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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

JAMES JANYA et al., Plaintiffs and Appellants, v. SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP, Defendant and Respondent.	B290754 (Los Angeles County Super. Ct. No. BC609677)

APPEAL from a judgment of the Superior Court for Los Angeles County, Teresa A. Beaudet, Judge. Affirmed.

The Rager Law Firm, Jeffrey Rager, James Y. Yoon; Gusdorff Law and Janet Gusdorff for Plaintiffs and Appellants.

Davis Wright Tremaine, John P. LeCrone and Rochelle L. Wilcox for Defendant and Respondent.

Plaintiffs James Janya and Michael Salloom appeal from a summary judgment on their retaliation, wrongful termination, defamation, and intentional infliction of emotional distress claims related to the termination of their employment with defendant Southern California Permanente Medical Group (SCPMG). With respect to the retaliation and wrongful termination claims, we conclude that SCPMG presented evidence that it terminated plaintiffs' employment for legitimate business reasons and plaintiffs failed to present evidence from which a reasonable jury could conclude that SCPMG's reasons were a pretext and that SCPMG was in fact motivated by retaliation. We also conclude that plaintiffs failed to present any evidence of actual malice to support their defamation claim, nor did they present any evidence of conduct by SCPMG that could support their claim for intentional infliction of emotional distress. Accordingly, we affirm the judgment.

BACKGROUND

A. *Duties of Respiratory Therapists*

Janya and Salloom were respiratory therapists employed by SCPMG at the Kaiser Permanente facility in Panorama City. Under Kaiser Permanente's written guidelines, respiratory therapists are required at the start of their shifts to conduct an initial clinical assessment of each patient assigned to them and document that assessment in SCPMG's electronic record-keeping system, HealthConnect. After the initial assessment, respiratory therapists are required to conduct additional assessments and ventilator checks on

each patient every two hours, and record their findings in HealthConnect. Entries into HealthConnect are required to be made "during and/or shortly after care is provided for the patient," and in no event more than two hours after care was given. HealthConnect automatically time-stamps when each entry is made. Timely recording of assessments and checks is critical because other medical professionals rely upon the data in making medical decisions.

B. *Plaintiffs' Employment at SCPMG and Prior Lawsuit*

Janya started working at the Panorama City facility in 2007, and Salloom (Janya's cousin) began in 2008. Throughout their employment, both Janya and Salloom received "meets requirements" or "exceeds requirements" ratings in their annual performance reviews. This was true (for Salloom, at least)[1] even after Janya and Salloom participated as plaintiffs in a wage and hour lawsuit brought in April 2014 against Kaiser Permanente International by 23 current and former respiratory therapists at the Panorama City facility.[2]

The wage and hour lawsuit was settled in December 2014. After the lawsuit, a policy was put in place to ensure that each respiratory therapist completed his or her meal break by the end of his or her fifth hour of work. Under that policy, the lead respiratory therapist on each shift (i.e., the most senior person on the shift) was responsible to

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[1] The record does not include Janya's performance review for 2014.

[2] There were approximately 35 respiratory therapists employed at the Panorama City facility during plaintiffs' employment there.

schedule and assign meal and rest breaks for all respiratory therapists working that shift.[3]

C. *A New Department Administrator is Hired*

In January 2015, Floyd Bailey was hired by SCPMG as the department administrator of the respiratory department at the Panorama City facility. Bailey instituted daily "huddles" for the respiratory therapists on duty to address and review department policies and current issues. Those policies and issues, which were listed in weekly huddle sheets, included the need to take meal breaks, the need to clock in and out appropriately and on time, the requirement to have bedside reports for all vented patients, the prohibition against "hanging out" in the ICU or NICU when not assigned to those units, and staffing issues.[4]

The first time staffing issues were addressed in the huddles was in June 2015. The written policy for the Panorama City facility required a minimum of five respiratory therapists for each shift. One of those five would be assigned to the ICU, one would be assigned to the NICU, and the remaining three covered the rest of the hospital. Despite the written policy, however, there were times when there were

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[3] It was important that breaks be staggered to ensure there always were enough respiratory therapists on duty to care for the patients.

[4] Some of these policies and issues were regularly addressed; others were addressed only occasionally.

only four (or, on rare occasions, three) respiratory therapists on a shift.[5] Many of the respiratory therapists complained about understaffing during the huddles, but Bailey told them that they needed to work as a team. Outside of the huddles, Janya and Salloom (and other respiratory therapists) complained about the understaffing to Zhaklin (Jackie) Shnoravorian, who was the department supervisor, and Susan Akopyan, who was the assistant department administrator.[6]

D. *Bailey Questions Salloom's Sick Days Taken*

In July 2015, while reviewing the time records for all employees, Bailey discovered what he believed was a pattern of Salloom calling in sick after his days off, extending his off-time. Bailey met with Salloom to discuss these sick days, and Salloom explained that all three instances Bailey identified were excused absences. He told Bailey that on all three occasions he was seeking medical treatment for a prior work injury that he sustained at Kaiser Permanente, and that he had provided doctor's notes for two of those dates.

After speaking with Salloom on July 27, 2015, Bailey spoke to the human resources department, and was told that the injury Salloom suffered occurred a long time before Bailey came to SCPMG. Bailey also checked the system to see if there were doctor's notes on file for the

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[5] This usually occurred when a therapist called in sick and a replacement could not be found.

[6] Shnoravorian supervised the respiratory therapists, and reported to Akopyan; as assistant department administrator, Akopyan reported to Bailey.

absences, and did not find any. He issued a "Level 1" corrective action to Salloom. The document memorializing the corrective action stated that it was "purely for informational purposes and will not be placed in an employee's Personnel File—although it may be kept in a separate, departmental file."

E. *The Investigation Leading to the Termination of Plaintiffs' Employment*

On Sunday, August 2, 2015, Janya was the lead respiratory therapist on his shift. Although it was his responsibility to assign meal breaks for the five respiratory therapists on duty that shift, he apparently forgot to do so. Over the course of the morning hours, Janya, Salloom, and another respiratory therapist, Adam Alepian, each had taken a lunch break, but they forgot to clock out when they did so. They all were spending down time in the ICU as 11:30 a.m. approached—which was the five-hour deadline by which they were required to have taken (and recorded) their meal break. Janya realized they needed to clock out, so all three did so at the same time.

On Monday, August 3, 2015, Bailey was reviewing the time cards from the weekend, and saw that Janya, Salloom, and Alepian had clocked out for lunch at the same time the previous day. This was very unusual; Bailey was unaware of any other instance in which multiple respiratory therapists took their meal break at the same time. He was concerned because having three therapists off the clock at the same time left the hospital "basically abandoned." He spoke to Janya about it that day (Monday), and Janya told him that the three of them had

taken their break together and lost track of time. Bailey told Janya that he would be investigating the incident and would get back to him.

Bailey started his investigation by looking at patient charts for August 2 to see if any patients were left unattended, and found some inconsistencies in Janya's charting. He decided to have Akopyan (the assistant department administrator) look at charting done by Janya, Salloom, and Alepian for the previous month or two to determine if the inconsistencies he found were just something that happened that day, or something that had been going on for a while. Bailey also looked at the time records for all three therapists. He and Akopyan found several issues with regard to Janya and Salloom, but none with regard to Alepian.

1. *Janya's Charting and Time-Keeping Issues*

In reviewing Janya's patients' charts, Bailey found two instances —one on July 14, 2015 and the other on July 18, 2015—in which Janya documented that he conducted an assessment and check of a vented patient at a certain time, but HealthConnect's automatic time-stamp showed that the information was not entered until two hours later, at nearly the same time the information from a subsequent assessment/check was entered. Bailey believed that the information recorded for the earlier assessments/checks on those dates must have been fraudulent because it is not possible to accurately recall all of the detailed information from those checks two hours later, when that information was input into HealthConnect.

With regard to August 2, 2015 (the day the three respiratory therapists clocked out for lunch at the same time), Bailey examined the therapists' badge swipes, video footage, and HealthConnect entries to determine where the three therapists had been and what they were doing that day. He noted that on that day, Janya was assigned to the Direct Observation Unit (DOU) located on the fifth and second floors. He discovered that Janya had clocked in at 6:45 a.m. in the ICU instead of the respiratory department, as is required.[7] Janya left the ICU at 6:56 a.m. and went to the respiratory department to give the other respiratory therapists their patient assignments. He left the respiratory department at 7:19 a.m. and went to the DOU on the fifth floor to see his first patient, who was on a ventilator. At 7:22 a.m., Janya documented that he received a report from the previous respiratory therapist at a patient's bedside. Bailey concluded, however, that Janya could not have received a report from the previous therapist at the patient's bedside because he was on a different floor than the patient at that time. Bailey also noted that, based upon Janya's lack of activity on HealthConnect, Janya had more than five and a half hours of down time during his eight-hour shift, and his badge swipes showed that he spent a majority of that down time in the ICU.

Finally, Bailey examined Janya's work assignment sheets, on which each respiratory therapist is supposed to record, for each of his or

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[7] Kaiser Permanente has a written policy, applicable to SCPMG employees, that requires employees to clock in and out at their "designated work area"; for Janya and other respiratory therapists, that was the respiratory department.

her assigned patients for that shift, the patient's name and room number and the various tasks the therapist performed on that patient. Each task is assigned points, which are totaled at the end of the shift. Bailey compared what Janya reported on the work assignment sheets to the patient records to determine the sheets' accuracy. He found that Janya's work assignment sheets often were not properly filled out or he inflated his numbers to make it appear that he had completed more tasks than he actually completed.

2. *Salloom's Charting and Time-Keeping Issues*

Bailey found many issues with Salloom's patient charts for July 4, 2015:

- The chart for the patient in room 1117 stated that Salloom did his initial assessment and a ventilator check at 7:35 a.m., but HealthConnect showed that the initial assessment was not entered until 9:09 a.m. The chart then stated that Salloom assessed the patient again at 9:35 a.m., but HealthConnect showed that that assessment was not entered until 11:09 a.m., and was entered concurrently with the information from a ventilator check Salloom conducted at 11:05 a.m. The chart also stated that Salloom conducted another ventilator check at 11:50 a.m., but that check was not entered into HealthConnect until 1:43 p.m., at the same time that a 1:40 a.m. check was entered.

- Salloom did not document an initial assessment for the patient in room 1119 until 3:31 p.m., which was eight hours into Salloom's shift.
- Salloom failed to document any initial assessment for the patient in room 1120.[8] He also indicated in the chart that he assessed the patient at 1:30 p.m., but that assessment was not entered into HealthConnect until 3:22 p.m., concurrently with the entry of a ventilator check that took place at 3:20 p.m.
- The chart for the patient in room 1121 indicated that Salloom assessed the patient at 9:40 a.m., but that assessment was not entered into HealthConnect until 11:18 a.m., simultaneously with the entry of another ventilator check performed at 11:15 a.m.
- Salloom indicated on his work assignment sheet that he completed six ventilator checks on the patient in room 5105, but HealthConnect records showed he completed only three such checks. His worksheet also indicated that he completed seven pulse ox checks, but HealthConnect showed he completed only four.

Bailey discovered similar issues on other days. On July 6, 2015, Salloom failed to document his initial assessment of three patients until more than 10 hours into his shift. On July 18, 2015, he failed to

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[8] An initial assessment—which is required to be conducted and reported for each patient at the start of each shift—is a more detailed and comprehensive assessment than subsequent assessments during a shift.

document his initial assessment of another patient until more than nine hours into his shift. That same day, Salloom indicated on his work assignment sheet that he completed six ventilator checks on one patient, but HealthConnect showed that he completed only two, while another respiratory therapist completed the other four; as a result, both Salloom and the other respiratory therapist claimed points for four of the ventilator checks. On August 11, 2015, Salloom indicated on his work assignment sheet that he completed six ventilator checks on a patient, but HealthConnect records showed that the patient had been taken off the ventilator the previous evening, and therefore Salloom could not have conducted any ventilator checks on that patient.

Finally, Bailey reviewed Salloom's time records, badge swipes, and HealthConnect records for August 2, 2015, to determine what he had been doing that day. First, Bailey noted that Salloom clocked in from the ICU instead of the respiratory department, as required under the written policy. Second, Bailey noted that Salloom clocked in 15 minutes early, without permission, but did not do any work during those 15 minutes before the official start of his shift. Third, Bailey determined that Salloom had approximately four hours and 50 minutes of down time during his shift, based upon Salloom having no activity in HealthConnect, and that he spent that time in the ICU even though he was not assigned to that unit.

3. *Bailey's Meetings With Janya and Salloom*

On September 15, 2015, Bailey met (separately) with Janya and Salloom to discuss the results of his investigation. Also present at both

meetings were two union representatives and assistant department administrator Akopyan, who took notes.

When asked about the instances in which he entered information for two ventilator checks/assessments simultaneously, Janya said that there was a computer "glitch" in HealthConnect. He explained that occasionally he would put information into the system and log out, but when he went back into the patient's records there would be an error message stating that he had had not completed his documentation. He would then re-enter the information and record it. He admitted that he had never reported this purported "glitch" to management.

Bailey also asked Janya about his documentation on August 2, 2015, in which he wrote that he had received a bedside report from the previous respiratory therapist with regard to a ventilated patient. Bailey told Janya that, based upon his badge swipes and video records, Janya could not have received the report at the patient's bedside. Janya told Bailey that the reference to bedside report probably was due to a "smart phrase" on HealthConnect (where HealthConnect fills in words automatically) that he should have amended.

Finally, Bailey asked Janya about his clocking in at the ICU rather than at the respiratory department, and his spending so much time in the ICU. Janya admitted that he often clocked in at the ICU because it was convenient for him; he did not recall if he ever was told by management that he could clock in there. He also admitted that he had been spending his down time in the ICU, that he had been doing so for quite some time, and that no one had given him permission to do so.

In Bailey's interview with Salloom, Salloom also cited the purported "glitch" in the HealthConnect system to explain why it appeared that he entered information from two ventilator checks simultaneously. When asked why some of his initial assessments were not entered until late in his shift, Salloom told Bailey that he did not believe there was a specific time frame for filing notes from his assessments, although he admitted that filing the assessments toward the end of his shifts was "not ideal" patient care.

Salloom was asked about clocking into work. He said that he knew he was supposed to clock in at the respiratory department, but he often clocked in at the ICU for convenience and to save himself time. He admitted, however, that he had not been given permission to do so.[9]

Finally, Bailey asked Salloom about the discrepancies in his work assignment sheets. Salloom said that he "wanted to buffer the points." He said he knew there had been a lot of cutting back at the facility and he wanted make it look like the therapists were busy.

Janya and Salloom were placed on paid investigatory suspension on September 21 and 23, respectively.

4. *Bailey's Further Investigation and Plaintiffs' Termination*

After hearing from both Janya and Salloom that HealthConnect had a glitch that caused it not to automatically save the information

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[9] As far as Bailey was aware, Janya and Salloom were the only two respiratory therapists who clocked in and out outside of the respiratory department.

they entered into it on some occasions, Bailey conducted a further investigation. Although he used HealthConnect himself, he had never experienced that problem, nor had he ever been told by any employees about such a problem. He asked the assistant department administrator and the supervisor if they had ever experienced the purported glitch, and they said they had not. He contacted HealthConnect long-term support and asked the support person if he had ever heard of this problem; he had not. Finally, he asked the support person to come to his office to attempt to recreate the supposed glitch. The support person set up a "test patient" and tried everything he could think of to make the glitch happen, but he could not recreate it.

Bailey concluded that that both Janya and Salloom had falsified patient care documentation, which he considered to be very serious because it could impact patient care, and then they lied to him about it. He believed that termination clearly was warranted for that reason. He also found that the other issues he uncovered—such as Janya documenting a bedside report that included descriptions of the patient's physical condition when video and badge swipe evidence showed that he could not have been at the patient's bedside when he received the report, Salloom failing to document an initial assessment for several patients for eight or more hours, both plaintiffs falsifying work assignment sheets, and timekeeping issues—provided additional support for termination.

Bailey consulted with human resources regarding his decision to terminate Janya's and Salloom's employment. He then spoke to his immediate supervisor, Matthew Graeser, the assistant medical group

administrator. According to Graeser, Bailey told him about his decision during a "hallway conversation," telling him that human resources and the legal department supported his decision. Graeser told him that he approved, based upon human resources' and the legal department's approval. Bailey also met with Zeron Apelian, the chief administrative officer of the Panorama City facility, to make him aware of the facts supporting his decision to terminate plaintiffs. Bailey told Apelian that he had consulted with human resources before making his decision, and Apelian agreed with the decision. Apelian estimated that his meeting with Bailey lasted 10 to 15 minutes.

On October 13, 2015, Bailey informed Janya and Salloom that their employment was terminated. In each termination notice, Bailey identified the reasons for the termination. For Janya, the notice stated he was being terminated for falsification of documentation in HealthConnect, conducting late ventilator checks on patients, failure to receive a bedside report on a patient who was on a ventilator, inflating his completed points on his work assignment sheets, and failing to use the designated department phone to clock in and out, "which created a false impression that you were working prior to the time you actually commenced work." For Salloom, the notice stated he was being terminated for falsification of documentation in HealthConnect, conducting late ventilator checks on patients, failure to complete an initial assessment on patients, inflating his completed points on his work assignment sheets, and failing to use the designated department phone to clock in and out, "which created a false impression that you were working prior to the time you actually commenced work." Janya

and Salloom each subsequently submitted letters of resignation dated October 13, 2015.

F. *The Instant Lawsuit*

On February 8, 2016, Janya and Salloom filed the instant lawsuit, alleging claims for violation of Labor Code section 1102.5, violation of Labor Code section 98.6, retaliation in violation of Health and Safety Code section 1278.5, wrongful termination in violation of public policy, defamation, and intentional infliction of emotional distress. The complaint named as defendants Kaiser Foundation Health Plan, Inc., Kaiser Foundation Hospitals, and SCPMG. Janya and Salloom subsequently dismissed the first two defendants, leaving SCPMG as the sole defendant.

In the first two causes of action, Janya and Salloom alleged that SCPMG retaliated against them for participating as plaintiffs in the 2014 wage and hour lawsuit. The third cause of action alleged that SCPMG retaliated against plaintiffs for presenting a grievance, complaint, or report about understaffing that created unsafe patient care and conditions. The fourth cause of action for wrongful termination was entirely derivative of the first three causes. The fifth cause of action alleged that statements SCPMG made in the termination documents defamed Janya and Salloom. The sixth cause of action alleged that SCPMG's conduct was outrageous, extreme, and uncivilized and caused Janya and Salloom to suffer humiliation, anguish, and severe emotional distress.

G. *The Summary Judgment Motion*

SCPMG moved for summary judgment. It argued it was entitled to judgment on plaintiffs' first four claims because SCPMG terminated Janya's and Salloom's employment for legitimate business reasons and there was no nexus between their participation in the wage and hour lawsuit or their comments regarding staffing and the decision to terminate their employment. SCPMG also argued it was entitled to judgment on the defamation claim because the statements at issue were privileged under Civil Code section 47, subdivision (c) (hereafter section 47(c)), and there is no evidence of malice. Finally, SCPMG argued it was entitled to judgment on the intentional infliction of emotional distress claim because (1) the claim is preempted by the Workers' Compensation Act; (2) Janya and Salloom cannot show they suffered severe emotional distress; and (3) there was no extreme or outrageous conduct on the part of SCPMG.

In support of its motion, SCPMG submitted evidence that (1) Janya and Salloom were required to timely and accurately report their ventilator checks on their patients, but HealthConnect records show that each of them, on several occasions, entered two ventilator checks almost simultaneously, although the two checks purportedly were conducted two hours apart; (2) both Janya and Salloom blamed the nearly-simultaneous entries on a glitch in the HealthConnect system; (3) Bailey investigated the alleged glitch, tried to replicate it, and was told by a HealthConnect expert that it did not exist; (4) Janya, who was responsible for scheduling meal breaks for the respiratory therapists on his shift when he was lead therapist, allowed three

therapists to take their meal break at the same time; (5) Bailey made the decision to terminate Janya's and Salloom's employment based upon the results of his investigation; (6) Bailey did not know about the 2014 wage and hour lawsuit until after Janya and Salloom were terminated; (7) Bailey did not terminate the employment of any other respiratory therapist who was a plaintiff in the 2014 wage and hour lawsuit; (8) Janya and Salloom each testified at his deposition that he never complained to Bailey about understaffing, and Bailey testified that he was not aware of any complaints from Janya or Salloom regarding understaffing; and (9) the statements the complaint alleged were defamatory were from Janya's and Salloom's termination notices, and neither plaintiff has any knowledge whether anyone who was not present at their meeting with Bailey ever saw the notices.

In their opposition to the motion, Janya and Salloom challenged SCPMG's assertion that Bailey was the sole decision-maker regarding their termination; they asserted that Bailey's superiors, a human resources employee, assistant department administrator Akopyan, and respiratory therapist supervisor Shnoravorian all participated in the termination decision. They contended that several of these decision-makers knew about the 2014 wage and hour lawsuit, and that there is a reasonable inference that Bailey also knew about it. They also contended that Janya and Salloom complained to some of the decision-makers—namely, Bailey, Akopyan, and Shnoravorian—about understaffing in the respiratory department, and that the alleged retaliation began shortly after they made those complaints. They argued that the timing of Bailey's investigation suggests retaliation,

that the investigation was a sham, and that the reasons given for the termination lacked evidentiary support and were rebutted. Therefore, they asserted that SCPMG was not entitled to judgment on the first four causes of action.

With regard to the defamation claim, Janya and Salloom agreed that the statements at issue were those set forth in their termination notices. They argued that they constitute defamation per se because they were directed at their occupational reputation. They contended that the statements were made with malice, and therefore were not privileged under section 47(c), because the statements were false and there was evidence of an intent to retaliate.

Finally, Janya and Salloom argued that SCPMG was not entitled to summary judgment on the intentional infliction of emotional distress claim because the Workers' Compensation Act does not bar such claims premised on alleged discrimination, and retaliation in the employment context can rise to the level of outrageous conduct under the case law.

In support of their opposition to SCPMG's motion, Janya and Salloom presented evidence that, among other things, (1) they each received ratings of meets or exceeds expectation in their annual performance evaluations; (2) Bailey's superiors, the human resources department, the assistant department administrator, and the supervisor of the respiratory therapists all knew about the 2014 wage and hour lawsuit; (3) Janya complained to Bailey about understaffing during the morning huddles in June and July 2015; and (4) Bailey's conclusion that they had failed to conduct timely ventilator checks and assessments was not correct. One of the items they submitted was a

screen shot from HealthConnect showing a message that stated: "**Data was pended during a timeout.** [¶] Your login session timed out the last time you were in this patient's chart. Doc Flowsheets will now navigate to where you were last so that you can finish documenting and file the data." (Boldface in original.) They also submitted evidence showing that Bailey's assertion in Salloom's termination notice that Salloom had not seen the patients for whom he had not filed initial assessments until eight or more hours into his shift was incorrect.

The trial court granted the summary judgment motion. The court found that Janya and Salloom failed to establish a prima facie case of retaliation with regard to the first two causes of action because there was no evidence that Bailey, who made the decision to terminate Salloom's employment, knew of the 2014 wage and hour lawsuit. The court also found that Salloom failed to establish a prima facie case of retaliation with regard to the third cause of action because he failed to present evidence that he had complained to Bailey about alleged understaffing. However, the court found that because Janya had presented evidence that he had complained about understaffing to Bailey, he had established a prima facie case with regard to the third cause of action.

The court next found that SCPMG had presented evidence that it had a legitimate business reason for the decision to terminate Janya and Salloom, namely, they had falsified patient records by documenting two ventilator checks simultaneously on several occasions, and they had violated other recordkeeping policies. The court rejected plaintiffs' argument that, because some of the accusations Bailey put forth in

their termination notices were wrong and others would not lead to termination, all of the reasons given for their termination were pretext. It found that although Janya and Salloom presented some evidence that there was, in fact, a glitch in the HealthConnect system that caused the delays in their charting on occasion, they presented no evidence that Bailey's belief that there was no glitch, based upon a HealthConnect expert, was unreasonable or dishonest. The court also found there was no evidence that Bailey's conclusions regarding Janya's and Salloom's other recordkeeping issues were so patently incorrect as to constitute deliberate falsehoods, and therefore constitute pretext. Finally, the court found there was no evidence that other respiratory therapists who participated in the wage and hour lawsuit or complained about understaffing were retaliated against. Accordingly, the court granted summary adjudication as to the first, second, third, and fourth causes of action.

Addressing the defamation claim, the trial court found that the statements at issue were privileged under section 47(c) and that Janya and Salloom submitted no evidence of malice on the part of Bailey or SCPMG; instead, they simply argued that the statements about their alleged policy violations were so patently false as to constitute intentional falsehoods. Inasmuch as the court found the evidence did not show patent falsehoods, it found that the defamation claim failed.

With regard to the claim for intentional infliction of emotional distress, the trial court found that the claim was not preempted by the Workers' Compensation Act. However, the court found that Janya and Salloom failed to produce evidence of outrageous and extreme conduct

by SCPMG sufficient to maintain such a cause of action, and granted summary adjudication of that claim.

The court entered judgment in favor of SCPMG and against Janya and Salloom. Janya and Salloom timely filed a notice of appeal from the judgment.

DISCUSSION

Janya and Salloom argue on appeal that they presented sufficient evidence to establish a prima facie case and raise a triable issue as to whether their termination was motivated by retaliation, and that this evidence of retaliatory motive precludes summary judgment of all of their claims. We disagree.

A. *Standards for Summary Judgment*

"A party may move for summary judgment 'if it is contended that the action has no merit or that there is no defense to the action or proceeding.' [Citation.] '[T]he party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law.' [Citation.] If the moving party carries this burden, 'the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact.' [Citation.] 'There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.' [Citation.] In making this determination, 'the court

may not weigh the plaintiff's evidence or inferences against the defendants' as though it were sitting as the trier of fact, [but] it must nevertheless determine what any evidence or inference *could show or imply to a reasonable trier of fact*.' [Citation.] The motion should be granted only if the movant 'would prevail at trial without submission of any issue of material fact to a trier of fact for determination.' [Citation.]" (*Colarossi v. Coty US Inc.* (2002) 97 Cal.App.4th 1142, 1149.)

On appeal from a summary judgment, we make "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." (*Iverson v. Muroc Unified School Dist.* (1995) 32 Cal.App.4th 218, 222.) Like the trial court, we must strictly construe the moving party's evidence and liberally construe the opposing party's evidence, and we must consider all inferences favoring the opposing party that a trier of fact could reasonably draw from the evidence. (*Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 838.)

B. *Retaliation / Wrongful Termination Claims*[10]

To establish a prima facie case of retaliation, an employee "must show (1) he or she engaged in a 'protected activity,' (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer's action. [Citations.] Once an employee establishes a prima facie case, the employer is required to offer a legitimate, nonretaliatory reason for the adverse employment action. [Citation.] If the employer produces a legitimate reason for the adverse employment action, the presumption of retaliation 'drops out of the picture,' and the burden shifts back to the employee to prove intentional retaliation." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042 (*Yanowitz*).)

The employee meets this burden by "prov[ing], [with] competent evidence, that the employer's proffered justification is mere pretext; i.e., that the presumptively valid reason for the employer's action was in fact a coverup. [Citation.] In responding to the employer's showing of a legitimate reason for the complained-of action, the plaintiff cannot "'simply show the employer's decision was wrong, mistaken, or unwise. 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],

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[10] We address the retaliation and wrongful termination claims together because the wrongful termination claim is based entirely on the allegations of retaliation.

and hence infer 'that the employer did not act for the [asserted] non-discriminatory reasons.'"""" (*McRae v. Department of Corrections & Rehabilitation* (2006) 142 Cal.App.4th 377, 388-389.)

It is not enough, however, merely to show that the employer's proffered reasons are pretextual. """The ultimate question is whether the employer intentionally discriminated, and proof that 'the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the *plaintiff's* proffered reason . . . is correct.' . . . In other words, '[i]t is not enough . . . to disbelieve the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination [or retaliation].' . . ." . . . Nevertheless, evidence that the employer's proffered reasons are pretextual is significant: "Thus, a plaintiff's *prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false,* may permit the trier of fact to conclude that the employer unlawfully discriminated [or retaliated]." [Citations.]" (*Arteaga v. Brink's, Inc.* (2008) 163 Cal.App.4th 327, 343.)

But this is not the end of the story, even on summary judgment. The California Supreme Court has cautioned that "even where the plaintiff has presented a legally sufficient prima facie case of discrimination, and has also adduced some evidence that the employer's proffered innocent reasons are false, the fact finder is not *necessarily* entitled to find in the plaintiff's favor. . . . '. . . *Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's*

explanation, no rational factfinder could conclude that the action was discriminatory [or retaliatory]. For instance, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory [or nonretaliatory] reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination [or retaliation] had occurred. [Citations.] . . . [¶] Whether judgment as a matter of law is appropriate in any particular case will depend on a number of factors. These include the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case.'" (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 361-362.)

1. *Prima Facie Case*

As noted, in the present case the trial court found that Janya and Salloom could not establish a prima facie case of retaliation based on their participation in the 2014 wage and hour lawsuit because the undisputed evidence showed that Bailey was the sole decision-maker regarding their termination, and he did not know about the wage and hour lawsuit, and therefore there was no causal link. (See *Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 70 ["'Essential to a causal link is evidence that the employer was aware that the plaintiff had engaged in the protected activity'"]; see also *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 615

["'The causal link may be established by an inference derived from circumstantial evidence, "such as the employer's knowledge that the [employee] engaged in protected activities and the proximity in time between the protected action and allegedly retaliatory employment decision"'"].) The trial court also found that Salloom could not establish a prima facie case of retaliation based upon his complaints about understaffing because the undisputed evidence showed that Salloom never complained about understaffing to Bailey (the court rejected SCPMG's argument that Janya could not establish a prima facie case regarding his understaffing complaints).

Janya and Salloom argue on appeal that the trial court's conclusion that they failed to establish a prima facie case of retaliation with regard to the wage and hour lawsuit was erroneous because, based upon the evidence they presented, (1) the jury could infer that several people who knew about the wage and hour lawsuit participated with Bailey in making the decision to terminate plaintiffs' employment and (2) even if Bailey was the sole decision-maker, the jury could infer that he had knowledge of the lawsuit. They also argue the trial court erred in finding that Salloom failed to present a prima facie case of retaliation based upon his complaints of understaffing affecting patient care because they presented evidence Salloom made such complaints to Akopyan and Shnoravorian. Finally, Salloom argues he presented evidence to establish a prima facie case that Bailey retaliated against him for objecting to Bailey's attempt to discipline him for taking sick days. We address each argument in turn.

a. *Retaliation for 2014 Wage and Hour Lawsuit*

Janya and Salloom presented undisputed evidence that chief administrative officer Apelian, assistant medical group administrator Graeser, assistant department administrator Akopyan, and respiratory therapist supervisor Shnoravorian all knew about the 2014 wage and hour lawsuit. They argue there was circumstantial evidence from which the jury could infer that one or more of these parties actively contributed to the decision to terminate their employment. None of the circumstantial evidence they cite is sufficient to support such an inference.

For example, Janya and Salloom cite to evidence that Bailey met with Apelian to discuss the termination decision for 10 to 15 minutes. They contend that the length of the meeting, combined with the fact that Apelian held a high-level executive position overseeing 1900 employees, and did not ordinarily meet with administrators regarding terminations of lower-level employees, raises the reasonable inference that the meeting involved something more than Bailey merely giving Apelian an update. They contend the evidence therefore suggests that Apelian was involved in the termination decision. We disagree. "[An] inference must be a reasonable conclusion from the evidence and cannot be based upon suspicion, imagination, speculation, surmise, conjecture or guesswork." (*Beck Development Co. v. Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160, 1204.) The conclusion Janya and Salloom posit is pure speculation. No jury reasonably could reach this conclusion based on this evidence.

Equally speculative is plaintiffs' assertion that Graeser was an active decision-maker based solely upon the fact that Bailey admitted he told Graeser about the termination decision even though Graeser did not normally get involved when a department administrator decided to terminate a lower-level employee. There is no evidentiary support for an inference that Graeser had any involvement in the termination decision other than to approve the decision once it had been made.

Similarly lacking in evidentiary support is Janya's and Salloom's assertion that Akopyan and Shnoravorian contributed to the termination decision because they assisted Bailey in the investigation. The undisputed evidence is that Akopyan's assistance was limited to conducting an audit of HealthConnect records for Janya's and Salloom's patients and taking notes during Bailey's meetings with Janya and Salloom during which he confronted them with the evidence that had been collected. The fact that she gathered objective information (at Bailey's direction) and took notes of conversations (at Bailey's request) does not support any inference that her involvement extended to participating in the decision about what to do with the information that was gathered. The same is true regarding Shnoravorian, whose only involvement was to fill out the termination documentation as directed by Bailey.

Because there is no evidence from which a jury reasonably could infer that anyone other than Bailey made the termination decision, Janya's and Salloom's only hope is to point to evidence from which the jury could conclude that Bailey himself knew about the wage and hour

lawsuit *and that Janya and Salloom had participated in it*. They have failed to do so.

Preliminarily, we note that Janya's and Salloom's argument focuses entirely upon trying to show that Bailey knew about the fact that a wage and hour lawsuit had been filed by some respiratory therapists and had been settled. They make no attempt to take the next step to show that Bailey knew that *Janya and Salloom* were two of those respiratory therapists. This second step is crucial, however, to show a causal link between Janya's and Salloom's protected activity and Bailey's treatment of them. (*Morgan v. Regents of University of California*, *supra*, 88 Cal.App.4th at p. 70.)

The only evidence Janya and Salloom cite to is: (1) the timing of Bailey's hiring; (2) Bailey's immediate focus on ensuring that the respiratory therapists took their mandated meal breaks and rest periods; and (3) Apelian's deposition testimony concerning his conversations with Bailey regarding the meal break issue. While some of this evidence might support an inference that Bailey knew there had been a wage and hour lawsuit filed against a Kaiser entity, none of it, separately or together, is sufficient to support an inference that Bailey knew that Janya and Salloom were two of the 23 plaintiffs in that lawsuit.

First, Janya and Salloom assert that Bailey was hired the same month that the lawsuit was settled, and thus it would be reasonable to infer that he was aware of it. But even if their evidence was sufficient to establish Bailey's hiring date (as opposed to his starting date)—the only evidence cited is Janya's testimony that in December 2014 (the

month of the settlement) he had been told by another respiratory therapist, who was told by someone else, that the new administrator had been hired but would not be starting for a month—it would be unreasonable for a jury to infer merely from the proximity of Bailey's hiring to the settlement of the lawsuit that Bailey necessarily had been informed of the existence of the lawsuit, let alone that he had been told the names of each of the plaintiffs in that lawsuit.

Second, Janya and Salloom cite to evidence that as soon as Bailey started in the respiratory department he immediately focused on making sure that the respiratory therapists timely took their meal breaks and rest periods, and assert the jury reasonably could infer from this that he knew about the recently-settled lawsuit. We do not disagree that such an inference is possible. Of course, it is equally possible to infer that SCPMG had emphasized to him that he needed to ensure that the meal and rest break laws were enforced, without informing him about the lawsuit. But what is *not* possible to reasonably infer from this evidence—without speculation or conjecture —is that Bailey had knowledge of which respiratory therapists were plaintiffs in that lawsuit.

Finally, Janya and Salloom cite to an incomplete and confusing passage from Apelian's deposition transcript as support for their assertion that Apelian told Bailey about the lawsuit, and seem to argue that Apelian's subsequent attempt to change that testimony following a break in the deposition somehow makes his original testimony more credible. In his original testimony, Apelian was asked, "Did [Bailey] explain what he did to make sure that those issues were taken care of

in 2015?" (Because the preceding pages of the transcript were not submitted in opposition to the motion for summary judgment, no context is given for this question.) Apelian responded, "I would say not in detail." He then was asked what he meant by "not in detail," and the following exchange took place. "A. That means were processes put in place to avoid future infractions. [¶] Q. And all he said was yes? [¶] A. Yes."

The preceding passage is found at page 91 of Apelian's deposition transcript. A short break was taken immediately following the testimony. On page 107 of the transcript, the deposing lawyer asked the following question: "Going back to the conversation you had with Floyd Bailey in 2015 about uninterrupted meal and rest break issues, right, you said you had one conversation, and he told you that it had been taken care of. [¶] Did he describe what he had done to take care of those issues?" Apelian responded, "Yeah, he didn't give me specifics. He just said, 'I took care of it to make sure it doesn't happen.'" Two pages later in the transcript (on page 109), another short break was taken, after which Apelian said, "Point of clarification. You asked me earlier if I have spoken to Mr. Bailey about the lawsuit." The deposing attorney responded, "That's not what I asked." After some discussion between the attorneys, Apelian's counsel said that Apelian wanted to clarify something, and Apelian stated: "I would like to state that I haven't spoken to Floyd specifically about missed lunches and breaks of that nature, but I have spoken to him on a rare occasion about how the department is functioning as a whole."

In light of counsel's statement that *he did not ask Apelian if he had spoken to Bailey about the lawsuit*, it is difficult to discern how Apelian's testimony has any relevance to whether Bailey knew about the lawsuit and Janya's and Salloom's participation in it. At best, the testimony is relevant only to show that Apelian and Bailey discussed the need to have procedures in place to ensure the respiratory therapists had uninterrupted meal breaks and rest periods.

In sum, because Janya and Salloom failed to present evidence from which a jury reasonably could conclude that Bailey knew they had engaged in protected activity by participating in the 2014 wage and hour lawsuit, the trial court properly concluded they failed to make a prima facie case as to their first two causes of action for retaliation related to that protected activity.

b. *Retaliation for Complaints About Understaffing*

As noted, the trial court found that Janya had established a prima facie case as to retaliation for complaints he made regarding understaffing, because he submitted evidence that he raised the understaffing issues at morning huddles; therefore it could be inferred that Bailey knew of his complaints and a causal link could be established. The court found that Salloom, however, had not established a prima facie case on this claim because he admitted in his deposition that he did not complain to Bailey about understaffing and there was no evidence Bailey knew of Salloom's complaints.

Janya and Salloom do not specifically address the trial court's finding regarding Salloom in their appellants' opening brief. Although

they do address Salloom's complaints in their appellants' reply brief, they do so in the context of responding to SCPMG's argument that neither Janya nor Salloom made any formal complaint to Bailey about understaffing affecting patient safety. With regard to Salloom, they assert that he complained to Akopyan or Shnoravorian and, because Shnoravorian reports to Akopyan, who reports to Bailey, Salloom's complaints to Akopyan or Shnoravorian constituted protected activities. But this misses the point of the trial court's finding. The court concluded that Salloom had not established a prima facie case of retaliation for engaging in the protected activity because he did not present any evidence that Bailey was aware that he engaged in that protected activity; thus, Salloom failed to show a causal link between that activity and an adverse employment action. The record supports this conclusion.

c. *Retaliation for Objecting to Attempted Discipline*

Janya and Salloom argued in opposition to SCPMG's motion for summary judgment that they established a prima facie case of retaliation based upon Salloom's alleged protected activity of objecting to being disciplined for taking sick time. SCPMG objected to this argument on the ground that this retaliation claim was not alleged in the complaint. The trial court did not address the purported claim in its ruling granting summary judgment.

We conclude the trial court acted properly by declining to address the newly-asserted claim. It is well established that "[t]he complaint limits the issues to be addressed at the motion for summary judgment."

(*Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1258.) Because the complaint in this case did not allege a claim for retaliation based upon Salloom's objection to being disciplined for taking sick time, there was (and is) no need to address such a claim in connection with SCPMG's motion for summary judgment.

2. *SCPMG's Legitimate, Nonretaliatory Reasons for the Adverse Employment Actions*

Janya and Salloom concede that SCPMG satisfied its burden to offer legitimate, nonretaliatory reasons for the adverse employment actions. Thus, the presumption of retaliation "'drops out of the picture,' and the burden shifts back to the employee to prove intentional retaliation." (*Yanowitz*, *supra*, 36 Cal.4th at p. 1042.)

3. *Evidence of Retaliatory Motive*

In light of the trial court's finding, which we affirm, that neither Janya nor Salloom established a prima facie case of retaliation based upon their participation in the wage and hour lawsuit and that Salloom failed to establish a prima facie case of retaliation for complaints regarding understaffing, the burden falls on Janya alone to prove intentional retaliation based upon his complaints regarding understaffing. Janya argues that evidence of the temporal proximity between his protected activity and his termination, combined with additional circumstantial evidence of retaliatory intent that he produced in opposition to SCPMG's motion raised sufficient issues of fact to avoid summary judgment. He cites to evidence of (1) the change

in SCPMG's treatment of him after he engaged in protected activities; (2) SCPMG's sudden strict enforcement of policies; (3) SCPMG's selective leniency; (4) another respiratory therapist fired for similar issues with HealthConnect; (5) other employees' experience of the purported glitch in HealthConnect that results in simultaneous recording of two ventilator checks; (6) the manner in which Bailey terminated Janya; and (7) Bailey's (or SCPMG's) reporting of Janya to the Respiratory Care Board of California as circumstantial evidence of retaliatory intent. He also points to the absence of evidence to support some of the issues Bailey raised in the termination notice as circumstantial evidence of pretext. Taken separately or together, this evidence does not raise an issue of retaliatory intent.

a. *Change in Treatment*

Janya presented evidence that he consistently received favorable performance reviews before he entered into a settlement of the wage and hour lawsuit. He also observed that SCPMG did not present any evidence that he ever had been disciplined prior to the discipline in the present case. He contends that a jury reasonably could infer from this that his "behavior had not changed, but rather, [he was] wrongly targeted and falsely accused because [he] had engaged in protected activity." We disagree that such an inference would be reasonable based on that evidence. Rather, to allow a *reasonable* inference that he was targeted due to his protected activity, Janya would have to also present evidence that he made similar double and/or false entries in HealthConnect in previous years, that the department administrator

was aware of those entries, and that the department administrator did nothing. He did not present any such evidence.

b. *Sudden Strict Enforcement of Policies*

Janya raises three examples of SCPMG's purportedly "sudden strict enforcement" of policies it had not previously enforced. However, none of the examples is supported by evidence from which a jury reasonably could infer retaliatory intent.

First, he argues that there were previous instances in 2015 in which multiple respiratory therapists clocked out for their meal breaks at the same time, but no corrective action was taken. But in his deposition testimony, which he cites as the evidence in support of his assertion, Janya testified that he was not aware of any instance in which three respiratory therapists clocked out at the same time, as happened in the present case. Although he testified that on at least one occasion when Cory Cusimano was the lead respiratory therapist she had two people clock out at the same time, he could not remember when that happened. More importantly, Janya failed to present any evidence that Bailey (or any other member of the management team) was aware of that occurrence. In fact, SCPMG submitted Bailey's deposition testimony in which he stated that he was not aware of any instance of multiple therapists clocking out for lunch together other than the instance that started his investigation of Janya and Salloom. In light of this evidence, no jury reasonably could infer that Bailey was strictly enforcing the meal break policy due to retaliatory intent.

The second example of SCPMG's purported "sudden strict enforcement" Janya identifies is Bailey's disciplining him for clocking in and out of the ICU rather than his designated work area. Janya presented his deposition testimony that he had been doing this for over a year and a half without anyone raising an issue about it. He also submitted testimony in which he stated that he had seen others (who were not named) clock *out* of the ICU "all the time." But the issue for which Janya was disciplined was clocking *in* at the ICU at the start of his shift (which Bailey stated in his termination notice created a false impression that he was working prior to the time he actually started work) and Janya presented no evidence that Bailey or other members of his management team knew of other respiratory therapists (except Salloom) who clocked in at the ICU at the start of their shifts.

Finally, Janya points to Bailey's disciplining him for notating in HealthConnect that he received a bedside report from the previous respiratory therapist during the change of shift on August 2, 2015. Janya argues that his use of the phrase "bedside report" was a typographical error caused by his failure to delete a "smart phrase" that HealthConnect automatically filled in, and that no other respiratory therapist had ever been disciplined for typographical errors. He also argues that receiving shift reports at bedside was not a requirement or strict policy, since there are times when a respiratory therapist cannot be in a patient's room (such as when procedures are being performed). Both of these arguments, however, miss the point. As Bailey explained, Janya was disciplined because his report not only stated he received a bedside shift report from the previous therapist at 7:22 a.m., but it also

included detailed information about the patient's condition that could only have been observed at the patient's bedside, yet Janya's badge swipes and video evidence showed that Janya was not on the same floor as the patient at 7:22 a.m. Based on this information, Bailey reasonably concluded the information that Janya entered into HealthConnect was false, which was grounds for termination.

c. *Selective Leniency*

Janya argues that the fact that Alepian, the third respiratory therapist who clocked out simultaneously on August 2, 2015, did not receive any discipline raises a reasonable inference of retaliatory intent. There are several problems with this argument. First, Janya failed to show that the reason he was treated differently than Alepian was because Alepian did not complain about understaffing. There was evidence that several respiratory therapists complained about understaffing affecting patient safety, but none of the other complaining therapists were identified. Thus, it is impossible to determine whether Alepian was among the therapists who complained—which is necessary to determine if he was treated differently because he had not complained. Second, as the lead respiratory therapist on the shift, one of Janya's duties was to schedule the meal breaks, which he failed to do. Janya then instructed Salloom and Alepian to clock out simultaneously. Thus, Janya, and not Alepian, was the person responsible for the serious violation of policy. Finally, and most importantly, Janya ignores the evidence that Alepian's HealthConnect records were examined for the same time period as Janya's, and no discrepancies

were found. Thus, Bailey had no cause to discipline Alepian. In short, Janya's evidence of purported leniency does not raise a triable issue of retaliatory intent.

d. *"Me Too" Evidence*

Janya presented evidence that Lorily Macaranas, a respiratory therapist who worked at the Panorama City facility from early 2015 through November 2015, raised understaffing and patient safety issues to Bailey during the morning huddle in mid-late 2015. About a month later, she was given the choice to resign or be terminated on the grounds that she was entering inaccurate, late, and simultaneous ventilator checks into HealthConnect. Janya argues that a jury reasonably could infer from Bailey's similar treatment of another respiratory therapist who complained about overstaffing that his accusations against Janya and Macaranas were a pretext to retaliate against those who make such complaints. But given the evidence that many respiratory therapists complained about understaffing in the morning huddles over several months, and the absence of any evidence that anyone other than Janya and Macaranas were terminated or asked to resign, or that anyone else had entered late and/or simultaneous ventilator checks, it cannot reasonably be inferred that the actions taken by Bailey against Janya and Macaranas—both of whom admittedly recorded late and simultaneous ventilator checks—were motivated by retaliatory intent.

e. *The Purported Glitch in HealthConnect*

Janya argues that the glitch in the HealthConnect system that caused the late and simultaneous recording of two ventilator checks that he was accused of was "well-known," and therefore a jury reasonably could infer that "(1) it is not reasonably credible that Mr. Bailey was unaware of the glitch; (2) even if Mr. Bailey had [not] been aware of the glitch, Ms. Akopyan and/or Ms. Shnorvarian (who had worked in the department over a longer period) would have known of its existence and would have informed Mr. Bailey that the timing discrepancies he found were benign; [and] (3) even if Mr. Bailey, Ms. Akopyan, and/or Ms. Shnoravorian were unaware of the glitch, a simple good-faith interview with any member of the respiratory therapy staff or nurses would have confirmed the glitch." We disagree such inferences reasonably could be reached based upon the evidence submitted.

The evidence Janya relies upon to establish that the purported glitch was "well-known" consists of (1) Janya's declaration in which he explained the purported glitch and his deposition testimony in which he stated that nurses and therapists see it "all the time"; (2) a screenshot from HealthConnect stating that "Data was pended during a timeout"; (3) deposition testimony by Shnoravorian that she may have seen the pended data screen, but not often; (4) deposition testimony by former department administrator John LaCombe stating that he had heard of something called pended status *but he did not know what it meant*; and (5) Macaranas's declaration describing the purported glitch.

As a preliminary matter, we fail to see how this evidence establishes the existence of the glitch Janya describes. Janya stated that the glitch happened sometimes when he logged out without first hitting the "file" button. (Macarana described it the same way.) But the screenshot of the pended data screen indicates that it appears only when the respiratory therapist (or other employee) *fails to log out*, and the session ultimately times out from lack of activity.[11] Thus, it would appear that the purported glitch is caused, not by the HealthConnect system, but rather by the employee failing to follow protocol by hitting "file" and logging out.

But even if there was a glitch that caused the pended data screen to pop up even when the employee had logged out, the evidence Janya presented is insufficient to support an inference that the purported glitch was so well-known that Bailey must have known about it, or that Akopyan and/or Shnoravorian would have known about it and told Bailey. Shnoravorian testified only that she *may* have seen the pended data screen, but not often, and LaCombe testified that he had heard of the screen but did not know what it meant. Janya cites to no evidence that Akopyan had ever seen the screen or knew about the purported glitch, and although Janya testified that other nurses and respiratory therapists knew about the purported glitch, he neither identified any of

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[11] The pended data message states: "Your login session timed out the last time you were in this patient's chart. Doc Flowsheets will now navigate to where you were last so that you can finish documenting and file the data."

those nurses or therapist nor offered testimony from anyone (other than Salloom and Macaranas) who also experienced the glitch.

Finally, SCPMG presented evidence that Bailey investigated the purported glitch by contacting an expert from HealthConnect. Not only did that expert deny the existence of the glitch, but he came to Bailey's office and did everything he could think of to try to replicate what Janya had described and was unable to do so.

Given all this evidence, no jury reasonably could conclude that Bailey knew of, or failed to properly investigate the existence of the purported glitch and thus acted with a retaliatory motive.

f. *Circumstances Surrounding the Termination*

Janya contends that Bailey's choice to terminate him, coupled with the manner in which he was terminated is evidence of retaliatory intent. He notes that even though he had no history of disciplinary issues during his eight years of employment at the Panorama City facility, Bailey chose to terminate him rather than issue him a warning or impose lesser punishment. Moreover, on the day he was terminated, he was escorted by Shnoravorian through the respiratory department, passing by several respiratory therapists, to Bailey's office. After waiting in Bailey's office for a while, he was escorted to a different floor for the meeting at which he was terminated. Janya argues the jury reasonably could infer that by having him escorted through the department before terminating him, Bailey intended to humiliate him, thus demonstrating his retaliatory animus. Any such inference would

be pure speculation, and would not raise a triable issue to avoid summary judgment.

g. *Reporting Janya to the Respiratory Care Board*

Janya argues that a jury could infer retaliatory animus from Bailey's reporting him to the Respiratory Care Board of California for falsification of patient charts after he and Salloom filed the instant lawsuit. Bailey, however, was *required by law* to report Janya. Under Business and Professions Code section 3758, "[a]ny employer of a respiratory care practitioner shall report to the Respiratory Care Board the suspension or termination for cause of any practitioner in their employ." (Bus. & Prof. Code, § 3758, subd. (a).) The statute defines "suspension or termination for cause" to include termination for "[f]alsification of medical records." (Bus. & Prof. Code, § 3758, subd. (b)(4).) Thus, no inference of retaliatory animus is raised by Bailey's report to the Board.

h. *Absence of Supporting Documentation*

In Janya's termination notice, Bailey noted that on August 2, 2015, the day the three respiratory therapists clocked out for lunch at the same time, HealthConnect records showed no activity by Janya (i.e., down time) for five hours and 35 minutes in an eight-hour shift. In the appellants' opening brief, Janya notes that SCPMG did not provide any evidence (such as a HealthConnect "full access audit") with its summary judgment motion to support Bailey's accusation, even though SCPMG submitted full access audits for other dates referenced in the

termination notice. He argues that SCPMG's failure to offer the supporting evidence for the August 2 accusation "not only undermines the veracity of Mr. Bailey's allegations, it also raises the reasonable inference that he did not have the evidence he said he had, and thus, that he did not actually believe what he wrote."

It does no such thing. First, it was Janya's burden to establish pretext, and if Janya believed the full access audit would show that Bailey's assertion regarding his downtime was incorrect, it was his responsibility to seek the records in discovery and submit them in opposition to the summary judgment motion. Second, the termination notice listed the reasons for Janya's termination, and excessive downtime was not one of those reasons. For purposes of its motion for summary judgment, there was no need for SCPMG to provide evidentiary support for every statement made in the termination notice. No reasonable inference can be drawn based upon SCPMG's failure to do so.

4. *Conclusion*

In light of Janya's and Salloom's failure to establish a prima facie claim of retaliation based on their participation in the 2014 wage and hour lawsuit, Salloom's failure to establish a prima facie claim of retaliation based upon complaints of overstaffing, and Janya's failure to raise a triable issue that SCPMG acted with retaliatory intent in terminating him, we conclude the trial court properly granted summary judgment to SCPMG on the first four causes of action and we affirm the judgment on those claims.

C. *Defamation Claim*

As noted, Janya and Salloom alleged in their defamation claim that the statements made in their termination notices were false and defamatory. The trial court granted summary judgment of the claim on the ground that the statements were privileged under section 47(c), and Janya and Salloom had not presented any evidence to show that the statements were made with malice. On appeal, Janya and Salloom argue that the evidence it presented to show that Bailey's reasons for terminating them were pretext for retaliation also would allow a jury reasonably to infer that Bailey made the statements with malice. Given our conclusion that the evidence is not sufficient to reasonably infer a retaliatory intent, we conclude it also is not sufficient to infer malice.

D. *Intentional Infliction of Emotional Distress Claim*

In granting summary judgment of the intentional infliction of emotional distress (IIED) claim, the trial court found that Janya and Salloom failed to "point to any particular evidence that shows extreme or outrageous conduct" by SCPMG, as is required to establish an IIED claim. In their appellants' opening brief, Janya and Salloom argue, in essence, that the evidence they presented to show that the reasons given for their termination were pretext for retaliation also shows that Bailey and SCPMG engaged in extreme and outrageous conduct by continuing to assert those purportedly false reasons. In light of our conclusion that no triable issue of pretext was raised, plaintiffs'

assertion that this same evidence shows extreme and outrageous conduct necessarily fails.[12]

DISPOSITION

The judgment is affirmed. SCPMG shall recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, Acting P. J.

We concur:

COLLINS, J.

CURREY, J.

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[12] Although our discussion of pretext involved only Janya, Salloom relied upon the same evidence to show pretext, with one additional assertion. Salloom argued that Bailey falsely stated in his termination notice that Salloom did not see certain patients until more than eight hours into his shift on certain days. But Bailey's statements were based upon the fact, which Salloom admitted, that Salloom did not record his initial assessment of those patients until eight or more hours into his shift.