

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
CALIFORNIA

Post v. John F. Otto, Inc.

Post · No. 2:20-cv-01174-KJM-AC · Decided March 3, 2023

SUMMARY

The United States District Court for the Eastern District of California granted John F. Otto, Inc.'s motion for summary judgment in full. The court held that the employer had decided to terminate Brett Post for legitimate, nondiscriminatory reasons before he requested medical leave, defeating his FMLA, CFRA, and related wrongful-termination claims. The court also granted summary judgment on Post's age-discrimination claim because he had not shown satisfactory job performance or evidence supporting an inference of age discrimination.

CASE DETAILS

COURT	United States District Court for the Eastern District of California
JURISDICTION	United States District Court for the Eastern District of California
DECIDED	March 3, 2023
DOCKET	2:20-cv-01174-KJM-AC
DISPOSITION	other
PROCEDURAL POSTURE	Defendant moved for summary judgment on plaintiff's claims under the Family and Medical Leave Act, the California Family Rights Act, and the California Fair Employment and Housing Act.
STANDARD OF REVIEW	Summary judgment is appropriate when there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court views the evidence and draws reasonable inferences in favor of the nonmoving party, but speculation, credibility concerns alone, and disputes over facts immaterial to the governing law do not preclude summary judgment.
PRECEDENTIAL VALUE	Unpublished federal district court order; precedential status unknown.
PARTIES	Brett Post v. John F. Otto, Inc., doing business as Otto Construction

TOPICS

- family and medical leave act
- age discrimination
- summary judgment
- employment law
- civil procedure

PRACTICE AREAS

employment law

civil rights

civil procedure

QUESTIONS PRESENTED

1. Whether Post's FMLA and CFRA interference claims survived summary judgment when Otto had undisputedly decided to terminate him for legitimate reasons before he requested leave.
2. Whether Post's FMLA and CFRA retaliation claims survived summary judgment when he did not oppose an allegedly unlawful practice or file a complaint before his termination.
3. Whether Post's FEHA wrongful-termination claim survived summary judgment.
4. Whether Post's FEHA age-discrimination claim survived summary judgment.

HOLDINGS

1. An employer defeats an FMLA or CFRA interference claim at summary judgment by showing that it would have terminated the employee regardless of the employee's leave request. Because Otto had already made the termination decision for legitimate, nondiscriminatory reasons before Post requested leave, Post could not establish the required causal connection or harm.
2. FMLA and CFRA retaliation claims require opposition to an unlawful practice; merely requesting or taking leave is analyzed as interference rather than retaliation.
3. Summary judgment was proper on Post's generic claims alleging unspecified violations of the FMLA and CFRA because he cited no authority supporting such freestanding claims.
4. The FEHA wrongful-termination claim failed because Post agreed that its success stood or fell with his FMLA and CFRA claims, which failed on summary judgment.
5. Post could not establish a prima facie age-discrimination case because the undisputed record showed he was not performing his job satisfactorily when terminated.

KEY QUOTATIONS

"An employer can defeat an FMLA interference claim by showing it would have terminated the employee regardless of the employee's request for leave" (III.A)

"there is no room for a McDonnell-Douglas type of pretext analysis when evaluating an 'interference' claim under [the FMLA]." (III.A)

FACTUAL BACKGROUND

Otto employed Post at will as a superintendent beginning in 1998. After assigning him to a high-profile construction project, Otto managers documented concerns about his communication, teamwork, attitude, treatment of coworkers, and ability to manage the project, and decided to terminate him before learning of his need for medical leave. Post then informed Otto of his upcoming knee surgery and requested leave, but Otto terminated him as previously planned several days later.

PROCEDURAL HISTORY

Post sued Otto after his employment was terminated shortly after he requested medical leave for knee-replacement surgery. The action was removed to the Eastern District of California. After briefing and a videoconference hearing, the court granted Otto's motion for summary judgment on all claims, resolved the motion, and closed the case.

DISPOSITION

other

CASES CITED

- Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)
- Celotex Corp. v. Catrett, 477 U.S. 317 (1986)
- Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986)
- First Nat'l Bank of Arizona v. Cities Serv. Co., 391 U.S. 253 (1968)
- Bachelder v. Am. W. Airlines, Inc., 259 F.3d 1112 (9th Cir. 2001)
- Xin Liu v. Amway Corp., 347 F.3d 1125 (9th Cir. 2003)
- Richey v. AutoNation, Inc., 60 Cal. 4th 909 (Cal. 2015)
- Bushfield v. Donahoe, 912 F. Supp. 2d 944 (D. Idaho 2012)
- Dela Cruz v. Brennan, 2021 WL 23295 (N.D. Cal. Jan. 4, 2021)
- Crawford v. JP Morgan Chase, 983 F. Supp. 2d 1264 (W.D. Wash. 2013)
- Sanders v. City of Newport, 657 F.3d 772 (9th Cir. 2011)
- Newell v. Ariz. Bd. of Regents, 2020 WL 1694735 (D. Ariz. Apr. 7, 2020)
- Perez-Denison v. Kaiser Found. Health Plan of the Nw., 868 F. Supp. 2d 1065 (D. Or. 2012)
- Edgar v. JAC Products, 443 F.3d 501 (6th Cir. 2006)
- Holtzclaw v. Certainteed Corp., 795 F. Supp. 2d 996 (E.D. Cal. 2011)
- McKenna v. Permanent Med. Grp., Inc., 2013 WL 3766769 (E.D. Cal. July 16, 2013)
- Berg v. TXJ Companies, 2013 WL 3242472 (D. Mont. June 24, 2013)
- Jones v. Nevada, 2016 WL 4707987 (D. Nev. Sept. 7, 2016)
- Nat'l Union Fire Ins. Co. v. Argonaut Ins. Co., 701 F.2d 95 (9th Cir. 1983)
- Noguera v. Davis, 5 F.4th 1020 (9th Cir. 2021)
- Merrick v. Hilton Worldwide, Inc., 867 F.3d 1139 (9th Cir. 2017)
- Guz v. Bechtel Nat'l, Inc., 24 Cal. 4th 317 (Cal. 2000)
- McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)

OPINION

1 2 3 4 5 6 7 8 UNITED STATES DISTRICT COURT 9 FOR THE EASTERN DISTRICT OF
CALIFORNIA 10 11 Brett Post, No. 2:20-cv-01174-KJM-AC 12 Plaintiff, ORDER 13 v. John F.
Otto, Inc., 1S Defendant. 16 17 Plaintiff Brett Post sues Defendant John F. Otto, Inc., doing

business as Otto 18 | Construction, for terminating his employment soon after he sought leave under the Family and 19 | Medical Leave Act.

See Compl., Not. Removal at 12-26, ECF No. 1-1. Otto moves for summary 20 | judgment. See generally Mot. Summ. J., ECF No. 11. It is undisputed that Otto had already 21 | decided to terminate Post for legitimate, nondiscriminatory reasons before he requested leave, so 22 | the motion is granted. 23 | I. UNDISPUTED FACTS 24 After reviewing the record, the court has determined the following facts are undisputed.!

25 | Otto hired Post in 1998, and he worked at will as a superintendent until his termination. Def. ' Both parties object to evidence cited by the other. See Pl. Opp'n to Def. Obj., ECF No. 17; Def. Obj. to Pl. Opp'n, ECF No. 18.

The court has not relied on the evidence cited in these objections, so they are moot. 1 Resp. Stmt. Facts (Undisp. Facts) Nos. 2, 4, ECF No. 16-1. In Fall 2019, Carl Barrett, Otto's 2 president, and Robert Ussery, a general superintendent, assigned Post a high-profile project, the 3 North Natomas Aquatic Park Project. Id. Nos. 14–15. They were reluctant to give Post this 4 assignment because of his recent history of weak interpersonal and communication skills, but 5 they hoped it would motivate him to improve.

Id. Nos. 15–16; Barrett Decl. ¶ 9, ECF No. 11-4; 6 R. Ussery Decl. ¶ 5, ECF No. 11-7; see also Performance Review 2017, Ex. 1 at 11–12, ECF No. 7 11-7 (mentioning problems with communication and teamwork); Performance Review 2018, Ex. 8 2 at 16, 19, ECF No. 11-7 (same); Performance Review 2019, Ex. 3 at 23, 26, ECF No. 11-7 9 (same).² In years past, by contrast, Post had received generally more positive reviews, and he had 10 risen through the ranks to become a superintendent without discipline.

See Performance Reviews 11 2009, 2011–2013, Bowman Decl. Ex. 2, ECF No. 13-2; see also Opp'n at 1 (citing Undisp. Facts 12 Nos. 4–5). 13 After receiving the assignment, Post learned he needed a knee replacement, which would 14 require six weeks' recovery. Undisp. Facts Nos. 58–59; Post Dep., Bowman Ex. 1 at 7–9, ECF 15 No. 13-2. A surgery could not be scheduled for several more months, and the available dates 16 conflicted with Post's work schedule, so he asked to be notified if an earlier surgery date became 17 available.

Undisp. Facts No. 60. He did not tell Otto about his need for surgery or mention a 18 possible leave. Id. No. 42. 19 A few days later, Post had a meeting with Ussery to discuss his job performance. Id. No. 20 22. During that meeting, Ussery “developed serious concerns” Post would “abandon the Aquatic 21 Park Project.” R. Ussery Decl. ¶ 7. Ussery again had concerns with Post's poor communication 22 and teamwork efforts.

Perf. Rev. 2019, Ex. 3 at 21–26. Robert Ussery's nephew Gary, who 23 worked for Otto as an assistant superintendent, also met with Post for a performance evaluation. 24 R. Ussery Decl. ¶¶

9–11; G. Ussery Decl. ¶ 6, ECF No. 11-6; Mem. P. & A. at 7, ECF No. 11-1. 25 Gary reported to Robert that Post had called him a “retard” and said Post was treating colleagues 26 “terribly.” R. Ussery Decl. ¶ 9; G. Ussery Decl. ¶ 5; Undisp.

Facts No. 30. Robert decided to fire 27 Post, and Barrett approved. R. Ussery Decl. ¶ 10; Barrett Decl. ¶ 10. 2 For all exhibits, the court cites the page numbers assigned by its CM/ECF system. 1 On the same day, Post scheduled his knee surgery for the next month. Undisp. Facts Nos. 2 41, 62. He did not tell Otto. Id. No. 42. 3 The next day, a Friday, Robert Ussery asked Forrest Stuckey, another superintendent, to 4 take over the Aquatic Park Project and told him Otto was firing Post.

Stuckey Decl. ¶¶ 1–6, ECF 5 No. 11-5. On Monday, Stuckey confirmed he would take over the project at the end of the week. 6 Id. ¶ 5. Stuckey was fifty-two or fifty-three at the time, approximately nine years younger than 7 Post. See id. Nos. 1, 36. Ussery and Barrett decided Friday would be Post’s last day. Barrett 8 Decl. ¶ 12; R. Ussery Decl. ¶ 14. They did not know about Post’s upcoming surgery or knee 9 problems.

Undisp. Facts No. 42. 10 On the Wednesday before the planned termination, Post told Barrett about his upcoming 11 surgery and requested medical leave. Undisp. Facts Nos. 41, 63. They discussed his leave, 12 including pay options and how to notify colleagues. Id. No. 63.

On Thursday, Post spoke to his 13 coworkers about his leave during a team meeting. Id. No. 64; Post Dep. at 17. Later in the day, 14 Post received a message asking him to meet with Ussery the next morning. Post Dep. at 18.

As 15 planned, Barrett and Ussery ended Post’s employment when they met on Friday morning. 16 Undisp. Facts No. 43. And as planned, Stuckey took over the Aquatic Park Project. Stuckey 17 Decl. ¶ 6. 18 Post filed this action to assert claims of wrongful termination on the basis of his request 19 for leave and his age. Undisp. Facts No. 48. His complaint includes claims for “violation,” 20 retaliation, and interference under the California Family Rights Act (CFRA) and Family Medical 21 Leave Act (FMLA) and for wrongful termination and age discrimination in violation of the 22 California Fair Employment and Housing Act (FEHA).

See Compl. ¶¶ 16–77 (citing 29 U.S.C. 23 § 2612, Cal. Gov’t Code § 12945.2, and Cal. Gov’t Code §§ 12940 et seq.). Otto moves for 24 summary judgment on all of these claims, see generally Mot. Summ. J., ECF No. 11, and the 25 court received full briefing, see generally Opp’n, ECF No. 13; Reply, ECF No. 16.

The court 26 originally submitted the matter without a hearing, but after reviewing the parties’ filings, the court 27 reset the matter for hearing. Min. Order, ECF No. 14; Order, ECF No. 21. The court held a 28 hearing by videoconference on January 21, 2022. Robert Bowman appeared for Post. Carolyn 1 Burnette appeared for Otto.

The matter was submitted for decision at the conclusion of the 2 hearing.³ 3 II. LEGAL STANDARD 4 A court will grant summary judgment “if... there is no genuine dispute as to any material 5 fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a).

The 6 “threshold inquiry” is whether “there are any genuine factual issues that properly can be resolved 7 only by a finder of fact because they may reasonably be resolved in favor of either party.” 8 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). 9 The moving party bears the initial burden of showing the district court “that there is an 10 absence of evidence to support the nonmoving party’s case.” *Celotex Corp. v. Catrett*, 477 U.S. 11 317, 325 (1986).

The burden then shifts to the nonmoving party, which “must establish that there 12 is a genuine issue of material fact....” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 13 475 U.S. 574, 585 (1986). In carrying their burdens, both parties must “cit[e] to particular parts of 14 materials in the record...; or show [] that the materials cited do not establish the absence or 15 presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to 16 support the fact.” Fed.

R. Civ. P. 56(c)(1); see also *Matsushita*, 475 U.S. at 586 (“[The 17 nonmoving party] must do more than simply show that there is some metaphysical doubt as to the 18 material facts”). Moreover, “the requirement is that there be no genuine issue of material 19 fact.... Only disputes over facts that might affect the outcome of the suit under the governing 20 law will properly preclude the entry of summary judgment.” *Anderson*, 477 U.S. at 247–48 21 (emphasis in original).

22 //// 23 //// 24 //// 25 //// 3 Otto submitted an unauthorized supplemental brief after the matter was submitted. ECF No. 25. The court has not considered that filing. See Standing Order at 3, ECF No. 2-1 (“No supplemental brief shall be filed without prior leave of court.”). 1 In deciding a motion for summary judgment, the court draws all inferences and views all 2 evidence in the light most favorable to the nonmoving party.

Matsushita, 475 U.S. at 587–88. 3 “Where the record taken as a whole could not lead a rational trier of fact to find for the non- 4 moving party, there is no ‘genuine issue for trial.’” *Id.* at 587 (quoting *First Nat’l Bank of 5 Arizona v. Cities Serv. Co.*, 391 U.S. 253, 289 (1968)). 6 III. ANALYSIS 7 A. Wrongful Termination 8 The court begins with Post’s termination claims under the FMLA and CFRA. “The 9 FMLA creates two interrelated, substantive employee rights....” *Bachelder v. Am.*

W. Airlines, 10 Inc., 259 F.3d 1112, 1122 (9th Cir. 2001). It allows covered employees up to twelve weeks’ 11 family and medical leave per year, and it guarantees employees the right to be restored to their 12 original or equivalent position when they return. 29 U.S.C. §§ 2612(a), 2614(a).

The CFRA is 13 California's counterpart to the FMLA and mirrors the federal provisions. Cal. Gov't Code 14 §12945.2(a) (authorizing twelve weeks' leave for covered employees and the right to return to 15 the "same or a comparable position"); see also *Xin Liu v. Amway Corp.*, 347 F.3d 1125, 1132 n.4 16 (9th Cir. 2003) (analyzing CFRA and FMLA claims interchangeably); *Richey v. AutoNation, Inc.*, 17 60 Cal. 4th 909, 919 (Cal.

2015) (same). 18 Employees may assert two claims under the FMLA and CFRA. First, an employee may 19 recover damages by demonstrating the employer interfered with the employee's right to take 20 leave. See 29 U.S.C. § 2615(a)(1); Cal. Gov't Code § 12945.2(q).

Second, an employee may 21 recover for harms suffered in retaliation for opposing activities made unlawful by the two 22 statutes. See 29 U.S.C. §§ 2615(a)(2); Cal. Gov't Code § 12945.2(k). Post has cited no authority 23 to support his generic claims for "violations" of the FMLA and CFRA, see Compl. ¶¶ 16–32, and 24 the court is aware of none. Summary judgment is granted on these "violation" claims.

25 The Ninth Circuit and California courts draw a bright line between interference and 26 retaliation claims. *Bachelder*, 259 F.3d at 1124; *Richey*, 60 Cal. 4th at 920. Interference claims 27 encompass a broad variety of adverse employment actions for exercising rights under the FMLA, 28 including termination. *Bushfield v. Donahoe*, 912 F. Supp. 2d 944, 955 (D.

Idaho 2012). By 1 contrast, the statutes' retaliation provisions are construed narrowly. See *Xin Liu*, 347 F.3d at 1133 2 n.7. A retaliation claim is sustainable only when an employee actually opposes an unlawful 3 practice. *Id.* This narrow interpretation flows from a United States Department of Labor 4 regulation, which provides that employees "are protected from retaliation for opposing (e.g., filing 5 a complaint about) any practice which is unlawful" under the FMLA.

29 C.F.R. § 825.220(e). 6 This does not mean employees have no remedy when they suffer adverse consequences after 7 taking leave; such a claim is analyzed as an interference claim. See, e.g., *Dela Cruz v. Brennan*, 8 No. 10-01140, 2021 WL 23295, at *3 (N.D. Cal. Jan. 4, 2021). 9 Post's retaliation claims do not fit the narrow category of viable retaliation claims.

He 10 does not claim to have opposed a policy, and he does not claim to have filed a complaint. See 11 Opp'n at 6–8; see generally *Bowman Decl.*, ECF No. 13-2. It is undisputed that Post never 12 complained of retaliation during his employment. Undisp. Facts No. 44.

The only complaint 13 Post filed was his discrimination complaint to the California Department of Fair Employment and 14 Housing after his termination. *Not. Removal Ex. A*, at 28–30. Because Post cannot show he 15 opposed an action made unlawful by the FMLA or that he believed to be unlawful, the court 16 grants summary judgment on Post's FMLA and CFRA retaliation claims.

17 Moving, then, to the interference claims, Post can prevail only if he shows “(1) he was 18 eligible for the FMLA’s protections, (2) his employer was covered by the FMLA, (3) he was 19 entitled to leave under the FMLA, (4) he provided sufficient notice of his intent to take leave, and 20 (5) his employer denied him FMLA benefits to which he was entitled.” *Crawford v. JP Morgan Chase*, 983 F. Supp. 2d 1264, 127 (W.D.

Wash. 2013) (quoting *Sanders v. City of Newport*, 22 657 F.3d 772, 778 (9th Cir. 2011)). 23 In this case, the final element is dispositive. To prevail at trial, Post would need to show, 24 among other things, that “he was harmed by the violation.” *Bushfield*, 912 F. Supp. 2d at 955. 25 As a result, to survive summary judgment, he must show “a causal connection” between an 26 adverse employment action and his request for leave.

Newell v. Ariz. Bd. of Regents, No. 18- 27 01903, 2020 WL 1694735, at *4 (D. Ariz. Apr. 7, 2020). A plaintiff may use direct or 28 circumstantial evidence to prove causation. *Perez-Denison v. Kaiser Found. Health Plan of the 1 Nw.*, 868 F. Supp. 2d 1065, 1080 (D. Ore. 2012).

However, “the FMLA is not a strict-liability 2 statute.” *Edgar v. JAC Products*, 443 F.3d 501, 507 (6th Cir. 2006). An employer can defeat an 3 FMLA interference claim by showing it would have terminated the employee regardless of the 4 employee’s request for leave, for example by showing it had decided to terminate the employee 5 before the employee requested leave.

Perez-Denison, 868 F. Supp. 2d at 1080–81. This is an 6 affirmative defense; the burden is on the employer to prove an employee would have been 7 dismissed. *Bushfield*, 912 F. Supp. 2d at 959. The court need not determine how compelling 8 Otto’s reason is for terminating Post, so long as it is legitimate, nondiscriminatory, and not 9 prohibited by the FMLA. *Perez-Denison*, 868 F. Supp. 2d at 1083.

10 To show there is no link between Post’s request for leave and his termination, Otto offers 11 evidence from three employees—Barrett, Robert Ussery and Stuckey—showing the company had 12 already decided to fire him for legitimate reasons by the time he asked for leave. Barrett Decl. 13 ¶ 10; Stuckey Decl. ¶ 4; R. Ussery Decl. ¶¶ 6–7, 10. Barrett and Ussery attest they decided to 14 terminate Post for two reasons: concerns about Post’s management of the Aquatic Park Project 15 and dissatisfaction with his “attitude, internal communications and treatment of coworkers and 16 subordinates.” Barrett Decl. ¶ 10; R. Ussery Decl. ¶¶ 6–11.

Stuckey confirms Otto asked him to 17 take over the Aquatic Park Project because Post would be fired, and this happened before Post 18 told the company he needed time for his surgery. See Stuckey Decl. ¶ 4. 19 Post’s performance evaluations from 2017, 2018 and 2019 corroborate these claims about 20 Otto’s motivations and show the company’s concerns were longstanding.

See Perf. Rev. 2017, 21 Ex. 1 at 11–12; Perf. Rev. 2018, Ex. 2 at 16, 19; Perf. Rev. 2019, Ex. 3 at 23, 26. Although the 22 Ninth Circuit has cautioned against relying on subjective evaluations such

as these, that warning 23 applies only to evaluations conducted after employees have exercised their rights. See *Xin Liu*, 24 347 F.3d at 1136–37. If an employer conducts evaluations after learning its employee has 25 requested leave, for example, those evaluations could be “tainted” by the employer’s disregard for 26 the employee’s leave request.

Id. at 1137. Here, Post’s evaluations were conducted before he 27 requested leave, so they cannot have been “tainted” by his request for leave. See generally *Perf. 28 Rev. 2017*, Ex. 1; *Perf. Rev. 2018*, Ex. 2; *Perf. Rev. 2019*, Ex. 3. 1 This conclusion withstands Post’s argument that he had received more positive reviews 2 many years before. These older reviews do not contradict the company’s evidence showing it 3 was not satisfied with his performance leading up to the time of his termination.

Perf. Rev. 2009, 4 2011-2013, *Bowman Decl. Ex. 2*; *Opp’n* at 7–8; see also, e.g., *Holtzclaw v. Certainteed Corp.*, 5 795 F. Supp. 2d 996, 1010 (E.D. Cal. 2011) (performance reviews from 1995 through 2004 not 6 relevant to 2008 termination).

On this record, it is undisputed Otto had a legitimate, 7 nondiscriminatory and permissible reason to fire Post. 8 Post has not cited evidence to the contrary. He relies heavily on conversations with 9 colleagues about his upcoming leave in the days immediately before his termination. See *Undisp. 10 Facts No. 64*; *Post Dep. at 15–18*. He argues these discussions could show Otto had not finalized 11 its plans to fire him, so his leave request might have had an influence.

See *Opp’n* at 7–8. This is 12 only speculation, and speculation does not suffice at summary judgment. *Fed. R. Civ. P. 13 56(c)(1)*; *Matsushita*, 475 U.S. at 586. Post argues relatedly that the same conversations show 14 Otto’s decision to terminate him may have been pretextual. *Opp’n* at 7. This argument 15 improperly imports a burden-shifting schema into the FMLA. “[T]here is no room for a 16 *McDonnell-Douglas* type of pretext analysis when evaluating an ‘interference’ claim under [the 17 FMLA].” *Bachelder*, 259 F.3d at 1131.

No evidence ties the conversations to Otto’s decision, 18 and by the time Post was having these discussions, Otto’s evidence shows without contradiction 19 that its decision was final and unambiguous. 20 Post also points out that Barrett did not tell Post he would be fired in response to his 21 request for leave. See *Opp’n* at 7. Again, this evidence does not contradict the evidence that Otto 22 had already decided to terminate Post’s employment.

A jury might very well decide that Barrett’s 23 silence was misleading or confusing, but that finding would not be relevant. Post has not cited 24 authority showing Otto should have rejected his leave request or disclosed its plan to fire him in 25 response to his request for leave, and the court is aware of none. Post’s “personal impressions” 26 do not create a triable issue of fact.

Newell, 2020 WL 1694735, at *6. 27 Nor can Post succeed by showing he was fired so soon after requesting leave. *Opp’n* at 6– 28 7. Circumstantial evidence such as this can, in some cases,

support an interference claim. See, 1 e.g., *Newell*, 2020 WL 1694735, at *4. This may even be so if an employer claims it developed 2 legitimate concerns, if those concerns arose after the employee requested leave.

See, e.g., 3 *McKenna v. Permanent Med. Grp., Inc.*, No. 12-00849, 2013 WL 3766769, at *6 (E.D. Cal. 4 July 16, 2013). Timing is not a question for a trial, however, when, as in this case, an employer 5 has offered undisputed evidence that it had already decided to let the employee go. See, e.g., *Berg 6 v. TXJ Companies*, No. 12-11, 2013 WL 3242472, at *8 (D. Mont.

June 24, 2013); *Jones v. 7 Nevada*, No. 14-01930, 2016 WL 4707987, at *3 (D. Nev. Sept. 7, 2016). Otto has cited 8 undisputed evidence that it would have fired Post for legitimate reasons whether or not Post had 9 requested leave. Undisp. Facts Nos. 41, 43, 63. It also is undisputed that Otto would have 10 terminated Post even if Stuckey had not been able to take on the Aquatic Park Project.

See Barrett 11 Decl. ¶¶ 11–12; Stuckey Decl. ¶ 4; R. Ussery Decl. ¶¶ 11–14. 12 Finally, Post contends the court must deny summary judgment to permit him to cross- 13 examine Messrs. Ussery, Barrett and Stuckey at trial and, by extension, to permit a jury to decide 14 whether they are credible. But “neither a desire to cross-examine an affiant nor an unspecified 15 hope of undermining his or her credibility suffices to avert summary judgment.” Nat’l Union 16 Fire Ins.

Co. v. Argonaut Ins. Co., 701 F.2d 95, 97 (9th Cir. 1983); see also, e.g., *Noguera v. 17 Davis*, 5 F.4th 1020, 1056 & n. 12 (9th Cir. 2021) (reaffirming potential cross-examination does 18 not generate a genuine dispute of fact). 19 In sum, Post has not cited evidence a jury could rely on to decide Otto denied him benefits 20 under the FMLA or CFRA. Even when the court views the evidence in the light most favorable 21 to Post’s claims, as it must be at this stage, it remains undisputed that Otto would have terminated 22 Post’s employment regardless of his leave request.

The court grants summary judgment of these 23 claims. 24 Post agrees the success of his FEHA wrongful termination claim stands or falls with his 25 FMLA and CFRA claims. Opp’n at 9. The court grants summary judgment on this claim as well. 26 ///// 27 ///// 1 B. Age Discrimination 2 California law prohibits employers from terminating employees over the age of forty 3 based on their age.

Cal. Gov’t Code §§ 12926(b); 12940(a). California uses the McDonnell 4 Douglas burden-shifting framework for age discrimination claims. See *Merrick v. Hilton 5 Worldwide, Inc.*, 867 F.3d 1139, 1145 (9th Cir. 2017) (citing *Guz v. Bechtel Nat’l, Inc.*, 6 24 Cal.4th 317, 354 (Cal. 2000), and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)). 7 First, “the plaintiff bears the burden of establishing a prima facie case, which raises a 8 presumption of discrimination.” *Id.* To establish a prima facie case, employees must show they 9 were (1) at least forty years old, (2) performing their job satisfactorily, (3) discharged, and (4) 10 “either replaced by substantially younger

employees with equal or inferior qualifications or 11 discharged under circumstances otherwise giving rise to an inference of discrimination.” Id. at 12 1146 13 (quotation marks and citations omitted).

The burden then “shifts to the employer to rebut this 14 presumption by producing admissible evidence sufficient to show that ‘its action was taken for a 15 legitimate, nondiscriminatory reason.’” Id. at 1145–46 (quoting *Guz*, 24 Cal. 4th at 355). “If the 16 employer sustains its burden, the presumption established in the first step disappears, and the 17 plaintiff must raise a triable issue suggesting that the employer’s proffered reason is mere pretext 18 for unlawful discrimination, or offer evidence of discriminatory motive.” Id. at 1146.

19 As explained above, it is undisputed Post was not performing his job to Otto’s satisfaction 20 at the time he was terminated. In the years leading up to his termination, his performance reviews 21 consistently documented Otto’s concerns with his interpersonal and communication skills. 22 Barrett Decl. ¶ 9; R. Ussery Decl. ¶ 5; see also Perf. Review 2017, Ex. 1 at 11–12 (mentioning 23 problems with communication and teamwork); Perf.

Review 2018, Ex. 2 at 16, 19 (same); Perf. 24 Review 2019, Ex. 3 at 23, 26 (same). Robert Ussery had become concerned that Post would 25 abandon the Aquatic Park Project. R. Ussery Decl. ¶ 7. Post had also used inappropriate and 26 derogatory language in the workplace and had treated his colleagues “terribly.” Id. ¶ 9; Undisp. 27 Facts No. 30. Post has not shown he could carry his burden at the first stage of the McDonnell- 28 Douglas framework.

For that reason, he has not shown in response to Otto’s motion he could 1 prevail on a claim of age discrimination if this case went to trial. The court grants summary 2 judgment of the age discrimination claim. 3 IV. CONCLUSION 4 The courts grants summary judgment in full to Otto. 5 This order resolves ECF No. 11 and closes the case. 6 IT IS SO ORDERED. 7 DATED: March 2, 2023.