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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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JAN THOMSEN,  
Plaintiff,  
v.  
GEORGIA-PACIFIC CORRUGATED,  
LLC,  
Defendant.

CIV. NO. 1:15-01506 WBS SAB  
MEMORANDUM AND ORDER RE: MOTION  
FOR SUMMARY JUDGMENT

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Plaintiff Jan Thomsen brought this employment disability discrimination action after his previous employer, defendant Georgia-Pacific Corrugated, LLC, terminated his employment. Pursuant to Federal Rule of Civil Procedure 56, defendant now moves for summary judgment on all of plaintiff's claims.

I. Brief Factual and Procedural Background

Plaintiff began working for defendant in approximately 1991 at its corrugated container plant in Madera, California.

1 After injuring his shoulder while at work in May 2012, plaintiff  
2 went on workers' compensation leave and returned to work in  
3 January 2013 after undergoing surgery on his left shoulder.  
4 (Thomsen Dep. at 24:12-19, 55:13-22.) At the time he went on  
5 leave, plaintiff had been working as a cut and die operator.  
6 (Id. at 21:8-11.) Defendant initially accommodated his  
7 disability by assigning him to a temporary position and then  
8 transferring him to a new position as an assistant end gluer.  
9 After working as an assistant end gluer, plaintiff claims he  
10 needed additional modifications to that position to accommodate  
11 his disability.

12 On February 19, 2014, defendant contends plaintiff was  
13 required to work overtime, but refused to do so and left the  
14 plant in violation of defendant's policies. After performing an  
15 investigation, defendant terminated plaintiff's employment on  
16 March 3, 2014 allegedly because of that conduct.

17 Alleging that defendant failed to engage in the  
18 interactive process and accommodate his disability and that  
19 defendant terminated him because of his disability, plaintiff  
20 initiated this action in state court. In his Complaint,  
21 plaintiff alleges the following claims: (1) disability  
22 discrimination in violation of subsection 12940(a) of  
23 California's Fair Employment and Housing Act ("FEHA"), Cal. Gov't  
24 Code §§ 12940-12951; (2) failure to provide reasonable  
25 accommodation in violation of subsection 12940(m) of FEHA; (3)  
26 failure to engage in the interactive process in violation of  
27 subsection 12940(n) of FEHA; (4) wrongful termination in  
28 violation of public policy; and (5) defamation. (Docket No. 1-

1 1.) After removing the action to this court on the basis of  
2 diversity of citizenship, defendant now moves for summary  
3 judgment on all of plaintiff's claims.<sup>1</sup> (Docket No. 19-1.)

4 II. Analysis

5 Summary judgment is proper "if the movant shows that  
6 there is no genuine dispute as to any material fact and the  
7 movant is entitled to judgment as a matter of law." Fed. R. Civ.  
8 P. 56(a). A material fact is one that could affect the outcome  
9 of the suit, and a genuine issue is one that could permit a  
10 reasonable jury to enter a verdict in the non-moving party's  
11 favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248  
12 (1986). The party moving for summary judgment bears the initial  
13 burden of establishing the absence of a genuine issue of material  
14 fact and can satisfy this burden by presenting evidence that  
15 negates an essential element of the non-moving party's case.  
16 Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

17 Alternatively, the moving party can demonstrate that the non-  
18 moving party cannot produce evidence to support an essential  
19 element upon which it will bear the burden of proof at trial.  
20 Id.

21 Once the moving party meets its initial burden, the

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22 <sup>1</sup> Plaintiff filed eight objections to evidence defendant  
23 submitted. (Docket No. 21-2.) Notwithstanding the questionable  
24 grounds for most of plaintiff's objections, the court denies them  
25 as moot because it does not rely on any of that evidence in  
granting summary judgment in favor of defendant.

26 Defendant also takes issue with plaintiff's 470  
27 additional statements of undisputed fact and cursory analysis of  
28 those facts in his brief. The court will not avoid the merits of  
plaintiff's claims because of the poor way in which counsel  
opposed the motion and therefore denies defendant's motion to  
strike.

1 burden shifts to the non-moving party to "designate 'specific  
2 facts showing that there is a genuine issue for trial.'" Id. at  
3 324 (quoting then-Fed. R. Civ. P. 56(e)). To carry this burden,  
4 the non-moving party must "do more than simply show that there is  
5 some metaphysical doubt as to the material facts." Matsushita  
6 Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).  
7 "The mere existence of a scintilla of evidence . . . will be  
8 insufficient; there must be evidence on which the jury could  
9 reasonably find for the [non-moving party]." Anderson, 477 U.S.  
10 at 252.

11 In deciding a summary judgment motion, the court must  
12 view the evidence in the light most favorable to the non-moving  
13 party and draw all justifiable inferences in its favor. Id. at  
14 255. "Credibility determinations, the weighing of the evidence,  
15 and the drawing of legitimate inferences from the facts are jury  
16 functions, not those of a judge . . . ruling on a motion for  
17 summary judgment . . . ." Id.

18 A. FEHA Reasonable Accommodation & Interactive Process

19 1. Subsection 12940(m): Reasonable Accommodation

20 Under subsection 12940(m) of FEHA, it is unlawful for  
21 an employer "to fail to make reasonable accommodation for the  
22 known physical or mental disability of an applicant or employee"  
23 unless the accommodation would "produce undue hardship." Cal.  
24 Gov't Code § 12940(m); see also Cal. Gov't Code § 12926(u)  
25 (defining "undue hardship"). "The elements of a reasonable  
26 accommodation cause of action are (1) the employee suffered a  
27 disability, (2) the employee could perform the essential  
28 functions of the job with reasonable accommodation, and (3) the

1 employer failed to reasonably accommodate the employee's  
2 disability." Nealy v. City of Santa Monica, 234 Cal. App. 4th  
3 359, 373 (2d Dist. 2015). Defendant moves for summary judgment  
4 based solely on the third element, arguing that it reasonably  
5 accommodated plaintiff as a matter of law.

6 "A reasonable accommodation is a modification or  
7 adjustment to the work environment that enables the employee to  
8 perform the essential functions of the job he or she holds or  
9 desires." Id. at 373; see id. at 374-75 ("Reasonable  
10 accommodations may include, among other things, job restructuring  
11 or permitting an alteration of when and/or how an essential  
12 function is performed," but "elimination of an essential function  
13 is not a reasonable accommodation."). "Reasonable accommodation  
14 may also include 'reassignment to a vacant position' if the  
15 employee cannot perform the essential functions of his or her  
16 position even with accommodation." Id. at 377 (quoting Cal.  
17 Gov't Code § 12926(p)(2)). "FEHA requires the employer to offer  
18 the employee 'comparable' or 'lower graded' vacant positions for  
19 which he or she is qualified," but "does not require the employer  
20 to promote the employee or create a new position for the employee  
21 to a greater extent than it would create a new position for any  
22 employee, regardless of disability." Id. (quoting Cal. Code  
23 Regs., tit. 2, § 11068(d)(1), (2)).

24 2. Subsection 12940(n): Interactive Process

25 Under subsection 12940(n), it is unlawful for an  
26 employer "to fail to engage in a timely, good faith, interactive  
27 process with the employee or applicant to determine effective  
28 reasonable accommodations, if any, in response to a request for

1 reasonable accommodation by an employee or applicant with a known  
2 physical or mental disability or known medical condition.” Cal.  
3 Gov’t Code § 12940(n). “The employee must initiate the process  
4 unless the disability and resulting limitations are obvious,” and  
5 the employee must “‘specifically identify the disability and  
6 resulting limitations, and [] suggest the reasonable  
7 accommodations.’” Scotch v. Art Inst. of Cal.-Orange Cnty.,  
8 Inc., 173 Cal. App. 4th 986, 1013 (4th Dist. 2009) (quoting  
9 Taylor v. Principal Fin. Grp., Inc., 93 F.3d 155, 165 (5th Cir.  
10 1996)). “FEHA requires an informal process with the employee to  
11 attempt to identify reasonable accommodations, not necessarily  
12 ritualized discussions.” Nealy, 234 Cal. App. 4th at 379.

13 “Both employer and employee have the obligation ‘to  
14 keep communications open’ and neither has ‘a right to obstruct  
15 the process.’” Scotch, 173 Cal. App. 4th at 1014 (quoting Jensen  
16 v. Wells Fargo Bank, 85 Cal. App. 4th 245, 266 (2d Dist. 2000)).  
17 “Each party must participate in good faith, undertake reasonable  
18 efforts to communicate its concerns, and make available to the  
19 other information which is available, or more accessible, to one  
20 party.” Gelfo v. Lockheed Martin Corp., 140 Cal. App. 4th 34, 62  
21 n.22 (2d Dist. 2006). “Liability hinges on the objective  
22 circumstances surrounding the parties’ breakdown in  
23 communication, and responsibility for the breakdown lies with the  
24 party who fails to participate in good faith.” Id.

25 3. Analysis of the Subsections 12940(m) and (n)

26 Claims

27 When plaintiff returned to work with restrictions in  
28 January 2013, it is undisputed that defendant initially

1 accommodated his disability by assigning him to work on a long-  
2 term temporary project of supervising other temporary employees  
3 who were sorting damaged containers. (Thomsen Dep. at 25:8-  
4 27:14, 31:5-17; Pangborn Decl. at 156 (Docket No. 19-2).) As of  
5 October 2013, plaintiff's physician indicated that plaintiff had  
6 "permanent restrictions" and could not carry anything over thirty  
7 pounds. (Pangborn Decl. at 156.) Upon completion of the  
8 temporary project, it is undisputed that plaintiff was still  
9 unable to return to his prior position.

10 At that time, defendant's Plant Superintendent, Jose  
11 Garcia; General Manager, Anthony Garcia; Human Resources  
12 Generalist, Shanna Naeole; and Plant Manager, Joe Del Razo met to  
13 discuss potential accommodations for plaintiff. (Naeole Dep. at  
14 38:4-8.) They considered all positions for which plaintiff was  
15 qualified and that would accommodate his lifting restriction.  
16 (J. Garcia Dep. at 76:6-8; A. Garcia Dep. at 56:11-57:24.)  
17 Defendant determined that the potential positions for plaintiff  
18 included a forklift driver and an assistant end gluer. (J.  
19 Garcia Dep. at 76:6-8.)

20 Anthony and Jose Garcia and Del Razo then met with  
21 plaintiff to discuss the potential new positions. (A. Garcia  
22 Dep. at 57:10-21; Thomsen Dep. at 40:11-23.) At that time, there  
23 was not an opening for a forklift driver, (A. Garcia Dep. at  
24 57:15-25), and plaintiff does not contend that he should have  
25 been offered that position. There was an opening for an  
26 assistant end gluer, and defendant offered that position to  
27 plaintiff as a lateral transfer with the same pay. (Thomsen Dep.  
28 at 54:4-8.) Plaintiff indicated at that meeting that he could

1 fulfill the responsibilities of the position and accepted the  
2 transfer. (A. Garcia Dep. at 57:15-21; Thomsen Dep. at 48:11-  
3 50:1.)

4 Despite fulfilling their obligations under FEHA as of  
5 that meeting and transfer, plaintiff contends defendant  
6 nonetheless violated FEHA when (1) defendant did not subsequently  
7 offer plaintiff a quality lab technician ("QL Technician")  
8 position instead of the assistant end gluer position; and (2)  
9 failed to subsequently modify the assistant end gluer position.

10 a. QL Technician Position

11 At some point after offering plaintiff the assistant  
12 end gluer position, plaintiff claims he informed defendant that  
13 he was interested in an opening for a QL Technician. (Thomsen  
14 Dep. at 41:7-24.) Jose and Anthony Garcia testified that the QL  
15 Technician position would not have been consistent with  
16 plaintiff's lifting restriction because it could require lifting  
17 in excess of thirty pounds when visiting various customers. (A.  
18 Garcia Dep. at 58:11-59:2; J. Garcia Dep. at 48:15-18.)  
19 Plaintiff also testified that he was told that the QL Technician  
20 position was not possible for him because it occasionally  
21 requires lifting over forty pounds. (Thomsen Dep. at 106:13-20.)  
22 Anthony Garcia testified that the lifting requirement of a QL  
23 Technician could not have been accommodated because the lifting  
24 occurs at customers' facilities and thus the ability to use any  
25 lifting device would have been dependent on what each customer  
26 had available. (A. Garcia Dep. at 58:24-59:8.)

27 Even assuming that lifting in excess of thirty pounds  
28 was not an essential function of the QL Technician position and



1 that plaintiff was qualified for that position,<sup>2</sup> "FEHA does not  
2 obligate an employer to choose the best accommodation or the  
3 specific accommodation a disabled employee or applicant seeks."  
4 Raine v. City of Burbank, 135 Cal. App. 4th 1215, 1222 (2d Dist.  
5 2006). It is undisputed that plaintiff initially agreed that the  
6 assistant end gluer position accommodated his disability and FEHA  
7 did not obligate defendant to offer plaintiff the position he  
8 found more preferable.

9 It is therefore undisputed that at the time defendant  
10 had transferred plaintiff to the assistant end gluer position, it  
11 had adhered to its obligation to engage in the interactive  
12 process and accommodate plaintiff's disability.

13 b. Modifications to Assistant End Gluer Position

14 After working as an assistant end gluer, plaintiff  
15 testified that he discovered the duties were not consistent with  
16 his lifting restriction and that he needed modifications. About  
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18 <sup>2</sup> Genuine disputes exist as to whether plaintiff was in  
19 fact qualified for the QL Technician position. While it is  
20 undisputed plaintiff did not possess the necessary computer  
21 skills for the position, (J. Garcia Dep. at 48:2-49:2; Thomsen  
22 Dep. at 21:21-22:12), a reasonable jury could find that plaintiff  
23 could have taught himself those skills, (see J. Garcia Dep. at  
24 49:13-24 (testifying that he had successfully taught himself the  
25 necessary computer skills when he had previously worked as a QL  
26 Technician and that he did not see any reason why plaintiff could  
27 not have also taught himself those skills)).

28 Defendant also contends that plaintiff lacked the  
necessary customer service experience and skills for that  
position. In the more than twenty years plaintiff worked for  
defendant, he had worked exclusively in production roles that  
primarily required physical labor and never gained customer  
service experience. (Thomsen Dep. at 21:21-22:12.) At the same  
time, there is some evidence that defendant offered public  
speaking training for its employees and plaintiff could have been  
eligible for that training. (See J. Garcia Dep. 20:22-21:18.)

1 two weeks to one month after working as an assistant end gluer,  
2 plaintiff raised concerns about the position with Kristina Lloyd  
3 in Human Resources. (Thomsen Dep. at 55:3-13.) He contends he  
4 told Lloyd that the occasional need to lift more than thirty  
5 pounds, the long hours, and the manual operation of the overhead  
6 lever were causing him shoulder pain. (Id. at 16:4-13, 49:1-7,  
7 50:11-51:13, 55:15-23; see also Lloyd Dep. at 102:21-103:11  
8 (testifying that she recalls plaintiff complaining about shoulder  
9 pain when he had to work overtime, but that she does not recall  
10 him complaining about the overhead lever).) Plaintiff also  
11 contends that "Mr. Garcia . . . was standing in the door" when he  
12 was talking with Lloyd and that he told Garcia that "it would  
13 have been nice for him to send a message out to all supervisors  
14 to let them know of [his] restrictions." (Thomsen Dep. at  
15 136:20-137:16.)

16 In response to plaintiff's concerns, Lloyd informed  
17 plaintiff that he would need to return to his doctor to determine  
18 whether additional restrictions were needed. (Id. at 55:24-56:2;  
19 Lloyd Dep. at 103:21-23.) Lloyd also emailed defendant's third-  
20 party workers' compensation claims representative Jennifer Brown  
21 from ESIS about plaintiff's complaints of pain from "working over  
22 8 hours and extension forward and upwards." (Whitten Decl. Ex. C  
23 at Ex. 61 (Docket No. 21); Brown Dep. at 10:12-11:18, 19:3-5.)  
24 Although Brown left a message for plaintiff recommending he  
25 return to his physician, she recognized that ESIS's involvement  
26 was limited to plaintiff's workers' compensation claim and that  
27 it was not involved with requests for accommodations under FEHA.  
28 (Brown Dep. at 18:24-19:19, 31:21-32:20.) Lloyd relaying

1 plaintiff's complaints to ESIS thus did not facilitate  
2 discussions about potential accommodations for plaintiff.

3 Plaintiff also testified that he complained to his  
4 shift supervisor, Leonard Lara, on one occasion that he could not  
5 work overtime because his "arm hurt." According to plaintiff,  
6 Lara "yelled" at him and told him that he had "been cleared" to  
7 work. (Thomsen Dep. at 124:18-24.) Jose Garcia testified that  
8 plaintiff told him on one occasion that he was experiencing  
9 shoulder pain in the assistant end gluer position. (J. Garcia  
10 Dep. at 43:24-44:19.) Jose Garcia claims he told plaintiff to  
11 "go back" to his doctor and that he would inform Human Resources  
12 of plaintiff's concern. (Id. at 44:22-24.) While Jose Garcia  
13 verbally informed Human Resources that plaintiff had complained  
14 about his shoulder pain, there is no evidence that anyone from  
15 Human Resources followed up with plaintiff. (Id. at 44:25-45:9.)

16 It is undisputed plaintiff never returned to his  
17 physician to request additional restrictions after he began  
18 working as an assistant end gluer. (Thomsen Dep. at 55:24-  
19 56:10.) Because plaintiff failed to return to his physician  
20 after Lloyd and Jose Garcia requested him to, defendant contends  
21 plaintiff's reasonable accommodation and interactive process  
22 claims must fail.

23 It is undisputed, however, that plaintiff's physician  
24 had already restricted plaintiff from lifting in excess of thirty  
25 pounds and plaintiff complained to defendant that his duties as  
26 an assistant end gluer occasionally required him to lift in  
27 excess of that restriction. Although defendant contends that  
28 plaintiff elected to lift multiple bundles and could have avoided

1 lifting in excess of thirty pounds, plaintiff has put forth  
2 evidence from which a jury could find that plaintiff felt  
3 compelled to lift multiple bundles. First, plaintiff testified  
4 that the speed of the process required him to move about four  
5 bundles at a time, which weighed in excess of thirty pounds when  
6 moved together. (Id. at 52:5-16.) He also claimed that moving  
7 the leftover corrugated cardboard pieces known as dunnage  
8 exceeded his restrictions because even though each individual  
9 dunnage was under ten pounds, the speed of the process required  
10 that he pick up multiple pieces at a time. (Id. at 53:2-54:3.)

11 Second, plaintiff testified that the machine operator  
12 he was assigned to work with, Jose Renteria, was not  
13 "accommodating" and allowed the machine to keep running when it  
14 was getting backed up and materials were falling. (Id. at 70:3-  
15 23.) Plaintiff testified he told Supervisor Chris McMillan how  
16 Renteria's behavior was risking injury to him and McMillan  
17 indicated that he had heard similar complaints about Renteria,  
18 but McMillan did not do anything to address plaintiff's concerns.  
19 (Id. at 70:3-71:25.)

20 In light of this evidence, a reasonable jury could find  
21 that defendant had an obligation to continue to engage in the  
22 interactive process to assess whether the assistant end gluer  
23 position could be modified to prevent plaintiff from lifting in  
24 excess of his restriction.

25 With respect to plaintiff's complaints about overtime  
26 hours and the overhead lever, it is undisputed that plaintiff's  
27 physician had not restricted plaintiff's ability to operate an  
28 overhead lever or work overtime. (Id. at 58:1-4.) Relying on

1 King v. United Parcel Service, Inc., 152 Cal. App. 4th 426 (3d  
2 Dist. 2007), defendant contends that plaintiff's failure to  
3 obtain a physician's note as to these restrictions is fatal to  
4 his FEHA accommodation and interactive process claims.

5 In King, the employee claimed that the employer failed  
6 to reasonably accommodate his blood disorder when it required him  
7 to work a later shift. After returning from a medical leave of  
8 absence because of his blood disorder, the plaintiff's physician  
9 had cleared him to work "regular hours." King, 152 Cal. App. 4th  
10 at 443. The parties disputed whether the "regular hours" the  
11 employee was cleared to work were regular "business hours" or the  
12 later hours he had been working prior to going on disability.

13 Id. In granting the employer's motion for summary judgment on  
14 the employee's FEHA claim, the court emphasized that the employee  
15 had not "sustained his burden of demonstrating a genuine issue of  
16 material fact given his failure to get additional clarification  
17 from his doctor to specifically restrict his hours and to  
18 communicate his limitations to his supervisors." Id. at 444. It  
19 concluded that it was "incumbent upon [the employee] to produce  
20 clear and unambiguous doctor's orders restricting the hours he  
21 could work." Id.

22 King cannot be interrupted as holding that an  
23 employee's FEHA claim will necessarily fail in the absence of a  
24 physician's note itemizing each restriction. Prior to finding  
25 that the employee had failed to carry his burden, the court in  
26 King recognized that "the interactive process compelled by FEHA  
27 requires flexibility by both the employer and employee, and that  
28 no magic words are required to necessitate accommodation." Id.

1 at 444. It also found the doctor's note necessary in that case  
2 because the employee had not "establish[ed] that he communicated  
3 his distress to his supervisors or made the kind of specific  
4 request for a modified work schedule required to trigger an  
5 employer's duty to provide accommodation." Id. The employee had  
6 also complained about working the later hours prior to his  
7 disability and had an "apparent ability" to work them after  
8 returning from disability leave. Id.

9 Unlike in King, defendant knew and plaintiff's  
10 physician had confirmed that plaintiff had a permanent shoulder  
11 injury and his complaints about the overhead lever and overtime  
12 hours related directly to that disability. Plaintiff also made  
13 repeated and specific complaints to defendant about how operating  
14 the overhead lever and working overtime were causing him shoulder  
15 pain. Under these facts, a reasonable jury could find that FEHA  
16 obligated defendant to do more than simply tell plaintiff to go  
17 back to his physician.

18 Allen v. Pacific Bell, 348 F.3d 1113 (9th Cir. 2003),  
19 is also distinguishable. In that case, the employee's physician  
20 had restricted the employee to sedentary positions and the  
21 employee subsequently requested to be reassigned to his prior,  
22 non-sedentary position. Allen, 348 F.3d at 1115. Pursuant to  
23 its "policy that it would reconsider an employee's disability  
24 restrictions if he submitted medical evidence that his health had  
25 changed," the employer required the employee to obtain a release  
26 from his physician before the employer would reassign him to a  
27 non-sedentary position. Id. Because the employee failed to  
28 obtain this release, the Ninth Circuit concluded the employer had

1 complied with its obligations under FEHA. Id. Unlike in Allen,  
2 defendant has not cited any internal policy requiring that a  
3 physician itemize each possible modification that may stem from a  
4 diagnosed and documented disability. Defendant's adjustment of  
5 how plaintiff could operate the overhead lever or whether he  
6 worked overtime hours would not have required defendant to take  
7 action that was entirely inconsistent with the limitations placed  
8 by plaintiff's physician like in Allen.

9           There is also circumstantial evidence from which a  
10 reasonable jury could find that defendant could have addressed  
11 plaintiff's concerns about the overhead lever. Plaintiff  
12 testified that he asked "Rudy" in maintenance whether the  
13 overhead lever could be moved and "Rudy" told him that it was  
14 possible to move the lever. (Thomsen Dep. at 51:14-24.)  
15 Defendant suggests that plaintiff could have independently  
16 modified how he operated the lever by slightly altering his  
17 stance and maneuvering the lever with his right hand instead of  
18 his left, (Garcia Decl. ¶ 14 (Docket No. 19-3)), but plaintiff  
19 contends that he needed to use his right hand to "tidy[] the  
20 product" while operating the lever with his left hand, (Thomsen  
21 Dep. at 62:14-63:9). A reasonable jury could thus find that FEHA  
22 obligated defendant to discuss these modifications with plaintiff  
23 and find out whether this adjustment was possible for him.

24           As the court in King explained, an employer cannot  
25 prevail at summary judgment on a FEHA reasonable accommodation  
26 claim unless "it establishes through undisputed facts that . . .  
27 the employer did everything in its power to find a reasonable  
28 accommodation, but the informal interactive process broke down

1 because the employee failed to engage in discussions in good  
2 faith." 152 Cal. App. 4th at 442-43. A reasonable jury could  
3 find that plaintiff's repeated complaints obligated defendant to  
4 at least engage in a dialogue with plaintiff in response to his  
5 concerns about the overhead lever and overtime hours before  
6 summarily concluding that he had to return to his doctor.

7 Accordingly, because triable issues of fact exist as to  
8 whether defendant continued to engage in the interactive process  
9 and reasonably accommodate plaintiff after transferring him to  
10 the assistant end gluer position, the court must deny defendant's  
11 motion for summary judgment on plaintiff's subsection 12940(m)  
12 and (n) FEHA claims.

13 B. FEHA Subsection 12940(a) Disability Discrimination

14 Subsection 12940(a) of FEHA renders it unlawful for an  
15 employer to discharge an employee because of the employee's  
16 "medical condition" unless the employee, "because of his or her  
17 physical or mental disability, is unable to perform his or her  
18 essential duties even with reasonable accommodations." Cal.  
19 Gov't Code § 12940(a)(1). "California applies the McDonnell  
20 Douglas burden-shifting framework and other federal employment  
21 law principles when interpreting the FEHA." Schechner v. KPIX-  
22 TV, 686 F.3d 1018, 1023 (9th Cir. 2012).

23 Under this framework, the plaintiff must first  
24 establish a prima facie case, which "requires the employee to  
25 show he or she (1) suffered from a disability, (2) was otherwise  
26 qualified to do his or her job, and (3) was subjected to adverse  
27 employment action because of the disability." Nealy, 234 Cal.  
28 App. 4th at 378. If "the plaintiff establishes a prima facie



1 case, the burden shifts to the employer to rebut the presumption  
2 by producing admissible evidence, sufficient to raise a genuine  
3 issue of fact . . . that its action was taken for a legitimate,  
4 nondiscriminatory reason.” Guz v. Bechtel Nat’l Inc., 24 Cal.  
5 4th 317, 355-56 (2000) (internal quotation marks omitted). “If  
6 the employer sustains this burden, the presumption of  
7 discrimination disappears,” and the plaintiff must then show “the  
8 employer’s proffered reasons as pretexts for discrimination, or  
9 [] offer any other evidence of discriminatory motive.” Id.

10 Defendant concedes for purposes of this motion that  
11 plaintiff can establish a prima facie case but contends it had a  
12 legitimate, non-discriminatory reason for terminating plaintiff  
13 and that plaintiff cannot establish a triable issue of fact that  
14 its reason was pretextual.

15 1. Legitimate, Non-Discriminatory Reason

16 Defendant argues it legitimately terminated plaintiff  
17 because plaintiff refused to work overtime at the end of his  
18 shift in violation of its Work Schedule Policy. Under FEHA, “it  
19 does not matter whether plaintiff actually did commit [the  
20 alleged misconduct] as long as [the employer] honestly believed  
21 he did.” King, 152 Cal. App. 4th at 433; see also King, 152 Cal.  
22 App. 4th at 436 (“It is the employer’s honest belief in the  
23 stated reasons for firing an employee and not the objective truth  
24 or falsity of the underlying facts that is at issue in a  
25 discrimination case.”).

26 Defendant’s written Work Schedule Policy states:  
27 In the case of multiple shift operations, employees  
28 shall not leave their stations until relieved by the  
oncoming shift, nor before the end of their shift. If

1 an employee's relief does not appear, the employee  
2 must remain at his/her station until relieved or given  
permission to leave by the supervisor on duty.

3 (Pangborn Decl. at 116.) The Employee Manual explains that an  
4 unscheduled requirement to continue working would constitute  
5 "Incidental Overtime." (See id. ("Incidental overtime may become  
6 necessary when an illness or emergency keeps co-workers from  
7 being at work as anticipated.")) As memorialized in the  
8 Employee Manual, an employee is "expected to cooperate" with a  
9 request to work incidental overtime "as a condition of [his or  
10 her] employment." (Id.) With incidental overtime, an employee  
11 may "request[] to be released from the overtime, [and] the  
12 company, in its discretion, may attempt to find a replacement for  
13 that position and offer such work as voluntary overtime." (Id.)

14 On February 19, 2014, plaintiff had worked his  
15 regularly scheduled night shift as an assistant end gluer, with  
16 Renteria working as the machine operator. (Thomsen Dep. at 67:5-  
17 8, 68:9-14, 69:1-8.) Lara was working as the production  
18 supervisor for the shift and, shortly before plaintiff's shift  
19 ended, Lara informed Renteria and plaintiff that both of the  
20 assistant end gluers for the next shift had called in sick and  
21 that either Renteria or plaintiff needed to continue working.  
22 (Id. at 72:11-25.) Plaintiff contends he told Lara he could not  
23 stay for the next shift because he had two appointments.<sup>3</sup> Lara

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24  
25 <sup>3</sup> Plaintiff later conceded in his deposition that he did  
26 not have any appointments, but made up that excuse because he did  
27 not want to admit that he was experiencing too much pain to work  
28 overtime. (Id. at 73:1-75:25.) While the jury may ultimately  
consider plaintiff's dishonesty in assessing his credibility, his  
false excuse is not relevant to his FEHA claim because defendant  
did not learn that his excuses were false until after this

1 testified that after plaintiff indicated he had appointments, he  
2 inquired whether Renteria could stay and when Renteria said he  
3 could not stay, Lara told plaintiff that he had to stay. (Lara  
4 Dep. at 7:16-23.)

5 After discovering that plaintiff had left, Lara  
6 reported to Jose Garcia that plaintiff had left without  
7 permission and Jose Garcia and Lara contacted Del Razo. (Del  
8 Razo Dep. at 87:4-25.) Del Razo and Lloyd began an investigation  
9 and plaintiff again indicated he had appointments when they  
10 contacted him at home to inquire why he had left. (Id. at 90:25-  
11 91:11.) Plaintiff was then suspended pending further  
12 investigation, which included obtaining written statements from  
13 Lara, Garza, and Renteria and verifying when plaintiff had  
14 clocked out that day. (Id. at 88:24-89:13.) After their  
15 investigation, Del Razo and Lloyd concluded that plaintiff had  
16 left the facility in violation of Lara's order and the company's  
17 policy.

18 Because Del Razo and Lloyd had both worked for  
19 defendant for less than a year and had not handled a similar  
20 incident before, they talked to Jose Garcia about what would be  
21 the appropriate disciplinary action. (Lloyd Dep. at 22:21-24.)  
22 Jose Garcia recalled that defendant had discharged at least one  
23 other employee in the past for similar misconduct. (Id. at  
24 22:21-24:11; see also J. Garcia Dep. at 12:19-22 (testifying he  
25 believes he gave Lloyd the name of two employees terminated under  
26 similar circumstances in the past).)

27  
28 litigation commenced.

1 Plaintiff concedes he understood that he was required  
2 to continue working unless his replacement relieved him or his  
3 supervisor gave him permission to leave. (Thomsen Dep. at 76:12-  
4 16.) According to plaintiff, he was authorized to leave because  
5 Richard Ramirez relieved him and Lara never told him he had to  
6 stay. (Id. at 77:4-17, 79:4-12.) Ramirez has indicated that he  
7 believed he was plaintiff's relief that day and had in fact  
8 informed plaintiff that he was his relief prior to plaintiff  
9 leaving.<sup>4</sup> (Ramirez Decl. ¶ 4.) It is undisputed, however, that  
10 Ramirez did not inform defendant that believed he had relieved  
11 plaintiff until after plaintiff was terminated.

12 Under these circumstances, defendant has established  
13 that it had a legitimate reason for terminating plaintiff after  
14 he refused to work incidental overtime and defendant had no  
15 reason to know that Ramirez claimed to have relieved plaintiff.

16 2. Pretext

17 "A plaintiff may establish pretext either directly by  
18 persuading the court that a discriminatory reason more likely  
19 motivated the employer or indirectly by showing that the  
20 employer's proffered explanation is unworthy of credence." Dep't  
21 of Fair Emp't & Hous. v. Lucent Techs., Inc., 642 F.3d 728, 746  
22 (9th Cir. 2011) (internal quotation marks and citation omitted).  
23 "While [the court] must liberally construe plaintiff's showing  
24 and resolve any doubts about the propriety of a summary judgment  
25 in plaintiff's favor, plaintiff's evidence remains subject to

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26 <sup>4</sup> Genuine disputes exist as to who was identified as  
27 working on the schedule for February 19, 2014. Taking all  
28 inferences in favor of plaintiff, the schedule indicated that  
Ramirez was relieving plaintiff. (See Ramirez Decl. ¶ 3.)

1 careful scrutiny.” King, 152 Cal. App. 4th at 433. The  
2 “[p]laintiff’s evidence must relate to the motivation of the  
3 decision makers to prove, by nonspeculative evidence, an actual  
4 causal link between prohibited motivation and termination.” Id.

5 Even if defendant had an honest belief that plaintiff  
6 left work on February 19, 2014 in violation of its policy,  
7 plaintiff contends that his termination for that misconduct was  
8 mere pretext because (1) defendant’s own policies supported  
9 discipline, not termination and (2) defendant’s decision was  
10 motivated by plaintiff’s disability and potential disability  
11 leave.

12 While defendant’s policy requires an employee to work  
13 incidental overtime as outlined above, it does not identify the  
14 consequence of an employee’s failure to work incidental overtime.  
15 At the same time, the Employee Manual has a detailed “no fault”  
16 attendance policy. The attendance policy defines “absences” as  
17 “any time missed by an employee when he/she is scheduled for  
18 work.” (Pangborn Decl. at 119.) The attendance policy provides  
19 an identified number of points that are assessed under various  
20 circumstances and the potential disciplinary actions resulting  
21 from incurring points, with a total of nine points amounting to  
22 just cause for termination. (Id. at 120-21.) The attendance  
23 policy provides for the assessment of one point if an employee  
24 leaves a shift sixty or more minutes early and for the assessment  
25 of two points if an employee fails to call in sick or show up for  
26 a scheduled shift. (Id.)

27 Although Del Razo acknowledges this attendance policy,  
28 he believes that the attendance policy did not apply to plaintiff

1 having "abandoned his shift . . . without authorization." (Del  
2 Razo Dep. at 93:8-94:6.) Del Razo could not explain what "no  
3 fault" means under the attendance policy, but testified that  
4 abandoning a shift does not come within the attendance policy for  
5 leaving early. (Id. at 94:14-95:22.) Anthony Garcia also  
6 recognized that the Employee Manual did not indicate that  
7 "walking off the job" was a terminable offense, but that it was  
8 an "immediate discharge violation" even if it was not a written  
9 policy. (A. Garcia Dep. at 40:21-41:6.) While Anthony Garcia  
10 expected that employees would be familiar with this unwritten  
11 "policy," he testified that he had not previously terminated an  
12 employee for "walking off the job," (A. Garcia at 48:2-24), and  
13 plaintiff could not recall it happening to another employee,  
14 (Thomsen Dep. at 85:24-87:1).

15 Because the Employee Manual is silent as to the  
16 consequence of an employee's refusal to work incidental overtime,  
17 but lays out a detailed attendance policy and point system, a  
18 reasonable jury could infer that defendant intended for the  
19 refusal to work incidental overtime to be treated as an  
20 attendance violation. Moreover, if plaintiff had simply failed  
21 to show up for his originally scheduled shift--and thus not been  
22 present for the alleged demand to work incidental overtime--he  
23 would have been assessed only two points under the attendance  
24 policy. A reasonable jury could thus infer that defendant knew  
25 its termination decision was inconsistent with the attendance  
26 policy and defendant simply seized on an opportunity to terminate  
27 plaintiff's employment to avoid having to continue to accommodate  
28 his disability.

1 Not only could a jury find that termination for  
2 plaintiff's alleged misconduct is inconsistent with defendant's  
3 attendance policy, triable issues also exist as to whether  
4 termination was consistent with defendant's past practices.  
5 While Jose Garcia testified he believed two other employees had  
6 been terminated for similar misconduct, he also testified that he  
7 lacked knowledge of the specific facts leading to the termination  
8 of those employees. (J. Garcia Dep. at 12:14-15:6.)  
9 Additionally, although Lloyd recalls checking one prior  
10 employee's personnel file, she does not recall confirming any  
11 details in the file except the existence of the termination  
12 notice. (Lloyd Dep. at 22:21-24:11.) Lara also testified that  
13 he had contacted Jose Garcia when he discovered plaintiff had  
14 left in order to let him know that one of the machines would not  
15 be operating, not because he was suggesting that plaintiff should  
16 be disciplined. (Lara Dep. at 25:10-20.)

17 The lack of a clear warning or prior practice of  
18 terminating employees who refuse to work incidental overtime is  
19 in stark contrast to the employer's unequivocal warning in King  
20 about termination prior to the employee's misconduct. In King,  
21 the employer terminated the employee for violating its integrity  
22 policy when the employee had allegedly "encouraged a driver to  
23 falsify a timecard to bring it into compliance with federal  
24 regulations limiting driving time." 152 Cal. App. 4th at 429.  
25 Prior to terminating the employee for this misconduct, the  
26 employer had (1) terminated the employee's supervisor for failing  
27 to have communicated the driving time regulations to plaintiff;  
28 and (2) met with plaintiff on two prior occasions to go over the

1 driving time policy and warn him that his job was in jeopardy if  
2 he did not monitor and accurately report drivers' hours. Id. at  
3 436-37. In King, it was "undisputed that plaintiff was well  
4 aware of company policy, his responsibility, and the consequences  
5 that would ensue if he failed to meet his responsibility." Id.  
6 at 437. It is far from undisputed in this case that plaintiff--  
7 or even defendant for that matter--understood that termination  
8 was likely to occur if an employee refused to work incidental  
9 overtime.

10 Defendant's knowledge that plaintiff's disability was  
11 permanent and could necessitate additional time off work also  
12 gives rise to the inference that plaintiff's termination for  
13 failing to work incidental overtime was mere pretext. On January  
14 17, 2014, a Panel Qualified Medical Evaluation ("PQME") was  
15 performed on plaintiff for purposes of his workers' compensation  
16 claim. (Whitten Decl. Ex. P at 1.) The PQME indicated that  
17 plaintiff is at "maximum medical improvement," his disability is  
18 "permanent and stationary," and he may require additional surgery  
19 on his shoulder. (Id. Ex. P at 18-19; see also J. Garcia Dep. at  
20 38:24-39:4 (explaining that "maximum medical improvement" means  
21 the individual will "never get better than what [he is] currently  
22 at").) This diagnosis was consistent with prior medical  
23 examinations in which plaintiff's physician found he required  
24 permanent work restrictions and potentially required another  
25 surgery. (Pangborn Decl. at 156.)

26 Although Del Razo does not recall seeing the PQME, he  
27 testified that, prior to making the decision to terminate  
28 plaintiff, he knew that plaintiff "was at his maximum medical



1 improvement" and had been found to be "permanent and stationary."  
2 (Del Razo Dep. at 85:22-25.) Jose Garcia testified he knew at  
3 the time of plaintiff's termination that plaintiff would always  
4 require an accommodation. (J. Garcia Dep. at 50:4-14.)  
5 Plaintiff has also raised a triable issue of fact that Lloyd was  
6 aware of the results of the recent PQME prior to making the  
7 termination decision. The notation in the corner of ESIS's copy  
8 of the PQME suggests that ESIS received the PQME on February 21,  
9 2014. (Whitten Decl. Ex. P at 1.) On February 20, 2014, Lloyd  
10 had emailed Brown stating, "We have an issue with Jan and I need  
11 to connect with you regarding his status ASAP. Did we get a full  
12 duty release for him?" (Id. Ex. C at Ex. 62.) A jury could  
13 infer that Lloyd asked about whether a "full duty release" was  
14 obtained because she was aware a PQME had recently been  
15 performed. In response to Lloyd's email, Brown and Lloyd had a  
16 subsequent phone conversation and a reasonable jury could infer  
17 that Brown responded to Lloyd's question about whether a full  
18 release was obtained in that conversation. (See Lloyd Dep. at  
19 115:10-25.)

20 Taking all inferences in favor of plaintiff, a jury  
21 could also infer from Lloyd's February 20, 2014 email to Brown  
22 that the "issue" Lloyd was referring to was plaintiff's conduct  
23 on the prior day. In the timeline Lara submitted to Lloyd, Del  
24 Razo, and Jose Garcia about the February 19, 2014 incident, he  
25 also began by memorializing plaintiff's shoulder injury and  
26 including the November 2013 permanent lifting restriction.  
27 Lloyd's email and Lara's timeline give rise to the inference that  
28

1 the decision makers were not evaluating the February 19, 2014  
2 incident independent of plaintiff's disability.

3 On February 25, 2014, plaintiff also informed Del Razo  
4 that he was "going to pursue disability vs. continuing to work"  
5 because of his shoulder pain and that "he would seek permanent  
6 disability whether he has a job or not." (Pangborn Decl. at  
7 357.) Del Razo relayed this information to Lloyd and Anthony  
8 Garcia via email. (Id.) It is undisputed that defendant  
9 provided a salary continuation plan that would have provided for  
10 plaintiff to take six months of short-term disability leave and  
11 that defendant would have continued to pay him during that leave.  
12 (McDonald Dep. at 18:5-19:1; see also Lloyd Dep. at 81:11-22  
13 (testifying that she was aware of the salary continuation plan  
14 and that defendant paid that benefit).)

15 According to defendant, plaintiff's intent to take  
16 additional disability was unknown at the time the termination  
17 decision was made because the decision was made on February 24,  
18 2014. (Lloyd Dep. at 12:3-16.) However, Del Razo's February 25,  
19 2014 email recounts how plaintiff was apologetic for his conduct  
20 on February 19, 2014 and had attempted to explain his actions.  
21 (Id.) Based on Del Razo's inclusion of plaintiff's apologies and  
22 explanations in the email, a jury could infer that Del Razo  
23 thought this information was relevant to a termination decision  
24 that had not yet been made or finalized. Defendant also did not  
25 draft the termination notice until February 28, 2014, (Del Razo  
26 Dep. at 104:8-17), which is four days after when Lloyd contends  
27 the decision had been made. Plaintiff has thus established a  
28 genuine dispute as to when defendant made the decision to

1 terminate him and whether it knew plaintiff was planning to take  
2 additional paid disability leave at the time it made the  
3 decision.

4 When considering all of this evidence, a jury could  
5 find that plaintiff's disability motivated defendant's decision  
6 to terminate him and that his termination for having refused to  
7 work incidental overtime was mere pretext. Accordingly, the  
8 court must deny defendant's motion for summary judgment on  
9 plaintiff's subsection 12940(a) FEHA claim.

10 C. Wrongful Termination in Violation of Public Policy

11 Defendant concedes that plaintiff's wrongful  
12 termination of public policy claim rises and falls with his FEHA  
13 claims. (Def.'s Mem. at 24:6-13.) Accordingly, because  
14 plaintiff has established triable issues of fact on his FEHA  
15 claims, the court must also deny defendant's motion for summary  
16 judgment on his wrongful termination in violation of public  
17 policy claim.

18 D. Defamation Claim

19 Under California law, "[t]he elements of a defamation  
20 claim are (1) a publication that is (2) false, (3) defamatory,  
21 (4) unprivileged, and (5) has a natural tendency to injure or  
22 causes special damage." Wong v. Tai Jing, 189 Cal. App. 4th  
23 1354, 1369 (6th Dist. 2010) (citing Taus v. Loftus, 40 Cal. 4th  
24 683, 720 (2007)). Plaintiff bases his defamation claim on the  
25 alleged false statements Jose Garcia and Lara made to Lloyd and  
26 Del Razo about (1) plaintiff leaving without his relief being  
27 present; (2) plaintiff using profanity when he left; (3) one of  
28 the machines being unable to run because plaintiff left; and (4)

1 that plaintiff deserved to be terminated because of his conduct.<sup>5</sup>  
2 (Pl.'s Opp'n at 18:16-19:5.) Even assuming plaintiff could  
3 establish a triable issue as to the falsity of these statements  
4 and that they were published, defendant contends the statements  
5 were nonetheless privileged under California Civil Code  
6 subsection 47(c).

7 Subsection 47(c) provides that a communication is  
8 privileged if it is made "without malice, to a person interested  
9 therein, (1) by one who is also interested, or (2) by one who  
10 stands in such a relation to the person interested as to afford a  
11 reasonable ground for supposing the motive for the communication  
12 to be innocent, or (3) who is requested by the person interested  
13 to give the information." Cal. Civ. Code § 47. Plaintiff does  
14 not, and cannot, dispute that Jose Garcia and Lara had a common  
15 interest as supervisors in communicating information to  
16 management that was relevant to the alleged misconduct and  
17 potential discipline of one of defendant's employees. Cf. King,  
18 152 Cal. App. 4th at 440 ("[B]ecause an employer and its  
19 employees have a common interest in protecting the workplace from  
20 abuse, an employer's statements to employees regarding the

21 <sup>5</sup> At oral argument, plaintiff's counsel indicated that  
22 plaintiff's defamation claim is also based on the failure of  
23 certain managers within the company to investigate the alleged  
24 false information reported to them. Plaintiff's counsel could  
25 not articulate how a mere listener to an alleged defamatory  
26 statement could ever be liable for defamation. The only case  
27 counsel cited at oral argument was Rollenhagen v. City of Orange,  
28 116 Cal. App. 3d 414 (4th Dist. 1981). That case addressed a  
broadcaster's failure to investigate prior to making a defamatory  
statement, not any duty on behalf of a person who hears a  
defamatory statement to investigate whether the statement is true  
before making a decision based on that statement. See  
Rollenhagen, 116 Cal. App. 3d at 423.

1 reasons for termination of another employee generally are  
2 privileged.”). Plaintiff argues only that the communications are  
3 not privileged because a reasonable jury could find that they  
4 were made with malice.

5 “Insofar as the common-interest privilege is concerned,  
6 malice is not inferred from the communication itself.” Noel v.  
7 River Hills Wilsons, Inc., 113 Cal. App. 4th 1363, 1370 (4th  
8 Dist. 2003). “The malice necessary to defeat a qualified  
9 privilege is actual malice which is established by a showing that  
10 the publication was motivated by hatred or ill will towards the  
11 plaintiff or by a showing that the defendant lacked reasonable  
12 grounds for belief in the truth of the publication and therefore  
13 acted in reckless disregard of the plaintiff’s rights.” Id.  
14 (quoting Sanborn v. Chronicle Publ’g Co., 18 Cal. 3d 406, 413  
15 (1976)) (internal quotation marks omitted). “[M]alice focuses  
16 upon the defendant’s state of mind, not his [or her] conduct.  
17 Mere negligence in inquiry cannot constitute lack of reasonable  
18 or probable cause.” Id. (internal quotations marks and citation  
19 omitted) (alterations in original).

20 Plaintiff has not put forth any evidence even giving  
21 rise to the inference that Jose Garcia and Lara were motivated by  
22 hatred or ill will when they made the statements underlying his  
23 defamation claim. Plaintiff nonetheless contends a jury could  
24 find that they made the statements with malice because they  
25 failed to thoroughly investigate the incident and thus lacked  
26 reasonable grounds to believe that the statements were true. The  
27 strongest evidence that plaintiff believed he was authorized to  
28 leave is Ramirez’s statements that he told plaintiff he was there

1 to relieve him. (See Ramirez Decl. ¶ 4.) Ramirez, however, did  
2 not share this information with defendant until after this  
3 litigation commenced.

4 While defendant could have interviewed Ramirez when it  
5 interviewed other employees, plaintiff's own dishonesty made such  
6 an interview irrelevant. It is undisputed that Del Razo and  
7 Lloyd called plaintiff the day of the incident to inquire why he  
8 had not stayed on to work the incidental overtime.<sup>6</sup> (Del Razo  
9 Dep. at 87:4-25.) In response, plaintiff told them that he left  
10 because he had appointments he could not miss. (Id. at 90:25-  
11 91:11.) Plaintiff never told defendant or even suggested during  
12 that interview that he believed he was allowed to leave because  
13 Ramirez had told him that he was there to relieve him. Instead,  
14 he repeated the same excuse that he has since admitted was false.  
15 (Thomsen Dep. at 73:1-75:25.) A reasonable jury could not infer  
16 that defendant acted negligently--let alone with malice--in  
17 failing to interview Ramirez because plaintiff's own lie made  
18 that interview entirely irrelevant.

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19  
20 <sup>6</sup> Any suggestion that Jose Garcia or Lara should have  
21 interviewed plaintiff or others prior to even reporting the  
22 alleged misconduct to Lloyd and Del Razo ignores the division of  
23 responsibility in a company as large as defendant. Additionally,  
24 while plaintiff contends defendant could have learned that  
25 Ramirez was relieving him by checking the schedule as plaintiff  
26 contends it existed that day, failure to check the schedule in  
27 light of plaintiff's representations as to why he left was  
28 negligent at most. See Noel, 113 Cal. App. 4th at 1371 ("[M]ere  
negligence . . . in the sense of oversight or unintentional  
error, is not alone enough to constitute malice. It is only when  
the negligence amounts to a reckless or wanton disregard for the  
truth, so as to reasonably imply a wilful disregard for or  
avoidance of accuracy, that malice is shown." (internal quotation  
marks and citation omitted) (omission in original)).

1           Accordingly, because a reasonable jury could not find  
2 that any of defendant's employees made the communications at  
3 issue with malice, the communications are privileged under  
4 subsection 47(c) and the court must grant defendant's motion for  
5 summary judgment on plaintiff's defamation claim.

6           IT IS THEREFORE ORDERED that defendant's motion for  
7 summary judgment be, and the same hereby is, DENIED with respect  
8 to plaintiff's FEHA subsections 12940(a), (m), and (n) claims and  
9 wrongful termination in violation of public policy claim; and  
10 GRANTED with respect to plaintiff's defamation claim.

11 Dated: June 2, 2016



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12 WILLIAM B. SHUBB  
13 UNITED STATES DISTRICT JUDGE  
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