechtel Nat. Inc.*, 24 Cal. 4th  
13 317 (Cal. 2000)). At the summary judgment stage, the burden on the plaintiff to demonstrate these  
14 elements is “minimal and does not even rise to the level of preponderance of the evidence.”  
15 *Jefferson v. Fed. Express Corp.*, No. C 09-04235 JSW, 2010 WL 3630984, at \*3 (N.D. Cal. Sept.  
16 14, 2010) (quoting *Lyons v. England*, 307 F.3d 1092, 1112 (9th Cir. 2002)).

17 a. Physical Disability

18 First, Huck must demonstrate that he is disabled by FEHA standards. FEHA defines a  
19 “physical disability” as the existence of a medical condition that hinders a “major life activity,” such  
20 as one’s employment. Cal. Gov. Code § 12926(k)(1)(A), (B). A plaintiff can prove his disability by  
21 showing that he had a medical diagnosis which limited his ability to work and that his employer was  
22 aware of this disabling condition. *See* Cal. Gov. Code § 12926(k)(1)(B)(I). Under FEHA, the  
23 definition of disability is broad and should be construed as such. *See* Cal. Gov. Code § 12993.

24 Huck has shown that he is disabled pursuant to FEHA. Huck began experiencing pain and  
25 reduced mobility in his left arm in September 2008. He soon visited his physician who told him that  
26 his condition was work related and recommended the use of dictation software. Huck informed his  
27 Kone supervisor of the doctor’s medical advice and the company provided him with the program,  
28 “Dragon Speak.” Despite this accommodation, Huck’s pain persisted and he returned to Dr. Savant

1 who advised him that his condition was likely exacerbated by work and that he should take a leave  
2 of absence. *See Artega v. Brink's Inc.*, 163 Cal. App. 4th 327, 348 (Cal. App. 2d 2008)  
3 (acknowledging that while pain is not always a FEHA disability, “[a]n assessment must be made to  
4 determine how, if at all, the pain affects the specific employee.”). Huck alleges that he immediately  
5 informed Kone of this desired leave of absence and, soon after, filled out a short term disability  
6 form. These facts demonstrate that Huck had a medically cognizable disability which limited his  
7 ability to type and travel: tasks that are essential to his job. This is sufficient to satisfy the broad  
8 FEHA definition of a disability. *See Cal. Gov. Code § 12993*. Huck, therefore, has satisfied the  
9 first element of his prima facie claim for employment discrimination.

10 b. Plaintiff's Qualifications

11 To establish the second factor of a prima facie claim for discrimination, Huck must show  
12 that, despite his disability, he is qualified to work at Kone because he can still perform the essential  
13 functions and “fundamental duties of the employment position.” Cal. Gov. Code § 12926(f). Once  
14 Huck informed Kone of his disability, the company accommodated his condition with dictation  
15 software. Huck's pain, however, persisted and his doctor soon recommended that he take a  
16 temporary leave of absence until his appointment on March 6, 2009. He told Viehweg of his  
17 doctor's advice and filed for disability leave in the beginning of March. Kone fired Huck soon after.  
18 At the time of Huck's termination, his doctor had not yet had the opportunity to determine Huck's  
19 ability to continue working. Rather, the purpose of the temporary leave was for Dr. Savant to have  
20 the chance to assess Huck's condition before he returned to Kone. The medical leave may have  
21 been finite. Neither plaintiff nor defendant knew at the time of termination whether Huck would be  
22 able to continue working. The Court, therefore, cannot assume that, as a matter of law, Huck was  
23 not qualified to continue working. *See Wong v. Pape Mach., Inc.*, No. CIV. S-08-0042 FCD DAD,  
24 2009 WL 937481, at \*7 (E.D. Cal. Apr. 7, 2009) (“It is unclear whether, at the time plaintiff took  
25 leave or at the time of her termination, either plaintiff or defendant knew if plaintiff would be able to  
26 return to work . . . . [O]n the record before it, the court cannot find that plaintiff was not a qualified  
27 individual as a matter of law.”).

28 c. Causation



1 Finally, Huck must satisfy the third element of his discrimination claim: that his employer  
2 fired him because of his disability. Cal. Gov. Code § 12940(a). To fulfill this burden, Huck needs  
3 to demonstrate first that the decision-making officials at Kone knew about his disability when they  
4 chose to fire him. *Franco v. Pier 1 Imps.*, No. EDCV 07-946-VAP (JCRz), 2008 WL 4217848, at  
5 \*16 (C.D. Cal. Sept. 11, 2008) (citing *Cohen v. Fred Meyer, Inc.*, 686 F.2d 793, 796 (9th Cir.  
6 1982)). Then, Huck must present enough evidence to infer that this knowledge of plaintiff’s  
7 disability was what caused his termination. *Id.* at 17.

8 In the Complaint, Huck adequately illustrates that his supervisor and other Kone employees  
9 knew about his disability. They also knew about his request for temporary medical leave. Huck has  
10 submitted evidence supporting this claim, including correspondence between Huck and Kone’s  
11 human resources department as well as Huck’s completed short-term disability form. (Pl’s. Exs. 6,  
12 7, 16). Although the parties disagree as to the extent of Kone’s knowledge about Huck’s condition  
13 or whether Huck was actually approved to take leave, it is undisputed that Kone officials were  
14 aware Huck was experiencing some sort of disabling condition. To this effect, they willingly  
15 provided him with both dictation software in 2008, and Kone’s short-term disability form.

16 Having satisfied the burden of demonstrating that Kone knew about his disability, Huck next  
17 offers evidence of causation, suggesting that Kone officials fired him because of his known  
18 disability and his request for a reasonable accommodation. He explains that on February 24, 2009,  
19 he told Viehweg and the director of human resources that he needed to take a leave of absence from  
20 his job. Then, after disobeying his doctor’s orders and traveling to Los Angeles, he once again  
21 informed Viehweg that he could not return to work until at least March 6, 2009. Huck contends that  
22 these conversations, coupled with his need to take temporary leave, were the impetus for his  
23 termination. He asserts that it was not a coincidence that he was fired within a few days of his  
24 request for short term leave. (Compl. ¶ 7).

25 “The temporal proximity between an employee’s disclosure of a medical condition and a  
26 subsequent termination can satisfy the employee’s prima facie causation requirement.” *Pier 1*  
27 *Imports*, 2008 WL 4217848, at \*17 (citing *Clark County Sch. Dist v. Breeden*, 532 U.S. 268, 273  
28 (2001)); see *Davis v. Team Elec. Co.*, 520 F.3d 1080, 1094 (9th Cir. 2008) (“Causation can be

1 inferred from timing alone where an adverse employment action follows on the heels of protected  
2 activity.” (quoting *Villiarmino v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1065 (9th Cir. 2002))). Here,  
3 plaintiff claims he told Kone about his condition in September or October of 2008. As his pain  
4 worsened, he kept his employer up to date on his progressive diagnosis. In early March 2009, The  
5 Human Resources Department at Kone called him to request that he complete the short-term  
6 disability form. Within the next few days, Huck was fired. Huck claims that Trotsky of Human  
7 Resources contacted him on March 3, 2009, and that he received the form on March 6, 2009. He  
8 further contends that he was fired on March 6, 2009. Alternatively, defendant asserts that Huck was  
9 fired on March 5, 2009, the day before he submitted his short-term disability form. Regardless of  
10 the exact termination date, Kone admits to learning about the disability only a few months before  
11 Huck’s firing. At summary judgment, where courts hold plaintiffs to only a minimal standard in  
12 making their prima facie case, the mere proximity of all of these events is sufficient for the Court to  
13 infer causation. Huck has established a prima facie case of discrimination.

14 2. Legitimate, Nondiscriminatory Reason for Termination

15 Once Huck establishes a prima facie claim for discrimination, Kone must demonstrate a  
16 legitimate, nondiscriminatory reason for Huck’s termination. An employer meets his burden under  
17 the *McDonnell Douglas* framework if he illustrates that the employee was fired because of a  
18 legitimate business purpose. *See, e.g., Valimont v. Chevron Energy Tech. Co.*, No. 09–17485, 2011  
19 WL 1979483, at \*2 (9th Cir. May 23, 2011) (concluding that an employer had a legitimate reason  
20 when the employee violated the company’s policies); *Hamed v. Macy West Stores, Inc.*, No. C–10–  
21 2790 JCS, 2011 WL 1935937, at \*4 (N.D. Cal. May 20, 2011) (finding a legitimate purpose when  
22 defendant argued that the employee violated the store’s coupon policies). The stated reason need  
23 not have been “wise or correct,” but merely lawful and nondiscriminatory. *Lawler v. Montblanc*,  
24 No. 10-CV-01131-LHK, 2011 WL 1466129, at \*7 (N.D. Cal. Apr. 15, 2011).

25 Defendant maintains that Huck was fired because he violated company policy in February  
26 and March of 2009. During this period, Viehweg directed Huck to cancel his trip to Hawaii. Huck  
27 went to Hawaii anyway, arguing that the trip was nonrefundable and was beneficial for his health.  
28 Kone asserts that Huck’s reasoning for defying orders are irrelevant: regardless, he indisputably

1 violated company policy by making the trip. Furthermore, while in Hawaii, Huck charged his rental  
2 car to the Kone business account. Kone states that this constituted an unauthorized business charge  
3 and was grounds for disciplinary action. Kone used its judgment to determine that the proper  
4 punishment was termination. This is evidenced in Kone’s termination notice, explaining the reasons  
5 for termination as, “insubordination as well as misuse of company funds.” (Def’s. Ex. D).  
6 Consequently, even if Huck had the intent to repay Kone for the Hawaii trip expenses, Kone had a  
7 nondiscriminatory reason to fire him for his violation of company policy. *See, e.g., Dumas v. New*  
8 *United Motor Mfg., Inc.*, 305 Fed. Appx. 445, 448 (9th Cir. 2008) (finding a legitimate reason for  
9 termination when the employer pointed to violations of company policy). This showing is sufficient  
10 to satisfy Kone’s burden to establish a legitimate reason for termination.

11 3. Pretext

12 The burden then shifts back to Huck to demonstrate that Kone’s proffered reason for  
13 termination is merely a pretext for discrimination. A plaintiff can prove pretext “either directly by  
14 persuading the court that a discriminatory reason more likely motivated the employer or indirectly  
15 by showing that the employer’s proffered explanation is unworthy of credence.” *Lucent Techs.,*  
16 *Inc.*, 642 F.3d at 746 (quoting *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1220 (9th Cir. 1998)).  
17 To show pretext a plaintiff cannot merely make assertions or rely on conjecture. *See Martin v.*  
18 *Lockheed Missiles & Space Co., Inc.*, 29 Cal. App. 4th 1718, 1735 (1994). Rather, he must be  
19 explicit in his allegations and provide “specific and substantial evidence” of the employer’s  
20 discriminatory motive. *Hersant v. Dep’t of Social Servs.*, 57 Cal. App. 4th 997, 1005 (1997) (“It is  
21 not enough for the employee simply to raise triable issues of fact concerning whether the employer’s  
22 reasons for taking the adverse action were sound. What the employee has brought is not an action  
23 for general unfairness but for [discrimination].”). A court must look at all the factors to determine if  
24 the evidence could convince a rational fact finder reasonably to infer that the employer’s actual  
25 motive was discriminatory. *Guz*, 24 Cal. 4th at 361-62 (listing a number of factors to consider,  
26 including the strength of plaintiff’s prima facie case, any probative value supporting that the  
27 employer’s nondiscriminatory reason is false, and other evidence supporting the employer’s  
28

1 argument). Otherwise, the court must grant the employer’s motion for summary judgment. *Id.* at  
2 362.

3 Plaintiff argues that Kone’s reason for termination, namely that Huck violated company  
4 policy, is merely a pretext for discrimination. Huck claims that Kone fired him, not because of the  
5 Hawaii trip, but because he requested a reasonable accommodation in the form of temporary leave.  
6 To buttress these assertions Huck pleads that he advised Viehweg and Human Resources of his  
7 doctor’s recommendation to stop working. He also submits a letter from Savant attesting to the  
8 doctor’s note he wrote for Huck to give to his employer. (Pl’s. Ex. 8).

9 Despite this proffered evidence, Huck is unable to demonstrate that he was actually denied  
10 the requested accommodation. He states that Viehweg called him to determine why Huck had  
11 missed a meeting the day after he went on medical leave, but does not offer any “specific or  
12 substantial evidence” of this conversation. *See Hersant, 57 Cal. App. 4th at 1005.* Even assuming  
13 this conversation occurred, however, standing alone, it is insufficient to establish pretext. *See id.* at  
14 1005 (requiring tangible evidence of discriminatory intent). Furthermore, after this alleged phone  
15 call, Kone accepted Huck’s leave of absence: In his declaration, Viehweg states that he never  
16 instructed Huck not to take a medical absence and was surprised when Huck defied doctor’s orders  
17 and went on the business trip to Los Angeles. Additionally, Kone contacted Huck to fill out short  
18 term disability paperwork in the beginning of March.

19 Huck admits to taking leave pursuant to his doctor’s advice. He traveled to Hawaii for this  
20 very reason. While Huck steadfastly insists that Kone retaliated against his request for leave by  
21 concocting a pretextual reason to fire him, there is no evidence for this allegation. *See Martin, 29*  
22 *Cal. App. 4th at 1735* (requiring more than mere allegations to find pretext). Conversely, there is  
23 ample evidence to support Kone’s stated legitimate reason for termination: Huck violated company  
24 policy by going on a canceled business trip paid for by his employer. He further violated that policy  
25 by charging additional items to the company credit card. Even if Huck intended to pay Kone back,  
26 he undeniably broke the rules: Kone Company Payment Card Policy states that the “P-card should  
27 not be used for personal expenses. In the event personal expenses are inadvertently charged to your  
28 P-card, attach a personal check payable to KONE.” (Pl’s. Ex. 15). Both parties agree that Huck

1 used the card for personal expenses. Huck has not proffered any evidence that this violation was  
2 inadvertent or that he tried to pay Kone back. Huck’s claim of pretext, therefore, is lacking.

3 At oral argument and in supplemental briefing, Huck presents an email exchange in which  
4 he allegedly informed Viehweg that he planned to travel to Hawaii despite the meeting’s  
5 cancellation. He contends that this evidence supports his claim of pretext because Viehweg knew  
6 about his upcoming trip yet failed to forbid him from going or inform him that the trip was against  
7 company policy. Kone objects to the admissibility and trustworthiness of these emails, referring to  
8 a number of form and timeline irregularities contained therein. Even assuming these emails are both  
9 admissible and credible, they do not establish pretext. They merely suggest that Huck informed  
10 Viehweg of his intention to travel to Hawaii on the pre-paid trip; they do not indicate that Viehweg  
11 approved of Huck’s plan or authorized the subsequent charges to the company credit card. Huck,  
12 therefore, is unable to present sufficient evidence to allow a rational fact finder to infer a  
13 discriminatory motive. *See Lucent Techs., Inc.*, 642 F.3d at 746 (“[T]he employee must  
14 demonstrate weaknesses, implausibilities, inconsistencies, or contradictions in the employer’s  
15 proffered legitimate reasons for its action that a reasonable factfinder could rationally find them  
16 unworthy of credence.”); *Guz*, 24 Cal. 4th at 358 (“[T]he ultimate issue is simply whether the  
17 employer acted with *a motive to discriminate illegally.*”) (emphasis in original).

18 Huck indicates that the timing of his narrative raises sufficient suspicion of pretext. He  
19 asked for temporary leave at the end of February and was fired in the beginning of March.  
20 “[T]emporal proximity alone [however] is not sufficient to raise a triable issue as to pretext once the  
21 employer has offered evidence of a legitimate, nondiscriminatory reason for the termination.”  
22 *Franco v. Pier 1 Imps., Inc.* No. EDCV 07-946-VAP (JCRx), 2008 WL 4217848, at \*19 (C.D. Cal.  
23 Sept. 11, 2008) (quoting *Arteaga v. Brink’s, Inc.*, 163 Cal. App. 4th 327 (2008) (calling temporal  
24 proximity merely a “scintilla of discriminatory evidence”)); *see also Smith v. Allen Health Sys., Inc.*,  
25 302 F.3d 827, 833-34 (8th Cir. 2002). Kone has offered such evidence; Huck’s trip to Hawaii  
26 violated numerous company policies and was a legitimate nondiscriminatory reason for termination.  
27 *See Dumas v. New United Motor Mfg., Inc.*, 305 Fed. Appx. 445 (9th Cir. 2008) (finding no  
28 showing of pretext when the employer established that the employee violated company policy by

1 failing to get permission for leave of absence). Whether Viehweg knew of Huck’s intention to  
2 travel to Hawaii or not does not alter this conclusion. Huck is unable to establish pretext and his  
3 discrimination claim cannot survive a motion for summary judgment.

4 B. Retaliation Claim

5 Huck’s complaint and opposition papers indicate that he intended to assert a FEHA  
6 retaliation claim against Kone as well. He contends that Kone retaliated against him for seeking a  
7 reasonable accommodation for his disability when he asked for a temporary leave of absence. Kone  
8 moves for summary judgment on this claim, asserting that Huck fails to establish a prima facie  
9 claim for retaliation. Courts considering summary judgment motions arising from FEHA retaliation  
10 claims also employ the *McDonnell Douglas* framework. *See Scotch v. Art Institute of Cal.*, 173 Cal.  
11 App. 4th 986, 1020 (2009)). The employee must first demonstrate a prima facie claim of retaliation.  
12 The employer then needs to proffer a legitimate, nondiscriminatory reason for the adverse  
13 employment action. If the employer fulfills this burden, the framework then requires the employee  
14 to establish that the retaliation was intentional. *Id.* at 1021.

15 To establish a prima facie claim for FEHA retaliation, plaintiff must show that “they  
16 engaged in protected activity, their employer subjected them to adverse employment action, and  
17 there was a causal link between the protected activity and employer’s actions.” *Lee v. Eden Med.*  
18 *Ctr.*, 690 F. Supp. 2d 1011, 1026 (N.D. Cal. 2010) (citing *Iwekaogwu v. City of Los Angeles*, 75 Cal.  
19 App. 4th 803, 814 (1999)). Here, Kone challenges Huck’s prima facie claim with respect to  
20 causation, arguing that plaintiff was fired not as retaliation against his request for an  
21 accommodation, but rather because of his company policy violation. Kone contends that Huck  
22 cannot rely on the temporal proximity between the termination and the request for accommodation  
23 to establish causation for purposes of his prima facie claim.

24 As discussed above, “[c]ausation can be inferred from timing alone where an adverse  
25 employment action follows on the heels of protected activity.” *Villiarmo v. Aloha Island Air, Inc.*,  
26 281 F.3d 1054, 1065 (9th Cir. 2002); *see also Taylor v. City of Los Angeles Dept. of Water &*  
27 *Power*, 144 Cal. App. 4th 1216, 1235 (2006) (“Close proximity in time of an adverse action to an  
28 employee’s resistance or opposition to unlawful conduct is often strong evidence of a retaliatory

1 motive.”). Huck’s prima facie claim, however, fails for another reason: he did not engage in a  
2 protected activity under FEHA before his termination. FEHA’s anti-retaliation provision is intended  
3 to protect employees who engage in a protected activity to oppose discriminatory action by an  
4 employer and are, subsequently, subjected to retaliatory measures. *See, e.g., Villiarmino*, 281 F.3d at  
5 1065 (considering a retaliation claim after an employee complained about sexual harassment);  
6 *Nielson v. Trofholz Techs., Inc.*, 750 F. Supp. 2d 1157, 1169-70 (E.D. Cal. 2010) (finding protected  
7 activity when an employee opposes conduct that is either actually unlawful, or the “employee  
8 reasonably and in good faith believes is unlawful”); *Scotch*, 173 Cal. App. 4th at 1020 (holding that  
9 plaintiff engaged in protected activity when he reported “weird retaliation” against him). As part of  
10 a prima facie claim for retaliation, plaintiff must prove that he partook in such a protected activity.  
11 This showing does not require plaintiff to have filed a formal complaint. *Yanowitz v. L’Oreal USA,*  
12 *Inc.*, 36 Cal. 4th 1028 (2005). The employee must, however, have opposed activity that the  
13 employee reasonably believes constitutes unlawful discrimination. “[C]omplaints about personal  
14 grievances or vague” remarks do not qualify as protected activity. *Id.* at 1047. This is because the  
15 crucial question in determining whether the employee has engaged in a protected activity is whether  
16 the employer was on notice of what conduct it needed to investigate for wrongdoing. *Id.*

17 In plaintiff’s opposition, he states that “Kone retaliated against him for exercising his rights  
18 to reasonable accommodation under the FEHA.” (Pl’s. Opp’n to Mot. for Summ. J. at 10). He  
19 asserts that Kone retaliated against him for asking to take medical leave. Requesting medical leave  
20 is not a protected activity. It does not formally or informally oppose employer discrimination. Nor  
21 does it put Kone on notice as to what conduct needs to be investigated. While Huck maintains he  
22 felt abused by Viehweg for being disabled, he does not claim that he made these grievances known.  
23 *See, e.g., Luchetti v. Hershey Co.*, No. C 08-1629 SI, 2009 WL 2912524, at \* 4-5 (N.D. Cal. Sept. 9,  
24 2009) (holding that plaintiff’s informal email complaint was insufficient to make his grievances  
25 known to the employer for purpose of a retaliation claim). He cannot, therefore, establish that he  
26 engaged in protected activity under FEHA before his termination.<sup>5</sup>

27 <sup>5</sup> Notably, Huck did engage in protected activity under FEHA when he contacted the San Francisco  
28 Department of Labor in May 2009. This action, however, does not satisfy plaintiff’s burden to state  
a prima facie of retaliation because he contacted the Department of Labor after he was fired in  
March 2009. It follows that Kone could not have decided to fire him based on this protected activity

1 C. Harassment Claim

2 Huck's complaint also suggests that he intended to assert a separate harassment claim  
3 pursuant to FEHA. To establish a claim of harassment under FEHA, a plaintiff must show that: (1)  
4 plaintiff is a member of a protected group; (2) plaintiff was subjected to harassment because he  
5 belonged to this group; and (3) the alleged harassment was so severe that it created a hostile work  
6 environment. *See Aguilar v. Avis Rent A Car Sys., Inc.*, 21 Cal. 4th 121, 130 (1999). This requires  
7 plaintiff to demonstrate that there existed a "concerted pattern of harassment of a repeated, routine,  
8 or generalized nature." *Id.* at 131. The harassment must have been "sufficiently severe or  
9 pervasive" to change employment conditions. *Chavez v. City of Los Angeles*, 111 Fed. Appx. 881,  
10 883 (9th Cir. 2004). When an employer performs a "necessary personnel management action[]"  
11 such as hiring and firing," it does not constitute harassment. *Reno v. Baird*, 18 Cal.4th 640, 646-47  
12 (1998).

13 The Complaint fails to state sufficient facts to support a harassment claim. Huck alleges that  
14 Viehweg screamed and cursed at him for missing a meeting during the February 26, 2009, phone  
15 call. He also states Viehweg was angry when Huck informed him that he could not attend a March  
16 6, 2009, meeting. Despite the fact that Huck maintains that his conversations with Viehweg made  
17 him fear for his job, he has not demonstrated harassment. Harassment entails a pattern of "severe or  
18 pervasive" behavior. This pattern must have an effect on plaintiff's working conditions. Huck has  
19 not alleged sufficient facts of pervasive behavior or changed work conditions.

20 D. Failure to Provide Reasonable Accommodation

21 Huck also indicates that his wrongful termination suit is based on Kone's failure reasonably  
22 to accommodate his disability. In order to state a prima facie claim for failure to accommodate  
23 under FEHA, a plaintiff must demonstrate that: (1) plaintiff has a disability under the Act; (2)  
24 plaintiff is qualified to perform the essential functions of the position; and (3) the employer failed  
25 reasonably to accommodate plaintiff's disability. *See* Cal. Gov. Code § 12940(m). The first two  
26 elements of a prima facie claim for failure to accommodate are identical to two factors in the prima

27  
28 that occurred three months after termination. *See Timmons v. UPS, Inc.*, 310 Fed. Appx. 973, 975  
(9th Cir. 2009) (upholding the granting of summary judgment on a retaliation claim when the  
employee's protected activities occurred after the employer took an adverse employment action).



1 facie claim for disability discrimination. The Court has already concluded that Huck is disabled  
2 under FEHA and that he is qualified to perform the essential functions of his position at Kone. All  
3 that remains, therefore, is the determination of whether Kone failed reasonably to accommodate  
4 Huck’s disability.

5 Under FEHA an employer must make a reasonable accommodation for the known disability  
6 of an employee. *See* Cal. Gov. Code § 12940(m). A “reasonable accommodation” involves “job  
7 restructuring, part-time or modified work schedules . . . and other similar accommodations for  
8 individuals with disabilities.” Cal. Gov. Code § 12926(n)(2); Cal. Code Regs. tit. 2 § 7293.9(a)(2).  
9 A temporary leave of absence is considered a reasonable accommodation under the FEHA. *See*  
10 *Hanson v. Lucky Stores, Inc.*, 74 Cal. App. 4th 215, 225 (1999) (stating that finite leave can  
11 constitute a reasonable accommodation if it is likely the employee will eventually return to work).

12 Looking at the evidence in the light most favorable to plaintiff, there are insufficient facts to  
13 conclude that Kone refused to provide Huck with a reasonable accommodation: In Viehweg’s  
14 declaration he states that he never instructed Huck his medical leave would not be granted.  
15 Additionally, Kone contacted Huck to fill out the short-term disability forms for the very purpose of  
16 implementing Huck’s medical leave, albeit around the time Huck was fired. Huck does assert that  
17 Viehweg was angry when he missed a meeting the day after he informed Kone about his temporary  
18 leave. Viehweg was also upset when Huck could not attend a March 3, 2009, meeting and allegedly  
19 stated “You do not get to decide when you work and when you don’t. That is up to KONE to  
20 determine, not you or your doctor.” (Compl. ¶ 14). Employer dissatisfaction, however, without any  
21 other evidence of failure to accommodate, is insufficient to establish a reasonable accommodation  
22 claim under FEHA. *See Hanson*, 74 Cal. App. 4th at 225. Huck must be able to convince a  
23 reasonable factfinder that KONE refused to accommodate him. By Huck’s own admission, he was  
24 accommodated. In spite of Viehweg irritation, Huck received dictation software from Kone, took  
25 time off, and planned on completing his short-term leave until the doctor advised him to return to  
26 work. There are no triable issues regarding defendant’s failure to accommodate.

27 E. Failure to Engage in the Interactive Process  
28

1 As part of his wrongful termination claim, Huck asserts that Kone violated Cal. Gov. Code  
2 § 12940(n) by not engaging in the interactive process. FEHA requires employers to “engage in a  
3 timely, good faith, interactive process with the employee or applicant to determine effective  
4 reasonable accommodations, if any, in response to a request for reasonable accommodation.”  
5 *Scotch*, 93 Cal. Rptr. 3d at 352 (internal citation and quotation marks omitted). In considering these  
6 types of claims, courts must determine what caused the breakdown in the interactive process and  
7 ascertain who is to blame for the collapse. *Barnett v. U.S. Air. Inc.*, 228 F.3d 1105, 1114-15 (9th  
8 Cir. 2000), *vacated on other grounds*, 535 U.S. 391 (2002). Employers will only be liable if they  
9 bear responsibility for the breakdown. *Id.* at 1114.

10 Huck first spoke with Kone about his disability at the end of 2008. He requested dictation  
11 software and Kone immediately provided him with “Dragon Speak.” When his pain persisted  
12 despite the accommodation, he determined, on the advice of his doctor, that he needed to take some  
13 time off. He informed Kone of his decision and took time to rehabilitate, flying to Hawaii for a few  
14 days of rest. Although Huck asserts that his decision to take medical leave was met with anger from  
15 his supervisor, he does not demonstrate that Kone refused to provide him with leave. In fact,  
16 undisputed facts support that Kone did allow Huck to go on medical leave. Consequently, Huck  
17 cannot prove that Kone failed to engage in the interactive process. *See Krieg v. U.S. Foodservice,*  
18 *Inc.*, No. C 10–02491 WHA, 2011 WL 4344568, at \*7 (N.D. Cal. Sept. 14, 2011) (dismissing  
19 plaintiff’s claim when evidence showed that employer already provided a reasonable  
20 accommodation). This claim cannot survive a motion for summary judgment.

21 F. Intentional Infliction of Emotional Distress

22 A claim for intentional infliction of emotional distress requires a showing of: “(1) extreme or  
23 outrageous conduct by defendant with the intention of causing, or reckless disregard of the  
24 probability of causing, emotional distress; (2) plaintiff’s suffering severe or extreme emotional  
25 distress; and (3) actual and proximate causation of the emotional distress by defendant’s outrageous  
26 conduct.” *Hughes v. Pair*, 46 Cal. 4th 1035, 1050 (2009). Plaintiff must illustrate that defendant’s  
27 conduct was so extreme that it “exceeds all bounds” tolerated in civilized society. *Id.* at 1050.  
28 Furthermore, plaintiff must establish that defendant’s outrageous conduct caused him such severe

1 emotional distress that no reasonable person “in civilized society should be expected to endure it.”  
2 *Id.* at 1051.

3 Huck is unable to demonstrate that anyone at Kone engaged in extreme or outrageous  
4 conduct sufficient to satisfy a claim for intentional infliction of emotional distress. He asserts very  
5 few facts with regards to this claim for relief. Huck merely alleges that Viehweg yelled at him for  
6 missing meetings and censured him for traveling to Hawaii. Viehweg’s verbal disapproval was  
7 entirely work-related and within the bounds of civilized society. *See Lawler*, 2011 WL 1466129, at  
8 \*7 (holding that an employer’s work-related criticism was not extreme conduct); *Janken v. GM*  
9 *Hughes Elecs.*, 46 Cal. App. 4th 55, 80 (1996) (“A simple pleading of personnel management  
10 activity is insufficient to support a claim of intentional infliction of emotional distress, even if  
11 improper motivation is alleged.”).

12 Furthermore, Huck has not established that he suffered severe emotional distress. While he  
13 states that he suffered “mental anguish, depression, anxiety, and other physical manifestations of  
14 stress,” he does not include any facts to support this assertion. (Compl. ¶ 32). Kone, therefore, is  
15 entitled to summary judgment on Huck’s claim for intentional infliction of emotional distress.

16 IV. CONCLUSION

17 There are no genuine issues of material fact concerning Huck’s employment law claims.  
18 Kone’s Motion for Summary Judgment therefore must be granted.

19  
20 IT IS SO ORDERED.

21  
22 Dated: 12/15/11

23   
24 RICHARD SEEBORG  
25 UNITED STATES DISTRICT JUDGE  
26  
27  
28