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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FRISCO LEAEA,

Plaintiff,

v.

UNITED AIRLINES INC.,

Defendant.

Case No. [18-cv-00749-SI](#)

**ORDER DENYING DEFENDENT’S
MOTION TO DISMISS FIRST
AMENDED COMPLAINT**

Re: Dkt. Nos. 40, 43, 44

On June 29, 2018, the Court held a hearing on defendant United Airlines, Inc.’s motion to dismiss plaintiff Frisco Leaea’s first amended complaint. For the reasons set forth below, the Court DENIES defendant’s motion.

BACKGROUND

Defendant United Airlines, Inc. (“United”) employed plaintiff as a Ramp Service Employee at San Francisco International Airport, beginning May 2012. First Amended Complaint (“FAC”) ¶ 6 (Dkt. No. 29). While employed, plaintiff “performed his job duties in an exemplary manner.” *Id.* at ¶ 7. On August 19, 2015, plaintiff injured his left big toe “at work.” *Id.* at ¶ 8.

About five days later, plaintiff was treated at defendant’s “Airport Clinic” and an X-ray examination revealed “a fracture to Plaintiff’s left big toe.” *Id.* at ¶ 10. Subsequently, plaintiff’s personal doctor “deemed Plaintiff temporarily and totally disabled.” *Id.* Plaintiff “requested a leave of absence” from August 26, 2015 to October 12, 2015, “as a reasonable accommodation for his disability.” *Id.* Plaintiff alleges that “when Plaintiff returned to work in or around October 2015, following his leave of absence related to his August 2015 disability, Defendant counted as occurrences under its no-fault attendance policy the time Plaintiff was absent from work due to his

1 disability, and terminated Plaintiff’s employment for violation of its attendance policy.” *Id.* ¶ 11.
 2 Plaintiff alleges that “Defendant discriminated against Plaintiff on account of his disability by
 3 terminating Plaintiff’s employment for time Plaintiff could not work due to his disability and/or
 4 terminated Plaintiff’s employment in retaliation for his need for a leave of absence
 5 accommodation because of his disability and/or as the result of its failure to accommodate
 6 Plaintiff’s disability.” *Id.* ¶ 12.

7 Defendant’s Attendance Policy is contained in a Collective Bargaining Agreement
 8 (“CBA”) between United and the International Association of Machinists & Aerospace Workers.
 9 Dkt. No. 6-2 (Attendance Policy).¹ The Attendance Policy defines “absence” as: “[a]ny single
 10 specific period of continuous time away from work for a single reason.” *Id.* at 2. The Attendance
 11 Policy defines “points” as: “[a] unit of measurement used to track absence and tardiness.” *Id.* at 3.
 12 The Attendance Policy also provides that: “[a]bsence from duty of the following reasons will not
 13 be assessed a point: Minor Tardy; AUTO; Vacations; Holidays; Trade Days Off; Personal
 14 Emergency Leave; FMLA—Any absence covered by the Company’s Family and Medical Leave
 15 policy; Jury Duty; Approved Leaves of Absence; Occupational Injury Time (OI); and Company
 16 Declared Adverse Weather Day (officially declared by management.)” *Id.*

17 Conversely, the Attendance Policy will assign points for the following absences:

19 Leaving work without notification to immediate supervisor	Up to Termination – Hearing
20 No Call, No Show	3 points
21 **1st Occurrence in a 12 month period of failure to report for an assigned overtime shift or leaving work early with notification to management but without approval	1 point
22 2nd or subsequent occurrence of failure to report for assigned overtime or leaving work with notification to management, but without approval	3 points
23 Contact Center: Inadvertently leaving	1 point

27 _____
 28 ¹ In ruling on defendant’s motion to dismiss the original complaint, the Court took judicial notice of the CBA. Dkt. No. 27 at 6 n.2.

work without notification for any type of flex shift or additional shift time.	
Late Reported Personal Absence	2 points
Reported Personal Absence	1 point
Tardy	½ point

Id. at 5. The Attendance Policy provides a discipline policy and guidelines for tracking absences that accrue attendance points:

Management will track attendance points on a rolling 12 months of active service. . . . Attendance points will be frozen while an employee is on an unpaid or inactive status and be re-activated once the employee returns to paid/active status. The 12 month calendar will then be re-activated. Notwithstanding the rolling 12 month calendar, if an employee reaches the level of Termination Warning, the employee will remain at Termination Warning and no points will be re-accrued for a full six month period from the date the employee is placed on Termination Warning. . . .

Id. The point system used to manage accountability for absences states:

Point Range	Point Range
7.0 to 4.0 points	Acceptable Attendance
3.5 to 2.5 points	Documented Verbal Warning
2.0 to 1.5 points	Written Warning
1.0 to 0.5 points	Termination Warning (Meeting Required)
0 points	Termination

Id. at 6. Employees start with a balance of 7 points and points are deducted for impermissible absences. *Id.*

United’s Reasonable Accommodation Process (“RAP”) Policy, which is also part of the CBA, “is the interactive process where United works with employees who, in order to perform their jobs, may be in need of an accommodation due to a medical condition or restriction.” Dkt. No. 6-5 at 1 (RAP Policy). “During the RAP meeting, the employee’s medical restrictions are reviewed and discussed in an effort to identify any reasonable accommodation that will enable the employee to perform the essential functions of the employee’s current position.” *Id.* “Depending on the circumstances and the operational needs of a department, a reasonable accommodation may involve (but is not limited to): providing a leave of absence. . . .” *Id.* at 2. “The RAP process is

1 designed to be an interactive process between the employee and the Company. The RAP Process
2 is an ongoing one, meaning that if an employee’s restrictions change in any way, or a position
3 opens up that was previously unavailable, the employee and Company should meet again and
4 continue the interactive discussion.” *Id.*

5 After his termination, plaintiff filed a grievance through his union challenging the
6 termination. FAC ¶ 14(a). The grievance proceedings started in January 2016 and ended on or
7 about September 20, 2016. *Id.* The FAC alleges that “[t]hroughout the grievance process,
8 Plaintiff alleged that Defendant unfairly terminated his employment because he was punished for
9 absences that were related to his disability by providing him with a leave of absence to treat and
10 recover from his disability without repercussions.” *Id.*² United denied the grievance.

11 On January 3, 2018, plaintiff sued defendant in San Mateo County Superior Court, alleging
12 claims under federal and California law. The complaint alleged, *inter alia*, that United
13 discriminated against him because of his disability by terminating plaintiff’s employment in
14 retaliation for plaintiff’s leave of absence and by failing to accommodate plaintiff’s disability.
15 Dkt. No. 1. Defendant removed this action to federal court on the basis of federal question and
16 diversity jurisdiction. Defendant then moved to dismiss the complaint, arguing all of plaintiff’s
17 claims should be dismissed for failure to state a claim and that plaintiff’s state law claims were
18 preempted. Dkt. No. 6 at 1. The Court granted in part and denied in part the motion to dismiss
19 with leave to amend, and deferred the preemption question until plaintiff filed an amended
20 complaint clarifying the nature of his claims. Dkt. No. 27.

21
22 ² Defendant contends that plaintiff and his union representatives did not, in fact, make
23 these arguments during the grievance process, and defendant requests that the Court take judicial
24 notice of a letter that United sent plaintiff denying his grievance at step 3 of the CBA’s grievance
25 process. Defendant argues that the letter, in which United sets forth its reasons for denying
26 plaintiff’s grievance, shows that plaintiff and his union representatives challenged the termination
27 on grounds unrelated to disability. The Court declines to take judicial notice of this document, as
28 the letter is neither “incorporated by reference in the complaint,” nor does it “form the basis of the
plaintiff’s claim.” *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). Further, even if the
Court took judicial notice of this document, the Court finds that United’s statements in the letter
regarding the arguments made by plaintiff in his grievance process are not, on their face,
necessarily inconsistent with the allegations in the FAC. In any event, the Court finds that the fact
that plaintiff and his union representatives may have challenged the termination on non-disability
grounds is not a basis for dismissal of the complaint.

1 On May 1, 2018, plaintiff filed the FAC, which alleges five causes of action under
2 California law. The FAC alleges that defendant: (1) unlawfully discriminated on the basis of
3 plaintiff’s disability in violation of the Fair Housing and Employment Act (“FEHA”); (2) failed to
4 accommodate plaintiff’s disability in violation of the FEHA; (3) failed to engage in the interactive
5 process in violation of the FEHA; (4) retaliated against plaintiff for asserting his rights under the
6 FEHA; and (5) wrongfully terminated plaintiff in violation of public policy set forth in the FEHA,
7 the California Family Rights Act (“CFRA”), and California Labor Code sections 246.5 and 98.6.
8 Dkt. No. 29 at 6-12. The FAC also states, “Plaintiff does not contend that there was a dispute
9 under the CBA between Plaintiff and Defendant related to his employment and/or termination.”
10 *Id.* at ¶ 13.³

11 Defendant has moved to dismiss the FAC, arguing that all of plaintiff’s claims should be
12 dismissed under Rule 12(b)(6) and 12(b)(1) based upon federal preemption.

13
14 **LEGAL STANDARDS**

15 **I. Rule 12(b)(6)**

16 A complaint must contain “a short and plain statement of the claim showing that the
17 pleader is entitled to relief,” Fed. R. Civ. Pro. 8(a)(2), and a complaint that fails to do so is subject
18 to dismissal pursuant to Rule 12(b)(6). To survive a Rule 12(b)(6) motion to dismiss, the plaintiff
19 must allege “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v.*
20 *Twombly*, 550 U.S. 544, 570 (2007). This “facial plausibility” standard requires the plaintiff to
21 allege facts that add up to “more than a sheer possibility that a Defendant has acted unlawfully.”
22 *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). While courts do not require “heightened fact
23 pleading of specifics,” a plaintiff must allege facts sufficient to “raise a right to relief above the
24 speculative level.” *Twombly*, 550 U.S. at 544, 555. “A pleading that offers ‘labels and
25

26 ³ United contends that this allegation is inconsistent with the original complaint because
27 the original complaint alleged that United misapplied provisions of the Attendance Policy and
28 RAP Policy against plaintiff. However, plaintiff has consistently alleged that United terminated
him pursuant to the Attendance Policy, and he has maintained that his discrimination and
retaliation claims are independent of the CBA and that he was terminated on account of his
disability.

1 conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not do.’” *Iqbal*,
2 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555). “Nor does a complaint suffice if it tenders
3 ‘naked assertion[s]’ devoid of ‘further factual enhancement.’” *Id.* (quoting *Twombly*, 550 U.S. at
4 557). “While legal conclusions can provide the framework of a complaint, they must be supported
5 by factual allegations.” *Id.*

6 In reviewing a Rule 12(b)(6) motion, courts must accept as true all facts alleged in the
7 complaint, and draw all reasonable inferences in favor of the plaintiff. *See Usher v. City of Los*
8 *Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). However, courts are not required to accept as true
9 “allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable
10 inferences.” *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008). If a court
11 dismisses a complaint, it must decide whether to grant leave to amend. The Ninth Circuit has
12 “repeatedly held that a district court should grant leave to amend even if no request to amend the
13 pleading was made, unless it determines that the pleading could not possibly be cured by the
14 allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (citations and
15 internal quotation marks omitted).

16 As a general rule, courts may not consider materials beyond the pleadings when ruling on a
17 Rule 12(b)(6) motion. *Lee v. City of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001).
18 However, courts “may take judicial notice of some public records, including the ‘records and
19 reports of administrative bodies.’” *Ritchie*, 342 F.3d at 909 (citing *Interstate Nat. Gas Co. v. S.*
20 *Cal. Gas Co.*, 209 F.2d 380, 385 (9th Cir. 1953)). Courts may not take judicial notice of facts in
21 the public record that are subject to reasonable dispute. *Lee*, 250 F.3d at 690.

22

23 **II. Rule 12(b)(1)**

24 Federal Rule of Civil Procedure 12(b)(1) allows a party to challenge a federal court’s
25 jurisdiction over the subject matter of the complaint. As the party invoking the jurisdiction of the
26 federal court, the plaintiff bears the burden of establishing that the court has the requisite subject
27 matter jurisdiction to grant the relief requested. *See Kokkonen v. Guardian Life Ins. Co. of*
28 *America*, 511 U.S. 375, 377 (1994) (internal citations omitted). A complaint will be dismissed if,

1 looking at the complaint as a whole, it appears to lack federal jurisdiction either “facially” or
2 “factually.” *Thornhill Publ’g Co., Inc. v. General Tel. & Elecs. Corp.*, 594 F.2d 730, 733 (9th Cir.
3 1979); *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004) (“A Rule 12(b)(1)
4 jurisdictional attack may be facial or factual.”).

5 When the complaint is challenged for lack of subject matter jurisdiction on its face, all
6 material allegations in the complaint will be taken as true and construed in the light most favorable
7 to the plaintiff. *NL Indus. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). In deciding a Rule
8 12(b)(1) motion which mounts a factual attack on jurisdiction, “no presumptive truthfulness
9 attaches to plaintiff’s allegations, and the existence of disputed material facts will not preclude the
10 trial court from evaluating for itself the merits of jurisdictional claims. Moreover, the plaintiff will
11 have the burden of proof that jurisdiction does in fact exist.” *Mortensen v. First Fed. Sav. & Loan*
12 *Ass’n*, 549 F.2d 884, 891 (3d Cir. 1977). “In resolving a Rule 12(b)(1) factual attack on
13 jurisdiction, the district court may review evidence beyond the complaint without converting the
14 motion to dismiss into a motion for summary judgment.” *In re Digimarc Corp. Derivative*
15 *Litigation*, 549 F.3d 1223, 1236 (9th Cir. 2008) (citation and internal brackets omitted).

16
17 **DISCUSSION**

18 **I. Preemption under the Railway Labor Act**

19 Defendant contends that plaintiff’s claims are minor disputes under the CBA and are
20 therefore preempted by the Railway Labor Act (“RLA”), 45 U.S.C. §§ 151-65, 181-88. Defendant
21 has the burden to demonstrate preemption. *See Caterpillar, Inc. v. Williams*, 482 U.S. 386, 393
22 (1987); *Jimeno v. Mobil Oil Corp.*, 66 F.3d 1514, 1526 n.6 (9th Cir. 1995); *Martinez v. Kaiser*
23 *Found. Hosps.*, C-12-1824 EMC, 2012 WL 2598165, at *2 (N.D. Cal. July 5, 2012).

24 “Whether federal law pre-empts a state law establishing a cause of action is a question of
25 congressional intent.” *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252 (1994) (citing *Allis-*
26 *Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985)). “Congress’ purpose in passing the RLA was
27 to promote stability in labor-management relations by providing a comprehensive framework for
28 resolving labor disputes.” *Id.* (citing *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557,

1 562 (1987)); *see also Alaska Airlines Inc. v. Schurke*, ___ F.3d ___, No. 13-35574, 2018 WL
2 3636431, at *11 (9th Cir. Aug. 1, 2018) (en banc) (“In the RLA and LMRA § 301 context, the
3 ‘purpose of Congress’ is to protect the role of grievance and arbitration and of federal labor law in
4 resolving CBA disputes, not to alter or displace state law labor rights.”). The RLA provides a
5 mandatory arbitral mechanism for resolving disputes, including “minor disputes” that involve the
6 “application or interpretation” of a CBA “covering rates of pay, rules, or working conditions.”
7 *Norris*, 512 U.S. at 252-53, 255-56; 45 U.S.C. § 151(a). Thus, the RLA preempts state law claims
8 upon “a determination that [the plaintiff’s] complaints constitute a minor dispute.” *Norris*, 512
9 U.S. at 253.

10 A minor dispute is a claim “that may be conclusively resolved” by a CBA. *Id.* at 262-63
11 (citing *Consol. Rail Corp. v. Ry. Labor Executives’ Ass’n*, 491 U.S. 299, 305 (1989)); *accord*
12 *Saridakis v. United Airlines*, 166 F.3d 1272, 1276 (9th Cir. 1999). In other words, a minor dispute
13 exists “only if [the state law claim] is dependent on the interpretation of a [CBA].” *Espinal v. Nw.*
14 *Airlines*, 90 F.3d 1452, 1456 (9th Cir. 1996) (citing *Norris*, 512 U.S. at 262-63); *see, e.g., Guidry*
15 *v. Marine Engineers’ Beneficial Ass’n*, No. C 05-03960 CRB, 2007 WL 707511, at *4, 6 (N.D.
16 Cal. Mar. 6, 2007) (finding no minor dispute because there was no dispute over the interpretation
17 of CBA terms and state law claims are only preempted when the resolution of a discrimination
18 claim itself hinges on the interpretation of a CBA).

19 The Ninth Circuit has recently articulated a two-part test to determine whether a claim a
20 preempted by the RLA. “First, to determine whether a particular right is grounded in a CBA, we
21 evaluate the ‘legal character’ of the claim by asking whether it seeks purely to vindicate a right or
22 duty created by the CBA itself.” *Schurke*, 2018 WL 3636431, at *7 (internal citation omitted).

23 If a claim arises entirely from a right or duty of the CBA—for example, a claim for
24 violation of the labor agreement, whether sounding in contract or in tort—it is, in
25 effect, a CBA dispute in state law garb, and is preempted. In such cases, the CBA
26 is the “only source” of the right the plaintiff seeks to vindicate. There is thus no
27 part of the claim that “do[es] not require construing [the] collective-bargaining
28 agreement[],” and as to which litigation in court, rather than through the grievance
and arbitration system, would be appropriate. For the same reason, there is no part
of the claim in which the uniform body of federal labor law does not control the
resolution of the parties’ dispute.

1 By contrast, claims are not simply CBA disputes by another name, and so are not
2 preempted under this first step, if they just refer to a CBA-defined right; rely in part
3 on a CBA's terms of employment; run parallel to a CBA violation; or invite use of
4 the CBA as a defense. . . .

5 *Id.* at *7-8 (footnotes and internal citations omitted).

6 “Second, if a right is not grounded in a CBA in the sense just explained, we ask whether
7 litigating the state law claim nonetheless requires interpretation of a CBA, such that resolving the
8 entire claim in court threatens the proper role of grievance and arbitration.” *Id.* at *8. The Ninth
9 Circuit has instructed that “[i]nterpretation’ is construed narrowly; ‘it means something more than
10 ‘consider,’ ‘refer to,’ or ‘apply.’” *Id.* at *8 (quoting *Balcorta v. Twentieth Century-Fox Film*
11 *Corp.*, 208 F.3d 1102, 1108 (9th Cir. 2000)). “Accordingly, at this second step of an RLA or
12 LMRA § 301 preemption analysis, claims are only preempted to the extent there is an active
13 dispute over the meaning of contract terms.” *Schurke*, 2018 WL 3636431, at *8 (internal
14 quotations and citation omitted). It is not enough “that resolving the state law claim requires a
15 court to refer to the CBA and apply its plain or undisputed language—for example, to discern that
16 none of its terms is reasonably in dispute[]; to identify bargained-for wage rates in computing [a]
17 penalty[]; or to determine whether [the CBA] contains a clear and unmistakable waiver of state
18 law rights.” *Id.* (internal quotations and citations omitted); *see also Ramirez v. Fox Television*
19 *Station, Inc.*, 998 F.2d 743, 749 (9th Cir. 1993) (“[R]eference to or consideration of the terms of a
20 [CBA] is not the equivalent of interpreting the meaning of the terms.”).

21 The Ninth Circuit also clarified that “[n]otably, the result of preemption at the second step
22 is generally not the extinguishment of the state law claim.” *Schurke*, 2018 WL 3636431, at *8.
23 Instead, “if, at the second stage of the analysis, a state law claim depends on a dispute over the
24 meaning of a CBA, it is only ‘to that degree preempted.’” *Id.* (quoting *Kobold v. Good Samaritan*
25 *Regional Med. Ctr.*, 832 F.3d 1024, 1036 (9th Cir. 2016)). “That is, state law claims are
26 preempted by the RLA or LMRA § 301 ‘only insofar as resolution of the state-law claim requires
27 the interpretation of a collective-bargaining agreement.’” *Id.* (quoting *Lingle v. Norge Div. of*
28 *Magic Chef*, 486 U.S. 399, 409 n.8 (1988)).

29 In *Schurke*, the Ninth Circuit held that a claim premised on a state law right to reschedule
30 vacation leave for family medical purposes was not preempted by the RLA, even though the

1 worker’s underlying right to vacation leave was covered by a CBA. At the first step of the
2 analysis, the court held that the plaintiff’s claim did not arise entirely from the CBA. “Masserant
3 has alleged a violation of the [statute’s] independent state law right to use banked vacation days. . .
4 . Masserant’s claim invokes a state law right that applies to all workers, whether CBA-covered or
5 not, and gives rise to a state law dispute, not a dispute concerning the meaning of the CBA.”
6 *Schurke*, 2018 WL 3636431, at *12. At the second step, the court held that the plaintiff’s claim
7 did not require construction of the CBA:

8 The claim of course relies on the terms and conditions of employment established
9 by the CBA, in that Masserant’s banked vacation days exist only by virtue of her
10 having earned them in accordance with a workplace policy incorporated in the
11 CBA. And the claim may be aided by reference to certain other CBA provisions,
12 such as those making banked vacation immediately available for exchange,
13 personal medical leave, maternity leave, bereavement leave, or cash-out. But
14 reliance on and reference to CBA-established or CBA-defined terms of
15 employment do not make for a CBA dispute if there is no disagreement about the
16 meaning or application of any relevant CBA-covered terms of employment.

17 *Id.* (internal citation omitted).

18 With these principles in mind, the Court now analyzes plaintiff’s claims.

19 **II. Analysis of plaintiff’s claims**

20 Plaintiff alleges that United “discriminated against Plaintiff on account of his disability by
21 terminating plaintiff’s employment for time Plaintiff could not work due to his disability and/or
22 terminated Plaintiff’s employment in retaliation for his need for a leave of absence
23 accommodation because of his disability and/or as the result of its failure to accommodate
24 Plaintiff’s disability,” all in violation of the FEHA. FAC ¶ 12. Plaintiff also alleges that United
25 “failed to engage in a timely, good faith, interactive process with Plaintiff to accommodate his
26 known disability in violation of the FEHA,” and that plaintiff’s termination violated public policy
27 as set forth in the FEHA and the CFRA. *Id.* ¶¶ 32, 45.

28 “In RLA cases . . . , courts must look to the source of the right asserted by the plaintiff.”
Espinal, 90 F.3d at 1456 (citing *Norris*, 512 U.S. at 257-59). Thus, a “discrimination claim need
not be preempted merely because certain aspects of the [CBA] govern . . . discharges.” *Jimeno*, 66
F.3d at 1525 (internal quotation marks omitted). In *Ramirez*, the court explained “the [CBA] will

1 likely be referred to by [plaintiff] and [defendant] to determine the terms and conditions of
2 [plaintiff's] employment. But [plaintiff's] underlying cause of action is that [defendant]
3 discriminated against her in applying and/or altering those terms and conditions. Although the
4 inquiry may begin with the [CBA], it certainly will not end there.” *Ramirez*, 998 F.2d at 748-49.

5 Here, plaintiff's claims arise from the FEHA (and the CFRA, with regard to wrongful
6 termination), and do not seek to vindicate a right that is purely created by the CBA. As plaintiff
7 argues, his claims would exist even if he was not covered by a CBA. The Ninth Circuit has
8 generally found that “rights created by . . . [FEHA] are independent of a CBA and thus claims
9 brought pursuant to” FEHA are not preempted by federal law, such as the RLA. *Saridakis*, 166
10 F.3d at 1276-77 (finding plaintiff's disability discrimination claim was not a minor dispute “and
11 therefore [not] subject to the RLA's dispute resolution mechanism”); *see also Schurke*, 2018 WL
12 3636431, at *12 (holding the plaintiff's claim was not preempted at step one because “Masserant's
13 claim invokes a state law right that applies to all workers, whether CBA-covered or not, and gives
14 rise to a state law dispute, not a dispute concerning the meaning of the CBA”); *Guidry*, 2007 WL
15 707511, at *4 (citing Ninth Circuit decisions that “rest upon the view that the rights conferred by
16 [FEHA] are defined and enforced under state law without reference to the terms of any [CBA] . . .
17 , and that actions asserting those rights are thus independent of [any CBA]”) (internal citations and
18 quotation marks omitted)).

19 Defendant's preemption arguments largely focus on the second step of the analysis,
20 namely whether the claims require interpretation of the CBA.⁴ Defendant argues that the Court
21 will be required to interpret and apply the Attendance Policy and the RAP Policy in order to
22 resolve all of plaintiff's claims. Defendant argues that interpretation of the CBA is required
23 because “Plaintiff explicitly claims United interpreted and applied the Attendance Policy against
24 him in a discriminatory manner, which resulted in him suffering an adverse employment action-
25 termination.” Motion at 14 (Dkt. No. 40). Defendant relies on plaintiff's allegation that United
26

27 ⁴ Defendant's briefing addresses plaintiff's claims as a whole and separately. However,
28 the arguments regarding preemption are largely the same for all the claims, specifically whether
the claims require the interpretation of the CBA.

1 “counted as occurrences under its no-fault attendance policy the time plaintiff was absent from
2 work due to his disability, and terminated Plaintiff’s employment for violation of its attendance
3 policy.” FAC ¶ 11. For example, defendant argues that the Court will be required to analyze and
4 interpret the Attendance Policy to determine such issues as what constitutes an absence, how the
5 point system works for purposes of counting absences, and how the progressive discipline policy
6 applies generally and as to plaintiff.

7 Plaintiff responds that his claims do not require the interpretation of the CBA, and that his
8 claims turn on whether defendant discriminated and retaliated against him on the basis of
9 disability, failed to provide reasonable accommodations for his disability, and failed to engage in
10 the interactive process. Plaintiff argues that at most the Court will be required to refer to the CBA,
11 and that the parties do not dispute the meaning of any terms in the CBA. Plaintiff contends that
12 this case is similar to *Carmona v. Southwest Airlines Co.*, 536 F.3d 344 (5th Cir. 2008), in which
13 the Fifth Circuit held that a flight attendant’s disability discrimination claims were not barred by
14 the RLA. In *Carmona*, Southwest Airlines terminated the plaintiff for excessive absenteeism
15 pursuant to an absence policy contained in a CBA. After challenging the termination as being in
16 violation of the CBA through an unsuccessful grievance, the flight attendant filed suit alleging that
17 the termination violated the Americans with Disabilities Act. The district court dismissed the
18 case, finding that the plaintiff’s claims were precluded by the RLA.⁵ The Fifth Circuit reversed,
19 holding that “[a]s provisions of the CBA are relevant to, but *not* dispositive of, the resolution of
20 Carmona’s claims, his claims do not constitute a minor dispute under the RLA.” *Id.* at 349
21 (emphasis in original).

22 Even though a court would have to refer to the CBA to consider fully each of the
23 alleged acts of disparate treatment, there is no disagreement about how to interpret
24 these provisions of the CBA that detail Southwest’s procedures for assessing
25 attendance, leave, discipline, and termination. Carmona’s factual allegations that . .
26 . his chronic illnesses were the real reason he was fired, do not bring the meaning
27 of any CBA provisions into dispute.

28 *Id.*

⁵ Because the *Carmona* plaintiff alleged federal discrimination claims, the courts analyzed whether those claims were *precluded* by the RLA, as opposed to preempted. *See id.* at 347 n.2.

1 The Court concludes under the second step of the analysis that plaintiff’s claims do not
2 require interpretation of the CBA, and are therefore not preempted. Similar to the flight attendant
3 in *Carmona*, plaintiff alleges that defendant terminated his employment pursuant to an absence
4 policy contained in a CBA, and that he was fired on account of his disability. While the Court
5 may be required to refer to the CBA to resolve plaintiff’s claims (and United’s defenses)⁶,
6 plaintiff’s claims do not require the interpretation of disputed terms in the CBA. *See Schurke*,
7 2018 WL 3636431, at *8 (“‘Interpretation’ is construed narrowly; ‘it means something more than
8 ‘consider,’ ‘refer to,’ or ‘apply.’”) (quoting *Balcorta v. Twentieth Century-Fox Film Corp.*, 208
9 F.3d 1102, 1108 (9th Cir. 2000)). Although defendant has cited portions of the CBA that may be
10 relevant to plaintiff’s claims, defendant has not identified an “active dispute over the meaning of
11 contract terms.” *Schurke*, 2018 WL 3636431, at *8 (internal quotation marks and citation
12 omitted). To the extent the parties dispute whether United properly assessed points for plaintiff’s
13 absences under the Absence Policy, the Court will be required to refer to that policy and make a
14 factual determination; that evaluation does not require interpretation over disputed terms of the
15 CBA.

16 Similarly, although the Court may be required to refer to the RAP Policy in connection
17 with evaluating plaintiff’s reasonable accommodation and interactive process claims,⁷ defendant
18 has not shown that the Court would be required to interpret any disputed terms in order to
19 adjudicate those claims. The interactive process requires “communication and good-faith
20 exploration of possible accommodations between employers and individual employees” to identify
21 “an accommodation that allows the employee to perform the job effectively.” *Nadaf-Rahrov v.*
22 *Neiman Marcus Group, Inc.*, 166 Cal. App. 4th 952, 984 (2008) (internal quotation marks

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25 ⁶ “[R]eliance on CBA provisions to defend against an independent state law claim does not
26 trigger . . . preemption.” *Humble v. Boeing Co.*, 305 F.3d 1004, 1011 (9th Cir. 2002); *see also*
Saridakis, 166 F.3d at 1277 (finding defendant’s reliance on the CBA as part of its defense does
not constitute a minor dispute).

27 ⁷ “While a claim of failure to accommodate is independent of a cause of action for failure
28 to engage in an interactive dialogue, each necessarily implicates the other.” *Moore v. Regents of*
the University of California, 248 Cal. App. 4th 216, 242 (2016) (citing *Gelfo v. Lockheed Martin*
Corp., 140 Cal. App. 4th 34, 54 (2006)).

1 omitted); *see* Cal. Gov't Code § 12940(n). Both parties “must communicate directly, exchange
2 essential information and neither side can delay or obstruct the process.” *Nadaf-Rahrov*, 166 Cal.
3 App. 4th at 984-85. There is no need to interpret the CBA to determine whether the parties failed
4 to communicate and explore in good faith possible accommodations for the plaintiff.

5 Finally, the Court finds that plaintiff’s retaliation claim requires a factual inquiry into any
6 retaliatory motive by the employer. *Norris*, 512 U.S. at 266. “Purely factual questions about an
7 employee’s conduct or an employer’s conduct and motives do not require a court to interpret any
8 term of the [CBA].” *Id.* at 261; *see also Livadas*, 512 U.S. at 123.

9 As the Court found in its previous order, defendant’s reliance on *Silva v. USP Reddaway*
10 *Inc.*, No. 17-CV-01354-LB, 2017 WL 2117397 (N.D. Cal. May 15, 2017), is misplaced. In *Silva*,
11 the plaintiff worked as a pickup and delivery truck driver, and after he experienced shoulder pain,
12 he requested a job transfer to long-distance driving as a reasonable accommodation. The company
13 denied the request, and the plaintiff sued, alleging breach of the CBA, common law
14 discrimination, and disability discrimination under the FEHA. *Id.* at *1. The plaintiff conceded
15 that the CBA breach claim was preempted, and therefore the court only addressed whether the
16 disability claims were preempted. *Id.* The court found that *Silva*’s discrimination claims were
17 preempted because “Mr. *Silva*’s claims will likely ‘necessitate determining whether CBA imposed
18 an obligation on’ Reddaway to offer him a line-driving position or whether, as the defendant
19 claims, its obligations under the CBA prevented it from doing so—which could disprove Mr.
20 *Silva*’s claim that Reddaway wrongfully discriminated against him.” *Id.* at *4 (footnote omitted).
21 The court found, “[i]t is more than just a question of having to ‘refer’ to or fleetingly ‘consult’ the
22 CBA. Whether Reddaway discriminated against Mr. *Silva* by not assigning him to line driving
23 will need some substantive assessment of the CBA to determine whether the terms of that
24 compact—terms on job assignment and seniority at least—allowed the defendant to do anything
25 else.” *Id.* The *Silva* court distinguished the plaintiff’s claims from “freestanding” discrimination
26 claims cases that do not implicate the terms of the CBA. *Id.* The *Silva* court held that the
27 plaintiff’s claims were preempted by the federal Labor Management Relations Act (LMRA)
28 because the court found “[plaintiff’s] theory [was] that [the defendant] discriminatorily breached

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the CBA itself.” *Id.* at *5. Here, in contrast, plaintiff has not alleged that defendant breached the CBA, and plaintiff’s claims do not require the interpretation of any disputed CBA term. Thus, *Silva* is distinguishable.⁸

CONCLUSION

For the foregoing reasons, the Court DENIES defendant’s motion to dismiss plaintiff’s FAC.

IT IS SO ORDERED.

Dated: August 9, 2018



SUSAN ILLSTON
United States District Judge

⁸ Further, *Silva* was decided prior to the Ninth Circuit’s recent decision in *Schurke*, which clarified the test for determining preemption.