PROPOSED TENTATIVE

In a second amended complaint, filed on September 27, 2023, plaintiff Ryan Mack (hereafter, plaintiff) alleges two causes of action against defendants City of Guadalupe (City), Emiko Gerber (Gerber), and Michael Cash (Cash), as follows: 1) a violation of the Fair Employment and Housing Act (FEHA), per Government Code[1] section 12940, subdivision (a), based on disability and age discrimination; and 2) a violation of FEHA per section 12940, subdivision (h), based on retaliation against plaintiff's "protected activities." According to the operative pleading, following a single sick day call-out on March 8, 2022, defendants ordered plaintiff to submit to "an invasive physical and psychological evaluation, and stat[ed] that Plaintiff's failure to comply and submit to the invasive testing will be deemed insubordination and shall subject Plaintiff to discipline, up to and including termination. The notification indicated that the medical report will be part of his personnel file, which will be open to inspection by future employers as well as anyone else who has access to it. The notification further indicated that the sole reason for the invasive examination was Plaintiff's request to use sick leave." According to plaintiff, he was "subjected to [a medical examination] out of retaliation for the protected activities and protected speech and was examined as part of a mere fishing expedition. . . ." He contends there is "no legitimate justification for taking the aforementioned adverse actions against [him]." Plaintiff alleges that he has exhausted his administrative remedies "by filing a charge of discrimination" with the Department of Fair Employment and Housing (DFEH), now named the California Department of Civil Rights (CDCR). Plaintiff "was forced to resign from his position as a Captain with the Fire Department and take up a lesser role with another agency." Each defendant has filed a separate answer.

Defendants have filed a joint summary judgment, or in the alternative, summary adjudication motion, challenging both causes of action. Defendants claim summary judgment is appropriate because 1) plaintiff, while alleging exhaustion of administrative remedies, actually failed to exhaust available administrative remedies concerning both causes of actions as to all three defendants; and (alternatively) 2) as to the individual defendants (Cash and Gerber), because they were not named in the administrative charge filed with the CDCR. Alternatively, for purposes of summary adjudication, all three defendants argue that 1) plaintiff cannot make out a prima facie case for either disability or age discrimination as to the first cause of action and for retaliation as to the second cause of action; and 2) there is undisputed evidence to show that there was a legitimate, nondiscriminatory/nonretaliatory basis to order the testing at issue. Plaintiff has filed opposition. No reply has been filed as of this writing.

The court will address defendants' request for judicial notice; detail the relevant legal principles that frame defendants' arguments and plaintiff's opposition, including exhaustion and the rules relevant for summary judgment/adjudication of the FEHA causes of action; assess defendants' exhaustion arguments on the merits as to both claims and parties; and examine the substantive merits of defendants' challenges to the two causes of actions advanced. The court will conclude with a summary of its conclusions.

A) Defendants' Judicial Notice Request

[1] All further statutory references are to the Government Code unless otherwise indicated.

Defendants ask the court to take judicial notice of the following documents:1) plaintiff's complaint filed with the CDCR, filed on December 6, 2022; 2) the right-to-sue letter issued by the CDCR, dated December 6, 2022; 3) the initial complaint against defendants filed by plaintiff with this court on March 20, 2023; and 4) the second amended complaint against defendants filed by plaintiff with this court on September 27, 2023. All documents are the appropriate subject matter of judicial notice, and as there is no opposition, the court grants the request.

B) Legal Background

Plaintiff, before filing a lawsuit alleging FEHA violations, must exhaust administrative remedies, meaning he must file an administrative complaint with the CDCR and receive a right-to-sue letter. (*McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 106.) The statutory time frames in order to satisfy this requirement are *not* at issue. (§ 12960, subd. (e).) At issue is the requirement that the allegations and parties in the judicial complaint must be "fairly reflected" in the facts and allegations advanced in the administrative charge. Generally, the administrative complaint must name the perpetrator(s) and "set forth the particulars" of the alleged unlawful practice. (§ 12960, subd. (b); *Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718, 1724.)

Case law has expounded on these requirements. "To exhaust his or her administrative remedies as to a particular act made unlawful by [FEHA], the claim must specify the facts in the administrative complaint." (*Martin, supra* 29 Cal.App.4th at p. 1724; accord, *Okoli v. Lockheed Technical Operations Co.* (1995) 36 Cal.App.4th 1607, 1613.) Although the allegations of a FEHA lawsuit need not be identical to claims previously identified in the administrative charge, a FEHA claim cannot proceed in a civil complaint unless it is " 'like or reasonably related to' " the charge submitted to the CDCR. (*Okoli*, at p. 1616; *Kuigoua v. Department of Veteran Affairs* (2014) 101 Cal.App.5th 499, 507.) This standard is met "where the allegations in the civil suit are within the scope of the administrative investigation 'which can reasonably be expected to grow out of the charge of discrimination.' " (*Rodriguez v. Airborne Express* (9th Cir. 2001) 265 F.3d 890, 897). If an investigation of what was charged in the administrative complaint would necessarily uncover other incidents that were not charged, plaintiffs can include the latter incidents in their court action. (*Kuigoua, supra,* 101 Cal.App.5th 499, 508.) Allegations in the civil complaint "that fall outside of the scope of the administrative charge are barred for failure to exhaust." (*Ibid*.) The administrative complaint " 'need not presage with literary exactitude the judicial pleadings which may follow.' " (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 267.) In determining whether a plaintiff exhausted his administrative remedies on the claims advanced, courts construe the administrative complaint liberally in light of what might be uncovered in a reasonable investigation. (*Id.* at p. 268.)

Case law is patent about the exhaustion requirements necessary to name a defendant in a judicial complaint. "In order to bring a civil lawsuit under the FEHA, the defendants must have been named ***in the caption or body of the [CDCR] charge***." (*Cole v. Antelope Valley Union*

High School Dist. (1996) 47 Cal.App.4th 1505, 1511, emphasis added; see *Alexander v. Community Hosp. of Long Beach* (2020) 46 Cal.App.5th 238, 251; *Medix Ambulance Service, Inc., supra,* 97 Cal.App.4th at p. 116.; Chin, Wiseman, Callahan & Lowe, Cal. Prac. Guide: Employment Litigation (The Rutter Group 2024) (hereafter, Chin) ¶ 16:315.) That is, even if not named as the offending party in the administrative complaint, an individual described in the body of the complaint as a perpetrator of discriminatory/retaliatory acts is subject to suit under the FEHA, for the rationale is that if the CDCR had investigated, the individual would have been put on notice of the charges, and would have had an opportunity to participate. (*Cole, supra,* 47 Cal.App.4th at p. 1511; see *Clark v. Superior Court* (2021) 62 Cal.App.5th 289, 306-307; *Saavedra v. Orange County Consolidated Transp. Service Agency* (1992) 11 Cal.App.4th 824, 826-828; Chin, *supra,* ¶ 16.317.)

As for the standards associated with discrimination and retaliation causes of action under FEHA, at trial California courts have used the three-stage burden-shifting approach established in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, used for analysis of Title VII claims (42 U.S.C. § 2000e et seq). (See *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 520, fn. 2; *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354; see also *Yanowitz v. L'Oreal USA, Inc*. (2005) 36 Cal.4th 1028, 1042.) For discrimination, plaintiff must provide evidence that (1) he was a member of a protected class, (2) he was qualified for the position he sought or was performing competently in the position he held, (3) he suffered an adverse employment action, such as termination, demotion, or other material impediment, and (4) there was a causal connection between the adverse action and the plaintiff's protected class protections. (*Moore v. Regents of University of California* (2016) 248 Cal.App.4th 216, 235; see *Guz, supra,* 24 Cal.4th at p. 355; *Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1067-1068.) "If, at trial, the plaintiff establishes a prima facie case, a presumption of discrimination arises." (*Guz, supra,* at p. 355.) At the second stage the employer must offer a legitimate nondiscriminatory reason for the adverse employment action. (*Guz, supra,* 24 Cal.4th at pp. 355-356.) "If the employer sustains this burden, the presumption of discrimination disappears." (*Id.* at p. 356.) At the third stage of the analysis, "[t]he plaintiff must then have the opportunity to attack the employer's proffered reasons as pretexts for discrimination, or to offer any other evidence of discriminatory motive. [Citations.] In an appropriate case, evidence of dishonest reasons, considered together with the elements of the prima facie case, may permit a finding of prohibited bias. [Citations.] The ultimate burden of persuasion on the issue of actual discrimination remains with the plaintiff." (*Guz, supra,* 24 Cal.4th at p. 356.)

A retaliation cause of action follows this same trial model, although the elements are different. To establish a prima facie case of retaliation under the FEHA at trial, plaintiff must show (1) he or she engaged in a "protected activity," (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer's action. (*Iwekaogwu v. City of Los Angeles* (1999) 75 Cal.App.4th 803, 814–815; *Flait v. North American Watch Corp.* (1992) 3 Cal.App.4th 467, 476.) Once an employee

establishes a prima facie case, a presumption of retaliation exists, and employer is required to offer a legitimate, nonretaliatory reason for the adverse employment action. (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 68.) If the employer produces a legitimate reason for the adverse employment action, the presumption of retaliation "drops out of the picture," and the burden shifts back to the employee to prove intentional retaliation. (*Ibid.*) (*Yanowitz, supra,* 36 Cal.4th at p. 1042.)

The trial model for both causes of action is modified for purposes of summary judgment/adjudication. (See *Arteaga v. Brink's, Inc.* (2008) 163 Cal.App.4th 327, 344.) With a motion for summary judgment/adjudication challenging either discrimination or retaliation under FEHA, the employer defendant, as the moving party, has the initial burden to present admissible evidence showing ***either*** that one or more elements of the plaintiff's prima facie case is lacking ***or*** that the adverse employment action was based upon legitimate, nondiscriminatory/nonretaliatory factors. (Code Civ. Proc., § 437c, subd. (p); *Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 203; see also *Hicks v. KNTV Television, Inc.* (2008) 160 Cal.App.4th 994, 1003.) Specifically, if the employer presents admissible evidence either that one or more of plaintiff's prima facie elements is lacking, or that the adverse employment action was based on legitimate, nondiscriminatory or nonretaliatory factors, the employer will be entitled to summary judgment unless the plaintiff produces admissible evidence which raises a triable issue of fact material to the defendant's showing. (*Guz, supra, supra*, 24 Cal.4th at p. 361, fn. omitted.) " 'In determining whether these burdens were met,' " we "liberally constru[e]" the employee-plaintiff's evidence " 'while strictly scrutinizing [the defendant-employer's]' " evidence. It should be noted that liberality does not mean abdication. "The employee's evidence must relate to the motivation of the decision makers and prove, by nonspeculative evidence, 'an actual causal link between prohibited motivation and termination.' " (*Featherstone v. Southern California Permanente Medical Group* (2017) 10 Cal.App.5th 1150, 1159.)

With these legal principles in mind, the court will examine defendants' exhaustion challenges as to claims made and the parties named, through the prism of summary judgment; it will then examine the merits of each cause of action through the prism of summary adjudication.

C) Summary Judgment

a) Failure to Exhaust As to Both Claims (Discrimination and Retaliation)

Defendants contend collectively that summary judgment is appropriate for all three defendants because as to both causes of action, "plaintiff failed to exhaust available

administrative remedies . . . ." The full sum of defendants' argument in this regard amounts to two sentences on page 22 of the memorandum of points and authorities, which reads in full as follows: "Plaintiff failed to allege age discrimination or mental or physical disability discrimination in his [CDCR] complaint and likewise there is no mention of retaliation either. Therefore, plaintiff failed to exhaust his administrative remedies regarding [these] causes action as well."

The court observes initially that it is uncertain whether the exhaustion requirement applies when plaintiff requests and receives an *immediate* right-to-sue notice pursuant to California Code or Regulations, title 2, section 10005, as occurred here. (Cf. *Rickards v. United Parcel Service, Inc.* (2012) 206 Cal.App.4th 1523, 1529 [noting that DFEH has made clear that "requests for an immediate right-to-sue letter are accepted from complainants who have decided to go directly to court without an investigation by DFEH"]; see *Clark, supra,* 62 Cal.App.5th at p. 305 [assuming without deciding that exhaustion requirements apply when law permits plaintiff to forego the entirety of the administrative process (apart from filing an administrative complaint and asks for an immediate right to sue letter)].) Despite this uncertainty, the court will nevertheless apply the exhaustion rules even when an immediate right-to-sue letter is requested and obtained, absent authority to the contrary, *which does not exist as of this writing*. (See, e.g., *Rankins v. United Parcel Service, Inc.* (N.D. Cal., Apr. 19,2 024, No. 3:23-CV-05785-JSC) 2024 WL 1707245, at *6 [acknowledging the uncertainty, but observing that "no California case the Court is aware of has indicated a request for an immediate right to sue letter eliminates the requirement for a DFEH complaint to provide fair notice," citing to *Clark, supra,* and thereafter applying California's exhaustion requirements to the situation involving an immediate right-to-sue letter request].)[2]

On the merits, defendants' challenges are perfunctorily raised, without analysis or case citations. The entire sum of the argument is contained in two sentences, as recounted above. Such a threadbare showing fails to address the issue in any meaningful way, meaning the

[2] Plaintiff in opposition makes much of *Clark*, and its observations that exhaustion rules may not apply when the complainant asks for an immediate right-to-sue letter. *Clark*, however, only raised this possibility - it did not decide the issue. More pointedly, *Clark* went on to apply the exhaustion rules even in the context of an immediate right-to-sue letter. For our purposes, therefore, the court finds persuasive the federal district court's observations in *Rankins*, and will apply the exhaustion rules even in a situation in which an immediate right-to-sue letter was secured, as there is no published case determining that exhaustion rules are inapplicable in this context. This conclusion is bolstered by California Code of Regulations, title 2, section 10005(d), which discusses the requirements for obtaining an immediate right-to-sue letter. The regulation requires the complainant to provide a name and address, telephone number, and an e-mail address; respondent's name, address, and whether available, telephone number and an e-mail address; the description of the alleged act or acts of discrimination or retaliation; the date or dates each alleged act of discrimination or retaliation occurred; the date and type of protected activity that occurred; the complainant's declaration; and the signature of the complainant. These requirements are similar to the factors at play associated with the exhaustion requirements.

challenge has been forfeited. (*Paulus v. Bob Lynch Ford, Inc.* (2006) 139 Cal.App.4th 659, 685 [issues that are not raised or supported by argument and citation to legal authority are forfeited].)

In any event, on the merits, defendants' challenges fail, for the court must examine the administrative complaint liberally and determine what might be uncovered by a reasonable investigation. (*Nazir v. United Airlines, Inc*. (2009) 178 Cal.App.4th 243, 268; see also *Guzman v. MBA Automotive, Inc*. (2021) 68 Cal.App.5th 1109, 1118, fn. 8 ["The regulations governing DFEH require it to 'liberally construe all complaints to effectuate the purpose of the laws the department enforces to safeguard the civil right of all persons to seek, obtain and hold employment without discrimination." (Cal. Code Regs., tit. 2, § 10003.) Any civil action for a FEHA violation is limited to matters like or related to the administrative charge. (See *Rodriguez v. Airborne* Express (9th Cir. 2001) 265 F.3d 890, 897 ["The scope of the written administrative charge defines the permissible scope of the subsequent civil action. Allegations in the civil complaint that fall outside of the scope of the administrative charge are barred for failure to exhaust"].)

No doubt plaintiff's December 6, 2022, administrative complaint is a testament to minimalism, alleging simply that on March 8, 2022, the complainant was "discriminated against because of complainant's medical condition (cancer or genetic characteristic) and as result of the discrimination was reprimanded"; and "Additional Complaint Details: Claimant was reprimanded by being forced to undergo invasive testing and medical examinations, as wel [*sic*] as further disciplinary actions due to his protected status." The complainant names himself, Ryan Mack, and identifies his employer, the City. While more specificity and detail would have been preferable, these allegations seem sufficient to allow a reasonable investigation into the nature of the claims advanced in the operative pleading. (*Okoli,* supra, 36 Cal.App.4th at p. 1615 ["Essentially, if an investigation of what was charged ... would necessarily uncover other incidents that were not charged, the latter incidents could be included in a subsequent [civil] action."].) Construing the administrative charges liberally in plaintiff's favor, an investigation arguably would reasonably have uncovered facts regarding mental disability discrimination and retaliation, based on events stemming from March 8, 2022, as alleged in the operative complaint. The allegations in the operative pleading defendants seek to exclude are in fact sufficiently related to plaintiff's administrative charge to satisfy the exhaustion of administrative remedies requirement. (See, e.g., *Concialdi v. Jacobs Engineering Group* (C.D. Cal., Apr. 29, 2019, No. CV171068FMOGJSX) 2019 WL 3084282, at *5 ["The administrative complaint, while brief, contains allegations and facts that could be construed as claims based on age and disability discrimination and retaliation"].) This offers no basis for summary judgment/summary adjudication.

b) Failure to Exhaust for Failing to Name the Individual Defendants in the Administrative Charge

Plaintiff clearly named the City as his employer and the entity responsible for the discrimination and retaliation claims. The City does not clam to the contrary. It seems equally apparent, however, that plaintiff failed to name individual defendants Michael Cash and Emiko Gerber either as a named party to the administrative claim, or in the body of the administrative charge. The administrative charge is silent completely about them.

As noted above, the law on this point is settled. California courts have consistently held that to be named in a lawsuit under FEHA a defendant must be named in the body or the caption of a previously submitted administrative complaint. The failure to mention either defendant (Cash or Gerber) in the administrative complaint (either as an offending party or in the body of the administrative charge) constitutes a failure to exhaust administrative remedies and precludes bringing a civil FEHA action against the two individual defendants. (*Medix, supra,* 97 Cal.App.4th at p. 118 [lawsuit could not proceed against defendants not named in the DFEH complaint's caption or body]; *Alexander, supra,* 46 Cal.App.5th at p. 251 [same]; *Cole, supra,* 47 Cal.App.4th at p. 1511 [same].) Contrary to plaintiff's claim in opposition, federal cases recognize and apply these same rules with existing FEHA causes of action. (See, e.g., *Wilson v. City of Fresno* (E.D. Cal., Sept. 8, 2020, No. 119CV01658DADBAM) 2020 WL 5366302, at *5 ["a plaintiff can exhaust administrative remedies for claims against defendant who are not named in the caption of the DFEH complaint if those defendants are identified in the body of the charge"]; *Ayala v. Frito Lay, Inc.* (E.D. Cal. 2017) 263 F.Supp.3d 891, 903 [California appellate courts have concluded that a defendant does not receive adequate notice if it is not named in either the caption or the body of the administrative charge].)

Plaintiff's reliance on *Martin v. Fisher* (1992) 11 Cal.App.4th 118 and *Saavedra v. Orange County Consolidated Transportation, etc. Agency* (1992) 11 Cal.App.4th 824, both cited in opposition, is misplaced. In *Martin*, the trial court dismissed plaintiff's employment discrimination claim advanced under FEHA because plaintiff failed to name defendant Fisher as a charged or offending party, and failed to obtain a right-to-sue letter naming Fisher. The *Fisher* court reversed. It rejected the idea that "only a party named in the caption of the administrative complaint may be sued . . . ." (*Id*. at p. 122.) "We conclude that since respondent [Fisher] *was named in body of the administrative charge* and participated in the administrative investigation, the trial court erred in dismissing [plaintiff's] claims against him for failure to exhaust administrative remedies." (*Id.* at p. 123, italics added.) *Saavedra*, *supra*, 11 Cal.App.4th 824 is the same. There, the appellate court concluded that plaintiff could maintain a cause of action under FEHA against her supervisor, Winterbottom, even though she had failed to name him in the caption as an offending party. (*Id.* at p. 827 [plaintiff could sue the defendant since he was "*identified* in the administrative complaint" as the person who had discriminated against plaintiff"].) Both *Martin* and *Saavedra* ***counter*** rather than support plaintiff's argument, for they are consistent with *Medix* and progeny, as detailed above. (See Chin, *supra,* § 16-316 ["[P]ersons identified although not named: Even if *not named* as the offending party in the DFEH complaint, an individual *described* in the body of the complaint as a perpetrator of

discriminatory acts is subject to suit under the FEHA. Rationale: If the DFEH had investigated, that individual would have been put on notice of the charges, and would have had an opportunity to participate" (first italics added, boldface & some italics omitted].)

Here, neither Cash nor Gerber was mentioned in the caption of the administrative charge as an offending party or *in its body* when describing the offending conduct. Nothing would have put them on notice in order to satisfy the exhaustion requirement. The undisputed material evidence, in light of well settled authority detailed above, shows that plaintiff exhausted administrative remedies *only* against defendant the City, not individual defendants Cash and Gerber.

Summary judgment is therefore appropriate as to individual defendants Cash and Gerber, but not defendant employer City, for failure to exhaust administrative remedies.

c) Summary Judgment is Also Appropriate as to Individual Defendants Cash and Gerber For an Alternative Reason – They Are Not Personally Liable for Discrimination and Retaliation, the Only Two Causes of Action Advanced in the Second Amended Complaint

Even if the court assumes arguendo that the exhaustion requirements do not apply when complainant/plaintiff seeks an immediate right-to-sue letter, as here, the court grants the summary judgment motion as to the two individual defendants for an alternative reason -- they are not personally liable for discrimination or retaliation under FEHA. In *Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, our high court concluded that while an employer may be liable for unlawful discrimination and retaliation under FEHA, individual supervisors (such as Cash and Gerber) working for the employer are not. (*Id*. at p. 1164 [**"**FEHA does not make individuals personally liable for discrimination," a holding that "applies equally to retaliation"]; see also *Raines v. U.S. Healthworks Medical Group* (2023) 15 Cal.5th 268, 277 ["Supervisorial employees are not liable under FEHA for their retaliatory acts"].)

Plaintiff in opposition seems to acknowledge these rules, but argues, for the first time, that the individual defendants are personally liable under FEHA for *harassment* pursuant to section 12940, subdivision (j)(3), which provides that an "employee of an entity subject to this subdivision is personally liable for any harassment prohibited by this section that is perpetrated by the employee, regarding of whether the employer or covered entity knows or should have known of the conduct and fails to take immediate and appropriate corrective action." It is true that supervisors are personally liable for acts involving work-place harassment based on, inter alia, age and disability. (See, e.g., *Jones, supra,* 42 Cal.4th at p. 1162 [supervisors who engage in harassment prohibited by this section are personally liable to all employees for their own harassing actions].)

Still, the scope of summary judgment/adjudication is framed by the allegations in the operative pleading, which determines the scope of the material issues at play for summary

judgment/adjudication. (*United Parcel Service Wage & Hour Cases* (2010) 190 Cal.App.4th 1001, 1009.) That is, the pleadings frame the issues on a motion for summary judgment. (*Heritage Marketing & Ins. Service, Inc. v. Chrustawka* (2008) 160 Cal.App.4th 754, 764). While courts must construe the operative pleadings broadly when deciding whether facts presented at summary judgment are within the issues framed by the complaint, courts cannot rewrite the pleading.

Under these rules, the operative pleading cannot be read to advance a harassment cause of action per FEHA. The word "harass" or "harassment" appears but once in the second amended pleading, in paragraph 13, and its use seems more makeweight than anything, for it is alleged that Cash called six times to "harass and retaliate" against plaintiff. This reading is bolstered by the fact the operative pleading fails to reference section 12940, subdivision (j), the statutory provision for harassment per FEHA; this stands in stark contrast to allegations advancing discrimination and retaliation, in which plaintiff references 12940, subdivision (a) [discrimination] and 12940, subdivision (h) [retaliation].

Further, to state a prima facie claim for age- or disability-based harassment under FEHA, plaintiff must allege the following: (1) he is a member of a protected class; (2) he was subjected to unwelcome harassment; (3) the harassment was based on his membership in the protected class; and (4) the harassment unreasonably interfered with his work performance by creating an intimidating, hostile, or offensive work environment. (*See Thompson v. City of Monrovia* (2010) 186 Cal.App.4th 860, 876 [discussing elements of a claim for race-based harassment]; see also *Ortiz v. Dameron Hospital Assn.* (2019) 37 Cal.App.5th 568, 581.) As our high court recently observed in *Bailey v. San Francisco District Attorney's Office* (2024) 16 Cal.5th 611, "[un]like FEHA discrimination claims, which address only *explicit* changes in the 'terms, conditions, or privileges of employment' (§ 12940, subd. (a)), harassment claims focus on 'situations in which the *social environment* of the workplace becomes intolerable because the harassment (whether verbal, physical, or visual) communicates an offensive message to the harassed employee.'[Citation.] In other words, "discrimination refers to bias in the exercise of official actions on behalf of the employer" whereas "harassment refers to bias that is expressed or communicated through interpersonal relations in the workplace." (*Id.* at p. 707, italics in original.) Even if the court assumes arguendo that plaintiff is part of a protected class, there are no allegations to suggest there was a hostile or abusive workplace within this definition – that is, there are no allegations to indicate any harassment was sufficiently severe and pervasive conduct to be actionable. Plaintiff cannot defeat summary judgment motion by raising a theory ***not*** raised in the operative pleading (See, e.g., *Laabs v. Victorville* (2008) 163 Cal.App.4th 1242, 1258 [in opposition to city's motion for summary judgment, plaintiff could not raise theory that was not mentioned in, or encompassed by, either original or amended complaint]; *Nein v. HostPro, Inc.* (2009) 174 Cal.App.4th 833, 851 [plaintiff could not raise issue of oral contract in opposition to motion for summary judgment where operative complaint did not allege that terms of employment relationship were by oral agreement]; *Bosetti v. United States Life Ins. Co. in City of*

New York (2009) 175 Cal.App.4th 1208, 1225 [plaintiff could not defeat motion for summary judgment by raising a theory of liability not meaningfully alleged in complaint].)

Summary judgment as to defendants Cash and Gerber is appropriate for this reason as well.

D) Summary Adjudication As to Both Cases of Action

a) First Cause of Action – Disability and Age Discrimination

Plaintiff advances two theories to support his discrimination cause of action – discrimination based on disability (a medical condition[3]) and discrimination based on his age. Defendants claim summary adjudication is appropriate because plaintiff cannot establish a prima facie claim for discrimination on either theory; alternatively, even if there is a material dispute about the evidence offered in support of a prima facie determination, there are legitimate, nondiscriminatory reason for the adverse employment decision.

The court finds plaintiff cannot establish a prima facie basis for discrimination based on age (even if the court assumes plaintiff is over 40). The age discrimination allegations in the operative pleading are brief and conclusory, appearing in paragraph 20, and in that vein simply allege plaintiff' was "over 40." As reflected in undisputed issue No. 38 of defendants' separate statement (and Exhibit 8 of defendants' evidentiary proffer), plaintiff admitted in responses to defendants' Requests for Admission, item 1, that he was not subjected to age discrimination by defendants, as alleged in the complaint; and in Item 7 of the same, that defendants were not liable for age discrimination as alleged in the operative complaint. These admissions are dispositive. It is settled that summary judgment for defendant is appropriate if defendant can "show" that an essential element of plaintiff's claim cannot be established, and such evidence usually consists of admissions by plaintiff following discovery to the effect that plaintiff has not discovered anything to support an essential element of the cause of action. (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 855.) This is precisely what has occurred here. Plaintiff

[3] The operative pleading provides that plaintiff called in sick on March 8, 2022, and that he informed defendants simply "that he was sick and not felling 100%." Thereafter, on the same day, defendant Cash contacted plaintiff at least six (6) times and "for unknown reasons" stated that he (Cash) was concerned about plaintiff's mental welfare, and believed "Plaintiff was under a lot of stress due to work . . . ." He and Gerber thereafter ordered plaintiff to take "an invasive physical and psychological evaluation . . . ." Plaintiff alleges that within 24 hours, and without further discussion, he was ordered to submit to an "invasive physical and psychological evaluation," stating that Plaintiff's failure to comply and submit "will be deemed insubordination and shall subject Plaintiff to discipline, up to and including termination." Plaintiff then claims conclusorily, in paragraph 22, that he suffered a "work injury," amounting to a "mental disability or medical condition," that limited a major life activity. Plaintiff fails to inform the reader what major life limitation was involved, a point developed later in this order. Plaintiff then concludes with a final unsupported flourish: "Due to the ongoing discriminatory and retaliatory behavior of Defendants, Plaintiff was forced to resign from his position as a Captain with the First Department and take up a lesser role with another agency."

does not dispute the import of these concessions in opposition. Age discrimination cannot be advanced.

As for the second theory of discrimination based on his "mental welfare," plaintiff is unclear in the operative pleading when he describes the discrimination cause of action, using terms like "medical condition" or "medical disability" interchangeably. These terms, however, have distinct meanings under FEHA. FEHA declares it is unlawful for "an employer, because of . . . physical disability, mental disability [or] medical condition to . . . discriminate against the persons in compensation or in terms, conditions, or privileges of employment." (§ 12940(a).) A "medical disability" includes, but is not limited to, having any mental or psychological disorder or condition, such as intellectual disability, organic brain syndrome, emotional or mental illness, or specific learning disabilities, that *limits a major life activity*. "Limits" should be determined without regard to mitigating measures, such as medications, assistive devices, or reasonable accommodations, unless the mitigating measure itself limits a major life activity, and a mental or psychological disorder or condition limits a major life activity if it makes the achievement of the major life activity difficult. "Major life activities" shall be broadly construed and shall include physical, mental, and social activities and working. (§ 12926, subds.(j)(1)(A), (B),(C).) "Medical condition," by contrast, means "any health impairment related to associated with a diagnosis of cancer or record or history of cancer," or "genetic characteristics" (i.e., any scientifically or medically identifiable gene or chromosome, that causes a disease or disorder, or an inherited characteristic that may deprive the individual). (§ 12926, subd, (i).) Only a "medical disability," not a "medical condition," includes discrimination based on a perception or mistaken belief by an employer as having a condition that limits a major life activity. (*Hodges Cedars-Sinai Medical Center* (2023) 91 Cal.App.5th 894, 905-906.) With this background, and despite the confusing terminology utilized by plaintiff in the operative pleading, the court will assume that plaintiff intends to advance a FEHA discrimination cause of action based on a "medical disability," not a "medical condition," as there is no indication that cancer or a genetic abnormality is involved, and because plaintiff, in its opposition, relies on defendants' perception of a mental disability as the gravamen of the cause of action. (See, e.g., Opp. at p. 7.)

With this clarification, the court finds that plaintiff cannot establish at least two critical prima facie elements for a discrimination cause of action based on mental disability. No doubt FEHA offers protection to a person who is not actually disabled, but who is "wrongly perceived to be" disabled. (*Gelfo. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 53; *Moore v. Regents of University of California* (2016) 248 Cal.App.4th 216, 234, fn. 3.) But even in that situation, to be considered part of the necessary "protected class," plaintiff must show that the perceived "mental disability" involved an infringement *of a major life activity, as defined above*. (*Wallace v. County of Stanislaus* (2016) 245 Cal.App.4th 109, 125 [pursuant to § 12926.1(b) and (d), FEHA protects against someone who is erroneously or mistakenly believed to have any a mental condition that limits a major life activity]; see *Higgins-Williams v. Sutter Medical Foundation* (2015) 237 Cal.App.4th 78, 83–84, quoting § 12926, subd. (j)(1); *Jensen v. Wells*

Fargo Bank (2000) 85 Cal.App.4th 245, 255-256 [plaintiff has the burden "to prove that he or she is a member of a protected class set forth in FEHA (such as a person with a disability)"].) It is not enough to simply allege a mental disability; a plaintiff must demonstrate that the perceived mental disability makes the achievement of work, or some other major life activity, difficult, or that it involves a limited major life activity. (*Gelfo, supra,* 140 Cal.App.4th at p. 47; see *Wallace, supra*, at p. 129; see generally *Glynn v. Superior Court* (2019) 42 Cal.App.5th 47, 53 [plaintiff alleging disability discrimination by an employer has prima facie burden to show employer perceived him to have a disability that involved a limited major life activity].)

Defendants have satisfied their burden on summary adjudication to show that plaintiff cannot meet this requirement.[4] Plaintiff makes it clear that he is not suffering from ***any*** mental disability – real or perceived. He also makes it clear that it was manifestly unreasonable for defendants to perceive him as suffering from any mental disability, let alone one that interfered with work, for they essentially concocted or misconstrued his March 8, 2022 "sick out" as a perceived mental disability, and did so simply to punish him for what he alleges is undesirous activity. All of this may be true, but for a discrimination cause of action under FEHA, even when based on perceived or mistaken mental disability, plaintiff must be able to show that the perceived mental disability infringed on a major life activity as part of plaintiff's prima facie burden. (See, e.g., *Paleny v. Fireplace Products U.S., Inc.* (2024) 103 Cal.App.5th 199, 209 [appellant cannot make a prima facie case of discrimination because she cannot establish that she is disabled under the FEHA].) Simply put, the perceived mental disability discrimination claim requires plaintiff to show that the perceived but erroneous mental disability nevertheless involved a limitation on a major life activity, something plaintiff has not and cannot show. (See, e.g., *Zamora v. Security Industry Specialists, Inc*. (2021) 71 Cal.App.5th 1, 57 [FEHA provides protection when an individual is *erroneously or mistakenly believed* to have any physical or mental condition that limits a major life activity].) He has not – and cannot – meet this prima facie requirement.[5]

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[4] The court as a result finds it unnecessary to determine whether the forced testing constituted an adverse employment for purposes of discrimination. It will assume without deciding that the psychological and physical testing ordered constituted an adverse employment decision for purposes of this analysis.

[5] Plaintiff's case is thus unlike *Wallace, supra*, 245 Cal.App.4th 109, in which plaintiff, a Sheriff's Deputy, sued County of Stanislaus for disability discrimination because the County removed him from his job as a bailiff and placed him on an unpaid leave of absence because of its incorrect assessment that he could not safely perform his duties as a bailiff even with reasonable accommodation. (*Id.* at p. 115.) In *Wallace,*, it was undisputed that plaintiff suffered a knee injury that infringed upon a major life event, although plaintiff could also perform the job as bailiff at least with some reasonable accommodations. (*Id.* at pp. 117-119.) Plaintiff here cannot make a similar preliminary showing.

The same is true regarding the plaintiff in *Glynn, supra,* 42 Cal.App.5th 47. There, a temporary corporate benefits staffer mistakenly thought plaintiff had transitioned from short-term disability to long-term disability, was unable to work with or without an accommodation, and thus fired plaintiff. Plaintiff tried to correct the misunderstanding, to no avail. The *Glynn* court found this situation could give rise to disability discrimination, because plaintiff was not totally disabled and was able to perform a job with or without a reasonable accommodation. Again, it was undisputed that plaintiff had a disability, limiting a major life event (a serious eye injury – myopic macular degeneration). (*Id.* at p. 50.) Plaintiff here cannot make such a claim.

Close review of the record before the court supports this conclusion. In his opposition, for example, plaintiff makes it clear that defendant Cash, when he called plaintiff after plaintiff called out sick on March 8, 2022, "for unknown reasons," "was concerned about Plaintiff's mental welfare," and stated it was because plaintiff was "under a lot of stress due to work." (See fn. 3, *ante*.) Plaintiff also makes it clear in his operative pleading that the ***real*** reason plaintiff was directed to submit to physical and psychological testing was to punish him for being outspoken, not because of a perceived disability with a major life activity limitation. In this same vein, plaintiff notes that all firefighters "experienced some stress," which is not uncommon. He emphasizes that there "was absolutely no indication that [he] was not fit for duty *other than calling out sick for a single day*." Plaintiff eschews any claim that he was disabled – and emphasizes no one could have legitimately perceived him as having a disability (and thus there was no limitation to any major life activity). Indeed, plaintiff at his deposition testified that on March 8, 2022, he was sick for one day only. "I felt ill, . . . It wasn't a chronic thing or anything like that," and he testified that at the time, "he had no physical, mental disabilities," other than diabetes, which was not known to defendant and plays no role in the current lawsuit. There is no evidence that plaintiff at any time suffered a limiting major life activity because of a disability. He is therefore not within the protected class for purposes advancing a discrimination cause of action.[6]

Additionally, plaintiff cannot show that the forced psychological and physical examination was based on discriminatory criterion associated with any perceived mental disability (i.e., meaning plaintiff cannot show a substantial causal connection between discrimination and the adverse employment decision, another prima facie requirement). (*Guz, supra,* 24 Cal.4th at p. 335 [to establish FEHA claim, it must be shown plaintiff's status under FEHA was a motivating reason for the adverse action].) As detailed in Issues No. 36 and 37 of defendant's separate statement, which are undisputed by plaintiff, plaintiff admitted in response No. 2 to defendants' Requests for Admission that he was not "subjected to disability discrimination" by defendant, as alleged in the responsive pleading. In his response to No. 5 of same, plaintiff also admitted that defendants are "not liable for discrimination based on disability" under FEHA as alleged in the operative pleading. Further, during plaintiff's deposition, plaintiff was asked "as far as this lawsuit is concerned, it doesn't involve physical injuries or medical conditions?" Plaintiff replied, "Yeah. No. Everything that I got hurt while on the job, I went and saw a doctor, I went and saw a doctor, and it got --- it got dealt. . . ." Plaintiff was expressly asked,, "Okay. So that's not an issue for this lawsuit," and plaintiff agreed, "Not

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[6] Plaintiff fails to cite to one case supporting the proposition that he can demonstrate he was a member of the "protected class," for prima facie case purposes, based exclusively on the fact defendants treated him as potentially disabled, even though defendants knew he was not disabled, concocting the perceived disability to punish plaintiff for unrelated reasons. The court is not claiming such activity is untoward – it potentially may be as alleged; it is simply observing that it does not involve a "protected class" status required to advance a FEHA discrimination cause of action.

an issue." It is settled that a defendant can support summary adjudication by showing that plaintiff does not possess, and cannot reasonably obtain needed evidence – as here through admissions by plaintiff following extensive discovery. (*Aguilar v. Atlantic Richfield C0.* (2001) 25 Cal.4th 826, 855.) That standard seems satisfied.

Plaintiff in opposition attempts to counter the import of these discovery concessions in two ways. First, plaintiff notes that he testified at his deposition that despite the one-day sick call-out on March 8, 2022, defendant Cash "proceed to call me numerous times, six times or so – and his lieutenant – demanding an answer as to why I called in sick, and I ended up having a two-minute conversation after being berated with these calls with the director." (See Responses to Issue Nos. 36, 37, 78, 79, 120 and 121 of Plaintiff's Response Separate Statement.) Yet nothing in these responses impacts or dilutes the import of plaintiff's earlier discovery responses. That is, nothing in his deposition testimony indicates that defendants ordered the physical psychological testing ***because of*** perceived mental disability discrimination.

Second, plaintiff relies on statements contained in *Wallace, supra*, 245 Cal.App.4th 109, which determined that an "employer 'discriminates' when it treats the employee differently because of a factor listed in the FEHA." (*Id.* at p. 126.) Plaintiff then argues that defendants "issued the order to undergo invasive medical testing because they perceived Plaintiff to have a mental disorder within the definition under FEHA." Because he was "treated differently" from other firefighters, plaintiff contends he can show an adverse employment action "because of" the perceived disability.

This argument is unpersuasive. It overlooks *Wallace*'s conclusion that plaintiff must show that the perceived mental disability itself was ***a substantial motivating reason*** for the defendant's decision to subject plaintiff to an adverse employment action. (*Id.* at p. 129; see also *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 225 [same].) Treating someone differently alone is not enough. How can the claimed mental disability be an actual motivating factor in the adverse employment decision when plaintiff acknowledges (and in fact insists) that the reason for the forced testing had nothing to do with any perceived disability, but because of defendants' desire to use the testing procedures as a way to punish plaintiff for his unrelated speech and union activities? In this calculus the motivating factor in the adverse employment action had nothing to do with any disability, perceived or otherwise. While defendants may have misused the testing procedures in the hope of punishing them for undesirable conduct, the misuse was not based on a perceived disability as required by FEHA. Not every misuse of a disability policy by an employer automatically constitutes discrimination under FEHA. Such misuse may constitute discrimination, but not always, as this case demonstrates. There is no evidence to show that any perceived discrimination was a substantial motivating factor in the adverse employment decision.[7]

[7] The court previously explained why *Wallace* and *Glynn* showed plaintiff cannot establish he was part of the "protected class" for purposes of advancing a discrimination cause of action, as discussed in footnote 4, *ante*. Those

Our high court's observations about the nature of FEHA discrimination per section 12940 underscore this conclusion. It has observed that discrimination on the basis of a mental disability "is not forbidden discrimination ***in itself***. Rather, drawing these distinctions is prohibited only if the adverse employment action occurs ***because of a disability and the disability would not prevent*** the employee from performing the essential duties of the job, at least not with reasonable accommodation. . . ." (*Green v. State of California* (2007) 42 Cal.4th 254, 262, emphasis added.) Here, the "distinctions drawn" by defendants had nothing do with any perceived disability he suffered, or because the perceived disability would not prevent plaintiff from performing the essential duties of a captain. Indeed, plaintiff was fully reinstated to his full position on April 8, 2022. after the testing occurred, as reflected in Exhibit 5 of defendants' evidentiary proffer.

As plaintiff cannot show that a substantial motivating factor for the adverse employment action was his perceived mental disability under FEHA, summary adjudication is also appropriate. This obviates the need for the court to examine whether there is undisputed fact that the adverse employment decision was made for a nondiscriminatory reason.

b) Second Cause of Action – Retaliation

This leaves the second cause of action based on retaliation. As noted above, to establish a prima face case for retaliation under FEHA, plaintiff must show (1) he or she engaged in a

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cases also reveal why plaintiff cannot establish that any perceived mental disability discrimination was a substantial motivating reason for the adverse employment determination as alleged. It will be remembered that in both *Wallace* and *Glynn*, plaintiffs had disabilities -- Wallace due to his knee injury and Glynn following a serious eye condition. Both courts concluded that ill-will animus was not required – just a showing that a disability was a substantial motivating factor in the adverse employment decision. In each case, the plaintiff/employee was placed on leave/terminated even though a reasonable accommodation could have been utilized. All that was required was plaintiff's showing that the employer discriminated (i.e., treated plaintiff differently) because of a disability and that the disability was a substantial motivating factor in the employer's decision to put plaintiff on leave/or to terminate. (*Wallace, supra*, at p. 129 [plaintiff's actual or perceived condition was a substantial motivating reason for defendant's decision to subject the plaintiff to an adverse employment action]; *Glynn, supra*, at p. 54 [we conclude Glynn provided direct evidence of disability discrimination—Allergan terminated him because [it] mistakenly believed he was totally disabled and unable to work. This is enough to defeat a motion for summary adjudication].) Plaintiff's discrimination claim here is different, resting on the notion that he has no disability at all, and further, that defendants *could not (and actually did not think) he suffered from one*. As a consequence, plaintiff cannot show on a prima facie basis that he was treated differently *because of* any perceived or mistaken mental disability, for the perceived mental disability played no role as a motive in the adverse employment decision. Put another way, the employers in both *Wallace* and *Glynn* were mistaken about the nature and scope of the employees' disabilities, which in reality did not render them incapable of working either with or without an accommodation; those mistaken beliefs played a substantial role in the adverse employment decision. Plaintiff here, by contrast, alleges he has no disability, and, further, that any perceived disability was manufactured in order to punish him. This cannot be discrimination under FEHA, because no perceived or mistaken perception of plaintiff's disability played a substantial role in the adverse employment decision.

"protected activity," (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer's actions. Defendants contend that plaintiff cannot establish he was engaged in a "protected activity" under FEHA because the "protected activities" at issue are not FEHA related. Alternatively, defendant claims that there are undisputed facts showing a nonretaliatory reason for the adverse employment decision.

The court agrees that plaintiff cannot meet its prima facie burden to establish a retaliation claim under FEHA, for to constitute "protected activity," "the protected activity" must involve violations of FEHA itself.[8] FEHA makes it unlawful for the employer to retaliate because the employee opposed any practices "***forbidden under this part*** or because the person has filed a complaint, testified, or assisted in any proceeding under this part." (§ 12940(h), emphasis added.) "The FEHA's stricture against retaliation serves the salutary purpose of encouraging open communication between employees and employers so that employers can take voluntary steps ***to remedy FEHA violations***." (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 475, emphasis added.) "Thus, protected activity takes the form of opposing any practices forbidden by FEHA or participating in any proceeding conducted by the [CDCR] or the Fair Employment and Housing Council (FEHC)." (Cal. Code Regs., tit. 2, §§ 11002, subds. (a), (b), 11021, subd. (a) [protected activities under FEHA include opposition to ***practices prohibited by the Act*** or a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing conducted by the Council or Department or its staff]; *Nealy v. City of Santa Monica* (2015) 234 Cal.App.4th 359, 380.)

None of the "protected activities" claimed by plaintiff – involving union and/or free speech activities – are protected by FEHA. In paragraphs 8 and 9 of the second amended complaint, plaintiff identifies his actions as a "vocal advocate on behalf of the his recognized bargaining unit"; he emphasizes that this was "protected speech, all related to the safety and working conditions of firefighters with the City"; he "voiced his opinion on union matters related to the efficiency, proper running and competency of the City and the Fire Department"; he "challenge[d] the accuracy of various assertions made by Defendants, pointing out to the public the inaccuracy"; he had been one of the "primary causes of the issues that the union has brought to light over the years"; and he "engaged in various union activities and free speech activities on multitude of occasions." Not one of these "actions" on its face involves "opposing any practices forbidden under FEHA or involve participating in CDCR proceedings." Plaintiff's exercise of his free speech rights (assuming for the sake of argument that speech was protected), including his activities with and/or for the union, do not implicate FEHA protected activities. (*Nealy*,

[8] In light of this, the court need not determine whether forced testing as implicated here is an adverse employment decision. As the court did with regard to the discrimination cause of action, it will assume without deciding that the ordered psychosocial and physical testing was an adverse employment decision for purposes of the retaliation cause of action.

supra, 234 Cal.App.4th at p. 381.) Nor is there any indication that plaintiff's allegations involved his reasonable and good faith belief that violations of FEHA existed, whether the challenged conduct is ultimately found to violate FEHA. (*Dinslage v. City of County of San Francisco* (1016) 5 Cal.App.5th 368, 381; *Kelly v. The Conco Companies* (2011) 196 Cal.App.4th 191, 467, 477 [a mistake of either fact or law may establish an employee's good faith but mistaken belief that he or she is opposing conduct prohibited by FEHA].) Defendant has met its prima facie burden to show no issues of disputed fact exist on this critical prima facie element.

Plaintiff acknowledges this requirement in opposition, but claims he has in fact alleged/shown protected activities ***were*** related to FEHA. He explains perfunctorily: "However, the speech activities of Plaintiff were established to be about harassment, retaliation, and hostile work environment, which are clearly FEHA related violations. Even if they turned out to be unfounded." Plaintiff cites to no evidence to support these claims. Plaintiff does note that "not long after Plaintiff was subject to the Fit for Duty Chief Cash was subject to a vote of no confidence by Plaintiff's labor union. Notably the vote of no confidence stemmed from accusations of Chief Cash engaging in 'harassment, retaliation, and the firefighters living in a hostile work environment.'"

Plaintiff has provided in his evidentiary proffer a single sheet paper, entitled "Vote of No Confidence Against Public Safety Director Michael Cash," dated April 26, 2022. It provides that Michael Cash as Director is "unable to manage both the Police and Fire Departments and blames us, the Firefighters for his budget issues and lack of revenue despite being a PUBLIC SERVICE. Under his leadership staff has been subject to DEPARTMENT-WIDE investigations as retaliation for defying his objectives. Actions include suspension from work simply for calling in sick, or disciplines for simple accidents like running over a traffic cone. It has become readily clear that, with the help of Human Resources Director Emiko Gerber, his true intention is to dismantle the Fire Department, one employee at a time. His actions have left every staff member subject to micromanagement, training is nearly non-existent, administrative leaves, harassment, retaliation, and the firefighters living in a hostile work environment." The document then provides six (6) "highlights" for its recommendation of no confidence, one of which reads: "3) Handed out unfounded disciplines/punishments to Fire Department and Police staff in an attempt to discredit and pacify [sic] anyone who would question his tactics."

A defendant moving for summary judgment bears the burden of showing that one or more elements of the cause of action cannot be established. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 767; *Genisman v. Carley* (2018) 29 Cal.App.5th 45, 49.) The moving defendant "bears the burden of persuasion that there is no triable issue of material fact and that [it] is entitled to judgment as a matter of law." (*Aguilar, supra, 2*5 Cal.4th at p. 850.) Upon a defendant's prima facie showing of the nonexistence of such an element, the plaintiff "is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact." (*Ibid.*) In this regard, the court reads the evidence offered by the

non-moving party in opposition liberally. (Fernandez v. Alexander (2019) 31 Cal.App.5th 770. 779.) "Responsive evidence that 'gives rise to no more than mere speculation' is not sufficient to establish a triable issue of material fact," and thus is not sufficient to defeat summary adjudication. (*Champlin/GEI Wind Holdings, LLC v. Avery* (2023) 92 Cal.App.5th 218, 226.)

Even drawing all reasonable inferences in favor of plaintiff, as the court is required to do, nothing in plaintiff's evidentiary proffer raises a triable issue of material fact that he engaged in "protected activities" -- a necessary predicate to advance a retaliation cause of action under FEHA. As noted, nothing in the second amended complaint suggests this is true – in fact, all allegations are to the contrary, as contained in paragraphs 8 and 9 suggest otherwise. Plaintiff offers no evidence in either his response separate statement or his memorandum of points and authorities to suggest that his "protected activities" involved protections against discrimination/harassment based on race, religion, creed, color, national origin, ancestry, physical or mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, general expression, age, or sexual orientation. (§ 12920; *Harris,* supra, 56 Cal.4th at p. 223.) All plaintiff offers is conclusory language that he opposed practices forbidden by the FEHA. Allegations involving workplace safety and "union activities" has a broad scope, and yet plaintiff fails to produce any evidence to show they were focused on FEHA violations.

The only evidence offered is the April 26, 2022 "No Confidence Vote" recommendation as detailed in the single-page document. True, the words "harassment," "retaliation," and "hostile work environment" are used therein. But the words have no individual talismanic meaning, for the specific incidents detailed in the letter reveal plaintiff did not engage in "protected activities" as required for a FEHA retaliation cause of action. For example, the term "retaliation" is used in this single document to describe 1) "DEPARTMENT-WIDE investigations as retaliation for defying [Cash's] objectives"; 2) "suspension from work simply for calling in sick"; 3) disciplines "for simple accidents"; and 4) "unfounded disciplines/punishments to Fire Department and Police Staff to discredit and pacify [sic] anyone who would question his tactics." These allegations do not involve FEHA based violations of hostile work environment, and thus are insufficient to create a disputed issue of material fact on the issue. (See *Wiz Technology, Inc. v. Coopers & Lybrand* (2003) 106 Cal.App.4th 1, 11 [holding that where the opposition to a motion for summary judgment presented speculation in place of specific facts, the trial court correctly granted summary judgment].)

FEHA is not a "civility code" and it is not intended to protect employees against all offense, boorish, rude, obnoxious, vulgar, or untoward behavior. (See, e.g., *Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 295); neither is it shield against harsh treatment *(Arteaga, supra,* 163 Cal.App.4th at p. 344), nor a protection against grossly offensive conduct generally. (*Kelley, supra,* 196 Cal.App.4th at p. 207, superseded by statute on other grounds as stated in *Taylor v. Nabors Drilling USA, LP* (2014) 222 Cal.App.4th 1228, 1239, fn. 2.) Complaints about the enumerated abuses, misdeeds, and/or transgressions do not involve violations of FEHA (for they do not involve objections to discriminatory FEHA misconduct or a

good-faith belief of discrimination as contemplated under FEHA (*Yanowitz, supra*, 36 Cal.4th at p. 1043; see also *Vines v. O'Reilly Auto Enterprises, LLC* (2022) 74 Cal.App.5th 174, 188 [recognizing, in dictum and in reliance on C, a distinction between FEHA related and non-FEHA related conduct for purposes of protected activity in the retaliation context], citing *Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970, 990.)

This conclusion is by what plaintiff could have provided in opposition without much fanfare, but did not. It was easily within plaintiff's wheelhouse to provide disputed material evidence that he engaged in FEHA-related " protected activity" (in the form of declarations or otherwise), as he claims in the operative pleading that he has engaged "in numerous protected activities"; was involved in "numerous meetings and public gathers" in which he "voiced his opinion on union matters"; during which he "challenged the factual accuracy of various assertions made by Defendants." But the opposition contains nothing remotely meaningful on this topic. Further, plaintiff offers no explanation as to why such evidence cannot be provided. (*Roman v. BRE Properties, Inc.* (2015) 237 Cal.App.4th 1040, 1054 [once defendant meets its initial burden that plaintiff cannot establish a cause of action, it is fundamental that plaintiff to defeat summary adjudication must present "specific facts" to show a disputed issues of material fact exist].) Plaintiff does not claim, for example, that he has had no opportunity to marshal the evidence, even though the evidence exists, necessitating a continuance. (Code Civ. Proc., § 437c, subd. (h).) The record in any event belies such a claim, as the litigation has been active since March 20, 2023.

The court grants defendant's summary adjudication motion to the second cause of action for retaliation under FEHA because the evidence before the court shows that plaintiff did not engage in ***FEHA-related*** "protected activities", a necessary predicate for a FEHA retaliation cause of action, meaning plaintiff cannot meet his prima facie burden to show retaliation under FEHA.[9] This conclusion obviates the need for the court to determine whether there are undisputed issues of material fact that suggest a non-retaliatory, legitimate reason for any adverse employment decision.

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[9] Plaintiff has never been precluded from alleging a retaliation cause of action under other whistleblower statutes, such as Labor Code section 1102.5(b) or Labor Code section 98.6, if appropriate. (See *Lawson v. PPG Architectural Finishes, Inc*. (2022) 12 Cal.5th 703, 709 [defining elements of Labor Code § 1102.5 whistleblower cause of action]; *St. Myers v, Dignity Health* (2019) 44 Cal.App.5th 301, 307 [explaining retaliation under Lab. Code, § 98.6].) Further, the court is not inclined to treat defendants' summary judgment/adjudication motion as a nonstatutory motion for judgment on the pleadings, thereby allowing leave to amend, even if the court has such authority following codification of the statutory motion to judgment on the pleadings per Code Civil Procedure section 438, for one simple reason. This treatment would be inappropriate because the court, in making its rulings as detailed in this tentative order, has not limited itself to allegations in the second amended complaint and to evidence admissible only via judicial notice. It has relied on facts presented by the parties, such as deposition testimony. (See. e.g., *American Airlines v. County of San Mateo* (1996) 12 Cal.4th 1110, 1118; *Koehrer v. Superior Court* (1986) 181 Cal.App.3d 1155, 1171, disapproved on other grounds in *Foley v. Interactive Data Corp*. (1988) 47 Cl.3d 654; see also Chin, *supra*, § 10.52 [the court cannot consider facts outside the pleadings, contained in declarations, when treating a summary judgment motion as a nonstatutory motion for judgment on the pleadings].)

In Summary:

- The court grants defendants' request for judicial notice, as there is no opposition to it.
- The court rejects defendants' arguments that plaintiff failed to exhaust the claims associated with discrimination and retaliation cause of action, as a reasonable investigation would have revealed the factual basis for the claims as alleged in the operative pleading.
- The court, however, grants defendants Michael Cash's and Emiko Gerber's summary judgment motion (in their individual capacity), because plaintiff only named the City of Guadalupe in the administrative complaint; plaintiff failed to name either Cash or Gerber as an offending party or in the body of the administrative complaint as a person involved. Plaintiff's reliance on *Martin v. Fisher, supra,* and *Saavedra v. Orange County Consolidated Transportation Etc., Agency, supra,* in opposition is misplaced, as those cases are factually distinguishable. As an alternative basis for summary judgment for defendants Cash and Gerber, the courts finds that neither individual defendant can be personally liable for discrimination and retaliation, and determines that plaintiff has not adequately pleaded a basis for harassment in the second amended complaint, meaning he cannot rely on that theory to defeat summary judgment.
- The court grants summary adjudication as to the discrimination cause of action because plaintiff has not and cannot establish two prima face elements – that he was a member of a protected class (because there is no evidence that any perceived disability involved a limited major life activity); and additionally, that discrimination was a substantial motivating factor in the adverse employment decision. This obviates the need for the court to determine whether there are disputed issues of material facts about the existence of a nondiscriminatory reason for adverse employment decision.
- The court also grants summary adjudication as to the retaliation cause of action because plaintiff has not and cannot show that retaliation was based on *FEHA-related* "protected activities", a necessary prima facie condition to a FEHA retaliation cause of action. condition. This (as above) obviates the need for the court to determine whether disputed issues of material fact exist to show a nonretaliatory reason for the adverse employment decision.
- Defendants are directed to provide a proposed order and judgment for signature.
- The parties are directed to appear either by Zoom or in person.