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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DENNIS HENDERSON, an individual,

Plaintiff,

vs.

CHICAGO CUBS BASEBALL CLUB, LLC; and DOES 1 to 20, inclusive,

Defendants.

Case No. 5:17-cv-02366-SVW-KKx

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, OR, IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT

[Fed. R. Civ. Proc. 56]

Date: June 4, 2018
Time: 1:30 p.m.
Judge: Hon. Stephen V. Wilson
Courtroom: 10A

Complaint Filed: October 18, 2017

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. STATEMENT OF FACTS 2

A. Plaintiff's Term Employment with the Cubs 2

B. Plaintiff's Job Duties as a Professional Scout 2

C. Plaintiff Performed Poorly as a Scout 6

D. Plaintiff Neither Wanted Nor Requested a Leave of Absence 9

E. The Chicago Cubs and Its Employees 10

III. LEGAL ARGUMENT 10

A. Standard of Review 10

B. Plaintiff Cannot Prevail on His Wage and Hour Claims Because he was Properly Classified as an Exempt Employee 11

C. Plaintiff's Derivative Claims for Meal and Rest Break Penalties Also Fail 12

D. Plaintiff's Claim for Paystub Penalties is Derivative of the Above Claims 13

E. Plaintiff's Derivative Claim for Waiting Time Penalties Fails 13

F. Plaintiff's Derivative Unfair Business Practices Claim Fails 13

G. Plaintiff's Conversion Claim Fails 14

H. Plaintiff's Reimbursement Claim Fails 14

I. Plaintiff Cannot Prevail on His California Labor Code Claims 14

J. Plaintiff's FEHA Claims Fail as a Matter of Law Because the Alleged Tortious Conduct Occurred Outside California 15

K. Plaintiff's FEHA Claims Fail Because He Did Not Suffer Any of the Alleged Adverse Employment Actions 16

L. Plaintiff's Disability Discrimination Claim Fails 17

M. Plaintiff's Remaining Disability Claims Fail Because He Did Not Request or Desire an Accommodation 20

N. Plaintiff's Age Discrimination Claim Fails Because the Cubs Did not Make Any Employment Decisions Based on His Age 21

O. Plaintiff's CFRA Claim Fails 22

1. Plaintiff was not Eligible for CFRA Leave 22
2. Plaintiff Did Not Request or Desire CFRA Leave 22
3. Plaintiff's CFRA Retaliation Claim Fails.....23
P. Plaintiff's FEHA Retaliation Claim Fails 23
Q. Plaintiff's Failure to Prevent Claim Fails.....24
R. Plaintiff's Wrongful Termination Claim Fails Because He Was Not Terminated.....24
S. Plaintiff's Wrongful Termination Claim Fails.....25
T. The Cubs are Entitled to Partial Summary Judgment on Plaintiff's Claim for Punitive Damages 25
IV. CONCLUSION.....25

TABLE OF AUTHORITIES

Page(s)

STATE CASES

Akers v. County of San Diego,
95 Cal.App.4th 1441 (2002) 17

Alamo v. Practice Mgmt. Info. Corp.,
219 Cal. App. 4th 466 (2013) 23

Am. Airlines v. Sheppard Mullin,
96 Cal. App. 4th 1017 (2002) 25

Arteaga v. Brink's, Inc.,
163 Cal. App. 4th 327 (2008) 25

Avila v. Cont'l Airlines, Inc.,
165 Cal. App. 4th 1237 (2008) 20

Brinker Restaurant Corp. v. Superior Court,
53 Cal. 4th 1004 (2012) 13

Campbell v. Arco Marine, Inc.,
42 Cal. App. 4th 1850 (1996) 16

Catalano v. Superior Court,
82 Cal. App. 4th 91 (2000) 25

Daly v. Exxon Corp.,
55 Cal. App. 4th 39 (1997) 24

Dudley v. Dep't of Transp.,
90 Cal. App. 4th 255 (2001) 23

Farmers Ins. Exch. v. Superior Court,
2 Cal. 4th 377 (1992) 13

Flores v. Autozone West, Inc.,
161 Cal. App. 4th 373 (2008) 25

Gelfo v. Lockheed Martin Corp.,
140 Cal. App. 4th 34 (2006) 17

Guz v. Bechtel Nat. Inc.,
24 Cal. 4th 317 (2000) 16,21

Haberman v. Cengage Learning, Inc.,
180 Cal. App. 4th 365 (2009) 23

Janken v. GM Hughes Elec's,
46 Cal. App. 4th 55 (1996) 25

Krantz v. BT Visual Images,
89 Cal. App. 4th 164 (2001) 13

Martin v. Lockheed Missiles & Space Co.,
29 Cal. App. 4th 1718 (1994) 19,22

Motevalli v. L.A. Unified Sch. Dist.,
122 Cal. App. 4th 97 (2004) 17,24

Richey v. AutoNation, Inc.,
60 Cal. 4th 909 (2015) 23

Stevens v. California Dep't of Corr.,
107 Cal. App. 4th 285 (2003) 22

Touchstone Television Prods. v. Superior Court,
208 Cal. App. 4th 676 (2012) 24

Yanowitz v. L'Oreal USA, Inc.,
36 Cal. 4th 1028 (2005) 24

FEDERAL CASES

Alamillo v. BNSF Ry. Co.,
869 F.3d 916 (9th Cir. 2017) 20

Anderson v. CRST Int'l, Inc.,
No. CV 14-368, 2015 WL 1487074 (C.D. Cal. Apr. 1, 2015), *aff'd in relevant part, and rev'd in part on other grounds*, 685 F. App'x 524 (9th Cir. 2017) 16

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986) 18,19

Bowerman v. Field Asset Servs., Inc.,
242 F. Supp. 3d 910, 927–28 (N.D. Cal. 2017) 18

Bucklin v. Am. Zurich Ins. Co.,
No. 11-cv-05519, 2013 WL 3147019 (C.D. Cal. June 19, 2013) 11,12

Davis v. Team Elec. Co.,
520 F.3d 1080 (9th Cir. 2008) 17

Gonzalez v. ITT Corp.,
No. CV 09-3400 SVW, 2009 WL 10700307 (C.D. Cal. Aug. 10, 2009) 15

Gulaid v. CH2M Hill, Inc.,
No. 15-CV-04824, 2016 WL 5673144 (N.D. Cal. Oct. 3, 2016) 15

Hoskins v. BP Prod. N. Am. Inc.,
No. 2:13-CV-0574-SVW, 2014 WL 116280 (C.D. Cal. Jan. 9, 2014) ..... passim

Inge v. Time Warner Inc.,
No. CV1002289SVW, 2010 WL 11598026 (C.D. Cal. Oct. 7, 2010) 21

Lawler v. Montblanc N. Am., LLC,
704 F.3d 1235 (9th Cir. 2013) 20

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No. 5:12-cv-510, 2012 WL 12951328 (C.D. Cal. Sept. 7, 2012) 10,19

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819 F. Supp. 2d 923 (E.D. Cal. 2011) 17

McDonnell Douglas Corp. v. Green,
411 U.S. 792 (1973) 17

Merrick v. Hilton Worldwide, Inc.,
No. 14-56853, 2017 WL 3496030 (9th Cir. Aug. 16, 2017) 22

Oliver v. Microsoft Corp.,
966 F. Supp. 2d 889 (N.D. Cal. 2013) 24

Oman v. Delta Air Lines, Inc.,
230 F. Supp. 3d 986, 993 (N.D. Cal. 2017) 15

Pesci v. McDonald,
No. 5:15-CV-00607-SVW, 2015 WL 12672094 (C.D. Cal. Oct. 22, 2015) 18

Rulenz v. Ford Motor Co.,
No. 10CV1791, 2013 WL 2181241 (S.D. Cal. May 20, 2013) 15,16

Shook v. Indian River Transp. Co.,
236 F. Supp. 3d 1165 (E.D. Cal. 2017), *aff'd*, 716 F. App'x 589 (9th Cir. 2018) 14

Sieczkowski v. Astrue,
No. 211CV02282SVW, 2012 WL 12888369 (C.D. Cal. June 7, 2012), *aff'd sub nom. Sieczkowski v. Colvin*, 557 F. App'x 677 (9th Cir. 2014) 21

Sneddon v. ABF Freight Sys.,
489 F. Supp. 2d 1124 (S.D. Cal. 2007) 25

Spragin v. McDonald's USA, LLC,
No. CV1009617, 2011 WL 13217960 (C.D. Cal. Jan. 20, 2011) 14

Vidrio v. United Airlines, Inc.,
No. CV15-7985, 2017 WL 1034200 (C.D. Cal. Mar. 15, 2017) 14,15

Ward v. United Airlines, Inc.,
No. C 15-02309, 2016 WL 3906077 (N.D. Cal. July 19, 2016) 15

FEDERAL STATUTES/RULES

Fed. R. Civ. P. 56(c) 10

STATE STATUTES/RULES

Cal. Bus. & Prof. Code
§ 17200 13

Cal. Civ. Code
§ 3294 25

Cal. Code Regs., tit. 8,
§11100(2)(a) 11
§11100(2)(b) 11
§11100(2)(c) 11
§11100(2)(d) 11
§11100(2)(e) 11
§11100(2)(f) 11
§11100(2)(g) 11
§ 13520 13

Cal. Gov't Code
§ 12940(h) 20
§ 12945.2 22

Cal. Lab. Code
§ 203 13

I. INTRODUCTION

As demonstrated below, Plaintiff Dennis Henderson's ("Plf.") laundry list of baseless claims is entirely without merit. His eight interrelated wage and hour claims, including six California Labor Code claims and two derivative claims, are premised on a risible theory that he was misclassified as an exempt employee when he worked for the Chicago Cubs Baseball Club, LLC (the "Cubs" or the "Organization") as a Professional Scout. The evidence – including, especially, Plf.'s own admissions during his deposition – clearly demonstrate that Plf. was engaged almost exclusively in exempt tasks. Indeed, Plf. confirmed under oath that his job required him to constantly exercise independent discretion and judgment, with little to no supervision, regarding tasks that informed one of the Cubs' most important decisions – whether and when to acquire prospective baseball players. Further, Plf. spent 75-90 percent of his working time – including entire weeks and months – outside of California. Therefore, because he worked for an out-of-state employer and his claims implicate policies developed outside of California, even if Plf. was not properly classified, he cannot prevail under the California Labor Code or his derivative claims.

Similarly baseless are Plf.'s purported claims for disability and age discrimination and for violation of the California Family Rights Act ("CFRA"). As an initial matter, Plf. cannot prevail on his FEHA claims because the wrongful conduct of which he complains occurred outside of California. Further, Plf. conceded that he did not need, desire, or request a leave of absence or any accommodation whatsoever. In addition, Plf. admits that he is not aware of anyone who discriminated against him, nor is he aware of any facts that support his frivolous allegations of age and disability discrimination – other than the fact that he happens to be over 40 years of age and allegedly had hip surgery.

Furthermore, the evidence in this case shows the absence of any genuine dispute that Plf. was widely viewed as one of the Cubs' worst performing scouts, and the decision not to renew his employment contract (his employment was *not* terminated, so his wrongful termination claim must be dismissed on that ground alone) was based on his subpar

performance, not on any discriminatory animus. The uncontroverted facts set forth below demonstrate that all of Plf.'s claims fail as a matter of law and that the Cubs are entitled to judgment on the entire complaint, or, alternatively, partial summary judgment as to each cause of action and the issues identified in the Cubs' Notice of Motion.

II. STATEMENT OF FACTS

A. Plaintiff's Term Employment with the Cubs

Plf. worked for the Cubs as a Professional Scout and was responsible for scouting three professional baseball organizations, including each organization's major league team and their affiliated Low A, High A, AA, and AAA teams. (UF 1).[1] Plf.'s job duties did not materially change from 2013 through the expiration of his contract with the Cubs in 2016. (UF 2). From 2013-2016, Plf. earned at least $65,000 annually. (UF 3).

The Cubs offer multi-year contracts to scouts who are performing well. (UF 4). However, the Cubs only offered Plf. one-year employment contracts. (UF 5). The Cubs did not terminate Plf.'s employment. (UF 6). Rather, Plf.'s employment with the Cubs ended upon the natural expiration of his 2015-16 contract on October 31, 2016. (*Id.*)

B. Plaintiff's Job Duties as a Professional Scout

As a Professional Scout, Plf. was "responsible for seeing, evaluating and reporting on player personnel … for recommendation to, and consideration by, the General Manager in possible player transactions." (UF 7). As part of the evaluation process, Plf. would travel to and attend baseball games in dozens of locations across the country, observe the players on the team for which he was responsible, and compose scouting reports on each individual player. (UF 8). Accordingly, Plf. worked outside of California 75-90% of the time. (UF 9). Plf. spent many weeks and even entire months during which he performed no work in California. (UF 10). During Spring Training, Plf. exclusively worked in Arizona. (UF 11). He also worked exclusively in Arizona when he worked Instructional League after the regular season concluded. (UF 11). Plf. was reimbursed for all expenses he incurred while working with the Cubs. (UF 12).

[1] "UF" numbers are references to the Cubs' Statement of Uncontroverted Facts.

Each scouting report contains numerous categories in which Plf. would provide his subjective evaluation of a player's various "Descriptors," including his "on-field makeup," "off-field makeup," "baseball instincts," "athleticism," "pitchability" and several other categories. (UF 13). For each descriptor, Plf. was expected to provide his subjective analysis of what he personally and exclusively observed and how that affected the player's ability to potentially contribute to the Cubs in the future. (*Id*.)

Each scouting report also contained a "Tools" section. (UF 14). In this section, Plf. would provide his analysis of a player's pitching or hitting capabilities. (*Id*.) This analysis involved evaluating a player in 8-10 categories, providing the scout's subjective opinion of the player's *current* capabilities in each category, then using a variety of factors including the scout's background and knowledge of baseball, along with what he observed while watching the player, to project the player's *future* capabilities. (*Id*.) In this section, Plf. would provide a subjective narrative about the player's capabilities in each category. (*Id*.)

Plf. also drafted a "Summary" regarding each player. (UF 15). This is the most important aspect of the scouting report because it allows the scout to provide a detailed description of his thoughts concerning the player's abilities, strengths and weaknesses, growth potential, ability to potentially contribute to the Cubs in the future, and any other thoughts or analysis the scout has regarding the player he observed. (*Id*.) The scouting report also contained a "One Liner" section in which Plf. would provide a shorter version of his subjective analysis of the player. (*Id*.)

In the scouting report, Plf. also described a "present role" and a "future role" for each player. (UF 16). Here, Plf. would decide how a particular player ranked compared to Major League Baseball players and how he expected the player to compare to other Major League players if and when the player reached his full potential. (*Id*.) Plf. would also project the position for which he believed the player would be best suited in Major League Baseball. (UF 17). Then, Plf. would make a recommendation as to whether the Organization should acquire or avoid acquiring the player. (*Id*.)

The Cubs expected Plf. to ensure that the various aspects of his scouting reports were

internally consistent. (UF 18). The grades that he puts on a player's Tools should support and be supported by the narrative in his summary, and his Tools ratings and narrative summary for a given player should support and be supported by his role projection for that player. (*Id.*) Plf.'s scouting reports failed in this crucial respect. (UF 19). Role projections and tool grades for a given player were often inconsistent and failed to support each other. (*Id.*) This caused the leaders of the Professional Scouting Department to lose confidence in his analysis. (*Id.*)

The Cubs' highest levels of management would use the information contained in Plf.'s reports to determine whether the Cubs should attempt to acquire a certain player. (UF 20). Plf. testified that he had to exercise his own judgment "on behalf of the Cubs." (UF 21). Plf. testified that "I have to make that call whether or not" a player is a good fit for the Organization. (*Id.*) Further, his "judgments were generally appreciated and respected" and he was not aware of a time when a Cubs employee contradicted his judgment concerning whether a player would be a good fit for the Organization. (*Id.*) Plf. would analyze a player to determine what he is "going to bring to the table" and whether a player is "somebody that you might want to acquire." (UF 22). The Cubs expect its scouts to analyze players that they see, exercise their independent discretion and judgment to project players' future capabilities and determine whether the Cubs should acquire certain players. (UF 23).

The Cubs' Professional Scouting Manual emphasizes the importance of a scout's role with the Organization. It states that "the Professional Scouting Department is one of the main information centers for evaluating and acquiring talent. The Cubs organization can't make good baseball decisions without good information. What separates a good team from a championship team is the quality of its evaluations…" (UF 24). The Manual also states that "the entire front office staff read and rely on pro scouting reports to make baseball decisions, so attention to detail and thoroughness is a necessity. The goal is to produce reports with conviction. Look beyond the obvious in every evaluation." (*Id.*)

The Manual also discusses what it takes to perform well as a scout:

> "what separates a good baseball scout from a great one is his vision. The ability to identify and evaluate a player with talent and strong makeup characteristics long before he reaches his potential is the mark of a quality scout. Our main objective is to acquire the finest baseball players for the Chicago Cubs…. Professional scouting involves identifying and evaluating current professional players for future trades, free agency (Major League and Minor League), waiver claims, advance scouting purposes, the Rule 5 Draft, and Independent League signings. The Chicago Cubs are dedicated to acquiring, hiring, and retaining scouts that have the proven ability to identify and evaluate professional players. Excellence in professional scouting will allow the Chicago Cubs Professional Scouting Department to assist in providing players to the Major League club that will impact our ability to win a World Series Championship." (UF 25).

Plf. himself confirmed under oath that "instinct plays into it" and, as a scout, you have to "make your own assessment of what's going on." (UF 26). He also testified that "you have to give it a great deal of thought" and "use your own judgment" when drafting reports because the reports will go to his supervisors who will make important decisions based on the information he reported. (UF 27). He also testified that he had to use his analysis, judgment and "trained eye" to evaluate a player. (UF 28). This required him to use his unique evaluation skills honed through years of experience as a baseball player, baseball coach, and talent evaluator. (*Id.*)

The Manual further encourages scouts to think creatively and exercise their independent judgment: "We strive to be innovative, resourceful, and disciplined in our approach to scouting. Due to the creative nature of the industry, this manual should serve as a guide and shouldn't cause you to lose any of your individual creativity when it comes to evaluating." (UF 29).

Plf. testified that he worked between 12 and 16 hours per day. (UF 30). In a given day, he would spend 8 to 9 hours evaluating players and taking notes on what he saw. (*Id.*) Then, he would draft a scouting report on every player on each team within his assigned organizations. (*Id.*) Each report took him one hour to 1.5 hours to write. (*Id.*) Plf. testified that all of the evaluations he conducted at the ballpark would "feed[] into the reports that [he was] writing." (*Id.*) Plf. also testified that he received no supervision when he was carrying out his duties. (UF 31). Thus, whenever he chose, he was able to take a rest break or meal break and nobody from the Cubs ever instructed him not to take a break. (UF 32).

C. Plaintiff Performed Poorly as a Scout

Joe Bohringer was the Cubs' Director of Professional Scouting from November 2011 through August 2015. (UF 33). At the end of August 2015, Jared Porter became the Director of Professional Scouting. (UF 34). Andrew Bassett was the second-in-command in the Professional Scouting Department throughout Mr. Bohringer's and Mr. Porter's tenures as Directors of the department. (UF 35). Like the vast majority of Cubs employees, Mr. Bohringer, Mr. Bassett, and Mr. Porter work or worked out of the Cubs' Chicago headquarters. (UF 36).

When Mr. Porter joined the Organization, Mr. Bohringer and Mr. Bassett each independently sorted the Cubs' Professional Scouts into tiers and individually sent their assessments to Mr. Porter. (UF 37). On August 29, 2015, Mr. Bohringer sent Mr. Porter his assessment of the Professional Scouting Department, listing Plf. in the lowest of three tiers. (UF 38). Mr. Bohringer criticized the fact that Plf. was "simply writing what he saw and letting others make decisions." (*Id.*) Mr. Bohringer stated that Plf.'s "ceiling is only average," meaning that even if Plf. improved to the point of reaching his peak potential, he would only be an average scout. (*Id.*)

Without seeing Mr. Bohringer's email, Mr. Bassett provided Mr. Porter with a similar, but even more critical assessment of Plf.'s performance. (UF 39). On August 31, 2015, Mr. Bassett drafted an email in Chicago, listing Plf. in the "Questionable contributors" category - the lowest of four tiers. (*Id.*) Mr. Bassett repeatedly criticized Plf.'s ability to identify and rank players' talent and ability – one of a scout's most important tasks. (UF 40). Mr. Bassett stated that Plf. "hasn't done a great job separating players." (*Id.*) This refers to Plf.'s inability to project which players are most likely to become contributors in Major League Baseball, one of a scout's most important duties. (*Id.*) Mr. Bassett also criticized Plf.'s ability to separate pitching at the lower levels. (UF 41). He also stated that Plf. "struggles to line [players] up effectively." (*Id.*) Again, Mr. Bassett was expressing that Plf. struggled with a very important job duty – determining which minor league players could eventually become good players in the Major Leagues. (*Id.*) Mr. Bassett went into further detail regarding Plf.'s inability to

evaluate talent. (UF 42). He stated that Plf. was similarly enthusiastic about the Angels' minor league players as he was about the Dodgers' minor league players. (*Id.*) As Mr. Bassett explained, this exposed a key flaw in Plf.'s ability to evaluate players because the Dodgers had vastly superior talent in its minor league system at the time. (*Id.*) In addition, Mr. Bassett stated that Plf. "says he wants to improve but reports don't reflect much aptitude for change." (UF 43). Plf. admits that he spoke with Mr. Bassett about what he can do to improve as a scout. (*Id.*) Accordingly, based on Mr. Bassett's exposure to Plf.'s scouting capabilities over several years, he believed that Plf. was not capable of performing adequately as a scout. (*Id.*)

In addition to these written analyses, Mr. Porter spoke with other Cubs employees who identified Plf.'s performance deficiencies. (UF 44). These discussions took place at the Cubs' headquarters in Chicago. (*Id.*) In September of 2015, soon after Mr. Porter joined the Cubs, he met with the Organization's Baseball Operations leadership. (UF 45). During this meeting, leadership told Mr. Porter that Plf. was one of the Cubs' weakest scouts. (*Id.*) Accordingly, they recommended that Mr. Porter should not renew Plf.'s employment contract for 2015-2016. (*Id.*) However, after this meeting, Mr. Porter spoke with Jason McLeod, the Cubs' Senior Vice President, Player Development and Amateur Scouting. (UF 46). Mr. McLeod, who was a long-time friend of Plf., asked Mr. Porter to give Plf. a chance. (*Id.*) Based on Mr. McLeod's request, Mr. Porter decided to give Plf. one more year despite several sources informing him that Plf. was one of the weakest scouts in the department. (*Id.*)

Shortly thereafter, Mr. Porter observed Plf.'s performance deficiencies firsthand. (UF 47). In October 2015, Mr. Porter and Mr. Bassett exchanged emails criticizing one of Plf.'s scouting reports. (*Id.*) Mr. Porter and Mr. Bassett felt that Plf.'s scouting report was inconsistent. (*Id.*) Certain aspects of the scouting report described an intriguing player with significant potential. (*Id.*) However, Plf. assigned the player an average grade and called him a "long-shot." (*Id.*) Accordingly, Mr. Porter and Mr. Bassett were frustrated that Plf.'s report did not contain the internal consistency they wanted to see in a scouting report. (*Id.*) Mr. Bassett and Mr. Porter drafted these emails while working in Chicago. (*Id.*)

Mr. Porter and Mr. Bassett discussed Plf.'s performance issues again at the beginning of the 2016 season. (UF 48). On May 10, 2016, just over one month into the regular season, Mr. Bassett called Plf.'s report "embarrassing." (*Id.*) Mr. Bassett noted that Plf. scouted a minor league pitcher with a history of problems controlling his pitches and who demonstrated a lack of control when Plf. observed him, yet Plf. evaluated the pitcher as having average to above average control for a *Major League* pitcher and did not comment on the pitcher's control problems. (*Id.*) Mr. Porter responded, "Bad scout man." (*Id.*) Mr. Bassett stated "[a]ssuming this falls into the 'don't waste our time category?" (*Id.*) Mr. Porter responded "yep," meaning there was no point in coaching Plf. on his performance since they knew he did not have the aptitude to meet their performance standards. (*Id.*) Mr. Bassett and Mr. Porter drafted these emails while working in Chicago. (*Id.*)

By May of 2016, Mr. Porter and Mr. Bassett determined that they likely would not renew Henderson's contract and discussed options for replacing him with a better scout. (UF 49). Mr. Porter's practice is to start finalizing employment decisions in late August. (UF 50). On August 24, 2016, Mr. Porter and Mr. Bassett drafted emails in Chicago documenting the department's staffing plan. (UF 51). Mr. Porter stated that he wanted to refrain from offering Plf. a new contract, but he wanted to provide Plf. with health insurance beyond the expiration of his employment, so he could care for his alleged health issue. (UF 52). Between August 31 and September 7, 2016, Mr. Porter spoke with Baseball Operations leadership about refraining from offering Plf. a new contract and received formal approval to do so. (UF 53). On or about September 19, 2016, the Cubs informed its car fleet manager that Plf. would not receive a company car for the next season. (UF 54). On or about September 21, 2016, Mr. Porter called Plf. from Chicago to inform him that the Cubs would not be offering him a new employment contract for 2016-17. (UF 55). Mr. Porter chose this time to inform Plf. and one other scout that they would not receive new contracts because he wanted to wait until they completed their assignments, but he also wanted to give them time to seek new employment with other teams since this was the time of year when teams typically hire new scouts. (UF 56). Plf.

did not perform any work for the Cubs from that day forward, but he received his full salary as if he did, until his employment contract ended on October 31, 2016. (UF 57).

Plf. never complained to the Cubs about anything. (UF 58). To this day, Plf. cannot identify a single person who allegedly discriminated against him. (UF 59). Further, Plf. could not identify any fact that indicates he was discriminated against, other than the fact that he allegedly had a disability and that he is over the age of 40. (*Id*.) He cannot identify a single comment that indicates he was discriminated against. (*Id*.)

D. Plaintiff Neither Wanted Nor Requested a Leave of Absence

Plf. had hip replacement surgery in 2014. (UF 60). He confirms that he was hospitalized for 1.5 days, recovered within five days, and did not miss any work. (*Id*.) He alleges that his hip began bothering him again in 2016. (UF 61). He continued with his normal routine and it did not interfere with his job. (*Id*.) In July 2016 in Chicago, Plf. informed Mr. Porter that he would have another surgery after the 2016 season ended. (UF 62). Plf. scheduled surgery for September 2016, but he testified that he was determined to complete all of his assignments and would not need, and did not want, to take time off from work. (UF 63). Plf. did not request any time off or any other form of accommodation. (UF 64). Plf. did not submit any medical paperwork concerning his alleged disability during his employment. (UF 65). Despite the Cubs' request for all medical documentation of his alleged disability, Plf. has failed to produce substantiating documents. (UF 66).

Mr. Porter encouraged Plf. to take care of his health and prioritize his health over work. (UF 67). Mr. Porter told him he could have the surgery right away and there was no need to wait until the season was over. (*Id*.) Plf. assured Mr. Porter that it was going to be a minor surgery and that he would not need to miss work. (UF 68). Plf. testified that "I never miss work" and "I wasn't anticipating being out." (*Id*.) Plf. also testified that he did not: (i) think the surgery was going to affect his ability to work; (ii) ask for any time off from work; (iii) plan to ask for any time off from work; or (iv) tell any Cubs employee that his surgery or complications were going to affect his ability to work. (UF 69).

Plf. ended up having surgery on approximately September 14, 2016. (UF 70). He

was "back on his feet" two days later, but he experienced some pain due to some fluid accumulation that needed to be drained. (*Id.*) Plf. would have been able to return to work within approximately two weeks. (UF 71). However, at this time, he did not have any assignments. (*Id.*)

E. The Chicago Cubs and Its Employees

The employees who develop the Cubs' employment policies work in the Cubs' headquarters in Chicago, Illinois. (UF 72). In each year from 2014 through 2016, the Cubs had fewer than 20 employees in California. (UF 73). When Plf. attended group meetings with the rest of the Professional Scouts, these meetings occurred in Chicago or Arizona. (UF 74).

In 2016, while Mr. Porter was Director of the Professional Scouting Department, the Cubs hired four scouts – one who was 42 years old at the time of hire, one who was 55 years old at the time of hire, one who was in his 60s at the time of hire, and one who turned 40 during his first season with the Cubs. (UF 75). The Cubs also retained three Professional Scouts who were older than 60 while Mr. Porter was the Director of the Pro Scouting Department. (UF 76). Therefore, during the 2017 season, at least 7 out of the Cubs' 14 professional scouts were 40 years old or older. (UF 77).

III. LEGAL ARGUMENT

A. Standard of Review

The Court is well-versed in the standards applicable to this motion. *Leon v. Saldana*, No. 5:12-cv-510, 2012 WL 12951328 (C.D. Cal. Sept. 7, 2012) (Wilson, J.). Summary judgment is proper if the materials before the court "show[] that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Id.* at *2 (Wilson, J.); Fed. R. Civ. P. 56(c). "Rule 56(e) requires the nonmoving party to go beyond the pleadings and identify specific facts that show a genuine issue for trial." *Id.* "A scintilla of evidence or evidence that is merely colorable or not significantly probative does not present a genuine issue of material fact." *Id.*

B. Plaintiff Cannot Prevail on His Wage and Hour Claims Because he was Properly Classified as an Exempt Employee

Plf. was properly classified as an exempt employee under the administrative exemption if: (i) his "duties and responsibilities involve … [t]he performance of office or non-manual work directly related to management policies or general business operations of his/her employer or his/her employer's customers;" … (ii) he "customarily and regularly exercises discretion and independent judgment;" (iii) he "performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge; or executes under only general supervision special assignments and tasks;" and (iv) he "is primarily engaged in duties that meet the test of the exemption."[2] Cal. Code Regs. tit. 8, §11100(2)(a)-(g). Notably, exempt work includes "all work that is directly and closely related to exempt work and work which is properly viewed as a means for carrying out exempt functions." *Id*. at (f).

In order to meet the first prong, the work must be "qualitatively administrative" and "quantitatively ... of substantial importance to the management or operations of the business." *Bucklin v. Am. Zurich Ins. Co.*, No. 11-cv-05519, 2013 WL 3147019, at *5 (C.D. Cal. June 19, 2013) (J. Wilson). Work is qualitatively administrative if it "relat[es] to the administrative operations of a business as distinguished from 'production' or, in a retail or service establishment, 'sales' work." *Id.* "The 'administrative operations of a business' may 'include work done by 'white collar' employees engaged in servicing a business. Such servicing may include, as potentially relevant here, advising management, planning, negotiating, and representing the company." *Id*. As discussed above, Plf. was not engaged in production or sales work. Rather, the vast majority of his tasks involved creating analyses that *advise management* on whether or not the Cubs should acquire a player.

Plf.'s work was quantitatively administrative if he was one of "a wide variety of persons who either carry out major assignments in conducting the operations of the

[2] Henderson earned more than the minimum salary required to comply with Cal. Code Regs. tit. 8, §11100(2)(g). (UF 3).

business, or whose work affects business operations to a substantial degree, even though their assignments are tasks related to the operation of a particular segment of the business." *Id.* Again, the record undisputedly shows that Plf.'s duties substantially affected the Cubs' business with respect to one of the Organization's most important tasks – acquiring players. Accordingly, Plf. meets the first prong of the test.

The Cubs easily meet the second and third prongs of the test because the record is replete with evidence that Plf. and other scouts constantly exercise discretion and independent judgment. Plf. also testified that he utilized specialized skills to engage in these tasks, all without supervision.

The Cubs also easily satisfy the "primarily engaged" prong of the administrative exemption. Henderson spent the vast majority of his time evaluating players and creating subjective scouting reports based on those evaluations. Specifically, he spent 8 to 9 hours per day evaluating players and one to 1.5 hours writing each of many scouting reports. (UF 30). He also admitted that all of the evaluations he conducted at the ballpark would "feed[] into the reports that [he was] writing." (*Id.*) As discussed above, nearly everything a scout writes in a report requires his independent discretion and judgment to: evaluate and draft narratives regarding a player's "descriptors" and "tools;" draft a summary regarding the player's strengths, weaknesses and potential as a player; and to make evaluations concerning a player's current and future abilities, potential role on the Cubs and whether the Cubs should attempt to acquire the player. Accordingly, Plf. was appropriately classified as exempt. Therefore, the Court should grant summary judgment to the Cubs on Plf.'s ninth through sixteenth claims.

C. Plaintiff's Derivative Claims for Meal and Rest Break Penalties Also Fail

Plf.'s claims for meal and rest break penalties fail for a number of reasons. As an initial matter, these claims are entirely reliant on Plf.'s misclassification theory. (Dkt. # 1, at ¶¶ 89-101.) As demonstrated above, Plf. was properly classified as an exempt employee, therefore, he cannot recover meal or rest break penalties.

Further, given that Plf. worked alone with no supervision and had complete autonomy over his schedule, he cannot plausibly claim that he was not authorized and permitted to take a

rest break or that he was not permitted a reasonable opportunity to take a meal break. (UF 31, 32). Accordingly, Plf. cannot recover meal and rest break penalties even if the Court determines that he should have been classified as a non-exempt employee. *Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004, 1033, 1036 (2012).

D. Plaintiff's Claim for Paystub Penalties is Derivative of the Above Claims

As a derivative cause of action to claims for meal and rest period premiums and allegedly unpaid wages, Plf. claims that he received inaccurate itemized wage statements. (Dkt. # 1, at ¶¶ 102-106.) As Plf.'s paystub claim is derivative of these meritless claims, his claim for paystub penalties fails as well.

E. Plaintiff's Derivative Claim for Waiting Time Penalties Fails

Plf.'s claim for waiting time penalties is also entirely reliant on his misclassification theory. (Dkt. # 1, at ¶¶ 107-111.) Because that theory fails, so does his claim for waiting time penalties. Even assuming *arguendo* that he was not timely paid upon his termination, Plf. would not be entitled to waiting time penalties because the Cubs acted in good faith and did not willfully fail to pay wages. *See* Cal. Lab. Code § 203. "[A] good faith dispute that any wages are due will preclude imposition of waiting time penalties under Section 203." Cal. Code Regs., tit. 8, § 13520. "The fact that a defense is ultimately unsuccessful will not preclude a finding that a good faith dispute did exist." *Id*.

F. Plaintiff's Derivative Unfair Business Practices Claim Fails

Plf.'s unfair business practices claim is premised on his claim that the Cubs misclassified him as exempt. (Dkt. # 1, at ¶¶ 122-129.) Cal. Bus. & Prof. Code § 17200, "borrows" violations of other laws and treats them as unlawful practices that are independently actionable. *Farmers Ins. Exch. v. Superior Court*, 2 Cal. 4th 377, 383 (1992). Therefore, since he cannot establish an underlying violation under the Labor Code, his cause of action for unfair business practices must fail. *See, Krantz v. BT Visual Images*, 89 Cal. App. 4th 164, 178 (2001).

G. Plaintiff's Conversion Claim Fails

Plf.'s conversion claim is also entirely premised on his misclassification allegation. (Dkt. # 1, at ¶¶ 116-121.) Therefore, since he was properly classified as an exempt employee, he cannot prevail on his conversion claim. Further, "'[w]here a statute crates new rights and obligations not previously existing in the common law, the express statutory remedy is deemed to be the exclusive remedy…." *Spragin v. McDonald's USA, LLC*, No. CV1009617, 2011 WL 13217960, at *2 (C.D. Cal. Jan. 20, 2011) (Wilson, J.). "[T]he Labor Code provides the exclusive remedy for" the violations upon which this claim is based. *Id*. Accordingly, Plf. "must pursue relief exclusively under the Labor Code." *Id*. Therefore, Plf.'s conversion claim must be dismissed.

H. Plaintiff's Reimbursement Claim Fails

Plf. admits that the Cubs reimbursed him for all expenses he incurred in connection with his job duties and that he is not aware of any expenses for which he was not reimbursed. (UF 12). Accordingly, Plf.'s reimbursement claim must be dismissed.

I. Plaintiff Cannot Prevail on His California Labor Code Claims

As established above, Plf. will not prevail on his California Labor Code claims because he was properly classified as an exempt employee. In addition, even if Plf. should have been classified as non-exempt, he cannot recover under the California Labor Code. When determining whether California law applies to an employee's California Labor Code claims, courts analyze a variety of factors including "the amount of work being performed in California, the residence of the employee, the residence of the employer, whether the conduct which gives rise to liability occurred in California, and the employer's ties to the jurisdiction." *Shook v. Indian River Transp. Co*., 236 F. Supp. 3d 1165, 1170 (E.D. Cal. 2017), *aff'd*, 716 F. App'x 589 (9th Cir. 2018). The *Shook* court declined to apply California law to plaintiffs' labor code claims where California-resident-plaintiffs spent 15-30% of their time working in California and the employer was based, and developed the relevant employment policies, in Florida. *Id*. at 1166-67, 1171. *Vidrio v. United Airlines, Inc*., No. CV15-7985, 2017 WL 1034200 (C.D. Cal. Mar. 15, 2017), held that

California residents could not prevail on their California Labor Code claim where they principally worked outside of California for a Chicago-based company. *Id.* at *1, 4-6. *See also Oman v. Delta Air Lines, Inc.*, 230 F. Supp. 3d 986, 993 (N.D. Cal. 2017) (rejecting California-resident plaintiffs' California Labor Code claims regarding work primarily performed out-of-state for out-of-state employer); *Ward v. United Airlines, Inc.*, No. C 15-02309, 2016 WL 3906077 (N.D. Cal. July 19, 2016) (same). Like the plaintiffs in each of these cases, Plf. is a California resident who principally worked outside of California (75-90% of the time), for an employer based in another state who developed the relevant employment policies in another state. Accordingly, for this additional reason, Plf. cannot prevail on his California Labor Code claims.

J. Plaintiff's FEHA Claims Fail as a Matter of Law Because the Alleged Tortious Conduct Occurred Outside California

When analyzing FEHA claims, "[c]ourts have generally presumed that a state statute does not have application to conduct which occurs outside of the state." *Gonzalez v. ITT Corp.*, No. CV 09-3400 SVW, 2009 WL 10700307, at *3 (C.D. Cal. Aug. 10, 2009) (Wilson, J.) (Even if "Plaintiff may have felt the reverberations of the wrongful conduct in California," "because the wrongful conduct took place extraterritorially, FEHA does not apply"). Therefore, in order to prevail on any of his FEHA claims, Plf. must establish that Defendant's alleged "tortious conduct occurred in the state of California." *Rulenz v. Ford Motor Co.*, No. 10CV1791, 2013 WL 2181241, at *3 (S.D. Cal. May 20, 2013). However, the alleged tortious conduct in this case all occurred in the state of Illinois. The individuals who decided the Cubs would not offer Plf. another employment contract or who documented Plf.'s performance deficiencies worked in Chicago and made all employment decisions with respect to Plf. in Chicago. (UF 36, 39, 44, 47-48, 51-52, 55). Accordingly, as a matter of law, Plf.'s FEHA claims must be dismissed.

Plf.'s claims cannot be salvaged because he is a California resident. "Courts in this circuit have applied this extraterritoriality rule [to FEHA claims] even if the plaintiff is a California resident." *Gulaid v. CH2M Hill, Inc.*, No. 15-CV-04824, 2016 WL 5673144, at

*9 (N.D. Cal. Oct. 3, 2016) (In analyzing FEHA claims, "[t]he operative inquiry is whether Plaintiff has plausibly alleged 'a factual nexus' between the California-based activities and the discriminatory conduct"). Accordingly, in *Anderson v. CRST Int'l, Inc.*, No. CV 14-368, 2015 WL 1487074 (C.D. Cal. Apr. 1, 2015), *aff'd in relevant part, and rev'd in part on other grounds*, 685 F. App'x 524 (9th Cir. 2017), the court granted the employer summary judgment of the California-resident-plaintiff's FEHA claims because "[i]t is undisputed that all of [defendant's] alleged misconduct occurred outside of California." *Id.*, at *5. The Ninth Circuit affirmed, holding the plaintiff's "claims under the FEHA fail because they are based on conduct that occurred outside the state." *Anderson v. CRST Int'l, Inc.*, 685 F. App'x 524, 526 (9th Cir. 2017).

Similarly, the *Rulenz* court dismissed the California-resident-plaintiff's FEHA claims because "Plaintiff's assertion that she maintained California residency is insufficient to defeat the presumption against extraterritorial application of FEHA." *Rulenz*, 2013 WL 2181241 at *4. The court analyzed *Campbell v. Arco Marine, Inc.*, 42 Cal. App. 4th 1850 (1996), which held that the FEHA does not apply extraterritorially, and noted *Campbell's* focus on "where the injurious conduct took place-not the residency of the Plaintiff." *Rulenz*, 2013 WL 2181241 at *4. Here, the alleged misconduct took place outside of California, therefore, Plf.'s FEHA claims must be dismissed.

K. Plaintiff's FEHA Claims Fail Because He Did Not Suffer Any of the Alleged Adverse Employment Actions

Each of Plf.'s FEHA claims require him to establish, in part, that he suffered an adverse employment action. *Guz v. Bechtel Nat. Inc.*, 24 Cal. 4th 317, 355 (2000). Plf. alleges the Cubs engaged in the following adverse employment actions: (i) failing to engage in the interactive process; (ii) failing to provide reasonable accommodation; (iii) subjecting him to unwarranted criticism; (iv) terminating Plf.'s employment; and (v) assigning him adverse job assignments. (Dkt. # 1, at ¶¶ 22, 28, 51, 57, and 65.) The first three alleged actions do not constitute adverse employment actions under the law. "An adverse employment action is one that 'materially affect[s] the compensation, terms,

conditions, or privileges of ... employment.'" *Davis v. Team Elec. Co*., 520 F.3d 1080, 1089 (9th Cir. 2008). Further, an adverse employment action requires "a substantial adverse change in the terms and conditions" of employment. *Akers v. County of San Diego*, 95 Cal.App.4th 1441, 1455 (2002). None of the first three alleged actions meet these requirements.

The final two alleged adverse actions undisputedly did not occur. An employer does not terminate an employee when it simply allows an employment contract to expire. *Motevalli v. L.A. Unified Sch. Dist*., 122 Cal. App. 4th 97, 113 (2004). Therefore, the Cubs did not terminate Plf. (UF 6). Further, Plf.'s job assignments did not materially change. (UF 2). For this additional reason, all of Plf.'s FEHA claims must be dismissed.

L. Plaintiff's Disability Discrimination Claim Fails

"In evaluating FEHA discrimination claims on summary judgement, California courts apply the burdenshifting test outlined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–04, (1973)." *Hoskins v. BP Prod. N. Am. Inc*., No. 2:13-CV-0574-SVW, 2014 WL 116280, at *3 (C.D. Cal. Jan. 9, 2014) (Wilson, J.). "To establish a *prima facie* case [in FEHA discrimination cases], the Plf. must show that: (1) he belongs in a protected class; (2) he was performing according to his employer's legitimate expectations; (3) he suffered an adverse employment action; and (4) some other circumstance suggests discriminatory motive...." *Id*. (citing *Guz*, 24 Cal.4th at 355). In the disability discrimination context, Plf. must also show, in part, that Plf. suffered from a disability and suffered an adverse employment action because of such disability. *McCarthy v. R.J. Reynolds Tobacco Co*., 819 F. Supp. 2d 923, 934 (E.D. Cal. 2011).

Plf. cannot establish *any* of these elements. First, Plf. has not established that he had a disability while working for the Cubs. "It is insufficient for [Plf.] simply to allege a disability or to identify an injury or physical condition. To proceed as a physically disabled person … [Plf.] must demonstrate his injury or physical condition … makes 'difficult' the achievement of work or some other major life activity." *Gelfo v. Lockheed Martin Corp.*, 140 Cal. App. 4th 34, 54 (2006). Plf. alleges he had surgery in 2014 that did not cause him

to miss work. (UF 60). When he allegedly experienced issues again in 2016, he continued with his normal routine and it did not interfere with his job. (UF 61). Plf. asserts that he had a second surgery in 2016, but he did not believe it would affect his work. (UF 63). Plf. did not submit any medical documentation concerning his alleged disability to the Cubs and did not produce such documentation in this matter. (UF 65, 66). Plf. is required to present "affirmative evidence" in support of his claims and he has not done so. *Bowerman v. Field Asset Servs., Inc.*, 242 F. Supp. 3d 910, 927–28 (N.D. Cal. 2017).

Further, even if an employee informs his employer of an injury and misses work due to that injury, this is not sufficient to notify the employer of a disability. *Pesci v. McDonald*, No. 5:15-CV-00607-SVW, 2015 WL 12672094, at *6 (C.D. Cal. Oct. 22, 2015) (Wilson, J.) ("…while Pesci told her interviewers of her cervical injury, there is no evidence that she ever informed any of her superiors that her headaches were a disability… there is no evidence that when Pesci would call in sick, she would explain that it was due to a disability."). Here, Plf. never informed the Cubs that he had a disability. Instead, he told the Organization he would not miss work. Accordingly, Plf. cannot establish that he was disabled during his employment with the Cubs. *See also, Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986) (Plaintiff cannot survive summary judgment "without offering 'any significant probative evidence tending to support the complaint.'").

In addition, Plf. was not performing to the Cubs' expectations. Plf.'s performance was criticized by each person that evaluated his work. (UF 38-41, 44-45, 47-48). These criticisms were documented before Plf. informed anyone of his alleged disability. Indeed, the Cubs were on the verge of refraining from renewing Plf.'s contract at the end of the 2015 season because of his poor performance, until his friend convinced Mr. Porter to give Plf. another chance. (UF 45, 46). Mr. Porter identified Plf.'s performance deficiencies immediately, noting Plf.'s scouting reports did not have the internal consistency the Cubs were seeking, and referring to Plf. as a "bad scout" who did not have the aptitude necessary to improve. (UF 47-48). Accordingly, Plf. cannot meet the second prong of his *prima facie* case.

This same evidence shows that the Cubs' decision not to offer him a new contract was motivated by legitimate business reasons. Therefore, Plf. cannot show that he was subjected to an adverse employment action because of his alleged disability.

Moreover, as discussed in Section III.C., Plf. did not suffer any of the alleged adverse employment actions. Finally, Plf. cannot establish that the Cubs acted with a discriminatory motive. Plf. could not identify a single person who allegedly discriminated against him. (UF 59). Further, Plf. could not identify any fact that indicates he was discriminated against on the basis of his disability, other than the fact that he allegedly had a disability. (*Id*.) He cannot identify a single comment that was made that indicates a discriminatory motive. Further, as discussed above, the Cubs nearly refrained from renewing Plf.'s contract in 2015 and were leaning heavily towards refraining from offering him a new contract as of May 2016 – before he notified the Organization of any alleged health issues. Accordingly, Plf. cannot establish a *prima facie* case.

Even if Plf. could establish a *prima facie* case, the Cubs would have the opportunity to "articulate a legitimate, nondiscriminatory reason for the employment action." *Hoskins*, 2014 WL 116280, at *4 (Wilson, J.). In making this assessment, the Court "must take [the Cubs'] proffered evidence as true." *Leon*, 2012 WL 12951328 at *4 (Wilson, J.). As discussed in detail above, the Cubs decided not to renew Plf.'s contract because he was a poor performer who demonstrated an inability to perform to the Cubs' expectations.

Once the Cubs have made this showing, Plf. must "attack the employer's asserted reasons as a pretext for discrimination or offer other evidence of discriminatory motive." *Hoskins*, 2014 WL 116280, at *4 (Wilson, J.). He must do so "by directly persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Id*. at *5. Thus, "to avert summary judgment, [Plf.] must produce 'substantial responsive evidence' that the employer's showing was untrue or pretextual. *Martin v. Lockheed Missiles & Space Co*., 29 Cal. App. 4th 1718, 1735 (1994). "For this purpose, speculation cannot be regarded as substantial responsive evidence." *Id*. Plf. cannot make this required showing,

so his disability discrimination claim must be dismissed. *See Alamillo v. BNSF Ry. Co.*, 869 F.3d 916 (9th Cir. 2017) (summary judgment appropriate where plaintiff did not establish that his disability was a substantial motivating reason for his termination, employer asserted legitimate reason for plaintiff's termination, and plaintiff could not establish that employer's reasoning was pretextual); *Lawler v. Montblanc N. Am., LLC*, 704 F.3d 1235, 1244 (9th Cir. 2013) (upholding summary judgment for employer in disability discrimination case where reason for termination was "facially unrelated to prohibited bias.").

M. Plaintiff's Remaining Disability Claims Fail Because He Did Not Request or Desire an Accommodation

Under the FEHA, it is unlawful for an employer "to fail to make reasonable accommodation for the ***known*** physical or mental disability of an applicant or employee." Cal. Gov't Code § 12940(h) (emphasis added). Accordingly, to establish a failure to provide reasonable accommodation claim, Plf. must show that he (1) "ha[d] a disability under FEHA; (2) … is qualified to perform the essential functions of the position; and (3) the employer fail[ed] to reasonably accommodate the disability." *Hoskins*, 2014 WL 116280, at *9 (Wilson, J.). In order to establish the third prong, "the employee must establish that he requested an accommodation, and that the employee is not responsible for any breakdowns in the interactive process." *Id*. When the "employee … request[s] an accommodation," then "the parties must engage in an interactive process regarding the requested accommodation…" *Avila v. Cont'l Airlines, Inc.*, 165 Cal. App. 4th 1237, 1252 (2008). Accordingly, Plf.'s failure to accommodate and failure to engage claims are intertwined. *Hoskins*, 2014 WL 116280, at *9 (Wilson, J.).

As discussed above, Plf. cannot establish that he is disabled or that the Cubs were aware of his alleged disability. Further, Plf. did not inform the Cubs that he needed an accommodation. Indeed, Plf. testified that he did not need or want an accommodation. Therefore, the Cubs had no duty to provide a reasonable accommodation or to engage in the interactive process. Accordingly, both of these claims must be dismissed.

N. Plaintiff's Age Discrimination Claim Fails Because the Cubs Did not Make Any Employment Decisions Based on His Age

The Court's analysis on Plf.'s age discrimination claim also follows "the burden-shifting analysis set forth in *McDonnell Douglas v. Green*." *Sieczkowski v. Astrue*, No. 211CV02282SVW, 2012 WL 12888369, at *4 (C.D. Cal. June 7, 2012) (Wilson, J.), *aff'd sub nom. Sieczkowski v. Colvin*, 557 F. App'x 677 (9th Cir. 2014). Accordingly, "[t]o establish a *prima facie* case, plaintiff must show that: (1) he belongs in a protected class; (2) he was performing according to his employer's legitimate expectations; (3) he suffered an adverse employment action; and (4) some other circumstance suggests discriminatory motive...." *Hoskins*, 2014 WL 116280, at *3 (Wilson, J.) (citing *Guz*, 24 Cal.4th at 355).

As discussed in Section III.D., Plf. was not performing according to the Cubs' legitimate expectations. Also, as discussed in Section III.C., Plf. has not suffered any of the alleged adverse employment actions. Further, Plf. cannot establish the fourth element, where he must show "actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were 'based on a [prohibited] discriminatory criterion.'" *Guz*, 24 Cal.4th at 355. Plf. cannot identify anyone who allegedly discriminated against him. (UF 59). He also cannot assert any fact that demonstrates he was discriminated against on the basis of his age. (*Id*.) Further, in 2016 alone, the Cubs hired three employees in the same protected class to for a department of just 14 employees. (UF 75). In addition, within this same small group, the Cubs employed and retained three scouts who were over 60 years of age. (UF 76). Accordingly, Plf. cannot establish that similarly situated persons outside of his protected class were treated more favorably. *See Inge v. Time Warner Inc.*, No. CV1002289SVW, 2010 WL 11598026, at *2 (C.D. Cal. Oct. 7, 2010) (Wilson, J.) (dismissing plaintiff's claim where plaintiff failed to show employment decision was based on age).

Even if Plf. could make the requisite *prima facie* showing, the Cubs would have the opportunity to rebut Plf. by showing that the Organization had a legitimate, nondiscriminatory basis for deciding not to offer him another contract. *Hoskins*, 2014 WL

116280, at *4 (Wilson, J.). As discussed in Section III.D., the Cubs have legitimate, nondiscriminatory reasons for his termination. Thus, Plf. must "attack the employer's asserted reasons as a pretext for discrimination or offer other evidence of discriminatory motive." *Hoskins*, 2014 WL 116280, at *4 (Wilson, J.). In doing so, Plf. "must produce 'substantial responsive evidence' that the employer's showing was untrue or pretextual." *Martin*, 29 Cal. App. 4th at 1735. He cannot do so. Thus, his age discrimination claim must be dismissed. *See Merrick v. Hilton Worldwide, Inc*., No. 14-56853, 2017 WL 3496030 (9th Cir. Aug. 16, 2017) (dismissing age discrimination claim where employer established legitimate reason for terminating plaintiff and plaintiff could not establish that such reasoning was pretextual).

O. Plaintiff's CFRA Claim Fails

1. Plaintiff was not Eligible for CFRA Leave

Plf. alleges that the Cubs employ 50 or more employees within a 75 mile radius of Plf.'s worksite. (Dkt. # 1, at ¶ 79.) This is false. Indeed, the Cubs had fewer than 20 employees in all of California during the relevant period. (UF 73). Accordingly, none of its employees are entitled to family or medical leave under the CFRA. *See* Cal. Gov't Code § 12945.2. Therefore, Plf.'s CFRA claim must fail.

2. Plaintiff Did Not Request or Desire CFRA Leave

Even if Plf. was eligible for CFRA leave, the Cubs were not required to grant such leave because, as discussed in Section II.B., Plf. did not request or even want to take leave. Accordingly, Plf. did not "place[] Defendants on notice that he had a serious health condition that required CFRA leave." (Dkt. # 1, at ¶ 81.) In order to receive CFRA leave, an employee "must provide 'at least verbal notice sufficient to make the employer aware that the employee needs CFRA-qualifying leave…'" *Stevens v. California Dep't of Corr*., 107 Cal. App. 4th 285, 287 (2003). Plf. did not provide the Cubs with such notice. Rather, he told the Cubs that he did not want a leave of absence. Accordingly, for this additional reason, Plf.'s CFRA claim fails.

3. Plaintiff's CFRA Retaliation Claim Fails

Plf. contradicts the above claim that he was denied leave by asserting that the Cubs "terminat[ed] his employment during a CFRA qualifying leave and/or by failing to reinstate her [sic] to the same or comparable job…." (Dkt. # 1, at ¶ 81.) Again, Plf. was indisputably not terminated. Further, this claim is nonsensical because Plf. alleges that he was denied CFRA leave. Nonetheless, even if Plf. had taken a CFRA leave, the Cubs may take the same employment actions it would have taken if Plf. had not taken such a leave. Specifically, an "employee has no greater right to reinstatement or to other benefits than if employee had been continuously employed during leave period…." *Richey v. AutoNation, Inc.*, 60 Cal. 4th 909, 919 (2015). Here, the Cubs decided it would not renew Plf.'s contract before he took any action that could be perceived as requesting a leave.

Also, to establish a *prima facie* case of CFRA retaliation, "a plaintiff must show that '(1) he availed himself of a protected right under the FMLA [and/or CFRA]; (2) he was adversely affected by an employment decision; [and] (3) there is a causal connection between the employee's protected activity and the employer's adverse employment action." *Dudley v. Dep't of Transp.*, 90 Cal. App. 4th 255, 261 (2001) (also stating that the same elements apply to CFRA claims as those stated "under the analogous federal statute"). As discussed above, the Cubs did not renew Plf.'s contract because of his poor performance, not because of any alleged protected activity. Thus, for these reasons as well, Plf.'s CFRA claim fails.

P. <u>Plaintiff's FEHA Retaliation Claim Fails</u>

To establish a *prima facie* case of retaliation under FEHA, Plf. must show: "(1) [h]e engaged in a protected activity, (2) h[is] employer subjected h[im] to an adverse employment action, and (3) there is a causal link between the two." *Haberman v. Cengage Learning, Inc.*, 180 Cal. App. 4th 365, 386 (2009). To prove a "causal link," he must demonstrate that his engagement in a "protected activity" was a "substantial motivating factor" for the Cubs' decision not to renew his contract. *Alamo v. Practice Mgmt. Info. Corp.*, 219 Cal. App. 4th 466, 483 (2013). For a FEHA retaliation claim, "protected activity" means complaining of or opposing conduct that the employee reasonably believes

to be discriminatory. *Yanowitz v. L'Oreal USA, Inc.*, 36 Cal. 4th 1028, 1043 (2005). Plf. never engaged in such activity. (UF 58). Accordingly, his retaliation claim must fail.

Q. Plaintiff's Failure to Prevent Claim Fails

Because Plf. has not presented a cognizable underlying claim for harassment, discrimination or retaliation under the FEHA, his claim for failure to prevent or remedy harassment, discrimination or retaliation necessarily fails as well. *See, e.g., Oliver v. Microsoft Corp.*, 966 F. Supp. 2d 889, 898 (N.D. Cal. 2013) (claim against employer for "failure to prevent or remedy discrimination or harassment fails in the absence of a viable underlying claim."). Moreover, the Cubs did not know about any alleged harassment, discrimination or retaliation until Plf. filed this lawsuit. The Cubs cannot be liable for failing to prevent harassment, discrimination or retaliation that the Organization did not and could not know about.

R. Plaintiff's Wrongful Termination Claim Fails Because He Was Not Terminated

The Cubs undisputedly did not terminate Plf.'s employment. (UF 6). Rather, the Cubs simply did not offer Plf. a contract beyond 2016. (*Id*.) It is well established that a plaintiff cannot assert a wrongful termination claim in violation of public policy, or *Tameny* claim, where the employer simply refrains from offering an employee another employment contract. *Motevalli* held that the employer did not terminate the employee by refraining from renewing her contract and "[a]bsent a termination, there is no cause of action for wrongful termination in violation of public policy." 122 Cal. App. 4th 97 at 113. *See also, Touchstone Television Prods. v. Superior Court*, 208 Cal. App. 4th 676, 680 (2012) ("[d]ecisional law does not allow a plaintiff to sue for wrongful termination in violation of public policy based upon an employer's refusal to renew an employment contract"); *Daly v. Exxon Corp*., 55 Cal. App. 4th 39, 45 (1997) (Plaintiff argued that she pled a wrongful termination claim where her employment contract was allowed to expire. "The argument fails because she was not fired, discharged, or terminated."). Accordingly, Plf.'s wrongful termination claim must be dismissed.

S. Plaintiff's Wrongful Termination Claim Fails

Plf.'s tortious wrongful termination claim is premised on his underlying FEHA claims. Accordingly, in addition to the above, this claim fails because Plf.'s FEHA claims fail. *See Arteaga v. Brink's, Inc.*, 163 Cal. App. 4th 327, 355 (2008).

T. The Cubs are Entitled to Partial Summary Judgment on Plaintiff's Claim for Punitive Damages

Plf. seeks punitive damages by alleging the Cubs acted "maliciously and oppressively, with the wrongful intention of injuring Plaintiff." (Dkt. # 1, at ¶¶ 32, 40, 48, 55, 61, 69, 76-77, 84.) A finding of malice or oppression requires "despicable" conduct that is "so vile, base, contemptible, miserable, wretched, or loathsome that it would be looked down upon and despised by ordinary people." *Am. Airlines v. Sheppard Mullin*, 96 Cal. App. 4th 1017, 1050 (2002). Managerial decisions, such as the decision not to renew a term contract, cannot be viewed as despicable, vile, or contemptible. *See Janken v. GM Hughes Elec's*, 46 Cal. App. 4th 55, 80 (1996). As there is no evidence of malice or wrongful intent by any Cubs employee, much less the "clear and convincing" evidence that is required, the Cubs are entitled to partial summary judgment on Plf.'s claim for punitive damages. *See Flores v. Autozone West, Inc.*, 161 Cal. App. 4th 373, 386 (2008); *Catalano v. Superior Court*, 82 Cal. App. 4th 91, 97-98 (2000); *Sneddon v. ABF Freight Sys.*, 489 F. Supp. 2d 1124, 1133 (S.D. Cal. 2007); Cal. Civ. Code § 3294.

IV. CONCLUSION

For all the foregoing reasons, the Cubs' motion for summary judgment, or, in the alternative, partial summary judgment, should be granted.

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