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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

JERRY J. HAWKINS,  
Plaintiff,  
v.  
SIMPLEXGRINNELL L.P., *et al.*,  
Defendants.

Civil No. 12cv1406 L (BGS)

**ORDER GRANTING  
DEFENDANTS’ MOTION FOR  
SUMMARY JUDGMENT [doc. #24]  
and DIRECTING ENTRY OF  
JUDGMENT**

Plaintiff Jerry J. Hawkins filed this action in the Superior Court of the State of California, in and for the County of San Diego. He alleges eight causes of action against defendants SimplexGrinnell L.P. (“SG”) and Tyco International (collectively “defendants”) including breach of contract; breach of the covenant of good faith and fair dealing; age discrimination; perceived disability discrimination; retaliation; wrongful demotion in violation of public policy; wrongful termination in violation of public policy; and intentional infliction of emotional distress. Defendants removed this action on June 11, 2012. Currently pending is defendants’ motion for summary judgment or partial summary judgment. [doc. #24]. The motion has been fully briefed and is decided without oral argument.

**A. Background**

Bob Ciereck, Operations Manager at SG’s San Diego location, hired Hawkins as a fire alarm installer/technician, with the title “systems integration technician”, in July 2006, when

1 plaintiff was 56 years old. A technician’s tasks include the installation of wiring and related  
2 devices for the installation of commercial fire alarm systems. Plaintiff had foreman  
3 responsibilities on several projects during his employment. The responsibilities of a foreman  
4 included completing his own installation work and overseeing the installation work performed  
5 by journeymen and apprentices. But in July 2010, SG removed plaintiff’s foreman  
6 responsibilities based on a series of safety violation involving plaintiff.

7 In March 2011, SG reduced its workforce because of the state of the economy, *i.e.*,  
8 defendants conducted a reduction in force (“RIF”). It chose to eliminate two of 19 technician  
9 positions and enacted an objective selection process based on a competency evaluation of the 19  
10 technicians. The two lowest rated employees were laid off, including plaintiff, who was the  
11 lowest ranking employee.

12 Plaintiff asserts that his removal as a foreman in July 2010, and his layoff in March 2011  
13 were illegally based on his age and his perceived disability, Hepatitis C. In addition, plaintiff  
14 contends he was discriminated against because he did not receive a company truck for his use as  
15 soon as he believed he should have and was retaliated against because of his complaints about  
16 the company truck.

17 **B. Summary Judgment Standard**

18 Summary judgment is appropriate under Rule 56(c) where the moving party demonstrates  
19 the absence of a genuine issue of material fact and entitlement to judgment as a matter of law.  
20 *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A fact is material  
21 when, under the governing substantive law, it could affect the outcome of the case. *Anderson v.*  
22 *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Freeman v. Arpaio*, 125 F.3d 732, 735 (9th Cir.  
23 1997). A dispute about a material fact is genuine if “the evidence is such that a reasonable jury  
24 could return a verdict for the nonmoving party.” *Anderson*, 477 U.S. at 248.

25 A party seeking summary judgment always bears the initial burden of establishing the  
26 absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. The moving party can  
27 satisfy this burden in two ways: (1) by presenting evidence that negates an essential element of  
28 the nonmoving party’s case; or (2) by demonstrating that the nonmoving party failed to make a

1 showing sufficient to establish an element essential to that party's case on which that party will  
2 bear the burden of proof at trial. *Id.* at 322-23. "Disputes over irrelevant or unnecessary facts  
3 will not preclude a grant of summary judgment." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors*  
4 *Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987).

5 "The district court may limit its review to the documents submitted for the purpose of  
6 summary judgment and those parts of the record specifically referenced therein." *Carmen v. San*  
7 *Francisco Unified Sch. Dist.*, 237 F.3d 1026, 1030 (9th Cir. 2001). Therefore, the court is not  
8 obligated "to scour the record in search of a genuine issue of triable fact." *Keenan v. Allen*, 91  
9 F.3d 1275, 1279 (9th Cir. 1996) (citing *Richards v. Combined Ins. Co. of Am.*, 55 F.3d 247, 251  
10 (7th Cir. 1995)). If the moving party fails to discharge this initial burden, summary judgment  
11 must be denied and the court need not consider the nonmoving party's evidence. *Adickes v. S.H.*  
12 *Kress & Co.*, 398 U.S. 144, 159-60 (1970).

13 If the moving party meets this initial burden, the nonmoving party cannot defeat summary  
14 judgment merely by demonstrating "that there is some metaphysical doubt as to the material  
15 facts." *Matsushita Electric Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986);  
16 *Triton Energy Corp. v. Square D Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995) ("The mere existence  
17 of a scintilla of evidence in support of the nonmoving party's position is not sufficient.") (citing  
18 *Anderson*, 477 U.S. at 242, 252). Rather, the nonmoving party must "go beyond the pleadings"  
19 and by "the depositions, answers to interrogatories, and admissions on file," designate "specific  
20 facts showing that there is a genuine issue for trial." *Celotex*, 477 U.S. at 324 (quoting Fed. R.  
21 Civ. P. 56(e)).

22 When making this determination, the court must view all inferences drawn from the  
23 underlying facts in the light most favorable to the nonmoving party. *See Matsushita*, 475 U.S. at  
24 587. "Credibility determinations, the weighing of evidence, and the drawing of legitimate  
25 inferences from the facts are jury functions, not those of a judge, [when] he is ruling on a motion  
26 for summary judgment." *Anderson*, 477 U.S. at 255.

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1 **C. Discussion**

2 **1. Breach of Contract**

3 It is beyond dispute that SG has a policy of at-will employment. Although plaintiff  
4 acknowledges that he signed an employment application and the offer letter that indicated the  
5 position he was accepting was an at-will agreement for employment, and he understood by the  
6 term “at-will” that “either Company or I may terminate the employment relationship at any time,  
7 for any reason, with or without cause or prior notice” (Hawkins Depo. at 45), he nevertheless  
8 argues that his employment relationship with SG was modified by an implied-in-fact contract to  
9 discharge only for cause. (*Id.*),

10 California law is quite clear: an express at-will agreement precludes the existence of an  
11 implied-in-fact contract. *See Guz v. Bechtel Nat'l, Inc.*, 24 Cal.4th 317 (2000); *see also*  
12 *Halvorsen v. Aramark Unif. Servs., Inc.*, 77 Cal. Rptr.2d 383, 385 (Ct. App. 1998). An at-will  
13 provision in an employment application sufficiently creates an at-will employment relationship  
14 that cannot be overcome by parol evidence of implied limitations to the at-will relationship. *See*  
15 *Gianaculas v. Trans World Airlines, Inc.*, 761 F.2d 1391, 1394 (9th Cir. 1985). Because  
16 “there cannot be a valid express contract and an implied contract, each embracing the same  
17 subject, but requiring different results,” allegations of an implied for-cause contract cannot rebut  
18 the employee's status as an at-will employee. *See Rochlis v. Walt Disney Co.*, 23 Cal.Rptr.2d  
19 793, 798 (Ct. App. 1993).

20 Here, plaintiff was aware of his at-will employment status in the employment application  
21 and acceptance of offer, both of which he signed. He cannot now introduce evidence of an  
22 altered relationship between the parties and indeed, there is no such evidence. As a result,  
23 defendant was entitled to terminate plaintiff’s employment at any time, with or without cause.  
24 Accordingly, defendants are entitled to summary judgment on plaintiff’s breach of contract  
25 claim.

26 **2. Breach of the Implied Covenant of Good Faith and Fair Dealing**

27 A terminated employee who fails to establish anything but an at-will employment  
28 agreement is precluded from recovering for breach of the covenant of good faith and fair

1 dealing. *Guz*, 24 Cal.4th at 350-352 (“Because the implied covenant protects only the parties’  
2 right to receive the benefit of their agreement, and in an at-will relationship there is no  
3 agreement to terminate only for good cause, the implied covenant standing alone cannot be read  
4 to impose such a duty.”).

5 As discussed above, plaintiff was an at-will employee and cannot establish a breach of  
6 contract claim. As a matter of law, plaintiff cannot recover for breach of the covenant of good  
7 faith and fair dealing and defendant is entitled to summary judgment on this claim.

### 8 **3. Discrimination Claims Under the FEHA**

9 Under the FEHA, it is illegal for an employer to discriminate against an employee “in  
10 compensation or in terms, conditions, or privileges of employment” on the basis of race, color,  
11 or national origin. CAL. GOV'T CODE § 12940(a). Courts apply the *McDonnell Douglas*  
12 burden-shifting framework to FEHA claims. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792,  
13 802–04; *see also Metoyer v. Chassman*, 504 F.3d 919, 941 (9th Cir.2007) (applying Title VII  
14 framework to FEHA claim). Under this framework, the plaintiff must first establish a *prima*  
15 *facie* case of discrimination, the elements of which will vary according to the specific situation.  
16 *Guz*, 24 Cal.4th at 355. In establishing a *prima facie* case, plaintiff is required to show: “(1) he  
17 was a member of a protected class, (2) he was qualified for the position he sought or was  
18 performing competently in the position he held, (3) he suffered an adverse employment action . .  
19 . and (4) some other circumstance suggest[ing] discriminatory motive [*i.e.*, similarly situated  
20 employees were treated more favorably].” *Id.* (citations omitted). In all cases, “a plaintiff must  
21 offer evidence that give[s] rise to an inference of unlawful discrimination.” *Nidds v. Schindler*  
22 *Elevator Corp.*, 113 F.3d 912, 917 (9th Cir. 1996).

23 The requirement that plaintiff establish a *prima facie* case “is designed to eliminate at the  
24 outset the most patently meritless claims, as where the plaintiff is not a member of the protected  
25 class or was clearly unqualified, or where the job he sought was withdrawn and never filled.”  
26 *Guz*, 24 Cal. 4th at 379. Establishing a *prima facie* case is “not onerous.” *Texas Dept. of*  
27 *Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). Nevertheless, plaintiff must at least  
28 show “actions taken by the employer from which one can infer, if such actions remain

1 unexplained, that it is more likely than not that such actions were ‘based on a [prohibited]  
2 discriminatory criterion.’” *Guz*, 24 Cal.4th at 355 (citations omitted).

3 An “adverse employment action” is a “shorthand expression referring to the kind, nature,  
4 or degree of adverse action against an employee that will support a cause of action under”  
5 FEHA. *Yanowitz v. L'Oreal U.S.A.*, 36 Cal.4th 1028, 1049 (2005). Such an action must  
6 “materially affect[ ] the terms, conditions, or privileges of employment,” *id.* at 1051, or “[be]  
7 reasonably likely to impair a reasonable employee's job performance or prospects for  
8 advancement,” *id.* at 1054–55.

9 If the plaintiff makes the required *prima facie* showing, “the burden shifts to the employer  
10 to rebut the presumption [of discrimination] by producing admissible evidence, sufficient to  
11 raise a genuine issue of fact and to justify a judgment for the employer that its action was taken  
12 for a legitimate, nondiscriminatory reason.” *Guz*, 24 Cal.4th at 355–56. If the employer  
13 succeeds, the plaintiff “must then ... attack the employer's proffered reasons,” with “specific,  
14 substantial evidence of pretext.” *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 890 (9th Cir. 1994)  
15 (quoting *Steckl v. Motorola, Inc.*, 703 F.2d 392, 393 (9th Cir.1983)). The employee must then  
16 “demonstrate either . . . that the defendant's showing [is] in fact insufficient or ... that there [is] a  
17 triable issue of fact material to the defendant's showing.” *Dep't of Fair Emp't & Hous. v. Lucent*  
18 *Techs., Inc.*, 642 F.3d 728, 745 (9th Cir. 2011) (quoting *Hanson v. Lucky Stores, Inc.*, 74 Cal.  
19 App.4th 215, 225 (1999)). The employee may do this by establishing pretext, “by persuading  
20 the court that a discriminatory reason more likely motivated the employer or indirectly by  
21 showing that the employer's proffered explanation is unworthy of credence.” *Id.* (quoting  
22 *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1220 (9th Cir. 1998)). “An employee ... [cannot]  
23 simply show the employer's decision was wrong, mistaken, or unwise.” *Id.*

#### 24 a. Age Discrimination

25 A plaintiff establishes a *prima facie* case of age discrimination under the FEHA by  
26 presenting evidence that “the plaintiff (1) is over the age of 40; (2) suffered an adverse  
27 employment action; (3) was performing satisfactorily at the time of the adverse action; and (4)  
28 suffered the adverse action under circumstances that give rise to an inference of unlawful

1 discrimination, *i.e.*, evidence that the plaintiff was replaced by someone significantly younger  
2 than the plaintiff. *Hersant v. Dept. of Social Services*, 57 Cal. App.4th 997, 1002–1003 (1997).

3 Plaintiff is over the age of 40. Hawkins asserts he suffered an adverse action when he did  
4 not receive a company vehicle for his use as soon as he believed he was entitled. The use of a  
5 company vehicle is not an adverse employment action sufficient to establish a *prima facie* case  
6 of age discrimination. In order to state cause of action for discrimination under FEHA, plaintiff  
7 must allege conduct amounting to “adverse employment action” by alleging facts that evidence  
8 “both a substantial and detrimental effect” upon plaintiff's employment. *See Thomas v. Dep't of*  
9 *Corrections*, 77 Cal. App.4th 507 (2000); *see also Akers v. County of San Diego*, 95 Cal.  
10 App.4th 1441, 1455 (2002)(“to be actionable, the [employer's conduct] must result in a  
11 substantial adverse change in the terms and conditions of the plaintiff's employment” and an  
12 employer's conduct “constitutes actionable retaliation only if it had a substantial and material  
13 adverse effect on the terms and conditions of the plaintiff's employment.”). In *Schaffer v. GTE,*  
14 *Inc.*, 40 Fed. Appx. 552, 555 (9th Cir. 2002), the Court noted that plaintiff “neither alleges facts  
15 nor adduces evidence showing how this conduct” – providing her with a less desirable cubicle,  
16 denying her Internet access; denying her access to a company vehicle – “had any material, let  
17 alone a substantial and detrimental, effect upon her employment.” “A change that is merely  
18 contrary to the employee's interests or not to the employee's liking is insufficient.” *Akers*, 95 Cal.  
19 App. 4th at 1455.

20 Plaintiff's belief that not receiving a company truck was an adverse action is incorrect in  
21 that use of a vehicle is neither material, substantial or detrimental to his employment. Thus, the  
22 only adverse actions plaintiff can rely upon are his demotion and termination in making a *prima*  
23 *facie* case for age discrimination.

24 It is undisputed that after the RIF, neither plaintiff nor the 25-year-old technician, who  
25 was also terminated, was replaced by any person of any age. Therefore, plaintiff has failed to  
26 provide any circumstances that give rise to an inference of unlawful discrimination, *i.e.*,  
27 evidence that the plaintiff was replaced by someone significantly younger than the plaintiff. *See*  
28 *Hersant*, 57 Cal. App.4th at 1002–1003.

1 It is also undisputed that plaintiff never complained to anyone at SG about his demotion  
2 or termination as being motivated by or related to his age:

3 Q. Okay. Did you ever complain to anybody at the company that you were  
4 being discriminated against because of your age?

5 A. I didn't complain about that.

6 (Hawkins Depo. at 129.)

7 At his deposition, plaintiff stated that he had never heard any comments about his age or  
8 that his demotion or termination were related to his age. Indeed, plaintiff acknowledges in his  
9 deposition that he is speculating about the reasons for his termination:

10 A. And I really strongly questioned why they were choosing me when I was –  
11 when I felt like I was in the top tier of this group of 19 technicians.

12 Q. And you testified earlier, though, Mr. Hawkins, that you didn't have any  
13 information about the selection process; correct.

14 A. Right.

15 Q. Okay. So essentially, this was just your gut that it was unfair?

16 A. Yes.

17 Q. Well, more than my gut.

18 I was one of the top technicians in that group of 19, and it didn't make – it  
19 was more than a gut feeling.

20 A. Wee, my criteria is my time compared with other technicians' time with the  
21 company, and my qualifications compared with the other technicians'  
22 qualifications with the company.

23 Q. Okay. But you don't have any information about the qualifications and the  
24 company's assessment of how that made that decision to lay you off?

25 A. I don't know what they did. I have no idea how they did that, no.

26 (Hawkins Depo. at 127-28.)

27 Plaintiff attempts to disavow his deposition testimony with his current declaration. A  
28 party cannot create a triable issue of fact sufficient to defeat summary judgment by contradicting  
his own previous sworn testimony. *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 806  
(1999). Because a party cannot create an issue of fact by an affidavit or declaration contradicting  
his prior deposition testimony, plaintiff cannot now dispute his testimony to create an issue of  
fact. *See Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 266 (9th Cir. 1991)(explaining that the  
purpose of a motion for summary judgment as a procedure for screening out sham issues of fact  
would be defeated by allowing a plaintiff who had been thoroughly deposed to later sign a  
declaration contrary to his/her prior testimony). Further, plaintiff's conclusory, unsupported



1 assertions to the contrary are not sufficient to create a genuine issue of fact for trial. *See*  
2 *Thornhill Publ'g Co., Inc. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir. 1979)(conclusory testimony  
3 in an affidavit is insufficient to defeat summary judgment).

4 Additionally, in his March 29, 2011 email to Beth Shroyer at SG, plaintiff makes no  
5 comment about age with respect to either his demotion or termination. Plaintiff states clearly:

6 There was [sic] currently about 20 installers working in this dept. several of them  
7 had less time with the company, less knowledge of Simplex systems, fewer  
8 certification than I have. Any of a number of them should have been chosen before  
9 me. There is no way I should have been among the first to go.  
10 (Dft's Exh A at 93. [doc. #24-4])

11 Based on plaintiff's own testimony, Hawkins has failed to establish any basis for showing  
12 a discriminatory motive based on his age and therefore, has not made even the minimal showing  
13 necessary for establishing a *prima facie* case of age discrimination. Defendants are entitled to  
14 summary judgment on the age discrimination claim.

#### 15 **b. Perceived Disability under FEHA**

16 To establish a *prima facie* case of disability discrimination under FEHA, plaintiff must  
17 show that he "(1) suffered from a disability, or was regarded as suffering from a disability; (2)  
18 could perform the essential duties of the job with or without reasonable accommodations[;] and  
19 (3) was subjected to an adverse employment action because of the disability or perceived  
20 disability." *Wills v. Super. Ct.*, 195 Cal. App.4th 143, 159–60 (2011) (quoting *Sandell v.*  
21 *Taylor–Listug, Inc.*, 188 Cal. App.4th 297, 310 (2010)).

22 There is no dispute that plaintiff disclosed to defendants that he had been diagnosed with  
23 Hepatitis C in July 2010, but plaintiff admits that he experienced no obvious symptoms and did  
24 not request accommodation for hepatitis C. (Plf's Exh 14) Plaintiff acknowledges that he was  
25 demoted prior to his disclosure to defendants: "I was – they – their decision to demote me  
26 obviously preceded their knowledge of my hepatitis". (Plf's Depo at 112) Therefore, with  
27 respect to plaintiff's need to make a *prima facie* showing, the only adverse action plaintiff  
28 suffered was his subsequent termination and not his demotion.

Defendants argue that plaintiff has not made a *prima facie* showing of perceived  
disability discrimination. Specifically, defendants contend there is no evidence that they had any

1 reason to believe plaintiff was limited in a major life activity. In other words, even after plaintiff  
2 advised defendants that he had hepatitis C, defendants did not perceive Hawkins as being  
3 disabled. Although plaintiff was initially asked to provide a medical statement about his health  
4 condition, it is undisputed that plaintiff never complied with that request and defendants did not  
5 make his continuing employment conditioned upon receipt of a medical statement. Additionally,  
6 plaintiff continued to work as a technician for SG for approximately nine months after his  
7 condition was disclosed and sought no accommodation for his condition.

8 Plaintiff has failed to establish the third element of his *prima facie* case—that he “was  
9 subjected to an adverse employment action because of the disability or perceived disability.”  
10 *Wills*, 195 Cal. App.4th at 159–60. Hawkins fails to provide any evidence that the decision to  
11 terminate his employment was based on his disability or his record or history of a disability, or  
12 that defendants were concerned plaintiff would suffer from a disability in the future. Indeed,  
13 plaintiff concedes that defendants who decided to terminate his employment never said anything  
14 that would lead him to believe they were “discriminating” against him because of hepatitis C.

15 Although the Court finds that plaintiff has not made the minimal showing necessary for  
16 establishing a *prima facie* case of disability discrimination, the Court will continue with the  
17 analysis under *McDonnell Douglas* test, *i.e.*, if the plaintiff establishes his *prima facie* case, a  
18 rebuttable presumption of discrimination arises and the burden shifts to the employer to rebut the  
19 presumption with evidence that its action was taken for a legitimate, nondiscriminatory reason.  
20 *Guz*, 24 Cal. 4th at 355-56.

21 **c. Rebuttal of a *prima facie* Case of Disability Discrimination**

22 In the present case, defendants contend that they had legitimate, non-discriminatory  
23 reasons for selecting plaintiff for termination.

24 First, a RIF that is implemented due to economic conditions is a legitimate  
25 nondiscriminatory business decision. *See Martin v. Lockheed Missiles & SG Co.*, 29 Cal.  
26 App.4th 1718, 1731-32 (1994). Defendants have provided evidence that the SG RIF was a  
27 business decision that occurred because of depressed economic conditions. (Dfts’ Exh. A,  
28 Ciereck Decl. at 4.) Plaintiff has provided no evidence to the contrary. His belief that the RIF

1 was a sham event to target his termination is nothing more than a conclusory, unsupported  
2 assertion which is insufficient to create a genuine issue of fact for trial

3         Second, the parties agree that plaintiff was counseled with respect to various safety  
4 violations. Although plaintiff believes that the two driver alerts he received, the incident in  
5 which a ladder fell off a company vehicle due to it being improperly secured, and the improper  
6 unloading of a wire care resulting in damage to the cart were of minimal importance, he  
7 acknowledges that safety is a legitimate concern for defendants. Although these issues arose  
8 prior to his demotion and therefore prior to his termination, they are legitimate  
9 nondiscriminatory reasons that could be taken into account in terminating plaintiff's  
10 employment.

11         Third, with respect to the RIF, defendants present evidence that two technicians would be  
12 terminated during the RIF, *i.e.*, the number of technicians would be reduced from 19 to 17, and  
13 the decision concerning the two technicians who would be terminated would be made by using a  
14 competency-based evaluation process. (Ciareck Decl. at 4.) The evaluation was intended to  
15 compare employees in the same job and same department. Five areas of competency were  
16 reviewed:

- 17             (1) Quality of Work – Neatness, accuracy, reliability, consistency and  
              thoroughness of work;
- 18             (2) Safety – Consider employee's knowledge and adherence to safety  
              policies/programs;
- 19             (3) Productivity – Volume of work produced within reasonable expectations'
- 20             (4) Attendance/Punctuality – Regular & punctual attendance, compliance with  
              work schedule & proper call-out procedures;
- 21             (5) Initiative/Excellence – Employee's ability to think creatively with minimal  
              guidance, performs work without being told, self-starter.

22 (Dfts' Exh. D. [doc. #24-8]) The first two areas were weighted at 25%; the third area was  
23 weighted 20%; the fourth and fifth areas were weighted 15%. (Ciareck Decl. at 5.) At the  
24 conclusion of the evaluation process for the 19 technicians, plaintiff had a total weighted  
25 average of 1.70, which placed him last in the competency rating. (*Id.*)

26         Although plaintiff strongly disagrees with the rating he received, he has not provided any  
27 evidence that the evaluation was based in any manner on a discriminatory intent, particularly  
28 with respect to disability discrimination, or that the evaluation was anything other than a

1 legitimate, non-discriminatory basis for selecting plaintiff for termination. Accordingly,  
2 defendants have produced substantial evidence of a legitimate, nondiscriminatory reason for the  
3 adverse employment action, and the burden now shifts to the plaintiff to prove pretext.

4 **d. Pretext**

5 “[T]he plaintiff may establish pretext ‘either directly by persuading the court that a  
6 discriminatory reason more likely motivated the employer or indirectly by showing that the  
7 employer's proffered explanation is unworthy of credence.’” *Villiarimo v. Aloha Island Air, Inc.*,  
8 281 F.3d 1054, 1062 (9th Cir.2002) (quoting *Burdine*, 450 U.S. at 256). Circumstantial evidence  
9 of pretense must be “specific and substantial” in order to create a triable issue with respect to  
10 whether the employer intended to discriminate on an improper basis. *Id.*; *see also Noyes*, 488  
11 F.3d at 1169–70.

12 Here, plaintiff states a material factual dispute exists as to whether defendants’ reasons  
13 for its adverse employment actions against plaintiff were pretextual but provides no evidence  
14 whatsoever to suggest that the RIF was not financially required or that the method of evaluating  
15 the technicians was subjectively motivated or designed. His unsupported belief that he was  
16 targeted for termination is not evidence and his feelings cannot raise a material issue of fact  
17 sufficient to avoid summary judgment. *See King v. United Parcel Service, Inc.*, 152 Cal.  
18 App. 4th 426, 433 (2007) (self-serving and uncorroborated testimony cannot create a  
19 genuine issue of material fact).

20 A court may grant summary judgment for an employer “where, given the strength of the  
21 employer's showing of innocent reasons, any countervailing circumstantial evidence of  
22 discriminatory motive, even if it may technically constitute a *prima facie* case, is too weak to  
23 raise a rational inference that discrimination occurred.” *Guz*, 24 Cal. 4th at 362.

24 Based on the evidentiary material presented, the Court finds and concludes that  
25 defendants have produced substantial evidence of a legitimate, nondiscriminatory reason for the  
26 adverse employment action of termination of plaintiff’s employment and plaintiff has failed to  
27 offer specific and substantial evidence that a discriminatory reason more likely motivated the  
28 defendants or indirectly by showing that the employer's proffered explanation is unworthy of

1 credence. Accordingly, defendants are entitled to summary judgment on plaintiff's disability  
2 discrimination claim.

#### 3 **4. Retaliation under FEHA**

4 The FEHA "makes it an unlawful employment practice '[f]or any employer ... to  
5 discharge, expel, or otherwise discriminate against any person because the person has opposed  
6 any practices forbidden under this part or because the person has filed a complaint, testified, or  
7 assisted in any proceeding under this part.'" *Rope v. Auto-Chlor System of Washington, Inc.*,  
8 220 Cal. App.4th 635, 651 (2013) (citing *Yanowitz v. L'Oreal USA, Inc.*, 36 Cal.4th 1028, 1042  
9 (2005)). "To state a claim of retaliation under FEHA, a plaintiff must show: (1) he engaged in a  
10 protected activity, (2) he was subjected to an adverse employment action, and (3) there is a  
11 causal link between the protected activity and the adverse employment action. *Rope*, 220 Cal.  
12 App.4th at 651, (quoting *Yanowitz*, 36 Cal.4th at 1042)).

13 Government Code §12940(h) "encompasses a broad range of protected activity." *Id.* "The  
14 protected activity element may be established by evidence that the plaintiff threatened to file a  
15 discrimination charge, by a showing that the plaintiff mistakenly, but reasonably and sincerely  
16 believed he was opposing discrimination or by evidence an employer believed the plaintiff was a  
17 potential witness in another employee's DFEH action." *Id.* [citations omitted.] "The  
18 determination as to what constitutes a protected activity is inherently fact-driven." *Id.*

19 Defendants contend that plaintiff cannot establish a *prima facie* case of retaliation  
20 because plaintiff did not engage in an protected activity. Further, "to constitute retaliation, there  
21 must also be evidence the employer knew the employee was engaged in activities in opposition  
22 to the employer at the time of the alleged retaliation." *Id.* at 653, citing *Yanowitz*, 36 Cal.4th at  
23 1046 (employee's unarticulated belief that an employer is engaging in discrimination is  
24 insufficient to establish protected conduct if there is no evidence employer knew employee's  
25 opposition was based upon a reasonable belief that employer was engaging in discrimination.).

26 Plaintiff's own testimony demonstrates that he did not believe that age or perceived  
27 disability discrimination were motivating defendants to terminate his employment. And plaintiff  
28 never complained to anyone at SG about age or disability discrimination while employed at SG

1 or after his termination. He never filed a grievance or a discrimination charge with the DFEH  
2 about age or perceived disability discrimination. As discussed above, the alleged failure of  
3 defendants to give plaintiff a company truck at the time believed it was due is not an adverse  
4 action and his complaints to defendants about the truck situation cannot be a protected activity  
5 sufficient to support a retaliation claim.

6 Here, plaintiff did not engage in any protected activity and therefore, he has not made a  
7 prima facie showing of retaliation. Defendants are entitled to summary judgment on this claim.

#### 8 **5. Wrongful Demotion and Termination in Violation of Public Policy**

9 In *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 172 (1980), the Court held that “an  
10 employer's traditional broad authority to discharge an at-will employee may be limited ... by  
11 considerations of public policy.” Thus, under California law, an at-will employee may maintain a  
12 tort cause of action against his employer where the employer's discharge of the employee  
13 contravenes fundamental public policy. *Foley v. Interactive Data Corp.*, 47 Cal.3d 654, 666  
14 (1988). Such claims must be based on a policy established by a constitutional or statutory  
15 provision. *Gantt v. Sentry Ins.*, 1 Cal.4th 1083, 1095 (1992).

16 In this case, plaintiff points to FEHA as the source of California’s non-discrimination  
17 policy. As discussed above, plaintiff’s FEHA claims are based on allegations that defendants’  
18 discriminatory conduct towards him on the basis of age and perceived disability race directly  
19 violated his rights under this clause.

20 Plaintiff cannot support his claims for wrongful demotion and termination in violation of  
21 public policy for the same reasons that he cannot support any of his FEHA claims: he has not  
22 provided evidence that defendants' conduct was motivated by his age or perceived disability. The  
23 evidence does not support an inference that defendants' decision to terminate plaintiff was  
24 motivated by anything other than his own failure to perform his job duties adequately.  
25 Defendants are therefore entitled to summary judgment on plaintiff's wrongful demotion and  
26 termination in violation of public policy.

#### 27 **6. Intentional Infliction of Emotional Distress**

28 IIED cause of action requires a showing of extreme and outrageous behavior beyond all

1 bounds of decency. *Agarwal v. Johnson*, 25 Cal.3d 932, 946 (1979), disapproved on another  
2 point in *White v. Ultramar, Inc.*, 21 Cal.4th 563, 574, fn. 4 (1999). The conduct must have been  
3 committed with the intention of causing, or reckless disregard of the probability of causing,  
4 emotional distress, and the plaintiff must have suffered severe emotional distress. *Agarwal*, 25  
5 Cal.3d at 946.) Under California law, discriminatory behavior can be sufficiently outrageous to  
6 give rise to an emotional distress claim. *See Murillo v. Rite Stuff Foods, Inc.*, 65 Cal.App.4th  
7 833, 848, 77 Cal.Rptr.2d 12 (1998); *see also Rojo v. Kliger*, 52 Cal.3d 65, 81  
8 (1990)(“employer's discriminatory actions may [also] constitute ... outrageous conduct under a  
9 theory of intentional infliction of emotional distress”

10 When a plaintiff bases an IIED claim on allegations of discrimination and retaliation, the  
11 plaintiff's failure to provide evidence supporting those underlying allegations will typically  
12 foreclose his IIED claim. *See Lee v. Eden Med. Ctr.*, 690 F. Supp.2d 1011, 1022 (N.D. Cal.  
13 2010) (awarding summary judgment to the defendant on plaintiff's IIED claims because the  
14 plaintiff failed to provide sufficient evidence to support FEHA claims of harassment,  
15 discrimination, and retaliation arising from the same non-outrageous conduct). Further, in  
16 response to defendants' motion, plaintiff has provided no evidence of defendants' “outrageous  
17 conduct beyond the bounds of human decency. *See Janken v. GM Hughes Electronics*, 46 Cal.  
18 App.4th 55, 80 (1996). Accordingly, summary judgment on this claim will be granted in favor of  
19 defendants.

20 **D. Conclusion**

21 For the reasons set forth above, **IT IS ORDERED** that defendants' motion for summary  
22 judgment is **GRANTED** in its entirety. **IT IS FURTHER ORDERED** that the Clerk of the  
23 Court enter judgment in defendants' favor and against plaintiff.

24 **IT IS SO ORDERED.**

25 DATED: February 25, 2014

26   
27 M. James Lorenz  
28 United States District Court Judge

28 ///

1 COPY TO:  
2 HON. BERNARD G. SKOMAL  
3 UNITED STATES MAGISTRATE JUDGE

4 ALL PARTIES/COUNSEL

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