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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

MICHAEL NOVAK et al., Plaintiffs and Appellants, v. JACOBS ENGINEERING GROUP, INC., Defendant and Respondent.	B278964 (Los Angeles County Super. Ct. No. BC583176)

APPEAL from a judgment of the Superior Court of Los Angeles County. Gregory Keosian, Judge. Affirmed.

Law Offices of John A. Belcher, John A. Belcher and Nicholas W. Song for Plaintiffs and Appellants.

Seyfarth Shaw, Brian P. Long and Paul J. Leaf for Defendant and Respondent.

Michael Novak and Novak Business Solutions Corporation (collectively "appellant") appeals from a final judgment entered after the trial court granted summary judgment in favor of Jacobs Engineering Group, Inc. (respondent) on appellant's claims against respondent for fraudulent inducement; negligent misrepresentation; disparate treatment -- age discrimination; and breach of implied covenant of good faith and fair dealing. We find no error, therefore we affirm the judgment.

FACTUAL BACKGROUND

Appellant's employment and retirement discussions

Appellant was an employee of respondent from 1985 through his retirement, effective September 3, 2013. Appellant was an excellent employee, with uniformly positive performance reviews. Appellant generated record sales in 2012, and was working on about 30 sales opportunities at the time of his retirement. Appellant was well compensated for his work, earning "well over $330,000.00 per year." For tax year 2013, he earned approximately $500,000.

Respondent's senior vice president was Dante Caravaggio. Appellant alleges that in 2013, Caravaggio falsely accused appellant of misconduct, and commented that appellant must have been "'slipping'" because he was "'getting old.'" Caravaggio also commented that appellant was getting "'tired'" and "'old.'" In mid June 2013, appellant prepared a memorandum complaining about Caravaggio's comments and attempted to give it to Carol Charron in respondent's human resources department. Charron told appellant to "hold" his memorandum and declined to take it. Appellant was never informed of an investigation regarding Caravaggio's comment. Caravaggio called appellant and stated, "'I guess I owe you an apology.'"

About a week later, on June 20, 2013, Caravaggio called appellant and suggested that appellant should consider taking

early retirement. Caravaggio said, "'you're aging out. We've known each other for years. Maybe you should think about retiring.'" Appellant alleges that he was not contemplating retiring, but that Caravaggio persuaded him to take early retirement by making various promises. Appellant stated that he and Caravaggio reached the following "oral agreement":

A. A consulting agreement would exist between respondent and appellant's corporation, Novak Business Solutions.

B. A tentative target date of 60 days was set for appellant to transition to the role of consultant.

C. At the end of his regular employment, appellant would be paid for earned and accrued bonuses, and accrued time off.

D. Appellant would work full time at the Long Beach office as a consultant for several months until a new Business Development Officer was hired. Thereafter, appellant's hours would be reduced.

E. Appellant's company would be given a minimum of 1,000 hours (i.e., half time) of consulting work in the first year. After the first year, appellant's work hours would be decided by mutual agreement. Caravaggio indicated there were plenty of hours of consulting work available.

F. Respondent would pay appellant at the rate of $200 per hour plus expenses.

G. Appellant would continue to have a computer belonging to respondent and respondent would continue to supply administrative assistance and supplies as needed.

H. Appellant would sign a two-year noncompete agreement.

Appellant memorialized his understanding of the oral agreement with Caravaggio in a "Memo to File" dated June 22, 2013.

During negotiations regarding the consulting agreement, Caravaggio was "'severely demoted,'" and had "'all [of] his authority taken away.'" Raoul Portillo took over the discussions about appellant's early retirement. Appellant understood that the consulting agreement would be finalized with Portillo. Caravaggio was originally designated in the agreement as respondent's "representative with authority to authorize tasks" for appellant's company, but his name was excised and replaced with Portillo's name.

After Portillo replaced Caravaggio as the representative negotiating the consulting agreement, appellant asked twice to include in the contract a guarantee of 1,001 consulting hours for Novak Business Solutions. Portillo rejected each request, stating "'[w]e cannot commit to a guaranteed percentage'" and "'we won't guarantee or commit to a utilization percentage. I've gone up a couple of channels on this one. It's a merit based system and each individual task [has] to be approved . . . .'" Appellant conceded that he understood that when one party asks for a key term to be included, and the other side rejects it, that term is not part of the deal.

The retirement agreement

The retirement agreement does not contain a promise to provide 1,001 hours of work. The agreement provides, in pertinent part:

> "1. Retirement Date. Employee's retirement from [respondent] is effective September 3, 2013 . . . [a]fter which, Employee shall perform no further duties, functions or services as an employee of [respondent]."
>
> "4. Lump Sum Payment. As additional consideration for Employee entering into this Agreement, Employee shall receive . . . a lump sum payment of . . . ($95,567.00) . . . ."

"10. Entire Agreement; Choice of Law. This Agreement constitutes the entire agreement between the parties pertaining to the subject matter contained in it and supersedes all prior and contemporaneous agreements, representations, and understandings of the parties. . . . ."

"11. Consulting Agreement. In further consideration of the promises provided herein, Employee and [respondent] concurrently agree to enter into the Consulting Agreement attached hereto as Exhibit B upon the termination of his/her employment."

"13. Release of Claims. In further consideration of the foregoing, Employee hereby releases and discharges [respondent], . . . from any and all matters, claims, demands, causes of action, debts, liabilities, controversies, judgments and suits of every kind [and] nature whatsoever, foreseen or unforeseen, known or unknown, whether in law or in equity, which [Employee] has or may have against the Releasees. This release includes, without limitation, all claims and causes of action, known or unknown by Employee, arising out of or in any way connected with Employee['s] employment relationship with [respondent] and/or the termination of Employee's employment. This release includes, without limitation, claims arising under federal, state or local laws prohibiting employment discrimination and/or claims arising out of any legal restrictions upon [respondent's] right to terminate [Employee's] employment. Employee expressly understands that among the various rights and claims being waived by him/her in this Agreement are those arising under the Age Discrimination in Employment Act, (29 U.S.C. § 621, et seq.), as amended. Employee further warrants that he/she has not filed any claims against the Releasees."

The retirement agreement further memorialized appellant's understanding that under the Age Discrimination in Employment Act, appellant had 21 days within which to consider the agreement before executing it. In addition, the agreement did not become binding until seven calendar days after the date of the last signature. During that seven-day period, appellant had the right to revoke the agreement.

The retirement agreement had a noncompete clause, which stated, in pertinent part:

> "21. Non-Compete. Employee covenants and agrees that for a period of two (2) years immediately following the end of his employment that he/she will not compete with [respondent] . . . directly or [i]ndirectly, . . . [i]n any geographic area where [respondent] or [respondent's] affiliated companies are engaged in business."

Finally, the retirement agreement acknowledged that appellant had the right to consult with an attorney regarding his decision to sign the agreement:

> "23. Voluntary agreement. [Appellant] UNDERSTANDS THAT THIS AGREEMENT INVOLVES THE KNOWING AND VOLUNTARY RELEASE OF KNOWN AND UNKNOWN CLAIMS BY EMPLOYEE AGAINST [RESPONDENT]. EMPLOYEE UNDERSTANDS THAT HE/SHE HAS THE RIGHT TO, AND HAS BEEN GIVEN THE OPPORTUNITY TO, CONSULT WITH AN ATTORNEY OF HIS CHOICE. EMPLOYEE ACKNOWLEDGES THAT HE/SHE HAS BEEN (AND HEREBY IS) ADVISED BY [RESPONDENT] THAT HE/SHE SHOULD CONSULT WITH AN ATTORNEY PRIOR TO EXECUTING THIS AGREEMENT, EMPLOYEE FURTHER ACKNOWLEDGES THAT HE/SHE HAS NOT BEEN DISCOURAGED OR DISSUADED FROM

CONSULTING WITH AN ATTORNEY BY [RESPONDENT]."

Upon taking early retirement, appellant was paid a lump sum of $95,567. Appellant's accrued time off was paid separately.

The consulting agreement

At the same time as they entered into the retirement agreement, the parties entered a consulting agreement. The consulting agreement contained the following provisions, among others:

> "1. Consulting services. During the period of this Agreement, Consultant agrees to perform services in a consulting capacity on individual projects assigned and accepted in accordance with the provisions hereof. Consultant agrees to provide such services on an as requested basis.
>
> "2. Term. This Agreement will be for the term September 4, 2013 through September 3, 2014. Thereafter this Agreement may be extended for additional periods by mutual agreement executed in writing between the parties.
>
> "3. Task Orders. Client shall submit any task which it desires the services of Consultant in the form of a written task order, in sufficient detail to define the task and services to be performed by Consultant. The nature and extent of the work to be performed by Consultant shall be defined in the task order. . . . The Client's representative with authority to authorize tasks hereunder is . . . Raoul Portillo Vice President Sales Heavy Process."[1]

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[1] Dante Caravaggio's name was stricken from the printed text by hand, and Portillo's name was handwritten below it.

"16. Independent Contractor. Nothing in this Agreement shall be deemed to constitute Consultant to be the agent, representative or employee of Client. Consultant shall be an independent contractor and shall have responsibility for and control over the details and means of performing the consulting services and shall be subject to the directions of Client only with respect to the scope and general results required.

"17. Integration. This Agreement contains the entire understanding between the parties, and there are no understandings or representations not set forth or incorporated by reference herein. No subsequent modifications of this Agreement shall be of any force or effect unless in writing and signed by both parties hereto."

Appellant's complaint filed with the Department of Fair Employment and Housing (DFEH)

At the end of the consulting agreement's one-year term, appellant had been assigned only 94 hours of consulting work. Appellant billed respondent for 906 hours of work. Appellant claims the bill was submitted for "the 1000 hours of work promised to me by Dante Caravaggio minus the 94 hours of work previously assigned." Respondent refused to pay the bill.

Appellant filed a charge with the DFEH on April 27, 2015.

PROCEDURAL HISTORY

Appellant filed a complaint against respondent on May 28, 2015. It asserted four causes of action: (1) fraudulent inducement; (2) negligent misrepresentation; (3) disparate treatment -- age discrimination; and (4) breach of implied covenant of good faith and fair dealing.

In his fraudulent inducement cause of action, appellant alleged that respondent devised a plan to induce appellant to

retire early and agree to a noncompete plan. Appellant alleged that respondent promised to appellant "at least 1001 hours of consulting work for the first year." However, appellant was only provided 94 hours of such work. In his negligent misrepresentation claim, appellant stated the same allegations, but claimed that respondent knew or should have known that it had no intention to comply with the material terms of the consulting agreement.

In his third cause of action for disparate treatment/age discrimination, appellant alleged that his age was a factor that motivated respondent to fraudulently induce him to take early retirement.

In his final cause of action for breach of the implied covenant of good faith and fair dealing, appellant alleged that he performed all acts and conditions required under the contract, yet in breach of the implied covenant of good faith and fair dealing, respondent only assigned him 94 hours of consulting work for the year.

On July 2, 2015, respondent filed a demurrer, which was overruled.

On June 2, 2016, respondent filed a motion for summary judgment, or in the alternative, summary adjudication (summary judgment motion). Respondent made the following arguments, among others: (1) appellant's first, second, and third causes of action were barred by the enforceable release of claims that appellant entered into prior to his retirement; (2) appellant's third cause of action for age discrimination was barred because it was filed past the applicable statute of limitations; (3) appellant's third cause of action for age discrimination failed to the extent that it was based on the consulting agreement because appellant was not an employee of respondent during that time; (4) appellant's fraudulent and negligent misrepresentation claims

failed because there was no misrepresentation of a past or existing fact, and appellant could not have justifiably relied on any misrepresentation regarding consulting hours; (5) appellant's second cause of action for negligent misrepresentation failed because it was preempted by the workers' compensation act; and (6) appellant's fourth cause of action for breach of the implied covenant of good faith and fair dealing failed because no contract term was violated.

On September 15, 2016, the trial court entered an order granting respondent's summary judgment motion in its entirety. As to the first and second causes of action, the trial court found that respondent met its burden of showing that no actionable misrepresentations were made to appellant. As to Caravaggio's statements, the court found that appellant could not have reasonably relied on such statements: "[r]easonable minds can only come to the conclusion that [appellant] did not reasonably enter into the contract based on Caravaggio's statements which were actively repudiated by Portillo prior to [appellant's] agreement to enter into the Contract."

Appellant put forth a novel theory as to his misrepresentation claims in opposition to summary judgment. He argued that he relied on Portillo's representation that respondent would provide jobs to him on a "'merit based system.'" Appellant argued that Portillo's use of the word "merit" was in reference to the jobs, not the merit of the independent contractor. The trial court noted that summary judgment cannot be granted or denied on a ground not raised by the pleadings. However, even if this theory of liability were properly pleaded, the trial court found that the statement could not form the basis for appellant's first and second causes of action. Specifically, "[t]he statement that [respondent] would offer jobs on a 'merit based' system is a representation about future events, and not existing

facts. . . . [Appellant] . . . introduced no evidence that this representation was false when it was made."

As to appellant's third cause of action for age discrimination, the trial court found that because appellant's employment ended on September 3, 2013, and his DFEH complaint was not filed until April 27, 2015, the claim was barred by the one-year statute of limitations. The court noted that appellant argued that he remained an employee after the execution of the retirement agreement and the consulting agreement. However, the court rejected this argument, finding no triable issue of fact as to whether appellant remained an employee of respondent after the execution of the agreements.

As to the fourth cause of action for breach of the covenant of good faith and fair dealing, the trial court found that respondent met its burden of showing that its conduct did not breach the implied covenant as a matter of law. The court cited *Wolf v. Walt Disney Pictures and Television* (2008) 162 Cal.App.4th 1107, 1120 (*Wolf*) as support for its position that "'implied terms cannot vary the express terms of a contract; if the defendant did what it was expressly given the right to do, there can be no breach.'" Thus, because the consulting agreement gave respondent exclusive discretion to offer appellant work, appellant's attempt to limit that discretion through an implied covenant that respondent would provide more than 94 hours of work was improper.

Final judgment was entered in favor of respondent on September 16, 2016.

On November 14, 2016, appellant filed his notice of appeal from the judgment.

DISCUSSION

I. Standard of review

A party moving for summary judgment bears the burden of showing that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 845.) "There is a genuine 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." (*Ibid.*) A motion for summary judgment should be granted if all the papers submitted show "that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).)

An order granting summary judgment is reviewed de novo. (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142.) Under this standard, we independently review the record to determine whether triable issues of fact exist to reinstate the action. (*Ibid.*) We view the evidence in the light most favorable to appellant as the losing party. (*Ibid.*)

II. No triable issues of fact exist as to any of appellant's causes of action

In his opening brief, appellant designates only one "issue presented" on appeal. He argues that the question of whether he was an employee -- not an independent contractor -- in his post-retirement position is a triable issue of fact. The trial court only discussed this issue in connection with appellant's third cause of action for age discrimination. If appellant's employment ended on September 3, 2013, his DFEH complaint was not timely filed and his third cause of action is barred by the statute of limitations. However, if -- as appellant argues -- he remained an

employee after the execution of the retirement agreement, his age discrimination claim is not time barred.

Respondent argues that because appellant presented only this issue on appeal, appellant has forfeited his appeal of the remaining three causes of action.

Although appellant formally presented only one issue, appellant addresses several issues throughout his opening brief. We therefore decline to find that appellant has forfeited his appeal of the other causes of action. We address each of appellant's arguments in connection with the related cause of action. As set forth below, we find none of these arguments persuasive, and affirm summary judgment as to each cause of action.

A. First cause of action for fraudulent misrepresentation

In order to prevail on a claim of fraudulent misrepresentation, appellant must show: (1) a misrepresentation; (2) knowledge of falsity; (3) intent to defraud; (4) justifiable reliance; and (5) resulting damage. (*Gil v. Bank of America, N.A.* (2006) 138 Cal.App.4th 1371, 1381.)

Appellant's first hurdle is to show a misrepresentation. The trial court determined that appellant did not allege an actionable misrepresentation.

On appeal, appellant appears to admit that the parties "could not agree on utilization percentages." Instead, he repeats his argument that he was promised a "'merit based *system*' for all assignments under the consulting agreement." Appellant does not explain how this constituted a misrepresentation or fraud.

Appellant cites two cases in support of his argument that respondent's indication that there would be a merit based system constituted a misrepresentation. The first is *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317 (*Guz*). Appellant appears to

argue that *Guz* supports a theory that the parties may have had an implied in fact contract arising from respondent's use of the words "merit based system." However, appellant does not clarify what exactly the parameters of such an implied contract allegedly were or in what way respondent misrepresented the terms of such alleged contract. Appellant simply states, "The email and the merit based 'system' are precisely the type of implied terms described in [*Guz*]."

We disagree. *Guz* involved a former employee's claims against his employer for breach of implied contract, breach of implied covenant of good faith and fair dealing, and age discrimination. The cited portions of *Guz* involved a discussion of whether the parties had an implied agreement that the employee would only be terminated for good cause. (*Guz, supra,* 24 Cal.4th at p. 336.) Appellant quotes the Supreme Court's language in discussing the existence of an implied contract not to terminate without good cause: "[t]he contractual understanding need not be express, but may be *implied in fact*." (*Ibid.*) Appellant has not alleged the existence of an implied agreement not to terminate employment without good cause. Nor was he terminated. Instead, he voluntarily signed a retirement agreement. *Guz* does not suggest that Portillo's email and use of the words "merit based system" constitute fraud or a promise of a minimum amount of work. We find the case inapplicable.

Appellant further relies on *Lazar v. Superior Court* (1996) 12 Cal.4th 631 (*Lazar*). In *Lazar*, the plaintiff employee claimed fraudulent inducement of an employment contract. After working for nearly 20 years in a family run business in New York, the employer contacted the plaintiff to persuade him to come work in Los Angeles as a west coast general manager for the company. (*Id.* at 635.) The employer undertook intensive recruitment efforts and ultimately induced the plaintiff to leave

his home of 40 years with assurances that the job would be secure and would involve significant pay increases. (*Ibid.*) Based on the employer's representations, the plaintiff accepted the employment in May 1990. In July 1992 the plaintiff was terminated after his job was eliminated due to management reorganization. (*Id.* at pp. 636-637). Under those circumstances, the plaintiff stated a claim for fraudulent inducement of an employment contract. The actionable misrepresentations included that the plaintiff "would be employed by the company so long as he performed his job, he would receive significant increases in salary, and the company was strong financially." (*Id.* at p. 639.)

We reject appellant's argument that the facts of this case are analogous. In contrast to *Lazar*, there were no promises of a minimum number of hours of work under the consulting agreement. And appellant has not made clear the significance of Portillo's promise of a "merit based system," or in what way it was false or otherwise actionable.

Appellant cites several cases for the proposition that evidence of fraud is not barred by the integration clause of the consulting agreement, which mandates that the written agreement constitutes the "entire understanding" between the parties. (*Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Assn.* (2013) 55 Cal.4th 1169, 1174-1175 [finding that parol evidence rule does not require exclusion of evidence to prove that the instrument is void for mistake, fraud, duress, undue influence, or other invalidating causes]; *Wang v. Massey Chevrolet* (2002) 97 Cal.App.4th 856, 872 [a contract clause stating that the parties relied only on representations in the contract does not establish that a party claiming fraud did not reasonably rely on representations not contained in the contract]; *Ron Greenspan Volkswagen, Inc. v. Ford Motor Land*

Development Corp. (1995) 32 Cal.App.4th 985, 994 [integration clause does not bar an action for fraud].)

We need not reach this issue. Appellant has failed to identify an actionable false statement. Thus, even if the contract does not bar his claim, it fails as a matter of law.

B. Second cause of action for negligent misrepresentation

To show a cause of action for negligent misrepresentation, a plaintiff must show the same elements as fraudulent misrepresentation, but need not show intent to induce reliance. (*Cadlo v. Owens-Illinois, Inc.* (2004) 125 Cal.App.4th 513, 519.)

Thus, to state a claim for negligent misrepresentation, appellant faces the same initial hurdle -- he must point to a specific misrepresentation. He has not done so, thus, this claim fails as a matter of law.

C. Third cause of action for disparate treatment -- age discrimination

The California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.) bars "employers" from engaging in discrimination. (§ 12940, subd. (a).) In order to show a cause of action for age discrimination under FEHA, an individual must show: (1) at the time of the adverse action the employee was 40 years of age or older, (2) an adverse employment action was taken against the employee, (3) at the time of the adverse action the employee was satisfactorily performing his or her job and (4) the employee was replaced by a significantly younger person. (*Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1003 (*Hersant*).) A prerequisite to bringing a claim under FEHA is filing a charge with the DFEH and obtaining a right-to-sue letter. (Gov. Code, §§ 12960, 12965, subd. (b).) The statute of limitations to file such a charge is one year. (§ 12960, subd. (d).)

"FEHA provides that no complaint for any violation of its provision may be filed with the Department '*after* the expiration of one year from the date upon which the alleged *unlawful practice* or refusal to cooperate *occurred*,' with an exception for delayed discovery not relevant here. [Citation.]" (*Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 492 (*Romano*).) "[T]he date that triggers the running of the limitations period under the FEHA is the date of actual termination." (*Id.* at p. 495.)

Because appellant's employment ended on September 3, 2013, his DFEH complaint (filed April 27, 2015) was not timely filed. Thus, his third cause of action for age discrimination is barred.

Appellant makes numerous arguments in an effort to avoid the statute of limitations bar. As set forth below, we find none of these arguments convincing.

1. The employee vs. independent contractor analysis is irrelevant

Appellant argues that subsequent to the execution of the retirement agreement and the consulting agreement, he remained an employee of respondent. Appellant argues that his status as an employee after he signed the agreements is a triable issue of fact. We disagree.

Appellant cites three cases in support of his argument that he remained an employee of respondent after retiring. None provides support for appellant's position. Specifically, none of the cases considers whether an individual who has retired from employment can remain an employee thereafter, particularly after he has expressly agreed that he "shall perform no further duties, functions or services as an employee of [respondent]," and received a payment of $95,567 as consideration for this agreement.

S. G. Borello & Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal.3d 341 (*Borello*), involved the question of whether agricultural laborers were "independent contractors," instead of employees, and thus exempt from workers' compensation coverage. The case sets forth numerous factors to be weighed in determining whether a group of individuals, such as these laborers, were misclassified as independent contractors. Unlike appellant, the workers had never been considered employees, and had not expressly agreed to retire from employment in exchange for money. The analysis set forth in *Borello* is thus entirely inapplicable.

Similarly, in *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, newspaper carriers brought a class action alleging that their employers improperly classified them as independent contractors, rather than employees, and violated California's labor laws. On appeal, the issue was whether the matter could proceed as a class action. Again, the case does not stand for the proposition that the *Borello* factors apply in the situation where a retiree has expressly retired from employment in exchange for valuable consideration. The same analysis applies as to *Bowman v. Wyatt* (2010) 186 Cal.App.4th 286, which involved the question of whether a dump truck owner, under contract to deliver asphalt to the City of Los Angeles, was properly considered an employee or independent contractor for the purposes of vicarious liability. The dump truck owner did not sign an agreement expressly retiring from employment. (*Id.* at pp. 299-305).

Appellant cannot ignore the facts of this case. Appellant was an employee of respondent for over 20 years. On September 3, 2013, he retired from employment, expressly agreeing that he would perform no further services as an employee of respondent and accepting consideration in return for his agreement.

Appellant was no longer an employee of respondent. Appellant has failed to present legal authority that the common law test set forth in the above cases applies under these circumstances.

Appellant insists that the label "independent contractor," found on appellant's consulting agreement, is not determinative of the status of the employment relationship. In support of this argument, appellant cites *Vizcaino v. Microsoft Corp.* (9th Cir. 1996) 97 F.3d 1187, but neglects to mention that the opinion was withdrawn by *Vizcaino v. Microsoft Corp.* (9th Cir, Feb. 10, 1997) 105 F.3d 1334.[2] The case does not support appellant's position that the common law employment test applies under the circumstances of this case. Thus, we decline to undertake that analysis.

2. Appellant's arguments regarding accrual of his cause of action are unconvincing

Appellant argues that his cause of action for age discrimination accrued at the time of actual discharge, not at the time of notification of discharge. (*Romano, supra*, 14 Cal.4th at p. 503.) Appellant implies that the date of his actual discharge from employment was September 3, 2014, the ending date of the consulting agreement. Appellant argues that prior to September 3, 2014, respondent could have assigned him more work. Thus, appellant argues, his damages were speculative until respondent refused to pay his final invoice in September 2014, at the end of the consulting agreement's term.

We have previously determined that there is no triable issue of fact as to the date appellant's employment ended. It ended on September 3, 2013, the date that he signed the

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[2] After rehearing en banc, the Ninth Circuit issued a revised opinion on the matter, at which time it was conceded that the workers at issue were employees. (*Vizcaino v. Microsoft Corp.* (9th Cir. 1997) 120 F.3d 1006, 1009).

retirement agreement and agreed that he would no longer undertake any activities as an employee of respondent. Pursuant to FEHA, "the date that triggers the running of the limitations period under the FEHA is the date of actual termination." (*Romano, supra*, 14 Cal.4th at p. 495.) The statute of limitations began to run on September 3, 2013, and appellant's DFEH complaint was untimely filed.

Because the termination of appellant's employment occurred on September 3, 2013, we decline to address the cases appellant has cited regarding continuing violation, as they are irrelevant. (See, e.g., *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1056 [employer's series of retaliatory acts took place during employee's employment]; *Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 812 [employer's harassment and discrimination took place during disabled employee's employment].)

3. Appellant's age discrimination claim is time-barred

In sum, appellant's employment ended when he signed the retirement agreement on September 3, 2013. Because he did not file his DFEH complaint until April 27, 2015, it was not timely filed. Appellant's age discrimination claim under FEHA thus fails as a matter of law.[3]

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[3] Appellant argues that a triable issue of fact exists regarding whether respondent's drastic reduction of appellant's hours under the consulting agreement was pretext for age discrimination. Citing *Hersant, supra*, 57 Cal.App.4th at page 1002, appellant argues that once he has established a prima facie case of age discrimination, respondent must offer a legitimate non age-based reason for the adverse employment action. Because appellant's cause of action for age discrimination is barred, we decline to address appellant's arguments regarding

D. Fourth cause of action for breach of implied covenant of good faith and fair dealing

1. Relevant law

"Every contract imposes on each party an implied duty of good faith and fair dealing. [Citation.] Simply stated, the burden imposed is "'that neither party will do anything which will injure the right of the other to receive the benefits of the agreement.'" [Citations.]" (*Chateau Chamberay Homeowners Assn. v. Associated Internat. Ins. Co.* (2001) 90 Cal.App.4th 335, 345.)

"[B]reach of a specific provision of the contract is not a necessary prerequisite" to a claim for breach of the covenant of good faith and fair dealing. (*Carma Developers* (*Cal.*)*, Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 373 (*Carma Developers*).) The covenant can be breached "for objectively unreasonable conduct, regardless of the actor's motive. [Citation.]" (*Ibid.*) "The covenant of good faith finds particular application in situations where one party is invested with a discretionary power affecting the rights of another. Such power must be exercised in good faith. [Citations.]" (*Id.* at p. 372.)

However, where a contract grants unfettered discretion to one party, and is otherwise supported by adequate consideration, the conduct is by definition within the reasonable expectations of the parties and "'can never violate an implied covenant of good faith and fair dealing.' [Citation.]" (*Wolf, supra*, 162 Cal.App.4th at p. 1121, quoting *Carma Developers, supra*, 2 Cal.4th at p. 376.) In *Wolf*, an author entered into a licensing agreement with Walt Disney, granting Disney the right to exploit the characters in the author's novel in exchange for Disney's promise to give the author five percent of "gross receipts." (*Wolf, supra*, at pp. 1112-1113.) When the author sued, claiming that Disney

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pretext or the evidence of respondent's alleged discriminatory actions.

underreported gross receipts, the jury found that gross receipts only included cash money, not nonmonetary compensation. The author then argued that Disney breached the covenant of good faith and fair dealing by purposefully orchestrating promotional agreements for which it received no monetary compensation. (*Id.* at p. 1121.) The Court of Appeal disagreed, stating:

> "Contrary to [appellant's] contention, there were no disputed factual issues for the jury to decide. The question was not what Disney did, but whether it was authorized by the parties' agreements to do it. In light of Disney's unfettered discretion under the 1983 Agreement to license or not license the Roger Rabbit franchise as it 'saw fit,' [appellant's] attempt to limit that discretion by use of an implied covenant, a pure legal question of contract interpretation, is improper. [Citations.]"

(*Wolf, supra,* 162 Cal.App.4th at p. 1121, fn. omitted.)

The *Wolf* court concluded, "so long as the agreement is supported by adequate consideration such that the grant of discretion does not render it illusory, the court will not recognize or enforce an implied term directly at odds with an express contractual grant of unfettered discretion. [Citation.]" (*Wolf, supra*, 162 Cal.App.4th at p. 1122.)

2. Respondent did not abuse its discretion in failing to assign more than 94 hours of work

Appellant argues that even assuming there was no guarantee of more than 1,000 hours of work, respondent "clearly abused its discretion in assigning only 94 hours of work." Appellant points to his own memo in which he recorded his preliminary understanding of his arrangement with Caravaggio. In the memo, appellant wrote that the consultancy arrangement "was to be ½ time for a year and then by mutual agreement

thereafter." Appellant argues that the "contention that the parties intended [respondent] to have absolute discretion on the number of hours to assign is simply not credible."

Appellant's interactions with Caravaggio, and his personal memo, are not part of the contract. Further, Portillo made it clear to appellant that respondent could not commit to a guaranteed number of hours. Appellant admitted in his deposition that he was aware that the contract did not contain a term guaranteeing a minimum number of hours. Thus, this evidence does not support his claim for breach of the implied covenant of good faith and fair dealing.

Pursuant to the written contract between the parties, appellant agreed to "perform services in a consulting capacity on individual projects assigned and accepted" in accordance with the terms of the contract. Appellant explicitly agreed "to provide such services on an as requested basis." Respondent was to "submit any task which it desires the services of Consultant in the form of a written task order, in sufficient detail to define the task and services to be performed by Consultant." The nature and extent of such work was to be defined by respondent in the task order.

These provisions gave exclusive discretion to respondent to offer appellant work. Appellant attempts to limit that discretion by claiming that there existed an implied covenant that respondent would provide more than 94 hours of work. As set forth in *Wolf*, we will not enforce an implied term at odds with contractually granted discretion. (*Wolf, supra*, 162 Cal.App.4th at p. 1122.)[4] Appellant's claim thus fails as a matter of law.

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[4] Appellant does not address the *Wolf* case, although it provided the legal basis for the trial court's decision on this issue below.

DISPOSITION

The judgment is affirmed. Respondent is awarded costs of appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.*
GOODMAN

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