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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
10

11 MARTHA DEA LA ROSA, an individual,
12 Plaintiff,
13 v.
14 COSTCO WHOLESALE
15 CORPORATION, a Washington
16 Corporation; and DOES 1 through 25,
17 inclusive,
18 Defendants.

Case No.: 3:21-cv-1630-W-BGS

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT
COSTCO WHOLESALE
CORPORATION’S MOTION FOR
SUMMARY JUDGEMENT OR, IN
THE ALTERNATIVE, PARTIAL
SUMMARY JUDGEMENT [DOC. 18]**

19 Pending before the Court is Defendant Costco Wholesale Corporation’s motion for
20 summary judgement or, in the alternative, partial summary judgement. [Doc. 18.]

21 The Court decides the motions on the papers, and without oral argument. *See*
22 Civ.L.R. 7.1.d.1. For the reasons that follow, **GRANTS IN PART** and **DENIES IN**
23 **PART** Defendant’s motion [Doc. 18].
24

25 **I. FACTUAL BACKGROUND**

26 **A. De La Rosa’s Beginning of Employment at Costco**

27 De La Rosa began her employment with Costco Wholesale Corporation (“Costco”)
28 in August 2001 as a Quality Control Line Technician at Costco’s 910 packing facility in

1 San Diego. (Deposition of Johnny Vergara (“Vergara Dep.”), Exhibit G to Declaration of
2 Christopher L. Garcia (“Garcia” Decl.) [Doc. 18-1], ¶ 8.) As a Quality Control Line
3 Technician, De La Rosa’s essential job duties included monitoring the production lines,
4 deciphering codes for products, checking the work of other quality control employees,
5 checking the cleanliness of machines, entering information into a computer, and checking
6 the weight of products. (Deposition of Martha De La Rosa (“De La Rosa Dep.”) at
7 22:22-23:8.) De La Rosa reported to production supervisor Erick Rosas. (*Joint*
8 *Statement of Disputed and Undisputed Facts* [Doc. 20], #13.) Rosas reported to quality
9 control manager Johnny Vergara. (*Id.*, #14.) Vergara reported to Eric Foster. (*Id.*, #15.)
10 Foster reported to Kenneth Eakes. (*Id.*, #15.)

11 **B. De La Rosa’s Leaves Of Absence**

12 De La Rosa requested, and was approved for intermittent leave from March 8,
13 2017 to September 8, 2017. (*Id.*, #6.) De La Rosa requested, and was approved for
14 continuous leave from November 2, 2017 to November 7, 2017. (*Id.*, #10.) De La Rosa
15 requested, and was approved for continuous leave from November 13, 2017 to December
16 8, 2017, which was in turn extended to January 25, 2018, and then further extended to
17 May 1, 2018. (*Id.*, #11.)

18 **C. De La Rosa’s Work Restrictions and Medical Accommodations**

19 In 2007, De La Rosa reported a carpal tunnel injury while working with a
20 machine. (De La Rosa Dep. at 66:6-67:3.) De La Rosa’s doctor-imposed work
21 restrictions of not lifting more than 10 pounds and no repetitive work. (De La
22 Rosa Dep. at 67:5-10.) Following the injury, De La Rosa was never reprimanded
23 or disciplined for falling behind in her work. (De La Rosa Dep. at 68:15-69:19.)

24 In July 2017, De La Rosa presented a doctor’s note indicating she had work
25 restrictions precluding her from lifting, pulling, or pushing in excess of 10 pounds. (*Joint*
26 *Statement of Disputed and Undisputed Facts*, #7.) Costco held an in-person job
27 assessment review meeting with De La Rosa to determine if she could perform the
28 essential functions of her Quality Control Line Technician position in light of her

1 restrictions, and if not, to explore whether any reasonable accommodations were
2 available to enable her to do so. (*Id.*, #8.) Both Costco and De La Rosa agreed that De
3 La Rosa could perform all of her position’s essential functions and that no
4 accommodation was necessary for her to do so. (Foster Decl., ¶ 2; Ex. C.) As to the non-
5 essential functions of her position, De La Rosa agreed she would “self monitor to ensure
6 [she was] working within [her] restrictions and request assistance when needed.” (*Id.*,
7 #9.)

8 **D. 2019 Medical Leave**

9 On January 9, 2019, De La Rosa began experiencing severe pain in her abdomen
10 shortly after the start of her shift. (De La Rosa Dep. at 217:17-18.) De La Rosa
11 immediately approached Rosas informing him of the pain and requesting to be excused
12 from her shift. (*Id.* at 217:11-20.) Rosas refused to let her leave. (*Id.*, 217:17-18.) De
13 La Rosa then requested that she be placed on a “lighter” production line which Rosas also
14 refused. (De La Rosa Dep. at 31:3-8.) At some point, Vergara and Rosas also spoke
15 with Angela Cruz (“Cruz”), another production supervisor, regarding De La Rosa’s
16 request to leave. (De La Rosa Dep. at 29:15-29:25; De La Rosa Decl., ¶ 2.) They held a
17 meeting in Cruz’s office while De La Rosa waited outside. (De La Rosa Dep. at 30:1-3.)
18 After the meeting, De La Rosa was told that she had to continue working. (*Id.* at 30:11-
19 18.) Two hours after her first request, De La Rosa approached Vergara again, informing
20 him that she was in a lot of pain and again asked to leave early or be placed on a lighter
21 production line. (De La Rosa Dep. at 30:25-32:2; 150:21-24.) Vergara told De La Rosa
22 that he could not do anything and instead admonished her for always being sick. (De La
23 Rosa Dep. at 30:19-22; 150:21-151:4.) When her pain continued, De La Rosa again
24 approached Rosas, stating she was in pain and needed help, but Rosas refused her pleas.
25 (De La Rosa Dep. at 149:17-19.) Before the end of the shift, two of De La Rosa’s
26 coworkers offered to switch production lines with her; however, Rosas refused the
27 request despite rotation being a regular occasion on the production lines. (De La Rosa
28 Dep. 31:23- 32:8; Vergara Dep. at 25:24-26:7.) That same day, De La Rosa went on a

1 medical leave of absence after having surgery for a hernia. (*Joint Statement of Disputed*
2 *and Undisputed Facts*, #25.) Costco accommodated De La Rosa's absence until she
3 returned in April 2019. (De La Rosa Dep. at p. 32:22-33:17.) When De La Rosa
4 returned to work, she did not submit any doctor's note or other documentation indicating
5 she needed any accommodations. (*Id.* at 247:7-25.)

6 De La Rosa returned to work on April 9, 2019. She was placed on two of the
7 heavier production lines and experienced pain. She asked to change to a lighter
8 production line but her request was denied. She continued working until April 24, 2019,
9 when she went back to the hospital and stayed there for several days. (*Id.* at 40:1-14.)
10 Her leave was extended to May 2, 2019, then again to June 1, 2019, then again to June
11 17, 2019, and finally to July 10, 2019. (*Id.* at 174:11-177:20.)

12 **E. Costco's Investigation**

13 On February 20, 2019, Erin Sieglock, Costco's Ancillary Operations Manager,
14 contacted Celeste Parker regarding a claim for benefits that had been submitted by De La
15 Rosa. (Parker Decl. ¶ 3.) Ms. Parker contacted David Pehau, the Optical Manager of the
16 Costco warehouse located in Chula Vista, California, to learn more information about the
17 matter. (*Id.*) Mr. Pehau informed Ms. Parker that on January 5, 2019, De La Rosa's
18 husband attempted to order eyeglasses for himself at the Optical Department of a Costco
19 warehouse in Chula Vista, under De La Rosa's benefits plan through Costco. (*Id.*) Mr.
20 Pehau further informed Ms. Parker that De La Rosa's husband submitted a lens
21 prescription from a Dr. Mascareno supposedly located in Chula Vista, but the
22 prescription did not have an exam or expiration date listed. (*Id.*) Mr. Pehau further
23 stated that the Optical Department called Dr. Mascareno's office to obtain the missing
24 information, but the provider instead stated it had no record of De La Rosa's spouse ever
25 getting an eye exam at its office. (*Id.*) Mr. Pehau further relayed that the provider stated
26 that while the prescription form was the provider's, it appeared the name of the patient
27 had been altered. (*Id.*)
28

1 Upon receiving this information, Ms. Parker investigated the conduct of De La
2 Rosa and her husband. (Parker Decl. ¶ 4.) She concluded that:

- 3 • On November 20, 2016, De La Rosa had an eye exam at the Costco optical
4 department located at a Costco warehouse on H Street in Chula Vista.
5 (Parker Decl., ¶ 4; De La Rosa Dep. at 77:7-78:17.)
- 6 • On January 25, 2017, De La Rosa presented an optical prescription for
7 herself issued by a doctor in Mexico, with a very different lens strength
8 compared to that prescribed by the Costco optician two months earlier. De
9 La Rosa presented this prescription to a different Costco warehouse located
10 on Broadway in Chula Vista. (Parker Decl., ¶ 4; De La Rosa Dep. at 77:7-
11 78:17.)
- 12 • On March 28, 2018, De La Rosa presented the Costco warehouse on
13 Broadway in Chula Vista with a different optical prescription for herself
14 issued by a doctor in Mexico, which again reflected a very different lens
15 strength. (Parker Decl., ¶ 4; De La Rosa Dep. 79:23-80:10.)
- 16 • Also on March 28, 2018, De La Rosa presented another optical prescription
17 from the same doctor in Mexico for her son, Ryan. (Parker Decl., ¶ 4.)
18 Ryan had also previously received a Costco eye exam, and the prescription
19 from the doctor in Mexico was dramatically stronger. (*Id.*)
- 20 • On March 20, 2019, De La Rosa ordered another pair of glasses for her son
21 using the prescription from the doctor in Mexico. (*Id.*)

22
23 On April 18, 2019, Ms. Parker called De La Rosa to question her about these
24 events. (Parker Decl., ¶ 5; De La Rosa Dep. 82:19-24; 84:18-85:14; 87:3-17.) De La
25 Rosa denied any wrongdoing and said she would talk to her husband and call back.
26 (Parker Decl., ¶ 5.)

27 De La Rosa did not call back, and on April 29, 2019, Ms. Parker called her again
28 and left a voicemail message. (Parker Decl., ¶¶ 5-6.) The next day, De La Rosa returned

1 the call and claimed that another doctor in Mexico had written the prescription for her
2 husband using Dr. Mascareno's form. (Parker Decl., ¶ 6.) De La Rosa was not able to
3 provide the phone number or name of the provider in Mexico. (*Id.*) With regard to the
4 various prescriptions with varying lens strengths, De La Rosa told Ms. Parker that the
5 eyeglasses she obtained using the Costco optician's prescriptions did not work, so she
6 instead received an exam with a non-Costco provider. (Parker Decl., ¶ 6; De La Rosa
7 Dep. 74:18-77:6.) After completing this interview, Ms. Parker reported what she had
8 learned to a Costco Personnel Manager – Kyle Hofman – at Costco's home office.
9 (Parker Decl., ¶ 7; Declaration of Kyle Hofman in Support of Motion for Summary
10 Judgment or, in the Alternative, Partial Summary Judgment (“Hofman Decl.”), ¶ 6, Ex.
11 D.) Mr. Hofman, in turn, conferred with Ancillary Operations Manager Erin Sieglock to
12 understand the ramifications of using Costco's vision benefits to obtain fake and/or
13 forged prescriptions. (Hofman Decl., ¶ 8.) Ms. Sieglock informed Mr. Hofman that
14 filling fraudulent prescriptions may jeopardize the dispensing license of the Costco
15 optician who filled the prescription. (Hofman Decl., ¶ 8.) Mr. Hofman concluded that
16 De La Rosa's conduct constituted terminable offenses, and that Human Resources would
17 support a decision to terminate De La Rosa's employment as a result. (Hofman Decl., ¶
18 9.) Mr. Hofman reported the findings of the investigation and his conclusions to Eric
19 Foster, the General Manager of CWI West, where De La Rosa worked. (Hofman Decl., ¶
20 10; Foster Decl., ¶ 6.) Mr. Foster consulted with Assistant Vice President Noe
21 Betancourt regarding De La Rosa's conduct. (Foster Decl., ¶ 7.) Mr. Betancourt told Mr.
22 Foster that he believed termination was appropriate because De La Rosa's conduct put
23 Costco and the optician's license at risk, and this was a zero tolerance in his eyes. (Foster
24 Decl., ¶ 7.) Mr. Foster then made the decision to terminate De La Rosa's employment.
25 (Foster Decl., ¶ 8.) On July 10, 2019, Mr. Foster met with De La Rosa, explained to De
26 La Rosa the investigation that was conducted, the conclusion reached that she engaged in
27 benefits fraud, and that her employment was being terminated as a result. (Hofman
28 Decl., ¶ 12; Foster Decl., ¶ 11.)

1
2 **II. LEGAL STANDARD**

3 Summary judgment is appropriate under Rule 56(c) where the moving party
4 demonstrates the absence of a genuine issue of material fact and entitlement to judgment
5 as a matter of law. *See* FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322
6 (1986). A fact is material when, under the governing substantive law, it could affect the
7 outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A
8 dispute about a material fact is genuine if “the evidence is such that a reasonable jury
9 could return a verdict for the nonmoving party.” *Id.* at 248. “Disputes over irrelevant or
10 unnecessary facts will not preclude a grant of summary judgment.” *T.W. Elec. Serv., Inc.*
11 *v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987).

12 A party seeking summary judgment always bears the initial burden of establishing
13 the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. The moving
14 party can satisfy this burden in two ways: (1) by presenting evidence that negates an
15 essential element of the nonmoving party’s case; or (2) by demonstrating that the
16 nonmoving party failed to make a showing sufficient to establish an element essential to
17 that party’s case on which that party will bear the burden of proof at trial. *Id.* at 322–23.
18 If the moving party fails to discharge this initial burden, the court must deny summary
19 judgment and need not consider the nonmoving party’s evidence. *Adickes v. S.H. Kress*
20 *& Co.*, 398 U.S. 144, 159–60 (1970).

21 If the moving party meets this initial burden, the nonmoving party cannot avoid
22 summary judgment merely by demonstrating “that there is some metaphysical doubt as to
23 the material facts.” *In re Citric Acid Litig.*, 191 F.3d 1090, 1094 (9th Cir. 1999) (citing
24 *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986); *Triton*
25 *Energy Corp. v. Square D Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995) (citing *Anderson*, 477
26 U.S. at 252) (“The mere existence of a scintilla of evidence in support of the nonmoving
27 party’s position is not sufficient.”). Rather, the nonmoving party must “go beyond the
28 pleadings and by her own affidavits, or by ‘the depositions, answers to interrogatories,

1 and admissions on file,’ designate ‘specific facts showing that there is a genuine issue for
2 trial.’” *Ford Motor Credit Co. v. Daugherty*, 279 Fed. Appx. 500, 501 (9th Cir. 2008)
3 (citing *Celotex*, 477 U.S. at 324). At this stage, the court must view all inferences drawn
4 from the underlying facts in the light most favorable to the nonmoving party. *See*
5 *Matsushita*, 475 U.S. at 587.

6 7 **III. DISCUSSION**

8 **A. Discrimination and Retaliation Claims**

9 The first issue raised in Defendant’s motion is De La Rosa’s discrimination and
10 retaliation claims under the Fair Employment and Housing Act (“FEHA”). De La Rosa’s
11 first cause of action contends that her protected status (disability) was a motivating factor
12 in Defendants’ termination of her (*Compl.* ¶ 29) and her fourth cause of action contends
13 that her termination was taken in retaliation for exercising her rights under FEHA
14 (*Compl.* ¶ 56). The parties address the two causes of action together; the Court will do
15 the same.

16 When a plaintiff alleges retaliatory employment termination under the FEHA and
17 the defendant seeks summary judgment, California follows the burden-shifting analysis
18 of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) to determine whether there
19 are triable issues of fact for resolution by a jury. *See Loggins v. Kaiser Permanente*, 151
20 Cal. App. 4th 1102, 1113 (2007). And so too where a plaintiff alleges discrimination
21 under the FEHA. *See Caldwell v. Paramount Unified School District*, 41 Cal. App. 4th
22 189, 195 (1995).

23 Under the *McDonnell Douglas* framework, the plaintiff carries the initial burden of
24 establishing a prima facie case of discrimination. *McDonnell Douglas*, 411 U.S. at 802.
25 If established, the prima facie case “results in a ‘presumption that the [defendant]
26 unlawfully discriminated against the [plaintiff].’” *Lessard v. Applied Risk Management*,
27 307 F.3d 1020, 1025 (9th Cir. 2002) (quoting *Texas Department of Community Affairs v.*
28 *Burdine*, 450 U.S. 248, 254 (1981)). The burden then shifts to the defendant to articulate

1 a legitimate, non-discriminatory reason for the employment action being challenged. *See*
2 *McDonnell Douglas*, 411 U.S. at 802. If the defendant carries this burden, plaintiff must
3 then demonstrate that the defendant's asserted reason is pretextual. *McDonnell Douglas*,
4 411 U.S. at 802, 804.

5 **1. Whether De La Rosa Has Established a Prima Facie Case Under**
6 **the McDonnell Douglas Framework**

7 De La Rosa contends that Costco concedes that she has established a prima facie
8 case of discrimination and retaliation for her first and fourth causes of action. (*Opp.* to
9 MSJ at 15.) Because the analysis in Costco's motion begins with discussion of the
10 legitimate business justification and because Costco does not dispute this in their reply
11 papers, the Court agrees.

12 Even if Costco did not concede this point, the Court would find that De La Rosa
13 has met her burden at this step. The amount of proof necessary to establish a prima facie
14 case at the summary judgment stage is minimal and need not even rise to a
15 preponderance of the evidence. *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 889 (9th Cir.
16 1994). Rather, De La Rosa need only adduce proof that "gives rise to an inference of
17 unlawful discrimination." *Id.* This requires "very little" evidence. *Caldwell*, 41 Cal.
18 App. 4th at 197 (quoting *Sischo-Nownejad v. Merced Community College District*, 934
19 F.2d 1104, 1111 (9th Cir. 1991)). De La Rosa has satisfied her burden by showing that:
20 (1) she was a member of a protected class (disabled), (2) she was performing competently
21 in the position she held, (3) she was terminated, and (4) she was terminated very close in
22 time to an extended medical leave for her disability. *See Guz v. Bechtel National*, 24
23 Cal.4th 317, 355 (2000).

24 **2. Costco's Legitimate, Non-Discriminatory Explanation**

25 Since De La Rosa has established a prima facie case, Costco must articulate a
26 legitimate, non-discriminatory reason for its adverse employment action. *Burdine*, 450
27 U.S. at 255. Costco's proffered legitimate, non-discriminatory reason for the termination
28 is that it determined that De La Rosa had engaged in fraud and violated Costco policy.

1 (See *MSJ* at 12.) Undisputed facts establish that Costco was alerted to potential fraud.
2 Costco investigated that potential fraud and came to the reasonable conclusion that De La
3 Rosa was engaging in the fraud. Based on the results of the investigation, Costco
4 determined De La Rosa had violated Costco policy and terminated her. Given this
5 evidence, the Court concludes that Costco has articulated a legitimate, non-discriminatory
6 reason for De La Rosa's termination.

7 **3. Whether De La Rosa Has Raised a Genuine Issue of Fact**
8 **Regarding Pretext**

9 Because Costco has adduced evidence that it had a legitimate reason for
10 terminating De La Rosa, she must, to survive summary judgment, demonstrate that
11 Costco's articulated reason is a pretext for unlawful discrimination by "either directly
12 persuading the court that a discriminatory reason more likely motivated the employer or
13 indirectly by showing that the employer's proffered explanation is unworthy of
14 credence." *Chuang v. Univ. of Cal. Davis*, 225 F.3d 1115, 1124 (9th Cir. 2000) (quoting
15 *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 (1981)). When relying on
16 indirect, circumstantial evidence to prove pretext, a plaintiff must produce specific and
17 substantial evidence "that tends to show that the employer's proffered motives were not
18 the actual motives because they are inconsistent or otherwise not believable." *Chuang*,
19 225 F.3d at 1127. The "evidence must be both specific and substantial to overcome the
20 legitimate reasons[.]" *Aragon v. Republic Silver State Disposal Inc.*, 292 F.3d 654, 659
21 (9th Cir. 2002), as amended (July 18, 2002).

22 The California Supreme Court has held that "evidence of dishonest reasons,
23 considered together with the elements of the prima facie case, may permit a finding of
24 prohibited bias." *Guz*, 24 Cal.4th at 380; see also *Morgan*, 88 Cal. App. 4th at 75 ("An
25 employee in this situation cannot simply show the employer's decision was wrong,
26 mistaken, or unwise. Rather, the employee must demonstrate such weaknesses,
27 implausibilities, inconsistencies, incoherencies, or contradictions in the employer's
28 proffered legitimate reasons for its action that a reasonable factfinder could rationally

1 find them unworthy of credence, ... and hence infer that the employer did not act for the
2 [... asserted] non-discriminatory reasons”) (quoting *Horn v. Cushman & Wakefield, Inc.*,
3 72 Cal. App. 4th 798, 807 (1999) (internal quotations omitted)).

4 De La Rosa points to several different aspects of the investigation and termination
5 decision to argue that there is a genuine issue of material fact regarding the truth of
6 Costco’s articulated non-discriminatory reason.

7 **a) Costco’s termination approval process**

8 De La Rosa first argues that Costco “failed to adhere to the company’s policy that
9 controls terminating an employee of De La Rosa’s tenure” and that this “points to
10 unlawful discriminatory animus as the true reason for Foster’s decision to terminate.”
11 (*Opp.* at 16.) Specifically, De La Rosa argues that Foster did not receive approval for De
12 La Rosa’s termination from an Executive Vice President, as required by Costco’s
13 Employee Agreement.

14 Costco does not dispute that Costco’s policy states that De La Rosa’s termination
15 should have been reviewed by an Executive Vice President or higher and does not dispute
16 that no executive vice president approved De La Rosa’s termination. (*See Joint*
17 *Statement of Disputed and Undisputed Facts*, #116-119.) This failure does not raise
18 doubts regarding Costco’s articulated reason. Foster informed Kenneth Eakes, an
19 Assistant Vice President at Costco, and Richard Chavez, a Senior Vice President at
20 Costco, of his decision to terminate De La Rosa and they both approved the termination.
21 (Foster Decl., ¶ 8.)

22 There is no evidence that Foster’s actions were motivated by any reasons
23 inconsistent with Costco’s articulated reason for terminating De La Rosa. De Le Rosa,
24 who has the burden at this stage, has not put forth any other evidence that suggests
25 Foster’s actions were anything more than an oversight. Both Eakes and Chavez received
26 the email with Parker’s findings, which contains nothing inconsistent with Costco’s
27 articulated reason. De La Rosa has not even shown that Foster willfully chose not to seek
28 approval from an Executive Vice President with knowledge that he was violating policy.

1 Costco’s articulated reason for the termination is that it determined that De La Rosa had
2 engaged in fraud and violated company policy. A mistake or oversight, without more,
3 does not suggest any inconsistency or implausibility in that articulated reason.

4 De La Cruz also argues that Hofman’s recommendation to Foster was based on the
5 conclusion that the prescriptions were fraudulent “despite the investigation not finding
6 the prescriptions to *actually be* fraudulent.” (*Opp.* at 17 (emphasis in original).) Costco
7 is not required to definitively prove that the prescriptions were “actually” fraudulent. *See*
8 *Hersant*, 57 Cal. App. 4th at 1005 (honest, but mistaken belief that grounds for discharge
9 exist precludes finding of discrimination). De La Rosa has not put forth any evidence
10 that raises a genuine issue of material fact as to whether Costco had a good faith belief
11 that the prescriptions were fraudulent.

12 Finally, De La Rosa argues that Foster’s interactions with Betancourt and Eakes
13 suggest that Costco’s reason is pretext for discriminatory animus. This argument recites
14 facts surrounding Foster’s decision to terminate De La Rosa but cites to no specific or
15 substantive evidence that casts doubt on Costco’s articulated reason. It is undisputed that
16 Foster had personal knowledge of De La Rosa’s medical leaves throughout Costco’s
17 investigation, but this simple fact is not evidence of pretext. And it does not transform
18 other facts—like Foster’s decision to consult Betancourt or his conversation with
19 Eakes—into evidence of pretext. The burden on De La Rosa at this stage requires her to
20 put forth specific evidence on Foster’s actions that demonstrate Costco’s proffered reason
21 is implausible. De La Rosa has not done so. The only specific evidence as to the content
22 of these interactions are the emails sent by Foster—and nothing in those emails suggest
23 that Costco’s articulated reason has inconsistencies or should not be believed.

24 **b) Parker’s Investigation**

25 De La Rosa argues that Parker “had personal knowledge of De La Rosa’s medical
26 leave” and that this knowledge “influenced Costco’s underlying actions and ultimately
27 lead to an incomplete investigation that was used to terminate De La Rosa.” (*Opp.* at 18.)
28 This argument fails at both levels.

1 At the first level, De La Rosa fails to put forth evidence that Parker’s knowledge
2 influenced her investigation. The paramount evidence on Ms. Parker’s investigation—
3 her April 30, 2019 email to Foster—suggests that her investigation was focused on the
4 suspected fraudulent prescriptions. At the very end of the email, Parker mentions that De
5 La Rosa “has been on a LOA” but De La Rosa points to nothing else that suggests her
6 knowledge of this fact affected her investigation in any way. Indeed, the rest of the email
7 and the rest of the evidence demonstrates her focus on the suspected fraudulent
8 prescription activity.

9 Parker was not the individual who initiated the investigation, she came to no
10 conclusions regarding her findings, and she made no recommendations to anyone
11 regarding any action that should be taken as to De La Rosa or her employment. And she
12 points to no evidence of *how* the influence occurred or where it manifested in the
13 investigation. In other words, De La Rosa does not show that Parker’s knowledge of her
14 medical leave affected the investigation in any way. De La Rosa asks this Court to infer
15 “influence” from the fact that Parker had “knowledge” but offers nothing to support that
16 connection. The mere fact that Parker had knowledge of De La Rosa’s medical leave is
17 not evidence that this knowledge influenced Costco’s termination decision.

18 At the second level, De La Rosa’s criticism of Parker’s investigation as “wholly
19 lacking” and “incomplete” does not raise a genuine dispute that Costco’s articulated
20 reason is inconsistent or not believable. De La Rosa argues that Parker “relie[d] solely on
21 a single conversation with Pehau to set the foundational facts of the investigation, did
22 “months of no work[,]” and failed to complete previous investigations “fully and
23 competently.” (*Opp.* at 19.) Courts analyzing this kind of argument have found that it is
24 not enough to show that the defendant’s course of action was imperfect or had missteps.
25 *See Hooks v. Works*, 14 Fed. Appx. 769, 772 (9th Cir. 2001) (plaintiff had not presented
26 substantial evidence that the investigation was a “sham”); *Hersant v. Dep’t of Social*
27 *Svcs.*, 57 Cal. App. 4th 997, 1005 (1997) (plaintiff “raised triable issues concerning
28

1 whether the actions of Department were reasonable and well considered” but not as to
2 whether the “stated reasons were implausible, or inconsistent or baseless”).

3 Parker’s investigation began when she was contacted by Ancillary Operations
4 Manager Erin Sieglock regarding an unusual claim for benefits that had been submitted
5 by De La Rosa. (Parker Decl., ¶ 3.) Parker then contacted Pehau to discuss his findings.
6 She received a significant amount of information from Pehau, including his findings
7 regarding De La Rosa’s family members’ prescription history, noted discrepancies with
8 the strength of De La Rosa’s various prescriptions, and the results of his call with Dr.
9 Mascareno’s office about the allegedly fraudulent prescription. (Parker Decl., ¶ 4.)
10 Parker relied on Pehau’s findings, as shown by her email to Foster and her deposition
11 testimony. Pehau conveyed the piece of information most crucial to Costco’s articulated
12 reason: that Dr. Mascareno’s office stated that it had no record of De La Rosa’s spouse
13 ever getting an eye exam at its office and “stated that the prescription that was submitted
14 seemed to have been altered.” (Exhibit D to Hofman Decl.) De La Rosa has put forth no
15 evidence that Parker had any reason to doubt these findings, or any other information
16 received from Pehau.

17 Parker continued her investigation by calling De La Rosa to ask her about the
18 underlying prescription and prescription history, following up with De La Rosa when she
19 did not call her back as indicated, and then reporting what she had learned to Hofman.
20 De La Rosa is correct that Parker did not contact De La Rosa until almost two months
21 after her last call with Pehau and that no further investigation between this time. (Parker
22 Dep. at 54:10-17; Parker Decl., ¶ 5.) But the evidence shows that this extended period of
23 time was due to an instruction from Costco’s director of personnel to not contact De La
24 Rosa while she was on medical leave. (Parker Dep. at 54:18-24.)

25 All in all, the evidence related to Parker and her investigation does not tend to
26 show that Costco’s articulated motives were inconsistent or not believable. *See Chuang*,
27 225 F.3d at 1127.

28 **c) Foster’s role**

1 As to Foster, De La Rosa argues a “cat’s paw theory,” alleging that Foster “used
2 the investigation [into the prescription issue] to push [AVP Kenneth] Eakes to terminate
3 De La Rosa.” (*Opp.* at 18.) De La Rosa proffers no specific or substantial evidence to
4 support this theory.

5 It is undisputed that Foster had knowledge of each of De La Rosa’s medical leaves.
6 (Foster Dep. at 26:25-27:14; 28:7-10; 72:20-25; 77:5-15.) But De La Rosa fails to show
7 that this knowledge affected his actions in any way. Foster sent an email to Eakes that
8 reads “FYI” with a copy of Hofman’s conclusions below it. (*Opp.* Ex. O.) Informing
9 does not amount to pushing. Like De La Rosa’s argument as to Parker, this argument
10 jumps from knowledge to motivation without evidence to support the leap.

11 All in all, De La Rosa has not put forth evidence that persuades the Court “that a
12 discriminatory reason more likely motivated the employer” or that Costco’s articulated
13 reasons “is unworthy of credence.” *Chuang*, 225 F.3d at 1124 (9th Cir. 2000) (internal
14 quotations omitted). De La Rosa has thus failed to satisfy her burden at stage three of the
15 McDonnell Douglas test. The Court therefore **GRANTS** Costco’s motion to dismiss the
16 first and fourth causes of action.

17 **B. Derivative Wrongful Termination and Failure to Prevent Claims**

18 De La Rosa’s failure to prevent claim (seventh cause of action) and her wrongful
19 termination claim (the eighth cause of action) are premised on the same facts as her
20 discrimination and retaliation claims. Because those claims fail for the reasons above,
21 these claims likewise fail. The Court therefore **GRANTS** Costco’s motion to dismiss the
22 seventh and eighth causes of action.

23 **C. Costco’s Failure to Accommodate in Violation of FEHA**

24 De LA Rosa’s third cause of action is for failure to accommodate in violation of
25 FEHA. Costco argues that this claim fails. De La Rosa argues that she a has established
26 a prima facie case for failure to accommodate. (*Opp.* at 19.) The Court agrees with De
27 La Rosa.

1 To prevail on this claim, De La Rosa bears the burden to prove that (1) she had a
2 disability covered by the FEHA, (2) she was a qualified individual (i.e., she could
3 perform the essential functions of her job with or without reasonable accommodation),
4 and (3) Costco failed to reasonably accommodate her. *See Nealy v. City of Santa*
5 *Monica*, 234 Cal. App. 4th 359, 373 (2015). As to the incident on January 9, 2019 and
6 the incident on April 9, 2019, the Court finds that De La Rosa has put forth evidence to
7 raise a genuine dispute of material fact for each of these elements.

8 At the time of both incidents, De La Rosa had a disability covered by the FEHA
9 and was a qualified individual. De La Rosa testified that when she arrived at work on
10 January 9, 2019, she immediately notified Eric Rosas that she was feeling pain and would
11 like to be excused from her shift. (De La Rosa Dep. at 217:17- 18.) She was denied this
12 accommodation. De La Rosa then approached Vergara and requested that she be put on a
13 lighter production line, but again was refused. (De La Rosa Dep. at 31:3-8.) De La Rosa
14 asked again if she could be allowed to leave or alternatively be placed on a different
15 production line but was refused each time. (De La Rosa Dep. at 30:25-32:2; 150:21-24.)
16 De La Rosa's testimony raises a genuine issue of material fact as to whether Costco
17 failed to reasonably accommodate her on January 9, 2019.

18 De La Rosa testified that when she returned to work on April 9, 2019 following her
19 hernia surgery, she again notified Costco that she was experiencing pain and would like
20 to be placed on a lighter production line as the one that she had placed on was
21 particularly heavy. (De La Rosa Dep. at 146:15-23; 152:20-23; 215:20-23.) According
22 to De La Rosa, Costco ignored her pleas for reasonable accommodation until De La Rosa
23 was placed back on leave on April 24, 2019. (De La Rosa Dep. at 146:19-24.) This
24 evidence demonstrates a genuine dispute of material fact as to whether Costco failed to
25 reasonably accommodate her in April 2019.

26 For the reasons states above, Costco's motion to dismiss the third cause of action is
27 **DENIED.**

1 **D. Failure to Engage in a Good Faith Interactive Process in Violation of**
2 **FEHA**

3 Costco also seeks summary judgement on De La Rosa’s second cause of action,
4 violation of FEHA for failure to engage in a good faith interactive process. (*MTD* at 14-
5 15.)

6 Under the FEHA, it is unlawful for an employer to “fail to engage in a timely,
7 good faith, interactive process with the employee ... to determine effective reasonable
8 accommodations, if any, in response to a request for reasonable accommodation by an
9 employee or applicant with a known physical or mental disability or known medical
10 condition.” CAL. GOV. CODE § 12940(n). The duty to engage in the interactive process is
11 generally “triggered upon notification of the disability and the desire for
12 accommodation.” *Vinson v. Thomas*, 288 F.3d 1145, 1154 (9th Cir. 2002) (citations
13 omitted). An “employer has a mandatory obligation to engage in the interactive process
14 and that this obligation is triggered either by the employee's request for accommodation
15 or by the employer's recognition of the need for accommodation.” *Barnett v. U.S. Air,*
16 *Inc.*, 228 F.3d 1105, 1112 (9th Cir. 2000), *rev'd on other grounds*, 535 U.S. 391, 122
17 S.Ct. 1516, 152 L.Ed.2d 589 (2002).

18 As to Costco’s actions on January 9, 2019 and in April 2019, the Court finds that
19 De La Rosa has put forth evidence to raise a genuine dispute of material fact regarding
20 whether Costco failed to participate in a good faith interactive process. In January 2019
21 and April 2019, De La Rosa had a disability covered by the FEHA. De La Rosa testified
22 that when she arrived at work on January 9, 2019, she immediately notified Eric Rosas
23 that she was feeling pain and would like to be excused from her shift. (De La Rosa Dep.
24 at 217:17- 18.) Costco denied this requested accommodation without participating in an
25 interactive process. De La Rosa then approached Vergara and requested that she be put
26 on a lighter production line; Costco refused this request as well and did not participate in
27 an interactive process. (De La Rosa Dep. at 31:3-8.) De La Rosa asked again if she
28 could be allowed to leave or alternatively be placed on a different production line but was

1 refused each time without an interactive process. (De La Rosa Dep. at 30:25-32:2;
2 150:21-24.) De La Rosa's testimony raises a genuine issue of material fact as to whether
3 Costco failed to engage in a good faith interactive process on January 9, 2019.

4 De La Rosa testified that when she returned to work on April 9, 2019 following her
5 hernia surgery, she again notified Costco that she was experiencing pain and would like
6 to be placed on a lighter production line as the one that she had placed on was
7 particularly heavy. (De La Rosa Dep. at 146:15-23; 152:20-23; 215:20-23.) According
8 to De La Rosa, Costco did not engage in an interactive process in response to her
9 requested accommodations, ignoring her requests until De La Rosa was placed back on
10 leave on April 24, 2019. (De La Rosa Dep. at 146:19-24.) This evidence demonstrates a
11 genuine dispute of material fact as to whether Costco failed to engage in a good faith
12 interactive process in April 2019.

13 Costco's motion to dismiss De La Rosa's second cause of action is **DENIED**.

14 **E. De La Rosa's CFRA Claims**

15 Defendant moves to dismiss De La Rosa's fifth cause of action, violation of the
16 California Family Rights Act ("CFRA"), on the grounds that Costco granted every leave
17 of absence De La Rosa ever requested. (*See MTD* at 15.) De La Rosa opposes, arguing
18 that Costco interfered with De La Rosa's CFRA leave. (*Opp.* at 22.) De La Rosa's
19 argument merely recites the same facts upon which she relies for her FEHA causes of
20 action, but these facts do not raise a genuine dispute as to whether Costco interfered with
21 her rights under the CFRA. Defendant is correct that De La Rosa testified that she was
22 granted every leave of absence she ever requested, and De La Rosa does not put forth
23 facts that disputes this testimony. Defendant's motion as to the fifth cause of action is
24 **GRANTED**.

25 Defendant also moves to dismiss De La Rosa's sixth cause of action for retaliation
26 in violation of the CFRA. This cause of action is premised on the same facts as her
27 retaliation claims under FEHA and the requisite legal elements are similar. To succeed
28 on a claim for retaliation in violation of the CFRA, De La Rosa must show: (1) Costco

1 was covered by the CFRA; (2) De La Rosa was eligible to take CFRA leave; (3) De La
2 Rosa exercised her right to take leave for a qualifying CFRA purpose; and (4) De La
3 Rosa suffered an adverse employment action, because of the exercise of her right to
4 CFRA leave. *Soria v. Univision Radio Los Angeles, Inc.*, 5 Cal. App. 5th 570, 604
5 (2016). As explained above, De La Rosa has not established genuine issues of fact
6 concerning whether Costco retaliated against her for taking medical leave. The same
7 reasoning applies here. Costco put forth a legitimate business reason for terminating De
8 La Rosa and she has not shown that Costco’s proffered reason is inconsistent or
9 implausible. Defendant’s motion to dismiss the sixth cause of action is **GRANTED**.

10 **F. De La Rosa’s Wage Statement Claim**

11 De La Rosa’s tenth cause of action alleges a violation of California Labor Code §
12 226 on the basis that her wage statements failed to accurately show the hours she worked
13 and the pay she received. (*Compl.*, ¶ 101.) Costco moves to dismiss this cause of action.
14 (*MTD* at 16.) Costco argues that De La Rosa cannot succeed on this claim because the
15 wage statements provided to De La Rosa “accurately reflect the hours that were actually
16 used to pay her.” (*MTD* at 16-17.) De La Rosa does not dispute that her wage statements
17 do, in fact, accurately reflect the hours she was paid (*see Opp.* at 23), but this fact is not
18 decisive.

19 Section 226 requires an employer to accompany “each payment of wages” with
20 “an accurate itemized statement” specifying, among other details, the “gross wages
21 earned” and “net wages earned.” (Cal. Lab. Code § 226, subd. (a).) As the California
22 Supreme Court held, section 226 requires that wage statements must contain all amounts
23 *earned*, not just those amounts actually paid. *Naranjo v. Spectrum Sec. Servs., Inc.*, 13
24 Cal. 5th 93, 119 (2022); *see also Maldonado v. Epsilon Plastics, Inc.*, 22 Cal. App. 5th
25 1308 (2018) (“Wage statements should include the hours *worked* at each rate and the
26 wages *earned*.”) (emphasis in original).

27 Section 226.7 further requires an employer to pay “one additional hour of pay” for
28 each day in which a lawful break is not provided. (Cal. Lab. Code § 226.7, subd. (c).) If

1 an employer does not provide a lawful break, both that additional credited hour of work
2 and the corresponding premium pay owed must be reported on the wage statement. (*Id.*;
3 *see also Naranjo*, 13 Cal. 5th at 120.) And if the employer does not report those items on
4 the wage statement, the employer deprives the employee of information needed to
5 evaluate whether the payment is correct and therefore injures the employee under the
6 terms of the statute. *Naranjo*, 13 Cal. 5th at 120.

7 Here, there is evidence that Costco failed to provide De La Rosa with a lawful
8 break at certain times. De La Rosa testified that she was told to clock out as though she
9 was taking a meal break but continued to work. (DLR I, 46:7-47:6.) De La Rosa's wage
10 statements do not reflect payment of these premiums upon her termination. (*Opp.*, Ex.
11 OO.) There is, therefore, a genuine dispute as to whether De La Rosa's pay statements
12 contained all amounts earned, as required by Section 226.

13 Defendant's motion to dismiss the tenth cause of action is **DENIED**.

14 **G. Punitive Damages**

15 De La Rosa's complaint includes punitive damages as a prayer for relief for her
16 first, second, third, fourth, fifth, sixth, seventh, and eight causes of action. (*Compl.* at p.
17 19.) Costco moves to dismiss punitive damages as a prayer for relief because none of the
18 individuals at issue is an officer, director, or managing agent of Costco and, at any rate,
19 De La Rosa has not established malice or oppression by clear and convincing evidence.
20 (*MTD* at 18.) De La Rosa argues that Parker, Foster, Eakes, and Chavez are all agents of
21 Costco and that there is a genuine dispute as to whether these individuals' actions
22 constitute malice or oppression.

23 Punitive damages are recoverable "where it is proven by clear and convincing
24 evidence that the defendant has been guilty of oppression, fraud, or malice." CAL. CIV.
25 CODE § 3294. When the defendant is a corporation, "the evidence must demonstrate an
26 officer, director or managing agent of Defendant committed, authorized or ratified an act
27 of malice, oppression or fraud to create a genuine issue of material fact on punitive
28 damages." *Yeager v. Corr. Corp. of Am.*, 944 F. Supp. 2d 913, 931 (E.D. Cal. 2013).

1 Punitive damages are recoverable for FEHA violations. *Commodore Home Systems, Inc.*
2 *v. Superior Ct.*, 32 Cal. 3d 211, 221 (1982).

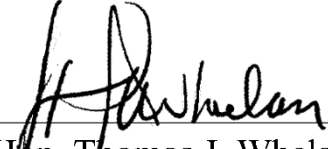
3 Because the Court grants summary judgement on the claims for disability
4 discrimination, retaliation, failure to prevent discrimination, violation of the CFRA, and
5 wrongful termination, the issue of punitive damages on those claims are moot. As to the
6 claims for failure to engage in a good faith interactive process (second cause of action)
7 and for failure to accommodate (third cause of action), the Court **DENIES** summary
8 judgement on De La Rosa's prayer for punitive damages as premature. *See Martinez v.*
9 *Costco Wholesale Corp.*, 481 F. Supp. 3d 1076, 1104 (S.D. Cal. 2020); *McInteer v.*
10 *Ashley Distrib. Servs., Ltd.*, 40 F. Supp. 3d 1269, 1295 (C.D. Cal. 2014).

11
12 **IV. CONCLUSION & ORDER**

13 For the reasons set forth above, the Court **GRANTS IN PART** and **DENIES IN**
14 **PART** Defendant's motion for summary judgement [Doc. 18]. The Court **GRANTS**
15 summary judgement on the first, fourth, fifth, sixth, seventh, eighth, and tenth and
16 **DENIES** summary judgement on the remaining claims.

17 **IT IS SO ORDERED.**

18 Dated: November 23, 2022

19
20 
21 Hon. Thomas J. Whelan
United States District Judge