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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

SAAD BISHARA,

Plaintiff and Appellant,

v.

RITE AID CORPORATION et al.,

Defendants and  
Respondents.

B278525

(Los Angeles County  
Super. Ct. No. BC552233)

APPEAL from judgment of the Superior Court of Los Angeles County, Holly Kendig, Judge. Affirmed.

Shegerian & Associates, Carney R. Shegerian and Heather Conniff, for Plaintiff and Appellant.

Morgan, Lewis & Bockius, Thomas M. Peterson, Barbara A. Fitzgerald, Jason S. Mills, Kathryn T. McGuigan, Lisa M. Carrillo, Defendants and Respondents.

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Plaintiff and appellant Saad Bishara appeals from a judgment of dismissal following an order granting summary judgment in favor of defendants and respondents Rite Aid Corporation, Rite Aid Payroll Management, Inc., Thrifty Payless, Inc., Kert Patal,<sup>1</sup> Rehana Mustafa, and Ahlet Hii in this wrongful termination action. On appeal, Bishara contends triable issues of fact exist as to: 1) discrimination based on his age or having taken medical leave, including whether Bishara was satisfactorily performing his job at the time of his termination; 2) harassment based on his age and having taken medical leave; 3) retaliation; and 4) wrongful termination in violation of public policy. We conclude there was no direct evidence that Bishara was terminated as a result of prohibited discrimination. Bishara failed to show a triable issue of fact that he was satisfactorily performing his job at the time of his termination. There was no evidence that harassment based on age or medical leave made his working conditions intolerable. Bishara never complained of discrimination or harassment based on his age or medical leave, so there were no triable issues of fact as to retaliation or wrongful termination in violation of public policy. Therefore, we affirm the judgment.

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<sup>1</sup> The correct spelling of the name is Kirt Patel.

## **FACTS AND PROCEDURAL BACKGROUND**

### **Allegations of the Complaint**

On July 21, 2014, Bishara filed a complaint against the defendants for several causes of action including discrimination and harassment in violation of the Fair Employment and Housing Act (FEHA; Gov. Code, § 12940) based on his age and having taken medical leave, retaliation, and wrongful termination in violation of public policy. He alleged the following facts. Bishara was hired as a pharmacist by Rite Aid's predecessor Thrifty in 1982 and employed by Rite Aid for 32 years until his termination. After Mustafa was promoted to Pharmacist in Charge in 2008, she wrote up Bishara for minor mistakes. Mustafa said, "I don't know what is going on between you and Rite Aid." She belittled him by referring to him as "old man." She also mistreated and belittled three other male pharmacists to the extent that they quit or transferred. Pharmacy District Manager Hii wrote up Bishara for minor infractions, which often were not Bishara's responsibility. Hii wrote up Bishara for a mistake made by the pharmacy technician on November 25, 2013, stating that Bishara was responsible for failing to catch the error, but the technician was not disciplined. Pharmacy District Manager Patel began aggressively suggesting that Bishara resign. At times, Bishara was written up without his knowledge. On December 30, 2013, the defendants asked Bishara to sign a

document stating that he had been written up nine times. Bishara was not aware of nine incidents within the past year and asked to take the document home to review it. The defendants told him to call human resources instead, which he did. Approximately one week later, Bishara was written up and suspended until January 15, 2014. He believes Rite Aid's true reasons for his termination were age, medical leave, and his good faith complaints.

### **Summary Judgment Motion and Supporting Evidence**

The defendants filed a motion for summary judgment, or in the alternative, summary adjudication. They noted that Bishara had no direct evidence of age or medical leave discrimination. They argued that Bishara could not establish a prima facie case of age discrimination based on circumstantial evidence, because he could not show that he was satisfactorily performing his job at the time of the adverse employment action or replaced by a substantially younger person. Mustafa and Patel did not make the decision to terminate his employment. He had no evidence of circumstances suggesting a discriminatory motive by the decision makers. In addition, the stray remarks that he had alleged were not enough to support his causes of action. The comments that Patel made about retirement were several years before Bishara was terminated, and Bishara did not take offense to the nickname "old man."

Bishara's cause of action for discrimination based on taking medical leave should be summarily adjudicated, they argued, because Bishara was never denied leave. After he took leave, he returned to the same position as he left. He felt like he was treated differently after he returned, but could not recall any specific instances of disparate treatment. The amount of time between his return from leave in 2011 and his termination in 2014 was too attenuated to create a triable issue of material fact. Bishara also could not demonstrate that Rite Aid's nondiscriminatory reasons for his termination were pretextual.

Bishara had failed to identify any conduct actionable as harassment on the basis of age or medical leave. He testified that Hii was a fine district manager and did not contend that Hii did anything to harass him. Bishara's conversations with Patel did not rise to the level of pervasive harassment and took place six years before Bishara's employment was terminated. Bishara stated that he did not take it as an offense when Mustafa referred to him as "old man," and it did not rise to the level of actionable conduct.

Bishara did not complain about discrimination based on age or medical leave to anyone at Rite Aid or his union, so he could not maintain a cause of action for retaliation based on having made complaints. His cause of action for wrongful termination simply duplicated his other claims and failed for the same reasons.

In support of the motion for summary judgment, the defendants submitted Rite Aid employment documents.

Bishara's duties under Rite Aid policies were undisputed. As a Rite Aid pharmacist, Bishara received and filled prescriptions from patients and doctors. Bishara was responsible for verifying the accuracy of every prescription that Rite Aid filled under his supervision. He was required to perform a clinical review of each prescription for proper dosage, strength, directions, and drug interaction. He would electronically confirm that the review process was completed. He was also required to conduct quality assurance, in which he verified the patient's name, prescriber's name, medication name, dosage instructions, and strength on the label were consistent with the printed prescription. The Rite Prescription Program is Rite Aid's policy to ensure accuracy in filling prescriptions. For every incident in which a prescription is misfilled, a California Quality Assurance Review Form must be completed and reviewed with the pharmacist who made the error. After a pharmacist has three errors or other incidents in a rolling 12-month period, the pharmacist receives a verbal warning. After six incidents in a rolling 12-month period, the pharmacist receives a written counseling. After nine incidents, the pharmacist receives a final written warning.

Rite Aid submitted the declaration of Lauren Kim. Kim has worked as a Pharmacy District Manager for Thrifty Payless Inc., doing business as Rite Aid, since 2000. In 2008, two stores merged, including the store where Bishara worked. Kim offered Bishara the position of Pharmacy Manager of the newly merged store. He declined, because he

did not want to lose union membership benefits. Kim offered the position to Mustafa, who accepted. Kim did not participate in the decision to terminate Bishara.

Rite Aid also submitted Hii's declaration. In June 2012, Hii became the Pharmacy District Manager for the store at which Bishara worked. On May 30, 2013, Hii provided Bishara with a counseling/development form for having accumulated three prescription misfills in the prior 12 months: 1) on March 24, 2013, Rite Aid discovered a patient had received a prescription on October 11, 2012, labeled with directions to take one pill two times per day, instead of two pills two times per day; 2) on April 29, 2013, Rite Aid discovered that a patient received a prescription two days earlier for Levothyroxine 50 mcg., instead of Levothyroxine 25 mcg.; and 3) on May 10, 2013, Rite Aid discovered a patient received Citalopram 40 mg. on May 3, 2013, instead of Citalopram 20 mg. Hii went to the pharmacy and discussed with Bishara how the errors might be avoided in the future.

On May 17, 2013, Rite Aid discovered a minor patient received a prescription the day before which was labeled to take two capsules of Cefdinir two times a day, instead of one capsule two times a day. This was considered Bishara's fourth filling error.

On August 20, 2013, Rite Aid discovered a patient with a prescription for Temazepam received Mirtazapine on August 18, 2013. This was Bishara's fifth filling error.

On September 27, 2013, pharmacy technician Hilda Lopez sent an email to Hii expressing concerns about Bishara's mistakes in filling prescriptions. On October 6, 2013, Rite Aid discovered a patient had received a prescription on September 5, 2013, for Sertaline (Zoloft) 100 mg., instead of the requested prescription for Sertaline 25 mg. The patient experienced adverse side effects as a result of taking the wrong medication strength. This was considered Bishara's sixth filling error.

Failing to report a prescription error is an immediately terminable offense. Two errors were not reported. On November 15, 2013, a patient received Ortho Tricyclen, instead of Ortho Tricyclen Lo. Bishara did not report the error. Bishara's pharmacy manager Mustafa learned of the error on November 16, 2013. On November 13, 2013, a patient received Fentanyl 12 mcg., instead of Fentanyl 50 mg. Bishara did not report the error. The error was discovered by Rite Aid on November 22, 2013. These were the seventh and eighth errors accumulated by Bishara.

On November 25, 2013, Hii gave Bishara a second counseling/development form. Hii and human resources district manager Henry Michalski met with Bishara to discuss the errors. They notified him that he was suspended pending further investigation. Hii reviewed all of the errors with him and asked if he understood the misfill policy. He tried to work with Bishara to figure out why the misfills were occurring and what could be done to assist him.



Bishara returned to work on December 12, 2013. That day, Hii gave Bishara a final written warning counseling/development form for failing to report the November 15, 2013 Ortho Tricyclen Lo prescription error.

On December 24, 2013, Rite Aid discovered a patient had received two medications with their labels switched on December 13, 2013. The patient had a prescription for Trazadone and Latuda, but received his medications labeled with the wrong directions. For reasons that are not explained in the record, this was not counted as the ninth error, but was counted later.

On December 26, 2013, Rite Aid discovered that a patient received a prescription on December 23, 2013, for Sulfacetamide Sodium 10%, instead of Sodium Sulfacetamide 10% & Sulfur 5%. This was considered the ninth error accumulated by Bishara.

On December 30, 2013, as a result of the ninth error, Hii gave Bishara a second final warning written counseling/development form. Hii and Pharmacy District Manager Patel met with Bishara to review all of the errors, including the errors that they had previously discussed. Hii said that if Bishara accumulated a tenth error, his case would go to committee review. He asked how each error occurred and gave him a chance to explain.

The error made on December 13, 2013, and discovered on December 24, 2013, was considered Bishara's tenth prescription filling error. On January 7, 2014, Rite Aid

discovered a patient had received a prescription on January 6, 2014, for Tolterodine Tartrate instead of Detrol LA.

Based on Rite Aid policy, a Rite Aid field review committee conference was convened after the accumulation of Bishara's tenth prescription error. The committee consisted of Hii and Alternate Pharmacy District Manager Claire Attia, Senior Regional Human Resources Manager Richard Padilla, and Pharmacy Regional Vice-President Hossein Khanzadeh. The committee held a conference call with Bishara for half an hour on January 10, 2014. Hii reviewed the eleven errors attributable to Bishara that occurred between October 11, 2012, and January 6, 2014. Khanzadeh asked Bishara about the underlying cause of the errors. Bishara did not know and blamed pharmacy technicians. In the committee's opinion, Bishara did not accept responsibility for failing to catch errors. The committee conferenced after speaking with Bishara. Based on the evidence presented during the call, the lack of improvement by Bishara, and his inability to take responsibility for his mistakes and determine the root cause of the errors, the committee unanimously voted to terminate his employment.

After the committee's conference call, two prescription misfills were discovered that were attributable to Bishara. On January 10, 2014, Rite Aid discovered a patient with a prescription for Metoprolol Succinate had instead received Metoprolol Tartrate on October 30, 2013. On January 11, 2014, Rite Aid discovered a patient had received a

prescription on October 27, 2013, for Metformin with label directions to take one pill two times a day, instead of two pills two times a day. Pharmacist Jong Lee, who was a man in his late 50s, was laterally transferred to fill Bishara's position after his termination.

In addition to Hii's declaration, Rite Aid submitted the field review committee record. The notes reflected that Bishara received a final warning on December 20, 2013, and had been suspended on January 7, 2014.

Defendants submitted copies of the error reports listing Bishara as the pharmacist responsible for dispensing the prescriptions in error. They also submitted a copy of Lopez's e-mail stating that she was uncomfortable dispensing medication under Bishara's supervision. She said a mistake was being made every day. The stress was affecting her, and she did not want to continue working there. Every week a customer was angry because of Bishara. Lopez stated that she or Mustafa were constantly dealing with mistakes made the prior day by Bishara and they were the ones getting yelled at. She said that she had not mentioned it earlier because she was afraid of him and did not like confrontations.

Defendants also submitted Patel's declaration. He has been a Pharmacy District Manager since 2008. He described Bishara's job duties and the prescription filling process. Verification of the accuracy of a prescription is assigned to the filling pharmacist who is performing the clinical review and quality assurance. If a prescription error is discovered,

California law required a pharmacist to complete a form and report the error.

Bishara's deposition testimony was submitted as well. Mustafa became Bishara's pharmacy manager in February 2008. Bishara could not recall whether he had three incidents of incorrectly filled prescriptions as of May 30, 2013. Bishara admitted that he did not catch the prescription for Ortho Tricyclen Lo that was filled incorrectly. He signed the November 25, 2013 counseling/development form stating that he had six prescription errors, but said Hii did not review the errors with him and Bishara did not ask any questions. He did not look at the document, but he understood it was for making a mistake in filling six prescriptions. He simply signed it and returned it to Hii. He did not remember the December 13, 2013 counseling/development document, but it looked like his signature and he had no reason to doubt that it was his. Patel was at the meeting at the district office with Bishara and Hii on December 30, 2013, but he was Bishara's former district manager before Hii. They explained that he had nine incidents of incorrectly filling prescriptions in the last nine months. Bishara had refused to sign the December 30, 2013 counseling/development form.

Bishara thought Rite Aid built a case against him as part of a conspiracy to terminate him because of his age and ethnicity, but he never mentioned this to Hii or any employee in human resources. He never told anyone at Rite Aid that it was wrong that his employment was terminated

and he did not try to be rehired. Bishara does not have any evidence that the Rite Aid California Quality Assurance Review Forms which reported the prescription errors attributed to Bishara were faked or fabricated. As to most of the incidents, he did not recall them and did not remember whether they occurred or did not occur.

Bishara's concerns about being treated fairly began in 2008. Bishara reported to Kim as his district manager. Bishara took leave when he fell from a ladder in February 2008. Another store closed in 2008 and the files were transferred to Bishara's store, where Bishara was the Pharmacist in Charge and the acting Pharmacy Manager. Mustafa was the Pharmacist in Charge of the store that closed. While Bishara was on leave, Kim informed him that Mustafa would be the Pharmacist in Charge and the Pharmacy Manager of Bishara's store. Bishara did not have any objection to Mustafa being the Pharmacist in Charge. He figured it was not a big deal and he accepted it. Pharmacy Managers could not be in the union. Bishara preferred not to be a Pharmacy Manager because he could continue to be in the union and eligible for union benefits. Bishara returned from his leave to his position as a Pharmacist. He returned to work earlier than planned, although Kim did not say anything that required him to return. He simply felt like he was being pushed out.

Bishara thought there was an agreement that Mustafa was going to be transferred out of his store again after a month, but Kim kept Mustafa at the store to get back at him

and demoted him from Pharmacist in Charge to Pharmacist while he was on leave. A few weeks after becoming Pharmacy Manager, Mustafa told Bishara that Kim had instructed her to report everything. He does not know what Kim meant and did not ask, but he thought Kim wanted Mustafa to keep an eye on him in order to get him in trouble. Shortly afterward, Kim ceased to be Bishara's Pharmacy District Manager.

Patel became Pharmacy District Manager from 2008 to 2013. Patel was replaced by Hii in 2013. Bishara felt he was harassed by Patel, Mustafa and Hii. Patel was always rude, not nice, and he would talk to Bishara like he was a little kid. A few months after he started, he yelled at Bishara about a prescription transfer. Bishara believed Patel did not like him, based on his attitude toward Bishara, but he does not have any knowledge of anything negative that anyone said to Patel about him.

Three or four months after Patel started in 2008, he took Bishara aside. He was angry and said Bishara's employment records had been subpoenaed. He asked Bishara's age. When Bishara said he was 64 years old, Patel asked if he would be retiring soon. Bishara said he was not. Patel advised, "[Y]ou should take advantage of that. You guys have a good pension plan." Bishara repeated that he was not planning to retire. Patel said perhaps Bishara's wife was divorcing him, but Bishara responded that he had no knowledge of that. Bishara has no reason other than this conversation to think Patel wanted to get rid of him.

Bishara felt Patel told Hii what to do, because Patel was not his district manager and Patel and Hii meeting together meant they communicated about him. Bishara did not have any knowledge that Patel said anything negative about him. Bishara could not remember any instances where Hii treated him inappropriately or offensively. Hii was fine as a district manager.

Bishara stated that Mustafa harassed a 23-year-old male employee named Jordan Lotz and 40-year-old male employee. In approximately August 2014, Mustafa said, “I don’t know what’s going on between you and Rite Aid.” Bishara did not ask what she meant. His feeling was that someone higher up was pushing her to harass him, but he had no idea who that person would be.

Mustafa, Lopez, and a former technician named Pam Hanson called Bishara “old man.” Bishara did not feel like it was intended to be offensive at the time. He did not think anything of it until Patel made comments about retirement. Bishara did not report any concerns about Hii, Patel, or Mustafa to anyone at Rite Aid or his union.

Bishara took approximately one month leave for a prostate surgery operation in August 2011. When he requested leave, it was granted. He returned to the same position that he had left. He felt that Rite Aid personnel treated him differently because he had taken leave, but he could not provide any specific instance where he was treated differently because he had taken leave. Bishara sometimes

worked alone, sometimes with a technician, and sometimes he worked at the same time as Mustafa.

### **Opposition to Summary Judgment Motion and Supporting Evidence**

The parties filed a joint stipulation to dismiss causes of action and defendants other than those discussed above. Bishara filed an opposition to the motion for summary judgment with supporting evidence. Bishara argued that he had made a prima facie showing of discrimination based on his age and medical leave. The defendants' pervasive discriminatory remarks based on age required denial of the summary judgment motion. Falsification of two prescription errors cast doubt on the defendants' documentation and motive. The timing of Bishara's termination supported an inference of pretext with respect to retaliation and discrimination. He asserted that he engaged in protected activity when he requested to be transferred in 2008, when he took two-month medical leave for surgery and Mustafa's ageist comments increased on his return, and he challenged the legitimacy of his suspension by filing a grievance with his union. In addition, he argued there was ample evidence of pervasive harassment based on age.

Bishara filed his declaration in support of the opposition to summary judgment. He declared that he is 67 years old. From 1989 to 2008, he worked as the Pharmacist in Charge at the Border Avenue store. He was supervised from 2004 to 2008 by Pharmacy District Manager Kim. In



2008, he was removed as Pharmacist in Charge and replaced by Mustafa, who became Pharmacy Manager. From 2008 to 2014, Bishara worked as a staff pharmacist. His direct supervisor was Mustafa until his termination.

Mustafa was immediately critical of Bishara's work performance. She was curt and reported petty items to Kim, such as Bishara's failure to take out trash or tidy up. Bishara felt this was harassing him.

During Bishara's employment, he consistently received evaluations from his managers that he was meeting expectations or his performance was good. He could not recall a negative performance evaluation. He received customer-nominated awards for excellence. In 2007, 2008, 2010, and 2011, he received the "Favorite Pharmacist" award.

From 2008 to the end of 2012, Patel was the Pharmacy District Manager and Bishara's second level supervisor. When Patel became district manager, Bishara met with him, complained about Mustafa's unfair treatment, and asked to be transferred. Patel said a transfer was unnecessary and he would take care of the situation. Patel spoke with Mustafa. From that day forward, Patel was irritable and curt with Bishara. He yelled at Bishara about a transferred prescription. Three or four months after he became Pharmacy District Manager, Patel pulled Bishara aside to discuss the subpoenaed records and Bishara's retirement plans.

From 2010 until Bishara's termination in 2014, Mustafa openly referred to him as "old man" on multiple occasions. She used it in a teasing manner, insinuating a negative meaning. For example, she would remark that he could not do something right because he was an "old man." Bishara did not take offense initially, but understood it had more significance after Patel asked his age and retirement plans. Mustafa used the term more frequently after he returned from leave in 2011.

Bishara received a prostate cancer diagnosis after a biopsy in August 2011. He took leave for surgery and recovery from December 27, 2011, to February 20, 2012.

Between the end of 2012 and the beginning of 2013, Hii became the Pharmacy District Manager and Bishara's second level supervisor. In May 2013, Bishara began receiving disciplinary forms from Hii for prescription errors identified by Mustafa. When the errors were discovered, Mustafa did not review them with Hii to determine how they happened and prevent them in the future. Hii did not provide any details about the errors.

Bishara explained the incident on November 15, 2013, when he failed to report the birth control medication that had been filled incorrectly. He believed Lopez was responsible for reporting the error.

On November 23, 2013, Mustafa told him that she had discovered another error the day before. This time, Mustafa told him the customer's name. Thyra Abraham had received an incorrect strength of Fentanyl. Bishara did not believe he

could have made this error, because Fentanyl is a strong narcotic and he always took special care with it. He had counseled Abraham several times to stop taking it. Mustafa did not provide further information.

On November 25, 2013, he had another meeting with Hii. Hii said Bishara had accumulated three more prescription errors, totaling six for the year, but did not show any documentation. Hii told him that he was being suspended as of November 27, 2013, pending investigation for failing to report the prescription error involving the birth control medication. Bishara filed a formal grievance with his union representative and was told there would be an investigation.

On December 12, 2013, the union representative called and said to go back to work. Bishara returned to work on December 13, 2013. Bishara received the final written warning that day based on the incident for which he had been suspended.

On December 30, 2013, Bishara had a meeting at Hii's office. Bishara was dismayed to see Patel at the meeting, because he is not Bishara's supervisor. Bishara was certain the errors were being falsely created to terminate him. The final written warning listed nine prescription numbers and claimed documentation of each incident was attached, but no supporting documents were attached. Bishara could not recall the prescriptions from memory. He was suspended from December 30, 2013, to January 15, 2014.

He was asked to participate in a conference call with the review committee. He attended a meeting on January 15, 2014, where Hii and an unfamiliar woman told him that he was being terminated. Bishara was never given details about the additional prescription errors discovered between December 30, 2013, and January 10, 2014. He was never shown copies of the reports generated as a result of the alleged prescription errors prior to his termination. He has been depressed and lost salary and medical benefits.

In addition to his declaration, Bishara submitted his awards and performance evaluations in support of his opposition. In particular, he provided his 2013 performance review, which both Mustafa and Bishara signed on May 6, 2013. Mustafa assessed Bishara as meeting expectations or above expectations in all categories. Her overall rating was that he met expectations. She commented, “[Bishara] meets expectation[s] for job requirement. He seeks to understand the basis and logic for change initiatives. He identifies and understands business needs, issues and opportunities.”

Bishara submitted a declaration from former pharmacy clerk Lotz. Lotz worked at the store from early 2012 to June 2013. Mustafa was Lotz’s direct supervisor. Lotz heard Mustafa refer to Bishara as “old man” at least 20 times while he was employed at the store. When Lotz heard her, she was not using the term with Bishara directly, but speaking about him to others in the pharmacy when Bishara was not there. Mustafa used the term to criticize Bishara to other pharmacy technicians and clerks, stating that “Bishara

could not do his work because he was ‘an old man’ or Bishara forgets to do things because ‘he’s an old man.’” When Lotz heard Mustafa use the term, she was using it in a negative and dismissive manner. In the time that Lotz was at the store, he was never aware of any customer complaint involving Bishara. In his observation, Bishara was appreciated by customers and co-workers. He never heard negative comments about Bishara, except from Mustafa. Customers did not have a good experience with Mustafa. Lotz observed customers become upset because she failed to explain why a medication was not in stock or was delayed. She did not communicate well and had little patience. Lotz was not aware of any prescription error under Bishara while he was working at the store. An error was significant and was the type of thing staff discussed. He never heard it mentioned by anyone.

Bishara submitted a declaration from customer Abraham. She has obtained medication at the Border Avenue store three or four times per month for the past 11 years. She nominated Bishara on multiple occasions for pharmacist of the year. Bishara had outstanding customer service. Abraham took a Fentanyl patch for back pain. Bishara counseled her several times about the medication and strongly suggested to stop the medication, which she eventually did. Abraham has never reported a prescription error. She has never been contacted by Lopez, Mustafa or anyone else from Rite Aid to inform her that a prescription

error occurred. She never had a problem of any kind receiving the correct prescription from the Rite Aid store.

Bishara provided his own deposition testimony on several issues, including testimony that he was suspended for two weeks from December 30, 2013, to January 15, 2014.

Bishara provided copies of the error reports stating Mustafa called the patient to inform her that the Fentanyl prescription was misfilled and the patient returned the medication. Another report showed the pharmacy received an electronic prescription for the medication Detrol LA on January 6, 2013, and the pharmacist who dispensed the prescription was reported to have been Bishara.

Bishara provided Mustafa's deposition testimony. Mustafa heard customers refer to Bishara as "old man," but never any coworkers. Mustafa did not feel it was appropriate to correct a customer. When Mustafa spoke with Bishara about the misfilled birth control medication Ortho Tricyclen Lo, he raised his voice, started yelling, and said they were trying to get him fired. Mustafa felt threatened.

### **Reply and Trial Court Proceedings**

Rite Aid filed a reply. Rite Aid had honest reasons for Bishara's termination. There was no evidence that the reasons Rite Aid gave for Bishara's termination were pretextual, and therefore, no basis to infer that he was terminated based on his age or medical leave status. Rite

Aid argued that Bishara was relying on speculation that Mustafa fabricated 10 prescription errors to have him terminated because of his age or his prior medical leave. Abraham's declaration was irrelevant. Rite Aid provided the trial court with the unredacted prescription error report to show that Abraham was not the patient who received the incorrectly filled Fentanyl prescription. Rite Aid also provided time records showing that Bishara worked on January 6, 2013, and was not suspended as he had stated in deposition. In addition, the field review committee notes reflected that Bishara was suspended on January 7, 2014, not December 30, 2013. Therefore, Bishara had not established that the prescription error documentation was incorrect or falsified. No triable issue of fact had been raised.

A hearing was held on June 22, 2016. The trial court found Bishara had not shown a prima facie case of age discrimination because he had not raised a triable issue of fact that he was performing competently. He was getting good performance reports from Mustafa. He speculated without evidence that someone created false prescription error reports. There was no evidence that the error reports were manufactured, and no evidence that either his decision to take leave or his age was a substantial motivating factor for the actions taken against him. He had not shown causation. It was undisputed that he was not replaced by a substantially younger employee. The pharmacist who replaced Bishara was a lateral transfer in his late fifties.

Neither Mustafa, nor Patel, participated in the decision to terminate Bishara, and they were the only employees identified as demonstrating any conduct that could reasonably be construed as discriminatory. There was no evidence that Hii engaged in any discriminatory activity. Bishara admitted he made some of the prescription filling errors. Although Bishara believed other errors were fabricated, there was no evidence to support finding fabrication. Bishara stated that he was suspended during the January 6, 2014 error, but his own time card shows otherwise. The failure to report the error concerning the birth control medication was a terminable error in itself. Bishara failed to show two elements necessary to establish a prima facie case for age discrimination, namely, that he was performing his job competently at the time of the adverse employment action and causation.

Similarly, Bishara requested and received medical leave twice. With respect to the first leave, it was outside the statute of limitations and Bishara's facts showed that no demotion occurred. He demonstrated no adverse consequences from the second leave, except more frequent references to him as "old man." He returned to the same position at the same level of pay. His termination did not occur until January 2014, which was two years after he returned from leave. The length of time between taking leave and the adverse action demonstrated lack of causation. Even the prescription error counseling did not start until May 2013, which was more than one year after he had



returned from medical leave. There was no temporal or causal nexus between the medical leave and the alleged discriminatory actions. The court found no prima facie case of disability leave discrimination had been presented. Even if a prima facie case had been established, the court found Bishara had not raised a triable issue of fact as to whether Rite Aid's decision to terminate him was pretextual.

With respect to the claims for harassment, the trial court found that Bishara had not shown any harassing conduct on the basis of his decision to take disability leave. Mustafa's purported lack of concern about his welfare was not the basis of a harassment claim. Referring to Bishara as "old man" was not sufficiently pervasive and severe, but also was unrelated to the medical leave. And his claim that he was demoted while he was on leave was also not the basis of a harassment claim. In fact, the evidence showed that he was offered the pharmacy manager position ahead of Mustafa and he declined it.

The trial court also did not find evidence of harassment based on age. The one conversation with Patel in 2008 did not amount to severe or pervasive conduct as a matter of law. The questions were innocuous and did not direct Bishara to retire or characterize him as old. There was no evidence or indication that Mustafa's references to Bishara as "old man" were severe enough to create an atmosphere of harassment that would alter the terms and conditions of his employment. Bishara admitted the term did not bother him when she used it. He began thinking about it more only

after the conversation with Patel. He never objected to it, reported the behavior, or confronted Mustafa. There was no evidence that the comments were severe enough to interfere with a reasonable employee's work performance.

The trial court also found no evidence of retaliation on the basis of having reported unfair treatment based on age or disability leave. Because Bishara had not raised any triable issue with respect to discrimination, harassment or retaliation, the cause of action for wrongful termination in violation of public policy could not survive. Even if Mustafa told Bishara the wrong customer name in connection with the Fentanyl prescription error, it was still an error, and Bishara did not show otherwise.

On June 24, 2016, the trial court issued its order granting the motion for summary judgment, finding Bishara had not raised a triable issue of fact as to any claim. On August 10, 2016, the trial court entered judgment in favor of Rite Aid. Bishara filed a timely notice of appeal from the judgment.

## DISCUSSION

### **Standard of Review**

Summary judgment may be granted only if “there is no triable issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.” (Code Civ. Proc., § 437c, subd. (c); *Hampton v. County of San Diego*

(2015) 62 Cal.4th 340, 347 (*Hampton*).) A defendant moving for summary judgment must show “one or more elements of the cause of action . . . cannot be established, or that there is a complete defense to the cause of action.” (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*).) If defendant meets this burden, the burden shifts to plaintiff to produce admissible evidence showing a triable issue of material fact exists. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar, supra*, at p. 850.)

We review de novo the trial court’s grant of summary judgment. (*Hampton, supra*, 62 Cal.4th at p. 347; *Hartford Casualty Ins. Co. v. Swift Distribution, Inc.* (2014) 59 Cal.4th 277, 286.) We take the facts from the record that was before the trial court and consider all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained. (Code Civ. Proc., § 437c, subd. (c); *Hampton, supra*, 62 Cal.4th at p. 347.) “We liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party.” (*Yanowitz v. L’Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037 (*Yanowitz*); accord, *Hampton, supra*, 62 Cal.4th at p. 347.)

### **Discrimination**

Bishara contends that he presented direct and circumstantial evidence showing triable issues of fact exist

as to discrimination on the basis of his age and medical leave. We disagree.

### **A. Statutory Scheme**

The FEHA prohibits an employer from discriminating against an employee based on age (Gov. Code, § 12940, subd. (a)) or because of an individual's exercise of the right to medical leave (*Id.*, § 12945.2, subd. (l)). The elements of a discrimination cause of action under FEHA are “(1) the employee's membership in a classification protected by the statute; (2) discriminatory animus on the part of the employer toward members of that classification; (3) an action by the employer adverse to the employee's interests; (4) a causal link between the discriminatory animus and the adverse action; (5) damage to the employee; and (6) a causal link between the adverse action and the damage.”

(*McCaskey v. California State Automobile Assn.* (2010) 189 Cal.App.4th 947, 979 (*McCaskey*), quoting *Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 713.) “In employment discrimination cases under FEHA, plaintiffs can prove their cases in either of two ways: by direct or by circumstantial evidence. (*Guz [v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354 (*Guz*)).” (*DeJung v. Superior Court* (2008) 169 Cal.App.4th 533, 549 (*DeJung*)).

## **B. No Direct Evidence**

“Direct evidence is evidence which, if believed, proves the fact of discriminatory animus without inference or presumption. Comments demonstrating discriminatory animus may be found to be direct evidence if there is evidence of a causal relationship between the comments and the adverse job action at issue.” (*DeJung, supra*, 169 Cal.App.4th at p. 550.) We do not apply the three-stage burden-shifting test established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, when the plaintiff has presented direct evidence of discrimination. (*Ibid.*)

In this case, there is no direct evidence proving Bishara was terminated as a result of discriminatory animus based on his age or his exercise of the right to take medical leave. Patel made a few comments related to Bishara’s age in a conversation approximately five years before Bishara’s termination. He did not supervise Bishara for more than a year before Bishara was terminated and did not participate in the decision to terminate Bishara. There is no direct evidence that Patel took any adverse employment action toward Bishara based on his age or medical leave. Mustafa made comments related to Bishara’s age, but there is no causal relationship between any adverse employment action that Mustafa took against Bishara and her age-related comments. There is no direct evidence of discrimination based on Bishara’s age without inference and speculation.

Moreover, there was no direct evidence of discrimination based on Bishara's exercise of his medical leave rights.

### **C. Prima Facie Case Under Burden-Shifting Test**

We apply the *McDonnell Douglas* test to resolve disparate treatment discrimination claims that are supported solely with circumstantial evidence. (*Guz, supra*, 24 Cal.4th at p. 354.) First, "a prima facie case[ ] of age discrimination arises when the employee shows (1) at the time of the adverse action he or she was 40 years of age or older, (2) an adverse employment action was taken against the employee, (3) at the time of the adverse action the employee was satisfactorily performing his or her job and (4) the employee was replaced in his position by a significantly younger person." (*Hersant v. Dept. of Social Services* (1997) 57 Cal.App.4th 997, 1333, fns. omitted.) To present a prima facie case of discrimination based on an employee's exercise of the right to take medical leave would "typically require evidence that '(1) [the plaintiff] 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 denial of an available job, and (4) some other circumstance suggests discriminatory . . . motive. [Citations.]' (*Guz, supra*, at p. 355.)'" (*McCaskey, supra*, 189 Cal.App.4th at p. 979.)

If a prima facie case is established, the burden shifts to the defendant to produce evidence demonstrating the adverse action taken against the plaintiff was unrelated to his age or disability (i.e., a non-discriminatory reason). When an employer does so, the burden shifts back to the plaintiff, who must demonstrate a triable issue by identifying evidence that reasonably suggests the adverse action is instead attributable to intentional discrimination. (*Guz, supra*, 24 Cal.4th at p. 357; see *DeJung, supra*, 169 Cal.App.4th at p. 553 [once employer satisfies its burden, “the employee must demonstrate a triable issue by producing substantial evidence that the employer’s stated reasons were untrue or pretextual, or that the employer acted with a discriminatory animus, such that a reasonable trier of fact could conclude that the employer engaged in intentional discrimination”].)

The defendants presented evidence that Bishara was not performing his job competently, which was sufficient to shift the burden of proof on this issue, and Bishara failed to raise a triable issue of material fact. Bishara presented evidence that Mustafa made age-related comments, but there was no evidence that Mustafa did not scrutinize the work of younger employees just as closely. He did not present evidence that the prescription errors Mustafa reported did not occur or were accumulated by another pharmacist. He did not show any of the errors that she reported were fabricated. He admitted that he failed to catch some of the misfilled prescriptions, such as the birth

control prescription error that he failed to report. In connection with the Fentanyl prescription error, Mustafa told Bishara the wrong patient name, but there was no evidence that the name of the patient on the error report was not accurately reported at the time that the error was discovered. Bishara presented no evidence that any of the errors reported by Mustafa had not been made.

Bishara also claimed in his opposition that he was suspended from work when a prescription error was attributed to him on January 6, 2014, implying a conspiracy to attribute errors to have him fired. Bishara's complaint, however, alleged that he was suspended approximately a week after he received the December 30, 2013 counseling development document. The allegations of the complaint are consistent with the defendants' evidence that Bishara's time records showed he worked January 6, 2014, and the field committee report stated Bishara was suspended as of January 7, 2014. In light of the allegations of the complaint and the defendants' evidence, Bishara's statement in deposition that he was suspended "the whole time" from December 30, 2013, to January 15, 2014, which was restated in his declaration, fails to create a triable issue of fact. Moreover, a single error report erroneously attributed to him is not sufficient to raise a triable issue of fact as to whether Bishara was performing his job competently for a prima facie case of age or leave discrimination.



## **Harassment**

Bishara contends the same evidence raises a triable issue of fact as to harassment based on age and medical leave, but he makes no serious explanation of this argument beyond citation to authority. We disagree that the evidence demonstrates a triable issue of fact.

Government Code section 12940, subdivision (j), defines “unlawful employment practice” to include harassment in the workplace based on age. “Under the statute “harassment” in the workplace can take the form of “discriminatory intimidation, ridicule and insult” that is ““sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.”” [Citations.] Moreover, harassing conduct takes place “outside the scope of necessary job performance, conduct presumably engaged in for personal gratification, because of meanness or bigotry, or for other personal motives.” (*Reno v. Baird* (1998) 18 Cal.4th 640, 646 . . . .) “Thus, harassment focuses 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.” (*Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 706 . . . .)’ (*Rehmani v. Superior Court* (2012) 204 Cal.App.4th 945, 951, original italics (*Rehmani*).)” (*Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 869 (*Serri*).)

“Whether the conduct of the alleged harassers was sufficiently severe or pervasive to create a hostile or abusive working environment depends on the totality of the circumstances. “These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.” [Citations.] “Common sense, and an appropriate sensibility to social context, will enable courts and juries to distinguish between simple teasing or roughhousing . . . and conduct [that] a reasonable person in the plaintiff’s position would find severely hostile or abusive.” [Citations.] As in sex-based harassment claims, “[t]he plaintiff must prove that the defendant’s conduct would have interfered with a reasonable employee’s [fn. omitted] work performance and would have seriously affected the psychological well-being of a reasonable employee and that [he or she] was actually offended.” [Citations.]’ (*Rehmani, supra*, 204 Cal.App.4th at pp. 951–952.)” (*Serri, supra*, 226 Cal.App.4th at p. 870.)

In this case, the defendants presented evidence that Patel’s age-related comments about Bishara’s retirement plans took place in a single conversation more than five years before Bishara filed his action, and Bishara was not offended when Mustafa referred to him as “old man.” Bishara failed to raise a triable issue of fact on the cause of action for harassment, because although he eventually connected Patel’s comments with Mustafa’s comments, there

was simply no evidence that Mustafa's comments offended Bishara or unreasonably interfered with his work performance. The age-related comments did not raise a triable issue of harassment in this case. There was no evidence of any harassment as a result of Bishara having taking medical leave.

### **Retaliation**

Bishara contends that he showed a triable issue of fact with respect to his cause of action for retaliation in connection with age discrimination and medical leave. We disagree as to both.

Employers subject to the FEHA may not “discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden [by the statute] or because the person has filed a complaint, testified, or assisted in any proceeding under this part.” (Gov. Code, § 12940, subd. (h).) For a claim of retaliation under the FEHA to survive summary judgment, there must be evidence on which a factfinder could conclude “(1) [the employee] 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.” (*Yanowitz, supra*, 36 Cal.4th at p. 1042.) If the employer demonstrates a legitimate reason for its adverse employment action, the burden shifts back to the employee to prove intentional retaliation. (*Ibid.*)

In this case, the defendants submitted evidence that Bishara did not engage in a protected activity. Bishara did not complain to anyone at Rite Aid or at his union about discrimination or harassment based on his age. This evidence was sufficient to shift the burden to Bishara. Bishara failed to show in the trial court or on appeal that he engaged in any protected activity.

“A plaintiff can establish a prima facie case of retaliation in violation of the [California Family Rights Act (CFRA)] by showing the following: (1) the defendant was a covered employer; (2) the plaintiff was eligible for CFRA leave; (3) the plaintiff exercised his or her right to take a qualifying leave; and (4) the plaintiff suffered an adverse employment action *because he or she exercised the right to take CFRA leave.*” (*Rogers v. County of Los Angeles* (2011) 198 Cal.App.4th 480, 491.)

The defendants submitted evidence that Bishara took medical leave as requested, returned to the same position at the same pay level, and did not even receive a disciplinary report for more than a year after he returned from his medical leave in February 2012. He was terminated two years after he returned to work from medical leave. This evidence was sufficient to shift the burden to Bishara on the cause of action for retaliation, and he provided no evidence that he suffered any adverse employment action because he exercised the right to take CFRA leave. The trial court properly granted summary judgment as to the cause of action for retaliation.

Because there were no triable issues of fact as to discrimination, harassment or retaliation, the trial court properly granted summary judgment of the cause of action for wrongful termination in violation of public policy as well. Bishara does not contend otherwise in his briefs on appeal.

### **DISPOSITION**

The judgment is affirmed. Respondents Rite Aid Corporation, Rite Aid Payroll Management, Inc., Thrifty Payless, Inc., Kert Patal, Rehana Mustafa, and Ahlet Hii are awarded their costs on appeal.

KRIEGLER, Acting P.J.

We concur:

BAKER, J.

DUNNING, J.\*

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\* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.