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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

DAVID MERRITT, Plaintiff and Appellant, v. EQUINOX FITNESS WOODLAND HILLS INC., et al., Defendants and Respondents.	B266534 (Los Angeles County Super. Ct. No. BC532180)

APPEAL from a judgment of the Superior Court of Los Angeles County, Holly E. Kendig, Judge. Affirmed in part, reversed in part.

JML Law, Joseph M. Lovretovich, David F. Tibor and Jennifer A. Lipski for Plaintiff and Appellant.

Jackson Lewis, Henry L. Sanchez and Sherry L. Swieca for Defendants and Respondents.

INTRODUCTION

David Merritt sued his former employer, Equinox Fitness Woodland Hills and Equinox Fitness, Inc. (collectively, Equinox), for disability discrimination in violation of the California Fair Employment and Housing Act (FEHA), Government Code section 12900, et seq.[1] The trial court granted Equinox's motion for summary adjudication on the FEHA-based claims, concluding the undisputed facts established that Merritt did not suffer from a "disability" as defined by FEHA, and that Equinox terminated his employment for a legitimate nondiscriminatory reason. The court also granted Equinox summary adjudication on Merritt's request for punitive damages. We affirm the court's ruling on the punitive damages claim, and reverse the judgment in all other respects.

FACTS AND PROCEDURAL BACKGROUND

Consistent with the applicable standard of review, we state the facts established by the parties' evidence in the light most favorable to Merritt as the nonmoving party, drawing all reasonable inference and resolving all evidentiary conflicts, doubts or ambiguities in Merritt's favor. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334 (*Guz*); *Sandell v. Taylor-Listug, Inc.* (2010) 188 Cal.App.4th 297, 308 (*Sandell*); *Arteaga v. Brink's, Inc.* (2008) 163 Cal.App.4th 327, 335, 341-342 (*Arteaga*).)

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[1] Statutory references are to the Government Code, unless otherwise indicated.

1. *Merritt's Employment as a Personal Trainer for Equinox*

On September 25, 2012, Equinox hired Merritt as a personal trainer at its Woodland Hills gym. Merritt reported to the personal trainer manager, Cameron McGarr; fitness managers, Don Powers and Jana King; and the gym's general manager, Chris Wellbaum.

As a personal trainer, Merritt was required to complete floor shifts and conduct personal training sessions. According to Equinox's "Personal Trainer Performance Agreement," trainers were expected to work a minimum of 42 hours per two-week pay period. Trainers who did not meet their minimum productivity commitment through training sessions (42 training sessions in a two-week period) were required to work floor shifts to cover the remaining hours. Typical floor shift duties included arranging weights, distributing towels, and ensuring that the floor stayed orderly. Floor shifts also served as paid networking opportunities for personal trainers "working toward building a client base or toward re-establishing full-time productivity." Equinox paid personal trainers slightly more than minimum wage for floor shifts and an additional commission for paid training sessions.

Merritt joined Equinox as a Tier 1 personal trainer. From November 2012 through January 2013 he conducted a total of 26 paid personal training sessions. During that period, Powers and McGarr encouraged Merritt to take classes to become a Tier 2 trainer. In January 2013, after completing the required course work and passing the final exam, Merritt was promoted to Tier 2. The promotion required approvals from the general manager, Wellbaum, as well as Powers and McGarr.

In mid-January 2013, Equinox approved and paid for Merritt to participate in a new training program, "Animal Flow." After completing the training, Merritt conducted weekly presentations on Animal Flow for gym clients. Powers praised Merritt for these presentations.

In February and March of 2013, Merritt conducted a total of 18 paid personal training sessions. In April, he conducted 25 sessions and received praise from McGarr for the increased productivity. In May, Merritt conducted 23 sessions. That month he also received permission from Equinox to attend classes for the Tier 3 personal trainer exam.

At the beginning of June 2013, McGarr presented Merritt with an "action plan" for the month. Under "Overall observations," McGarr wrote of Merritt, "Sounds great on the phone and can talk to people easily. Is very professional and has ability to be full time." The action plan called for Merritt to (1) increase the number of complimentary fitness evaluations (referred to as "Equifits") he conducted each week, with the goal of achieving two per week; (2) increase his sessions per client to more than six by the end of the month; and (3) "set and work to achieve goals" needed to reach a "full time client load." While certain goals were to be accomplished by the end of June, each goal had specific action items—such as, "track[ing] new members met on each floor shift" or "identify[ing] clients who are not training an average of 2x/week"—with deadlines ranging between June 7 and June 17, 2013.

2. *Merritt's Injury*

On the morning of June 18, 2013, Merritt met with McGarr for their regularly scheduled weekly meeting. McGarr held individual meetings with every personal trainer on a weekly basis. They discussed Merritt's progress toward achieving his goals for the month and the goals he needed to achieve for July. Per his discussion with McGarr, Merritt noted that his "major goal" for July was to have six active clients by the end of the month. McGarr told Merritt that if he failed to accomplish the goal by the end of July, they would need to have a discussion about his future employment with Equinox.

Later that day, while adjusting weights during his floor shift, Merritt was injured when a 45-pound circular weight fell onto his feet from a height of approximately three feet. He did not scream or curse because there were members in the area. He said he was in "extreme pain" and he "didn't know if [his foot] was broken." Merritt tried to "walk off" the injury, but the pain worsened. After about five to 10 minutes he removed his shoes to see if the impact broke skin, which it had.

Merritt reported the injury to King, who was conducting a weekly meeting with another trainer at the time. Merritt interrupted the meeting because the pain was so intense and he thought he may need to see a doctor. King initially asked Merritt if he was trying to " 'get workers' comp,' " but then clarified she was " 'just joking.' " She said she needed to notify McGarr, as she did not know how to fill out the workers' compensation paperwork. When Merritt asked King about seeing a doctor, she told him McGarr would file the paperwork and Equinox would "give" him a doctor per the company's "protocol." Merritt went

home and attempted to self-treat the injury with ice and elevation.

On June 20, 2013, Merritt met with McGarr and King. Merritt told McGarr that he was "still in pain" and asked when he could see Equinox's doctor. McGarr said he needed to do his investigation first and then Merritt would be referred to a doctor. According to Wellbaum, that statement was inconsistent with Equinox's procedures, which required management to immediately fill out the appropriate paperwork and send an employee to the company's medical provider upon the report of a work-related injury. Merritt returned home after the meeting, having worked less than three hours that morning.

Later that afternoon, Merritt emailed King, with a courtesy copy to McGarr. He told King he wanted to "follow up" on the injury he reported two days earlier and asked her to "[l]et me know what I need to do next." He also advised her that he planned to see a doctor later that evening. Merritt called a doctor from his insurer's approved list, but the doctor's office did not have an available appointment until several days later.

King confirmed that Merritt was walking with a "changed gait" on the date of the injury and that the condition persisted for up to a week after. Wellbaum learned of Merritt's injury on June 20, 2013 and later observed him walking with a "bit of a limp." After his injury, Merritt worked every day he was scheduled to work, including the four consecutive days following his injury. He said he was in "a lot of pain" at the time, but wanted to work through it to "show my dedication to Equinox."

On June 21, 2013, McGarr emailed Merritt to request additional information for the workers' compensation incident report. McGarr asked if there were any witnesses to the incident, whether Merritt stopped working and if he planned to miss any days of work. He also requested the name of Merritt's doctor and the medical facility where Merritt received treatment.

On June 25, 2013, Merritt was examined by Dr. Richard Sarte. Dr. Sarte observed "[t]rauma [to] both great toes," and noted that Merritt continued to experience more pain to the left than the right toe. Radiographs showed "some arthritic changes" to the left great toe and "small cystic changes" to the left foot. Dr. Sarte referred Merritt for an MRI of his left foot and prescribed him pain and anti-inflammatory medications. He also advised Merritt to wear a non-flexible shoe to reduce joint movement and to take a break from standing or walking on his feet every hour.

After his appointment, Merritt met with McGarr. Merritt maintained the meeting focused principally on his injury and the doctor's order to spend time off his feet every hour; however, McGarr claimed he also gave Merritt the goal of conducting at least three Equifits between June 25 and July 2, 2013 and that they discussed the consequences for failing to meet the goal. Merritt acknowledged his action plan required him to conduct Equifits, but he denied that this goal or any attendant consequences were discussed at the June 25 meeting.

On June 27, 2013, Merritt had a MRI performed on his left foot.

3. *Merritt's Termination*

On July 1, 2013, Merritt wrote an email responding to McGarr's earlier questions about his treatment and whether he planned to take time off from work. Merritt explained that Dr.

Sarte had referred him for an MRI to determine whether there was "soft tissue and nerve damage" and that the results should be available the following day. He also advised McGarr that he was "presently unable to stand for long periods without the prescribed pain medication" and that he would make a decision about taking time off "once the prognosis is in."

The next day, on July 2, 2013, McGarr submitted a request to Equinox's payroll provider for preparation of Merritt's final paycheck.

On July 5, 2013, King notified Merritt that Equinox had decided to terminate his employment. She handed Merritt a form, titled "Record of Discussion," which McGarr had prepared, though he was not present at the meeting. Under the heading "Previous Incidents," the form stated: "Was supposed to do 3 equifits b/t 6/25 and 7/2 and completed zero; consequences were discussed when goal was set 6/25." Under the heading "Describe Unsatisfactory Performance/Behavior," the form stated: "Meeting set performance goals are mandatory for the company. Total of number produced is often significantly lower than what is mandated by the company. Clear directions were given." Finally, under the heading "Consequences if Unsatisfactory Performance/Behavior occurs again," the form stated: "Continuted [*sic*] underperformance has resulted in termination."

Merritt protested that McGarr had promised he would have until the end of July 2013 to have six active clients. He also asserted that he was not provided the leads or clients that Equinox offered to other trainers. Merritt questioned King about whether his injury played any role in the termination decision, and complained that his final paycheck was short. King was

unable to address these issues and told Merritt he would need to speak with McGarr.

A few days later, Merritt met with McGarr and Wellbaum to discuss his termination. Merritt once more complained that McGarr had promised he would have until the end of July to achieve certain goals, and he again raised concerns that his injury had influenced the termination decision. McGarr responded that he had not seen the "same energy" from Merritt and that "he was putting in no effort in achieving the behavioral goals" that they had discussed. McGarr said they had "decided to move forward with the termination, despite it not, in fact, being the end of July." For his part, Wellbaum acknowledged it was reasonable for Merritt to expect he would have until the end of July to accomplish the goal, but he nevertheless said they had decided to " 'part ways.' " Wellbaum said the decision would be the same, even if Merritt got " 'better after workers' comp.' "

After his termination, Merritt continued to suffer pain and to receive treatment for osteoarthritis in his feet. A medical evaluation prepared by the Agreed Medical Examiner, Dr. Lee Woods, for Merritt's workers' compensation case determined that, "[i]n reference to the left foot, Mr. Merritt is precluded from engaging in activities requiring repetitive prolonged standing and walking, squatting, kneeling, ladder and stair climbing." In December 2013, Merritt began physical therapy.

4. *Merritt's Lawsuit Against Equinox*

On January 3, 2014, Merritt filed a six-count complaint against Equinox for (1) failure to pay earned wages; (2) disability discrimination; (3) failure to accommodate; (4) failure to engage in the interactive process; (5) wrongful termination in violation of public policy; and (6) declaratory and injunctive relief. The

complaint sought compensatory and punitive damages, in addition to other relief.

5. *Summary Judgment*

On March 13, 2015, Equinox filed a motion for summary judgment. The motion principally argued Merritt could not establish a claim for disability discrimination because his injury did not constitute a " 'physical disability' " under FEHA. Equinox also maintained that it terminated Merritt's employment for a legitimate nondiscriminatory reason—namely, his "failure to meet personal training session goals." Finally, Equinox argued Merritt could not recover punitive damages because McGarr, King and Wellbaum were not "managing agents" of Equinox.

The trial court granted summary adjudication with respect to all causes of action, except the claim for failure to pay earned wages. The court concluded Merritt could not establish he suffered from a physical disability under FEHA, because he "does not dispute that he did not yell or curse at the time of the accident, never took any time off of work (even in the four days after the accident, before he was taking any pain medication), or that no doctor ever diagnosed any injury to either foot, let alone one that limited plaintiff from working or participating in any other major life activity."

The court likewise concluded that Merritt had failed to raise a triable issue of fact with respect to Equinox's asserted nondiscriminatory reason for terminating his employment. The court explained, "plaintiff submits no evidence showing that McGarr knew that plaintiff's injury constituted a disability when he decided to terminate plaintiff for poor performance, or any evidence to suggest that plaintiff's injury played any role in the termination decision." In that regard, the court cited Merritt's

admission that he told Wellbaum he had a " 'sore big toe' " and "Wellbaum's testimony that plaintiff was not visually limping except for immediately after the injury."

As for all other FEHA-related causes of action, the court concluded Merritt's inability to establish he suffered a physical disability precluded relief. Finally, the court concluded Merritt could not recover punitive damages because there was no evidence that King, McGarr or Wellbaum exercised authority over corporate policy, or that they acted with malice, oppression or fraud.

Merritt voluntarily dismissed the failure to pay earned wages claim, and filed a timely notice of appeal.

DISCUSSION

1. *Standard of Review and* McDonnell Douglas *Test for Summary Judgment in Employment Discrimination Cases*

"Because of the similarity between state and federal employment discrimination laws, California courts look to pertinent federal precedent when applying our own statutes. [Citation.] In particular, California has adopted the three-stage burden-shifting test established by the United States Supreme Court for trying claims of discrimination . . . based on a theory of disparate treatment." (*Guz, supra,* 24 Cal.4th at p. 354, citing *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 [93 S.Ct. 1817, 36 L.Ed.2d 668] (*McDonnell Douglas*).) "This so-called *McDonnell Douglas* test reflects the principle that direct evidence of intentional discrimination is rare, and that such claims must usually be proved circumstantially. Thus, by successive steps of increasingly narrow focus, the test allows discrimination to be inferred from facts that create a reasonable likelihood of bias and

are not satisfactorily explained." (*Guz,* at p. 354; *Arteaga, supra,* 163 Cal.App.4th at p. 342.)

"[T]he *McDonnell Douglas* test was originally developed for use at trial, not in summary judgment proceedings." (*Sada v. Robert F. Kennedy Medical Center* (1997) 56 Cal.App.4th 138, 150 (*Sada*); *Guz, supra,* 24 Cal.4th at pp. 354–355.) Unlike a trial, a "defendant seeking summary judgment must bear the initial burden of showing that 'the action has no merit' (Code Civ. Proc., § 437c, subds. (a) & [(o)(2)]), and the plaintiff will not be required to respond unless and until the defendant has borne that burden." (*Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718, 1730.) Thus, in an employment discrimination case, the employer bears the initial burden of showing " 'either that one or more of plaintiff's prima facie elements is lacking, or that the adverse employment action was based on legitimate, nondiscriminatory factors.' " (*Sada,* at p 150.) " '[T]he 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.' " (*Ibid.*, italics omitted; *Arteaga, supra,* 163 Cal.App.4th at p. 344; *Sandell, supra,* 188 Cal.App.4th at p. 309.)

" 'Summary judgment is granted when a moving party establishes the right to the entry of judgment as a matter of law. [Citation.] On appeal, the reviewing court makes " 'an independent assessment of the correctness of the trial court's ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law.' " ' " (*Sandell, supra,* 188 Cal.App.4th at p. 308; *Guz, supra,* 24 Cal.4th at p. 334.)

"In independently examining the record on appeal 'to determine whether triable issues of material fact exist,' we ' "consider[ ] all the evidence set forth in the moving and opposition papers except that to which objections were made and sustained." [Citations.]' [Citation.] Further, ' "we must view the evidence in a light favorable to plaintiff as the losing party [citation], liberally construing [the plaintiff's] evidentiary submission while strictly scrutinizing the defendants' own showing, and resolving any evidentiary doubts or ambiguities in plaintiff's favor." ' " (*Sandell, supra,* 188 Cal.App.4th at p. 308; *Arteaga, supra,* 163 Cal.App.4th at pp. 341-342.)

" ' "In the summary judgment context, . . . the evidence must be incapable of supporting a judgment for the losing party in order to validate the summary judgment." ' [Citation.] ' "Thus even though it may appear that a trial court took a 'reasonable' view of the evidence, a summary judgment cannot properly be affirmed unless a contrary view would be unreasonable as a matter of law in the circumstances presented." ' " (*Sandell, supra,* 188 Cal.App.4th at p. 308.)

2. *Equinox Failed to Negate Merritt's Prima Facie Case for Disability Discrimination*

"A prima facie case for discrimination 'on grounds of physical disability under the FEHA requires plaintiff to show: (1) he suffers from a disability; (2) he is otherwise qualified to do his job; and, (3) he was subjected to adverse employment action because of his disability.' " (*Faust v. California Portland Cement Co.* (2007) 150 Cal.App.4th 864, 886 (*Faust*).) "The prima facie burden is light; the evidence necessary to sustain the burden is minimal. [Citation.] [G]enerally an employee need only offer sufficient circumstantial evidence to give rise to a reasonable

inference of discrimination." (*Sandell, supra,* 188 Cal.App.4th at p. 310.)

Equinox contends the evidence conclusively negated the disability and causation elements of Merritt's prima facie case. We address each element in turn, beginning with the first: whether Merritt suffered from a disability.

a. *There was sufficient evidence to find Merritt suffered from a physical disability*

FEHA prohibits employment discrimination based on a physical disability. (§ 12940, subd. (a).) The statute's provisions are to be interpreted broadly to provide robust protection. (See § 12926.1, subd. (b); see also § 12993, subd. (a) ["The provisions of [FEHA] shall be construed liberally for the accomplishment of [its] purposes"].)

Under FEHA, a " '[p]hysical disability' " includes having a physiological condition that both (1) "[a]ffects one or more . . . body systems," including the "musculoskeletal" system; and (2) "[l]imits a major life activity." (§ 12926, subd. (m)(1).) A physiological disorder "limits a major life activity if it makes the achievement of the major life activity difficult." (§ 12926, subd. (m)(1)(B)(ii).) " 'In deciding whether [the employees'] limitations . . . make them "disabled" under FEHA, the proper comparative baseline is either the individual without the impairment in question or the average *unimpaired* person.' " (*Arteaga, supra,* 163 Cal.App.4th at p. 345.)

The term " '[m]ajor life activities' shall be broadly construed and includes physical, mental, and social activities and working." (§ 12926, subd. (m)(1)(B)(iii).) FEHA's accompanying regulations add that "[m]ajor life activities include, but are not limited to, . . . performing manual tasks, . . . *walking*, standing, sitting,

reaching, lifting, [and] bending." (Cal. Code Regs., tit. 2, § 11065, subd. (l)(1), italics added; *Sandell, supra,* 188 Cal.App.4th at p. 311.) Further, " 'working' is a major life activity, regardless of whether the actual or perceived working limitation implicates a particular employment or a class or broad range of employments." (§ 12926.1, subd. (c).)

In contrast to the federal Americans with Disabilities Act of 1990 (ADA), which requires that a disability "*substantially* limits" a major life activity (42 U.S.C. § 12102(1)(A), italics added), FEHA requires only that the physiological impairment "limit" such activities. (§ 12926.1, subd. (c); § 12926, subd. (m)(1)(B); *Sandell, supra,* 188 Cal.App.4th at p. 312.) "This distinction is intended to result in broader coverage under the law of this state than under that federal act." (§ 12926.1, subd. (c).) Thus, under FEHA, whether a condition limits a major life activity "shall be determined without regard to mitigating measures such as medications, assistive devices, prosthetics, or reasonable accommodations, unless the mitigating measure itself limits a major life activity." (§ 12926, subd. (m)(1)(B)(i); § 12926.1, subd. (c).) Further, although "mild" conditions that "have little or no residual effects," such as "minor cuts, sprains, muscle aches, soreness, bruises, or abrasions," are not disabilities under FEHA (Cal. Code Regs., tit. 2, § 11065, subd. (d)(9)(B)), short-term or temporary conditions that do limit a major life activity will qualify for protection. (See *Diaz v. Federal Express Corp*. (C.D.Cal 2005) 373 F.Supp.2d 1034, 1051-1053 [unlike ADA, FEHA has no durational requirement for evaluation of whether condition constitutes disability]; accord *Avila v. Continental Airlines, Inc.* (2008) 165 Cal.App.4th 1237, 1249.)

Equinox contends that Merritt's injury merely resulted in " '*soreness*' " and that Merritt "presented no evidence that it affected a 'body system,' " as required by FEHA. Additionally, Equinox argues Merritt failed to demonstrate that the condition limited a major life activity. Although Equinox acknowledges that walking constitutes a major life activity, it maintains Merritt's "injury did not make achievement of [that] activity difficult." Merritt offered sufficient evidence to dispute this contention.

Equinox relies principally upon *Arteaga*. The case, while instructive, is readily distinguished. The plaintiff in *Arteaga* worked as a "messenger" for the Brink's armored vehicle service, and was responsible for supervising the vehicle and its crew to ensure the security of shipments of cash. (*Arteaga, supra,* 163 Cal.App.4th at p. 335.) Due to several cash shortages on runs where the plaintiff had been the messenger, Brink's opened a formal investigation. (*Id.* at pp. 336-337.) During the investigation, the plaintiff "informed Brink's for the first time that he was feeling a combination of 'pain' and 'numbness' in his arms, fingers, shoulders, and feet." (*Id.* at p. 337.) The same day, he was examined by a physician, who determined the plaintiff was " 'okay' and sent him back to work with a full release." (*Id.* at p. 338.) Six days later, Brink's terminated the plaintiff's employment, citing the shortages and management's " 'loss of confidence' " in his " 'ability to perform [his] duties at the standard required.' " (*Id.* at p. 339.) Some time after his termination, the plaintiff was diagnosed with carpal tunnel syndrome, which "limited him in only one respect: He could no longer play soccer." (*Id.* at p. 340.)

The *Arteaga* court concluded the plaintiff did not have an actual disability because there was no evidence his symptoms made "the performance of his job duties difficult as compared to his unimpaired state or to a normal or average baseline." (*Arteaga, supra,* 163 Cal.App.4th at p. 346.) First, the court emphasized that the plaintiff "never exhibited any signs of a medical problem," nor did his supervisors "ever see him suffering from any medical condition." (*Id.* at pp. 346-347.) Further, the plaintiff had waited a year to report his symptoms, and "raised the subject only after learning he was under investigation for cash shortages." (*Id.* at p. 347.) Second, he "did not say what *kind* of pain he experienced, for example, tingling, aching, burning, stinging, stabbing, or throbbing," nor did he use words indicating the "*degree* of pain, such as minor, mild, moderate, severe, intense, extreme, or unbearable." (*Ibid.*) The court stressed that the "matter-of-fact way" the plaintiff reported the condition was consistent with his medical examination, in which the physician found "nothing wrong with [the plaintiff] and sent him back to work without any restrictions." (*Ibid.*) Finally, the court emphasized that "[p]ain alone does not *always* constitute or establish a disability," and "[i]n this case, the pain and numbness did not make *work* difficult for" the plaintiff. (*Id.* at p. 348, italics added.) Rather, "his symptoms limited only his ability to play soccer, which is not a major life activity." (*Id.* at p. 347.)

There are important distinctions in this case that compel a different conclusion than the court reached in *Arteaga.* Unlike the plaintiff in *Arteaga*, Merritt immediately reported his injury to Equinox management. Indeed, he interrupted King's meeting with another trainer because the initial trauma and pain were so intense. In contrast to the "matter-of-fact way" the plaintiff in

Arteaga seemed to view his condition (*Arteaga, supra,* 163 Cal.App.4th at p. 347), Merritt described the pain he experienced as "extreme" and "excruciating," and said it was so severe he "didn't know if [his foot] was broken." The doctor who examined Merritt a week later observed "[t]rauma [to] both great toes," and noted that Merritt continued to experience pain. And, rather than send Merritt back to work "without any restrictions" (see *ibid.*), the doctor referred Merritt for an MRI, prescribed him pain and anti-inflammatory medications, told him to wear a non-flexible shoe to reduce joint movement, and ordered him to take a break from standing or walking on his feet every hour.

Most crucially, Merritt's injury and the persistent resulting pain that followed did not just limit his ability to play sports or exercise; these conditions made it difficult to *walk*, as confirmed by both King and Wellbaum who observed Merritt walking with a "changed gait" and a "bit of a limp" after the injury.[2] The fact that King observed Merritt's "changed gait" for only a week is of no moment, because the evidence shows Merritt began taking medication to manage the pain and inflammation in his foot at the same time his limp subsided. (See § 12926, subd. (m)(1)(B)(i) [whether a condition limits a major life activity "shall be determined without regard to mitigating measures such as medications"].) And, in contrast to *Arteaga*, Merritt's pain and difficulty walking made work difficult, because, as Wellbaum

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[2] Equinox stresses that Merritt identified participating in martial arts as a major life activity affected by his injury. Even if we accept, as the *Arteaga* court did, that participating in a sport is not a major life activity (see *Arteaga, supra,* 163 Cal.App.4th at p. 347), this still does not preclude Merritt from establishing the disability prong of his prima facie case. (But see § 12926, subd. (m)(1)(B)(iii) [directing that " 'Major life activities' shall be broadly construed"].) Walking is a major life activity, and Merritt offered sufficient evidence to support a reasonable inference that his condition limited his ability to walk.

acknowledged, a major part of a trainer's job at Equinox required walking around the gym floor and interacting with members. On each of the critical points the *Arteaga* court identified, the evidence here supports an inference that Merritt suffered a physical disability under FEHA.

The trial court cited three undisputed facts that precluded Merritt from establishing the disability prong of his prima facie case—those were, Merritt did "not yell or curse at the time of the accident, never took any time off of work (even in the four days after the accident, before he was taking any pain medication), [and] no doctor ever diagnosed any injury to either foot, let alone one that limited plaintiff from working or participating in any other major life activity." The first two facts are insufficient to support the ruling. Merritt explained that he did not yell or curse at the time of the accident because there were gym members in the area and, consistent with his perceived job duties, he took care not to make a scene in front of them. As for the second fact, Merritt maintained he declined to take time off because he hoped to work through the pain and show his dedication to Equinox. A reasonable fact finder could credit Merritt's explanations and still conclude he suffered a severe and disabling injury, notwithstanding the undisputed facts identified by the trial court.

The third fact is inconsistent with the evidence. Contrary to the trial court's statement, just a week prior to Merritt's termination, Dr. Sarte observed "[t]rauma [to] both great toes," noted that radiographs showed "some arthritic changes" to the left great toe and "small cystic changes" to the left foot, referred Merritt for an MRI of his left foot, prescribed him pain and anti-inflammatory medications, and ordered Merritt to take a break

from standing or walking on his feet every hour. Further, several months after Merritt's termination, a medical evaluation prepared by an orthopedic surgeon in connection with Merritt's workers' compensation case determined that, "[i]n reference to the left foot, Mr. Merritt is precluded from engaging in activities requiring repetitive prolonged standing and walking, squatting, kneeling, ladder and stair climbing." This evidence was sufficient to support a reasonable inference that Merritt suffered from a physiological condition affecting his musculoskeletal system and that this condition limited his ability to walk and work. (§ 12926, subd. (m)(1).)

b. *There was sufficient evidence to infer Equinox terminated Merritt's employment because of his disability*

Equinox also contends the evidence conclusively negated the causation element of Merritt's discrimination claim. Because Merritt did not yell or curse when the weight fell on his foot, continued to work until his termination, and did not see a doctor until a week after the incident, Equinox maintains it "did not think that Merritt was disabled" and, therefore, "could not have terminated Merritt because of his disability."[3] "An adverse employment decision cannot be made 'because of' a disability, when the disability is not known to the employer." (*Brundage v. Hahn* (1997) 57 Cal.App.4th 228, 236.) "[A]n employer 'knows an employee has a disability when the employee tells the employer about his condition, or when the employer otherwise becomes

[3] Equinox also relies upon evidence it offered to demonstrate it had a nondiscriminatory reason for terminating Merritt's employment—namely, his alleged poor job performance. We address this evidence in the next section and conclude Merritt offered sufficient evidence to raise a triable issue as to whether Equinox's proffered reason was pretextual.

aware of the condition, such as through a third party or by observation. The employer need only know the underlying facts, not the legal significance of those facts.' " (*Faust, supra,* 150 Cal.App.4th at p. 887.)

For purposes of Merritt's prima facie case, it does not matter whether his supervisors knew his condition fit the legal definition of "disability" under FEHA; it is enough that they knew of the condition and the effect it had on his ability to walk and work. (See *Faust, supra,* 150 Cal.App.4th at p. 887; *Sandell, supra,* 188 Cal.App.4th at pp. 313-314 [because employer knew plaintiff used a cane to walk, a fact finder could reasonably conclude employer was aware plaintiff was "disabled within the meaning of FEHA"].) Here, Merritt communicated his symptoms and limitations to Equinox management on multiple occasions. He notified King immediately after the injury that he was in excruciating pain and that he did not feel he could remain on his feet for prolonged periods. King witnessed Merritt walking with an "altered gait" for up to a week, until around the time he began taking medication to mitigate the pain and inflammation in his feet. Wellbaum likewise observed Merritt walking with a "bit of a limp." After his appointment with Dr. Sarte, Merritt told McGarr that he was still in great pain and that the doctor ordered him to sit down every hour. Following his MRI, Merritt advised McGarr via email that he was "presently unable to stand for long periods without the prescribed pain medication" and that he may need to request time off work. Taken together, this evidence was sufficient to support an inference that Equinox knew about Merritt's condition and the resulting limitations it imposed on his ability to walk and work.

The temporal proximity between Equinox management learning of Merritt's condition and the subsequent adverse employment decision was sufficient to satisfy Merritt's prima facie burden regarding causation. As the *Arteaga* court explained, "[b]ecause the employee's burden of establishing a prima facie case under *McDonnell Douglas* is fairly minimal, the temporal proximity between an employee's disclosure of his symptoms and a subsequent termination may satisfy the causation requirement at the *first step* of the burden-shifting process." (*Arteaga, supra,* 163 Cal.App.4th at p. 353.) Here, the evidence showed Equinox terminated Merritt less than three weeks after his injury and within days of Merritt disclosing he had an MRI to determine whether there was "soft tissue and nerve damage" that could have a prolonged effect on his ability to work without accommodations. The trial court thus erred in concluding Merritt would be unable to establish a prima facie case for disability discrimination.

We turn now to whether Merritt presented sufficient evidence to find Equinox's proffered reason for terminating his employment was pretextual.

3. *Merritt's Evidence Raised Triable Issues of Fact Regarding Equinox's Proffered Reason for His Termination*

On summary judgment, once the employer offers substantial evidence of a legitimate, nondiscriminatory reason for an adverse employment action, the burden shifts to the plaintiff to " 'offer evidence that the employer's stated reason is either false or pretextual, or evidence that the employer acted with discriminatory animus, or evidence of each which would permit a reasonable trier of fact to conclude the employer intentionally

discriminated.' " (*Faust, supra,* 150 Cal.App.4th at p. 886; *Sada, supra,* 56 Cal.App.4th at p. 150.) To satisfy this burden, " '[t]he [employee] cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer . . . . Rather, the [employee] must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder *could* rationally find them "unworthy of credence," [citation], and hence infer "that the employer did not act for the [the asserted] non-discriminatory reasons." ' " (*Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1005; *Sandell, supra,* 188 Cal.App.4th at p. 314.)

"Pretext may be inferred from the timing of the discharge decision, the identity of the decision maker, or by the discharged employee's job performance before termination." (*Hanson v. Lucky Stores, Inc.* (1999) 74 Cal.App.4th 215, 224; *Flait v. North American Watch Corp.* (1992) 3 Cal.App.4th 467, 476.) Pretext also may be demonstrated by showing that " 'the proffered reason had no basis in fact, the proffered reason did not actually motivate the discharge, or, the proffered reason was insufficient to motivate discharge.' " (*Hanson,* at p. 224.) "[E]vidence that the employer's claimed reason is *false*—such as that it conflicts with other evidence, or appears to have been contrived after the fact—will tend to suggest that the employer seeks to conceal the real reason for its actions, and this in turn may support an inference that the real reason was unlawful." (*Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 715.)

Critically, to defeat summary judgment, the employee need only demonstrate "triable issues of material fact exist [as to]

whether discrimination was a *substantial motivating reason* for the employer's adverse employment action, even if the employer's professed legitimate reason has not been disputed." (*Husman v. Toyota Motor Credit Corp*. (2017) 12 Cal.App.5th 1168, 1186, italics added (*Husman*); *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 (*Harris*) [in mixed-motive FEHA cases, the jury must determine "whether discrimination was 'a substantial motivating factor/reason' " for the adverse employment action].) "A 'substantial motivating reason' is a reason that actually contributed to the [adverse employment action]. It must be more than a remote or trivial reason. It does not have to be the only reason motivating the [adverse employment action]." (CACI No. 2507, italics omitted; see *Davis v. Farmers Ins. Exchange* (2016) 245 Cal.App.4th 1302, 1320-1321 [explaining Judicial Council amended CACI No. 2507 to conform to Supreme Court's decision in *Harris*].)

Equinox maintains it presented "overwhelming evidence" to demonstrate Merritt was terminated due to "poor performance" and not because of his disability. It cites evidence showing that Merritt never reached the goal of 84 monthly training sessions at any point during his employment, and that he was consistently one of the lowest ranked trainers throughout his eight months with Equinox.[4] Equinox further stresses that McGarr put

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[4] This evidence showed that in November 2012, Merritt conducted three paid personal training sessions and was ranked 28 out of 28 among all personal trainers; in December 2012, he conducted 14 sessions and was ranked 26 out of 27; in January 2013, he conducted nine sessions and was ranked 26 out of 27; in February 2013, he conducted nine sessions and was ranked 26 out of 30; in March 2013, he conducted nine sessions and was ranked 24 out of 27; in April 2013, he conducted 25 sessions and was ranked 21 out of 26; in May 2013, he conducted 23 sessions and was ranked 21 out of 27; and in June 2013, he conducted five sessions and was ranked 26 out of 27. Merritt disputed some of these numbers insofar as they did not include unpaid training sessions.

Merritt on a "performance action plan" before Merritt's injury, and that Merritt met none of the plan's deadlines. Based on this evidence, Equinox argues it "simply cannot be said that Equinox harbored discriminatory intent and terminated Merritt for having a temporary toe injury rather than his failure to meet his performance action plan after months of underperformance." We disagree.

Here, there was evidence to support an inference that Merritt's disability—specifically, the limitations it placed on his ability to walk and work without accommodation—was a substantial motivating factor in Equinox's decision to terminate his employment. To begin, the timing of the discharge decision, coupled with Merritt's job performance history, suggests underperformance alone was " 'insufficient to motivate discharge.' " (*Hanson, supra,* 74 Cal.App.4th at p. 224.) Equinox's employment agreement with Merritt provided for a 90-day "probation period," during which Equinox was to "evaluate the Employee's performance," subject to its "at will" termination policy. Equinox contends it discharged Merritt for failing to meet "productivity standards," and cites evidence showing he failed to achieve "full-time productivity" in each of the eight months he was employed. But this evidence does not resolve all material factual questions. In particular, it does not explain why Equinox continued to employ Merritt long past the probation period, notwithstanding his supposed poor performance, only to terminate him less than three weeks after he reported his disability to management.

For his part, Merritt offered evidence suggesting that Equinox rarely discharged trainers for anything short of misconduct, and that McGarr historically kept trainers on

working floor shifts, even if they failed to reach "full-time productivity" through training sessions. This evidence consisted primarily of a declaration by a former personal trainer, Mayra McCullough, who worked with Merritt at Equinox. McCullough declared that Equinox continued to employ her, despite her "having about two years of significantly reduced [training session] numbers," and that this was consistent with McGarr's practice of "keep[ing] trainers even if they had low 'turnaround' numbers." Merritt also presented evidence showing that, on June 17, 2013 (the day before he was injured), Equinox employed 28 personal trainers. Ten of these trainers were listed as "U/P" (underperforming), while only 10 others were listed as "FTE" (full-time employees). And, of the eight trainers in Merritt's tier, only one had completed more training sessions than Merritt as of the day before his injury. Merritt's evidence also showed he was promoted to Tier 2 trainer, notwithstanding his supposed performance issues, and that he was in the process of taking classes for a promotion to Tier 3 when he was terminated. Taken together with the suspicious timing of Merritt's discharge, this evidence allows a reasonable inference that Merritt's disability contributed to the adverse employment decision.

That inference is not negated by evidence that Equinox put Merritt on an "action plan" two weeks before his injury. Merritt rightly stresses that the action plan did not specify consequences for failing to meet its listed goals, and McGarr admitted that he does not recall discussing such consequences with Merritt when they met regarding the action plan. Indeed, there is no evidence that Equinox ever warned Merritt that he was in danger of being terminated prior to June 18, 2013. Moreover, the action plan acknowledged that Merritt "[i]s very professional and *has ability*

to be full time." (Italics added.) Consistent with that statement, a fact finder could rationally conclude that Equinox intended the action plan to assist Merritt with reaching full-time productivity, and that it was not meant to establish conditions he must meet to avoid termination.

Equinox's shifting responses to Merritt's supposed underperformance issues cast further doubt on its claim that Merritt's disability did not actually contribute to the discharge decision. The evidence shows that, on June 18, 2013, hours before Merritt was injured, McGarr gave him the goal of securing six active clients *by the end of July* and said that if he failed to accomplish that goal, they would need to have a discussion about his future employment. However, on July 2, 2013, the day after Merritt advised McGarr that he had a MRI to determine whether there was "soft tissue and nerve damage" that could require time off from work, McGarr submitted a request for Merritt's final paycheck. And, when Equinox discharged Merritt on July 5, 2015, McGarr prepared a form identifying Merritt's failure to perform three Equifits between June 25 and July 2, 2013 as the only "Previous Incident[]" supporting disciplinary action. The form stated Merritt had "completed zero" Equifits, when in fact he had performed two. Finally, when Merritt later met with McGarr and objected that he had been promised until the end of July to have six active clients, McGarr responded that he had not seen the "same energy" from Merritt and that Equinox had "decided to move forward with the termination, despite it not, in fact, being the end of July."

Equinox argues there are more innocuous ways to interpret the evidence, which support its contention that Merritt was

terminated solely because of his supposed performance issues.[5] That may be true, but it is irrelevant to our task in independently reviewing the record on summary judgment. This court's duty is to determine only whether the evidence could, as a matter of law, support a judgment in favor of Merritt, as the nonmoving party. Here, the evidence is such that a reasonable fact finder could conclude that Equinox's proffered explanation was not the only reason it terminated Merritt's employment, and that his injury was a substantial motivating factor in the discharge decision. Merritt's prima facie showing, coupled with the evidence he presented regarding pretext, is sufficient to preclude a determination that, as a matter of law, Equinox is entitled to judgment in its favor on Merritt's disability discrimination claim. (*Sandell, supra,* 188 Cal.App.4th at p. 319; *Husman, supra,* 12 Cal.App.5th at p. 1186.)

4. *Merritt's Evidence Raised Triable Issues of Fact on His Claims for Failure to Accommodate and Failure to Engage in an Interactive Process*

Under FEHA, it is an unlawful employment practice for an employer "to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee." (§ 12940, subd. (m)(1).) An employee's initial request for an accommodation triggers the employer's obligation to participate in the interactive process of determining one. (*Spitzer v. The*

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[5] For instance, Equinox argues Merritt's promotion to Tier 2 had nothing to do with his performance, even though the promotion came with a small raise in commission and required approval from the general manager, personal trainer manager and fitness manager. Equinox also argues McCullough's declaration should not be credited in relation to Merritt's treatment, because McCullough was not "similarly-situated to him." Contentions like these reflect factual disputes that must be resolved in favor of Merritt, as the nonmoving party, on summary judgment. (*Sandell, supra,* 188 Cal.App.4th at p. 319.)

Good Guys, Inc. (2000) 80 Cal.App.4th 1376, 1384; § 12490, subd. (n).) "Employers must make reasonable accommodations to the disability of an individual unless the employer can demonstrate that doing so would impose an 'undue hardship.' " (*Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 947; *Spitzer,* at p. 1383.)

Merritt's evidence showed that, due to the condition of his foot, his doctor suggested he be permitted to sit down for a break every hour. Merritt communicated this recommendation to Equinox's management, and later advised McGarr that he may need to take time off from work, depending on his MRI results. This was sufficient to trigger the interactive process and duty to accommodate.[6]

In granting summary adjudication on Merritt's claims for failure to accommodate and failure to engage in the interactive process, the trial court relied entirely upon its prior determination that Merritt did not, as a matter of law, have a disability under FEHA. For the reason discussed above with respect to Merritt's disability discrimination claim, we reject that conclusion.

5. *Merritt's Derivative Claims Survive Summary Adjudication*

The parties agree that Merritt's causes of action for wrongful termination in violation of public policy and declaratory

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[6] Equinox stresses that King told Merritt to take as many breaks as he needed when Merritt first came to her with his injury. Merritt, however, presented evidence that McGarr failed to similarly authorize this accommodation when advised of Merritt's doctor's recommendation. Further, Merritt's evidence showed that McGarr submitted a request for Merritt's final paycheck the day after Merritt notified McGarr that he may need to take time off after his MRI results came back. This evidence was sufficient to raise triable issues on Merritt's claims for failure to engage in the interactive process and failure to accommodate.

and injunctive relief depend upon the viability of his disability discrimination claim. (See *Angell v. Peterson Tractor, Inc.* (1994) 21 Cal.App.4th 981, 987 [FEHA prohibition on disability discrimination supports a common law tort action for termination in violation of public policy]; accord *Jennings v. Marralle* (1994) 8 Cal.4th 121, 132; see *Harris, supra,* 56 Cal.4th at p. 211 [in light of FEHA's express purpose of "preventing and deterring unlawful discrimination in the workplace," a plaintiff may seek "declaratory relief or injunctive relief to stop discriminatory practices"].) The trial court likewise ruled that because Equinox was entitled to judgment, as a matter of law, on Merritt's disability discrimination claim, Merritt was barred from pursuing these derivative claims. As we have concluded Merritt raised triable issues of fact regarding his disability discrimination claim, we must also conclude these derivative claims survive summary adjudication.

6. *Summary Adjudication of the Punitive Damages Claim Was Proper*

Code of Civil Procedure section 437c, subdivision (f)(1) authorizes the trial court to summarily adjudicate a claim for punitive damages where the moving party demonstrates the claim has "no merit." Here, the court concluded Merritt could not pursue a claim for punitive damages against Equinox because the undisputed facts demonstrated that the managers who participated in his discharge did "not exercise any authority . . . over corporate policy." We agree.

Punitive damages are available against a corporate employer only if based upon the act of "an officer, director, or managing agent of the corporation." (Civ. Code, § 3294, subd. (b).) "Officer" and "director" are official titles, and Merritt

acknowledges that none of his managers held these positions at Equinox.

As our Supreme Court explained, "by selecting the term 'managing agent,' and placing it in the same category as 'officer' and 'director,' the Legislature intended to limit the class of employees whose exercise of discretion could result in a corporate employer's liability for punitive damages." (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 573 (*White*).) The term is subject to a narrow construction that limits corporate liability for punitive damages to only those employees who "exercise substantial discretionary authority over decisions that ultimately determine corporate policy." (*Id.* at pp. 576-577.) "Thus, supervisors who have broad discretionary powers and exercise substantial discretionary authority in the corporation could be managing agents. Conversely, supervisors who have no discretionary authority over decisions that ultimately determine corporate policy would not be considered managing agents even though they may have the ability to hire or fire other employees." (*Id.* at p. 577.)

In order to demonstrate that an employee is a "true managing agent," a plaintiff seeking punitive damages must show that "the employee exercised substantial discretionary authority over significant aspects of a corporation's business." (*White, supra,* 21 Cal.4th at p. 577.) Decisions that meet this standard are "the type likely to come to the attention of corporate leadership." (*Roby v. McKesson Corp*. (2009) 47 Cal.4th 686, 715.) A managing agent's discretion is the "sort of broad authority that justifies punishing an entire company for an otherwise isolated act of oppression, fraud, or malice." (*Ibid.*)

Merritt failed to offer evidence that King, McGarr or Wellbaum exercised substantial discretionary authority over significant aspects of Equinox's corporate policy. At most, Merritt's evidence showed that King and McGarr *failed to follow corporate policy* when they did not immediately send him to the company doctor after he reported his injury, and that Wellbaum failed to enforce that policy when he declined to discipline McGarr. These deviations from Equinox's corporate policy, even if shown to be malicious, do not reflect the sort of broad authority that justifies punishing the entire company for the conduct of local managers at one of Equinox's many facilities. (See *Kelly–Zurian v. Wohl Shoe Co.* (1994) 22 Cal.App.4th 397, 421-422 [highest ranking employee in Southern California office, who had discretion to discipline and discharge employees, was not a managing agent, as a matter of law, because he could not set corporate policy which was dictated from company's St. Louis headquarters].) The trial court properly concluded that Merritt's request for punitive damages had "no merit." (Code Civ. Proc., § 437c, subd. (f)(1).)

DISPOSITION

The summary adjudication of the punitive damages claim is affirmed. In all other respects the judgment is reversed. In the interest of justice, Merritt is awarded his costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

STONE, J.*

We concur:

EDMON, P. J.

LAVIN, J.

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